

**THE CARIBBEAN COURT OF JUSTICE
AND THE EVOLUTION OF CARIBBEAN DEVELOPMENT***

by

**THE RIGHT HONOURABLE SIR DENNIS BYRON
PRESIDENT
CARIBBEAN COURT OF JUSTICE**



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Introduction

It is both an honour and a privilege to be invited to deliver the feature address at the 15th Annual Conference of the Sir Arthur Lewis Institute of Social and Economic Studies of the University of the West Indies. I am intrigued by the theme of this year's conference which delves into the issue of whether development in the Caribbean is standing still or standing tall. This is a fitting theme given that the namesake of the conference is one of the world's foremost authorities on the subject of development economics. Sir Arthur Lewis was not a man of the *status quo*. Instead he preferred to chart new waters. The revolutionary nature of his scholarship is most strikingly evident in his work *Industrialisation of the British West Indies*. His central tenet, as described by another noted regional economist the late Dr. Norman Girvan was to critique the "prevailing economic orthodoxy." Thus he argued that Caribbean development would be best served by founding an economy based on the export of labour intensive manufactured items rather than the export of natural resources and raw material.¹ In so doing, he was indeed ahead of his time. Taking a page from his book I propose to mount my own challenge by suggesting that Caribbean development cannot be viewed through the prism of standing but rather must be explored through the language of evolution and change.

¹ Sir Arthur Lewis, *A Man of His Time and Ahead of His Time*, Distinguished Lecture for the Year of Sir Arthur Lewis (2008).

Regional Integration

It is often said that the only constant thing in life is change. Alterations, adaptation and alliances seem indelible features of Caribbean development. Rather than 'standing', we have demonstrated our ability to change with the felt necessities of the time. In the Caribbean we have witnessed our fair share of changes. We have moved from colonialism to federation to independence. We have witnessed slavery, indentureship, emancipation and free movement. We have integrated from CARIFTA to the Caribbean Community and Common Market to the CSME.

Our region's development has and continues to be dynamic and ever-changing responsive to the goals and aspirations of our people. Nowhere is this more apparent than in the movement towards regional integration. The pillars of the regional integration movement rest upon the Revised Treaty of Chaguaramas and the CSME. The CSME is designed to provide a "seamless economic space" characterised by the four freedoms – freedom of establishment, freedom to provide services, free movement of capital and free movement of CARICOM nationals. The catalyst underlying this development is the need to maintain a competitive edge in the global market. As a regional bloc, CARICOM Member States will be better equipped to withstand the effects of globalisation. Thus a new era of regional integration was ushered in by the CSME to keep apace with the changing global climates.

The regional integration movement offers widespread economic benefits to the Caribbean region. It opens up the market for regional trade in both goods and services thereby proving beneficial to business interests, the professional class, the banking sector and the service industry. For a region that is coming to terms with rising debt to GDP ratios and the global economic downturn, strengthening our Caribbean markets seems a natural and mutually beneficial choice. Trade liberalisation and expansion within the region can shelter us from the sometimes harsh realities of the global market. The economic gains realised can then be further invested in human development by expanding access to education, health care, infrastructure and technology.

It falls to the economists and business people of the region to keep their feet on the pedals to ensure that the regional integration movement keeps moving forward. The private sector must complement and in certain cases, egg on the work of the government in exploring the full gamut of benefits to be reaped from the CSME. Not only will they benefit economically in terms of their bottom line but they will also help to create a climate that strengthens the social fabric of the Caribbean region. It must be remembered that CARICOM does not have the doctrine of direct effect as obtains in the European Union which facilitates the immediate **application** and **effectiveness** of European law in the Member States.² The successful implementation of the decisions taken by the organs of CARICOM³ in furthering the objectives of the CSME is thus

² *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62.

