

**THE CARIBBEAN COURT OF JUSTICE:  
AN INSTITUTION WHOSE TIME HAS COME**

**By Weston Eidson\***

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## I. Introduction

Since the independence movement began in earnest for much of the Caribbean in 1962,<sup>1</sup> to the very recent past, the newly independent nation states, free from their colonial masters, in this case almost exclusively Britain, have been subjected to the laws of a foreign land and a foreign court. Having a foreign court passing judgment from thousands of miles away led to much disenfranchisement among the nations in the Caribbean, and this brought a need for something more Caribbean, something that would be better in touch with the wants, needs, mentality, and overall spirit of the Caribbean as a whole. From this idealism and from this disenfranchisement came the idea of a Caribbean court of last resort, a court that would counter the traditional Privy Council sitting in London.

For nearly 300 years, much of the Caribbean was ruled from London and as such was subject to her jurisdiction and laws.<sup>2</sup> Those parts of the region ruled by Britain are often referred to collectively as the West Indies or the English Speaking Caribbean.<sup>3</sup>

Two explicit reasons led to creation of the Caribbean Court of Justice: dissatisfaction with the Privy Council in London<sup>4</sup> and the need for a court to deal with proliferating commercial disputes of the Caribbean Community and Common Market (“CARICOM”).<sup>5</sup> These two reasons are strongly reinforced by a third aspiration: the

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<sup>1</sup> 29 ENCYCLOPAEDIA BRITANNICA, *West Indies*, 731 (2002).

<sup>2</sup> Leonard Birdsong, *The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 198 (2005).

<sup>3</sup> *Id.*

<sup>4</sup> Hugh M. Salmon, *The Caribbean Court of Justice: A March with Destiny*, 2 FL. COASTAL L.J. 231, 234 (2000).

<sup>5</sup> Honorable Sir David Simmons, *Caribbean Legal Affairs: The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 171, 178 (2005).

desire of former European colonies to have a sense of self and to no longer be subject to decisions made in Europe.<sup>6</sup> In other words, the Caribbean wants a *Caribbean* court.

## II. Overview

### A. History and Members

The Caribbean Court of Justice was born out of an idea from the early 1960s of a West Indies Federation where all the former British colonies of the Caribbean would act as one political unit.<sup>7</sup> This never came to fruition, but the notion itself, and the sense of family that the mostly island nations share with one another, helped create CARICOM. CARICOM was institutionalized by the Treaty of Chaguaramas,<sup>8</sup> which was signed on July 4, 1973 in Chaguaramas, Trinidad and Tobago, by a number of Caribbean nations.<sup>9</sup> After many years the plan for a single economy of the Caribbean was becoming realized, and in 2001 a Revised Treaty of Chaguaramas was signed establishing the CARICOM Single Market and Economy (CSME). Because a court was necessary to hear trade disputes arising from the CSME, on February 14, 2001 the Agreement Establishing the Caribbean Court of Justice was signed.<sup>10</sup> Dominica and St. Vincent and the Grenadines later signed the agreement on February 15, 2003, bringing the total number of signatories to 12.<sup>11</sup> The court was officially inaugurated in Queen's Hall - Port of Spain, Trinidad

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<sup>6</sup> Salmon, *supra* note 4, at 239.

<sup>7</sup> Honorable Mr. Justice Hayton, *The Role of the Caribbean Court of Justice: An Overview*, Address at the Conference of Society of Trusts & Estates, Barbados (Feb. 3, 2005) (transcript available at [http://www.caribbeancourtofjustice.org/papers\\_addresses.html](http://www.caribbeancourtofjustice.org/papers_addresses.html)).

<sup>8</sup> <http://www.caricom.org/index.jsp> (follow “Community” hyperlink).

<sup>9</sup> *Id.*

<sup>10</sup> <http://www.caribbeancourtofjustice.org/> (follow “About the Court” hyperlink). The Agreement was signed by Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname; and Trinidad & Tobago.