³ The Conference of Heads of Government, the Council of Ministers, The Council for Finance and Planning, The Council for Trade and Economic Development, The Council for Foreign and Community Relations and The Council for Human and Social Development: See Article 10 of the Revised Treaty.

dependent on government action. Perhaps this ‘implementation gap’ is the reason why Caribbean development is described as ‘standing.’ While I readily acknowledge that there is room for improvement, I must highlight that the private sector and the wider citizenry have a part to play in making regional integration and the CSME a high priority matter on the national agenda. In this regard it is hoped that conferences such as this one today will help keep up the momentum! We the people have a vested interest in the CSME and we stand to benefit the most from its full realisation. Therefore the journey in translating the goals and aspirations expressed in the RTC which are central to the operation of the CSME requires all hands on deck.

The Caribbean Court of Justice

The Caribbean Court of Justice continues to play its part in the operationalization of the CSME. In a sense the Court is the lynchpin as it acts as the guardian of the RTC and has exclusive jurisdiction to determine disputes arising from its operation. This original jurisdiction of the Court provides fertile ground for the resolution of corporate trade disputes which will inevitably arise as the CSME comes to full realisation. The CCJ is uniquely positioned to ensure that the promise offered by this single economic space, this further extension of our dream for a cohesive and united Caribbean region, is translated from the text of the RTC into a sustainable commercial reality. This ultimately requires the input of all players in the economy. The Court can only fulfil its mandate when its adjudicative function is activated. The trigger lies in the Member States, the corporate entities and even in private citizens; all of whom are able to approach to Court to adjudicate upon disputes arising out of the operation of the CSME.

Sitting in its appellate jurisdiction, the Court is also able to make a significant contributor to economic growth and social development. The judicial system is one of the key factors considered in foreign direct investment. Investors want the assurance fostered by the existence of an independent and efficient judiciary to settle commercial disputes. An environment marked by an inefficient or corrupt judiciary can be a deal breaker. Thus the aim of the Court, as expressed in its Strategic Plan, is to be a leader in providing high quality justice, justice that is responsive, innovative and inspirational. Responsive, in the sense of rising to the challenges of our diverse communities. Innovative, in the sense of fostering jurisprudence that is reflective of our history, values and traditions, and consistent with international legal norms. Inspirational, in the sense of holding fast to the tenets of court excellence to shape a judicial system, worthy of the trust and confidence of the people of the region. The contribution of the Court to Caribbean development straddles many different spheres. The work of the Court has effected institutional, jurisprudential, cultural and normative in the landscape of Caribbean development as we explore the full potential of regional integration offered by the CSME.

Institutional Change

The impact of the CCJ in the area of institutional change is most manifest in the contribution of the Court to the strengthening of the administration of justice. The Court is committed to enhancing the performance of the region's judicial system. The Caribbean region is witnessing an explosion of litigation resulting in backlogs and

delays which if not properly managed will erode public confidence in the judicial system. This is where three umbrella bodies of the CCJ: CACTUS, CAJO, and CALCA, come in. CACTUS is made up of court technology users at all levels of the administration of justice. These officers come together annually to share information about their organisations, discuss issues that affect them and suggest solutions that they can incorporate, that other courts in the region may already be using to better and more efficiently manage their processes. CAJO is the Caribbean Association of Judicial Officers. It is a prime vehicle for judicial education in the region and is currently considering online judicial education programmes for Caribbean judges. The main objective of CALCA is the advancement of knowledge, education, learning, research, and practical application of law and the administration of justice in the Caribbean context. The cumulative contribution of these three organisations ensures that our regional judiciaries exploit a variety of avenues for technological, institutional and educational advancement.