<sup>11</sup> *Id.*

and Tobago on Saturday, April 16, 2005.<sup>12</sup> The court then heard its first case in August of that year, a long-standing libel case out of Barbados.<sup>13</sup>

## 1. CCJ as Court of Original Jurisdiction over CARICOM Matters

Currently, all the signatories to the agreement establishing the Court use the Caribbean Court of Justice as the court of original jurisdiction when trade disputes within CARICOM require judicial review. As a court of original jurisdiction, the CCJ discharges the functions of an international tribunal, applying rules of international law in respect to the interpretation and application of the Revised Treaty of Chaguaramas. In this regard, the CCJ performs functions like the European Court of Justice, the European Court of First Instance, the Andean Court of Justice and the International Court of Justice. Many similarities such as *locus standi*<sup>14</sup> of these courts are discussed below. “In short, the CCJ is a hybrid institution - a municipal court of last resort and an international court with compulsory and exclusive jurisdiction [with] respect [to] the interpretation and application of the Treaty.”<sup>15</sup> The Community needed a court because the arbitral procedure under the original Treaty of Chaguaramas was never used. Serious disputes were never settled, thereby hampering the integration movement. “Moreover, the rights and obligations created by the CSME are so important and extensive, relating to the establishment of economic enterprises, the provision of professional services, the movement of capital, the acquisition of land for the operation of businesses, that there is a clear need to have a permanent, central, regional institution to authoritatively and

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<sup>12</sup> Lillian Crawford-Abbensetts & Andrea Ewart, *The Caribbean*, 40 INT’L LAW. 541 (2006).

<sup>13</sup> BBC News, *Caribbean Court Hears First Case*, <http://news.bbc.co.uk/2/hi/americas/4132328.stm> (August 9, 2005).

<sup>14</sup> *Locus standi*, Latin for ‘place to stand,’ standing, right to bring an action.

<sup>15</sup> <http://www.caribbeancourtjustice.org/> (follow “About the Court” hyperlink).

definitively pronounce on those rights and corresponding obligations. The Caribbean Court of Justice is intended to be such an authoritative institution.”<sup>16</sup> In other words, one of the most pressing reasons for having the court was the need for uniformity in CARICOM and the CSME in order to attract foreign capital. This was something that was out of the jurisdiction and expertise of the Privy Council.

The new court is an autonomous body and has become the judicial organ of the Caribbean Community.<sup>17</sup> This did and does, however, make many observers nervous about the role and practice of law that the civil law countries of Suriname and Haiti will have within the court. The common law systems will benefit from the flow-over effect of decisions made by the Court, especially involving disputes in which the civil law countries are litigants but obliged to use *stare decisis*.<sup>18</sup> Similarly, the civil law systems of the Community will not escape that flow of the regional common law jurisprudence of the appellate court into the municipal domain, particularly in such areas as human rights, thus furthering the integration of both legal systems.<sup>19</sup> Chief Justice of the Eastern Caribbean Supreme Court, Sir Denis Byron, stated that the CCJ will be the leading single contributor to the harmonization of the practice and application of law in the Member States of the Community,<sup>20</sup> more so than the CSME or any other single organ under CARICOM.

The Rose Hall Declaration which came out of the Twenty-Fourth Meeting of the Conference of Heads of Government, was adopted on the Thirtieth Anniversary of the

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<sup>16</sup> <http://www.caribbeancourtofjustice.org/> (follow “About the Court” hyperlink then the section III hyperlink).

<sup>17</sup> Sheldon McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations* 29 (2005).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Community, July 4, 2003, in Montego Bay, Jamaica,<sup>21</sup> and asserted that although CARICOM is a “Community of Sovereign States” and ultimate supranationality is not its goal, the region would be stronger if the various states were more closely aligned.<sup>22</sup>

Some parallels have been drawn with the European courts in terms of the constraining nature a regional court could have on individual governments in the Caribbean. CARICOM will be much like a “parent” of the Member States. The Member States will be obligated to act much like the United Kingdom upon joining the European Community. Here the U.K. was forced, upon accession to the European Communities, to enact legislation giving domestic legal effect to Community Law.<sup>23</sup> This problem of giving up some sovereignty was also found worthwhile for the greater cause and strength of the overall region at the Rose Hall Declaration.

To add further strength to the court, the Revised Treaty allows non-CARICOM nations to join the Court with the hope of gaining legitimacy over a larger constituency. Membership in the court is available to “[a]ny other Caribbean country, which is invited by the Conference to become a Party to this Agreement.”<sup>24</sup> Further, “[t]he Conference may, in its wisdom, invite a Caribbean country to become a member of the Court, even if that country has no interest in becoming a member of the Community. This often is not as incongruous as it may appear. A country with which the Community has extensive bilateral trade and economic interaction could become a part of the CCJ Agreement without taking on all the obligations of membership in the Community, and thus avail itself of an authoritative and determinative dispute settlement regime. Conversely, a

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<sup>21</sup> The Rose Hall Declaration on “Regional Governance and Integrated Development,” <http://www.caricomlaw.org/docs/rosehalldeclaration.htm>.

<sup>22</sup> McDonald, *supra* note 17, at 30.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 32.

Commonwealth Caribbean Country or Territory may not be able to exercise the rights and assume the obligations of membership of the Community, but may find it convenient or may be allowed to participate in the appellate jurisdiction of the Court. The invitation to join would thus be appropriate to join in both circumstances.”<sup>25</sup> In other words, a country may choose to use the CCJ in either of its manifestations if it sees fit, whether as the court of original jurisdiction or as the highest appellate court.

Officially of course the Court does not have jurisdiction over these nations until they accede to it, and only Member States Contracting Parties of the Agreement have standing or *locus standi*.<sup>26</sup> According to Article 211:<sup>27</sup>

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

Along these lines, and because the Revised Treaty is the most powerful document that binds the Community together, with the Single Market and Economy being the central and most integral part of the Community, it makes sense that those in the Community will have to submit to the original jurisdiction of the Caribbean Court of Justice for

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<sup>25</sup> McDonald, *supra* note 17, at 32.

<sup>26</sup> *Id.*

<sup>27</sup> Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy, July 5, 2001, [http://www.caricom.org/jsp/community/revised\\_treaty.jsp?menu=community](http://www.caricom.org/jsp/community/revised_treaty.jsp?menu=community) [hereinafter Revised Treaty].

economic claims that arise out of the single market.<sup>28</sup> This fact is documented in Chapter 9, Articles 211 and 212 of the Revised Treaty.

Finally, Article 221 states that: “Judgments of the Court shall constitute legally binding precedents for parties before the Court unless such judgments have been revised in accordance with Article 219.”<sup>29</sup> This new legal order will inherently send waves through the two legal systems of the community, those using the common law and those using the civil law, “particularly if one accepts that issues of social and economic rights cannot be seen as being distinct in countries such as Haiti and Jamaica.”<sup>30</sup>

## 2. CCJ as Court of Last Resort

As previously discussed, the CCJ is more than the court of original jurisdiction for CARICOM. It is also designed to function as the highest appeals court for many of the Caribbean nations. Currently, however, only Barbados and Guyana have acceded to the CCJ as their final appellate court.<sup>31</sup> Other countries such as Jamaica, which use the Privy Council in London,<sup>32</sup> would need to amend their constitutions to begin to use the CCJ instead.<sup>33</sup> The two main political parties of Jamaica are at odds as to whether a national referendum would be necessary for amendment. The majority of the population in Jamaica is in favor of the Court. Recent polls in Jamaica show 40% of voters wanting the Caribbean Court of Justice to replace the Privy Council; only 24% want to keep the Privy

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<sup>28</sup> Lillian Crawford-Abbensetts, Andrea Ewart, and Douglas Earl McLaren, *The Caribbean*, 39 INT’L LAW. 591 (2005).

<sup>29</sup> Revised Treaty, *supra* note 27, art. 221.

<sup>30</sup> McDonald, *supra* note 17, at 34.