The contribution of the Court to the administration of justice is also evident in the context of court financing. Judicial financing across the region is currently done by way of an annual subvention from the national budget. Thus the judiciary prepares a budget which is forwarded for approval through the Attorney General. This model of financing is not easily reconcilable with the notion of the independence of the judiciary. Thus the financing of the CCJ followed a different path. The CCJ Trust Fund with a capital base of \$100 million is designed to fund the Court in perpetuity. The Fund is managed by a professionally staffed board with a wide array of competencies as set out in the Trust

Fund Agreement.⁴ This ensures that the Court is insulated from the political influence which can erode public trust and confidence in the administration of justice; a risk which is heightened in smaller countries like those of the Caribbean region. For these reasons this model for financing has been put forward as warranting “serious consideration for wider adoption by the community of international courts.”⁵

Institutional change can also be viewed on a more nuanced level in terms of increasing access to justice. The case which stands out most in this regard is that of *Elizabeth Ross v Coreen Sinclair*,⁶ Two very poor ladies (one quite aged) from Guyana had a dispute between them about the right to occupy a condominium. It was a matter very important to them. They could never previously have had that matter litigated by a second tier appellate court. The CCJ heard it *in forma pauperi*; a facility provided under Rule 10.6 of the *Caribbean Court of Justice (Appellate Jurisdiction) Rules* to impoverished parties to apply to the Court for special leave to appeal as a poor person. Two members of the Guyanese Bar agreed to represent both ladies *pro bono*. The ladies were able to have most hearings done by teleconferencing. It is clear then that indigent persons have been accessing the Court.

⁴ Article VI of the Agreement Establishing the Caribbean Court of Justice Trust Fund provides that the Board be comprised of the Secretary General of Caricom, the Vice Chancellor of the University of the West Indies, the President of the Insurance Association of the Caribbean, the Chairman of the Association of Indigenous Banks of the Caribbean, the President of the Caribbean Institute of Chartered Accountants, the President of the Organization of Commonwealth Caribbean Bar Association, the Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community, the President of the Caribbean Association of Industry and Commerce, and the President of the Caribbean Congress of Labour.

⁵ Kate Malleon, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, I.C.L.Q. 2009, 58(3), 671-687.

⁶ [2008] CCJ 4 (AJ); (2008) 72 WIR 282

This increased level of access also applies to legal practitioners. The number of senior counsel appearing before the CCJ in the matters heard to date has been 27 and the number of junior counsel 102. In those jurisdictions which have acceded to the appellate jurisdiction, the opportunity to appear before the highest appellate court is of immeasurable benefit from the standpoint of professional development of legal practitioners. In relation to original jurisdiction matters, attorneys appearing before the CCJ are able to hone and develop their knowledge and understanding of the RTC and the fundamental pillars of the CSME such as the common external tariff; an issue that was explored in the *Trinidad Cement Limited and TCL Guyana Incorporated v The Co-operative Republic of Guyana*⁷ and in *Hummingbird Rice Mills and Suriname v the Caribbean Community*⁸ cases.

Increasing access to justice is beneficial for both personal and normative reasons. On a personal level, it demonstrates that the judicial system at its heart exists to facilitate problem solving and dispute resolution. When the justice system operates efficiently, litigants have a greater level of assurance that their dispute has been thoroughly ventilated and a sound decision arrived at. On a normative level, access to justice is inextricably linked to the promotion of the rule of law which lies at the foundation of a healthy democracy. Thus the CCJ in both its appellate and original jurisdiction is able to effect positive change in the social order of Caribbean societies by delivering justice which is accessible, efficient and reflective of our values and mores. By strengthening

⁷ [2009] 75 WIR 327, [2009] CCJ 5 (OJ)

⁸ [2012] 79 WIR 448, [2012] CCJ 1 (OJ).

the judicial system the Court also contributes to an economic climate that fosters increased growth and investment.

Jurisprudential Change

The promise of the CCJ is often described in terms of creating Caribbean jurisprudence. The Court represents an opportunity to build our own principles in accordance with our historical and social experiences, to meet social changes, and to give effect to regional standards and values as the laws of the region are interpreted and applied. It has consistently demonstrated its ability to forge new ground in the development of Caribbean jurisprudence.