<sup>31</sup> Jane E. Cross, *The Trade Winds of Judicial Activism: An Introduction to the 2004-2005 Goodwin Seminar Articles by Dennis Morrison, Q.C., and the Honourable Mia Amor Mottley, Q.C., M.P.*, 30 NOVA L. REV. 393 (2006).

<sup>32</sup> Birdsong, *supra* note 2, at 219.

<sup>33</sup> *Id.*

Council.<sup>34</sup> 36% of voters have no opinion on the matter, or not enough information to form one.<sup>35</sup> The opposition party, the Jamaica Labour Party (JLP) insists on a referendum to legitimize the constitutional amendment.<sup>36</sup> The Privy Council agreed with this demand by saying that it was unconstitutional to change Jamaica's highest court of appeals from the Privy Council to the CCJ without a referendum.<sup>37</sup> The ruling party, the People's National Party (PNP) wanted instead to push the amendment through the legislative process with no referendum.<sup>38</sup> The JLP, however, has threatened that if the referendum is not held it will void the accession to the CCJ if it comes to power.<sup>39</sup>

This constitutional debate in Jamaica illustrates one of the reasons why more countries have not begun to use the appellate jurisdiction of the Court. This is, however, not the only reason; some countries are also already members of another international court, the Eastern Caribbean Supreme Court.

The Eastern Caribbean Supreme Court (ECSC) located in Castries, Saint Lucia, has been in existence since 1967, and is comprised of the independent states of Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and three British Overseas Territories: Anguilla, British Virgin Islands, and Montserrat.<sup>40</sup> All of these sovereign nations are signatories to the Agreement Establishing the Caribbean Court of Justice; only the British

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<sup>34</sup> BBC Monitoring Latin America – Political, *Jamaicans give Caribbean Court of Justice Positive Rating*, Caribbean Media Corporation, December 20, 2006.

<sup>35</sup> *Id.*

<sup>36</sup> Birdsong, *supra* note 2, at 219.

<sup>37</sup> Robert Hart, *Bombshell Ruling – Privy Council Says Passage of CCJ Unconstitutional*, Jamaica Gleaner, February 4, 2005, <http://www.jamaica-gleaner.com/gleaner/20050204/lead/lead1.html>.

<sup>38</sup> Birdsong, *supra* note 2, at 219.

<sup>39</sup> Financial Times Information, *Jamaican Opposition Calls for Referendum on Caribbean Court of Justice*, BBC Monitoring, December 21, 2006.

<sup>40</sup> <http://www.eccourts.org/> (follow the “About the ECSC” hyperlink).

Virgin Islands and Anguilla are not signatories to the Agreement.<sup>41</sup> In other words, it is not clear whether this agreement to establish the Eastern Caribbean Supreme Court would have to be dissolved or, more likely, the CCJ would simply act as the Privy Council does now and just be the next step after the ECSC.

Suriname and Haiti, whose legal systems are based on Dutch and French civil law respectively, may also have a more difficult adjustment to the Caribbean Court of Justice as a court of last resort, because their jurists and population in general are much less familiar with common law. Therefore, many common law principles like *stare decisis* will be foreign to them. When dealing with a dispute that may arise out of CARICOM and the CSME, however, more familiar aspects of international and trade law will come into play. In other words, the ease with which Suriname and Haiti can participate will depend on whether they choose to use the Court as their highest appellate court as well as in its original jurisdiction mode. Both civil law and common law jurisdictions can participate in the CCJ in the exercise of its original jurisdiction.<sup>42</sup> This is so because the CCJ, in exercising its original jurisdiction, is discharging the functions of an international tribunal that applies rules of international law, where distinctions between common and civil law are not as pronounced. Furthermore, it is noteworthy that Guyana, while English speaking, uses aspects of Roman law as well as common law.<sup>43</sup> International law rules are common to both common law and civil law jurisdictions. The situation would be more complicated, however, if Suriname or Haiti wished to participate in the appellate jurisdiction of the CCJ, where municipal law rules, and not international law rules, apply.

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<sup>41</sup> *Id.*

<sup>42</sup> Birdsong, *supra* note 2, at 222.

<sup>43</sup> CIA World Factbook, Legal Systems, <https://www.cia.gov/cia/publications/factbook/fields/2100.html>.

Of the other countries that use the Caribbean Court of Justice for its original jurisdictional purposes, but not yet for its court of final appeals purposes, are Trinidad and Tobago, which has its own Supreme Court of Judicature (comprised of the High Court of Justice and the Court of Appeal)<sup>44</sup> and Belize.<sup>45</sup> Both ultimately answer to the Privy Council.<sup>46</sup>

Jurisdiction of the Caribbean Court of Justice as the court of last resort was not addressed in the Revised Treaty but was so addressed in the CCJ Agreement, stating “the Court is a superior Court of Record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party.”<sup>47</sup> This allows the Court to use a signatory’s domestic law when deciding a case.

### ***B. Institutional Distinctiveness of the CCJ and Organization***

The Caribbean Court of Justice has a number of features that tend to distinguish it from other courts of similar regional organization such as the European Court of Justice. Some of these features are:<sup>48</sup>

1. the unique nature of its jurisdiction;
2. the *non liquet* rule;
3. the role of doctrine, and *stare decisis* and precedent in the original jurisdiction;
4. *locus standi* for natural and legal persons;

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<sup>44</sup> <http://www.tlawcourts.org/> (follow the “Supreme Court” and “Structure” hyperlinks).

<sup>45</sup> <http://www.belize-law.org/> (follow “The Judiciary” hyperlink).

<sup>46</sup> <http://www.privacy-council.org.uk/>.

<sup>47</sup> Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2000, <http://www.sice.org/trade/ccme/ccj1.pdf> [hereinafter CCJ Agreement].

<sup>48</sup> McDonald, *supra* note 17, at 39.

5. the referral procedure;
6. the advisory opinion procedure;
7. the modality for appointing the Judges;
8. the modality for the appointment of the President;
9. sources from which the Judges may be drawn;
10. the mechanism for financing the Court;
11. the peripatetic nature of the Court; and
12. compliance with the Judgments and Orders.

As discussed above, the Revised Treaty gives the CCJ the power of original jurisdiction, though to be sure that the Court has a mandate to serve as both a court of original jurisdiction and appellate jurisdiction with equal weight, Article III of the CCJ Agreement addresses both by stating:

- (a) Original jurisdiction in accordance with the provisions of Part II, and
- (b) Appellate jurisdiction in accordance with the provisions of Part III.<sup>49</sup>

### **1. *Stare decisis* and the *Non liquet* Rule**

The Court has adopted *stare decisis* and precedent as the norm for its decision making; it does, however, realize that the realm of international law often relies more heavily on custom and treaties and further acknowledges that other international tribunals such as the European Court of Justice are, at least on face, obliged to use a form of civil law.<sup>50</sup> The Court also finds that many international tribunals, including the European Court of Justice, develop a form of jurisprudential constant, and in the case of the European Court of Justice, have actually “gone further and adopted an approach closer to

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<sup>49</sup> CCJ Agreement, *supra* note 47, art. III, para. 1.

<sup>50</sup> McDonald, *supra* note 17, at 39.

a common law regime.”<sup>51</sup> With this in mind the decisions tend to be as consistent as they must be, and adhered to by other lower national courts when their principles are invoked. Further, the advisory opinions will also need to be respected, and when necessary, followed. The final rationale is as follows: “[t]he Community is a capital-importing region, and, therefore, the need exists to create a socio-economic environment where external investors, as well as those within the Community, can have legitimate expectations as to the outcome of investment decisions.”<sup>52</sup> This fact is central to the decision making of the Court and essentially one of, if not the, fundamental reason for the creation of the Court.