In its appellate jurisdiction, the Court has been able to clarify important doctrinal elements of Guyanese land law. Guyana has a hybrid land law system, a mixture of Roman-Dutch law and English common law which is unique and complex in its own right. The Caribbean Court of Justice, as Guyana's final appellate court has offered clarity, legal certainty and stability to the Guyanese community on many of these land issues. In *Ramdass v Jairam and Others*⁹ the Court clarified and definitively stated that equitable interests in immovable property are not recognized and cannot be acquired in Guyana. In *Toolsie Persaud Ltd v Andrew James Investments Ltd and Others*¹⁰, the Court clarified the Guyanese law of adverse possession. The Court held that it is possible to acquire title to State land by adverse possession once the claimant shows a sufficient degree of physical custody and control of the claimed land and an intention to

⁹ (2008) CCJ 6 (AJ); (2008) 72 WIR 270

¹⁰ [2008] CCJ 5 (AJ); (2008) 72 WIR 292

exercise such custody and control on his own behalf and for his own benefit. The case of *Lackram Bisnauth v Ramanand Shewpersad and Rajwattie Bisnauth*¹¹ provides useful guidance on the principles relating to the acquisition of prescriptive title to land under the Guyana Title to Land (Prescription and Limitation) Act, cap 60:02.

Sitting in its original jurisdiction, the CCJ is intended to play an integral role in bringing the benefits of regional integration home to the ordinary Caribbean citizen. The case which stands as a testament to the Court's ability to breathe life into the text of the RTC is that of *Shanique Myrie*¹² where the CCJ has clarified the general rule that CARICOM nationals are entitled to hassle free travel and an automatic six-month stay upon entry into another CARICOM State. The Court also indicated that the right to free entry and hassle free travel is subject to exceptions which will be strictly construed. Thus a CARICOM national can legitimately be denied entry where the person is likely to become a charge on public funds or where the person's entry is inimical to the public interest. Thus the concept of free movement has transcended the Skilled Nationals regime to embrace all CARICOM nationals. This development leads to the observation that:

“Myrie can serve as a catalyst to facilitate expansion of the notion of free movement beyond that of employment or other economic activity and thus contribute to the further evolution of that nascent virtue of ‘Caribbean identity’ which has already taken root in the field of education through the University of the West Indies and sport via the ‘exploits’ of the West Indies Cricket Team.”¹³

¹¹ [2009] CCJ 8 (AJ)

¹² [2013] CCJ 3 (OJ)

¹³ Mr Justice Winston Anderson, Free Movement Within CARICOM: Deconstructing Myrie v Barbados, Speech delivered to the OECS Bar Association (2013).

Cultural and Normative Change

The CCJ also demonstrates the ability of law to effect broader societal change in the sense of effecting shifts in our cultural and normative moorings. In the Caribbean human rights does not feature prominently on our regional psyche. Whether this is attributable to our colonial past, the horrors of slavery and indentureship or the fears gripping our nations in the wake of rising crime is beyond the scope of my address today. It serves to simply observe human rights lie at the heart of our legal structure yet we do not always give them the prominence they deserve. By its jurisprudence the CCJ has demonstrated its ability to ensure that the human rights which lie at the heart of our very existence as human beings are protected and preserved.

In *the Attorney General and Others v Joseph and Boyce*¹⁴ the Court held although individual citizens derived no rights under treaties concluded between States, the promotion of universal standards of human rights showed a tendency towards a confluence of domestic and international jurisprudence and consequently a ratified but unincorporated treaty could give rise to certain legitimate expectations. In this case the Court rationalised that in balancing the competing interests of the individual convicted of murder and sentenced to death to pursue a petition to the Inter American Human Rights Commission, and that of the State to refuse to await the completion of the process, the principle of legitimate expectation prevailed.

¹⁴ *Boyce, supra*

One of the topical human rights issues throughout the world today is the excessive duration of pre-trial detention, as a serious human rights violation; a violation which must be addressed from many angles. One aspect was addressed by the CCJ in *Romeo Da Costa Hall v The Queen*¹⁵. The point came up when the State accepted a plea of guilty of causing serious harm with intent and withdrew the indictment for murder. In calculating the sentence the trial court took into account two of the years spent on remand, although it was acknowledged that the appellant had spent four years and five months. The CCJ emphasised that although a court does have discretion, the primary rule is that full credit should be granted for time spent on remand, but pointed out some of the elements which would justify exceptions to the primary rule, including, where the court concluded that defendant deliberately contrived to expand the time on remand, and the entire or part of the pre-trial custody was unconnected with the offence for which he was being sentenced, and where the custody or part of it was also caused by other offences for which he had been convicted or was awaiting trial.

The cultural change fostered by the CCJ has transcended the arena of human rights and moved into the broader sphere of public accountability and good governance. These principles are under threat all around the world, driven by the spectre of corruption and mismanagement which has all too often been displayed public officials in whom trust and confidence are traditionally reposed. Thus in *Trinidad Cement Limited v The Competition Commission*¹⁶ the Court explained that:

¹⁵ (2011) 77 WIR 66; [2011] CCJ 6 (AJ)

¹⁶ [2012] 81 WIR 24, [2012] CCJ 4 (OJ).

“By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the member states transformed the erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law. ... The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.”

This theme of accountability lies at the heart of the decision *Florencio Marin v the Attorney General of Belize*. The case arose out of a questionable transaction involving both ministers whereby prime government land was sold to a private company beneficially owned by one of the ministers at prices well below market value, resulting in a loss of public revenue. Traditionally, in cases where the State suffered losses from abuses in public office the remedies relied upon were, dismissal from office, disciplinary action, criminal prosecution, the use of integrity and anti-corruption legislation or litigation for breach of trust or fiduciary litigation. However armed with the *Marin* decision, another avenue is now available to address corruption and wastage of public funds in the form of legal proceedings being brought by the Attorney General for the tort of misfeasance.

The Future of Caribbean Development

Despite these fundamental changes ushered in by the CCJ in the area of Caribbean development, I must draw attention to one cycle in our region's evolution remains to be realised, that of accession to the appellate jurisdiction of the Court. This is the only area

of Caribbean development where I am willing to concede that the epithet of ‘standing’ seems apposite. The CCJ recently celebrated its ninth anniversary on April 16, 2014. Its roots can be traced all the way back to the ideals of the West Indian Federation.

After nine years, we still have not received the region’s full embrace. I must emphasise that this state of affairs is at odds with the commitment undertaken by the parties to the Agreement Establishing the Court. All signatories committed to the accession to the Court in its appellate jurisdiction, convinced of the “determinative role of the Court in the further development of Caribbean jurisprudence”¹⁷ and “the deepening of the regional integration process.”¹⁸ All signatories, bar one, signed the Agreement without any reservation. Yet nine years later, reservations persist. The Court is funded by the region but is not used. The Court has distinguished judges, well-trained staff, modern technology, video conferencing, e-filing, a Regional Judicial and Legal Service Commission – all of which are designed to ensure that we deliver high quality justice to the people of our region. Yet reservations remain.

Conclusion

Caribbean development, be it economic, institutional or social, is heavily impacted by the work of the CCJ. The Court has consistently demonstrated that it is anything but standing. Rather it is developing and evolving to meet the needs of the wider citizenry. This dynamic evolution is at odds with the debate surrounding the accession to CCJ as the final appellate court for the region. I would like to conclude by reminding the audience of one of Sir Arthur’s most enduring legacy – the transformative power of

¹⁷ See the Preamble to the Agreement Establishing the Caribbean Court of Justice.

¹⁸ Ibid.

education. On his tombstone is inscribed the following quote: “The fundamental cure to poverty is not money, but education.” Perhaps the education is also the fundamental cure to enable us to fully realise our independence by acceding to the appellate jurisdiction of the CCJ. This audience has a central role to play in ensuring that the reservations surrounding the Court are dispelled. We all must ensure that this area of Caribbean development does not remain ‘standing’ much longer.



The Right Honourable Sir Dennis Byron