Another distinguishing feature of the Court that differentiates it from other international tribunals, in this case namely the European Court of Justice, is the inability of the CCJ to rule a case as *non liquet*.<sup>53</sup> In both the Revised Treaty and the CCJ Agreement, the Court is disallowed from refusing to determine a case on the grounds of either silence or obscurity of the law. Hence the line written into both the Revised Treaty and the CCJ agreement: “The Court may not bring a *non liquet* on the grounds of silence or obscurity of the law.”<sup>54</sup> In the civil law systems, judges can, instead of deciding a case, simply write “NL” if the facts did not point to a definite conclusion and leave the case for a time to be determined later.<sup>55</sup> The presence of both common law and civil law systems in the Community requires a more definitive position on this matter. In consequence, a provision was created barring *non liquet* from being applied.<sup>56</sup> In

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Non liquet*, Latin for ‘it is not clear,’ given when there is no clear law governing, the court can not come to a conclusion.

<sup>54</sup> CCJ Agreement, *supra* note 47, art. XVII, para. 2; Revised Treaty, *supra* note 27, art. 217, para. 2.

<sup>55</sup> McDonald, *supra* note 17, at 40.

<sup>56</sup> *Id.*

essence, the prohibition on the principle of *non liquet* is a license for the Court to use all its available vision and imagination to find difficult answers to complex legal problems.<sup>57</sup> The law of the Community needs to be fleshed out and the best way for this to happen is to have all the possible cases decided; the principle of *non liquet* would hamper this growth and development at such an early stage in the Court's life.<sup>58</sup>

There are obvious high hopes for the integration of the civil law countries, but jurists in these nations do have their reservations. The CCJ is seen as an overwhelmingly common law court, as is the entire Community, but, while having only two nations that apply civil law, fully nine of the fourteen million inhabitants of the Community live under the rule of civil law.<sup>59</sup> This creates a considerable number of civil law jurists, lawyers, and, just as importantly, those living under the notion and sensibilities of the civil law ideal. Conversely, by being outnumbered, the common law citizens could also worry about new histories, economics, and political situations, not to mention languages that are brought into their more Anglicized social strata. In its original jurisdiction facility, however, the concerns of those civil law jurists are more pronounced. In a presentation by Lim A. Po, Mr. Po voices some concerns for the civil law nations in the following way:

“The principle of *non-liquet* and the doctrine of *stare decisis* are attributes of supranationality. [Another writer] has elaborated extensively on these attributes and has concluded that, in exercising original jurisdiction, these attributes appear to be open to considerably less ambiguity and speculation than in the exercise of the Court's appellate jurisdiction.

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<sup>57</sup> *Id.* at 43.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 40.

My submission is that in the application of the principle of *non-liquet* and *stare decisis* in the jurisdiction of the Caribbean Court, differences in the legal systems of the Member States become relevant.

There is a risk of bias in the Court for common law reasoning when filling gaps in international treaty and customary law and when applying the doctrine of *stare decisis*. *Stare decisis* is not a doctrine of civil law. Nor is it a doctrine of international law, so it would be natural for the Court to relate in its decision making to the manner in which this doctrine is applied in common law.”<sup>60</sup>

Mr. Po goes on to highlight some other differences between the common law and civil law by stating:

“Important differences are that lawyers from the civil countries tend to be more conceptual, while lawyers from the common law countries are considered to be more pragmatic. And that priority is given to doctrine over jurisprudence in civil law; while the opposite is true in common law. Also, in civil law the legal rule has risen to a higher level of abstraction compared to common law. . . .

Civil law statutes do not provide definitions. On the other hand, the common law style of drafting emphasizes precision rather than conciseness. Common law statutes provide detailed definitions, and each specific rule enumerates specific application or exceptions. These differences in style can also be found in international conventions. . . .

In civil law the main tasks of courts are to decide on particular cases by applying and interpreting legal norms, while in common law, courts not only decide on disputes but are also supposed to provide guidance as to how similar disputes should be settled in the future.”<sup>61</sup>

Nevertheless, the “Heads of Government have resolved – by the act of welcoming Suriname and Haiti to the Community – to overcome the non-legal differences and concerns and to extract the positive benefits rather than be intimidated by the less attractive matters. It falls within the domain of the CCJ and the members of the legal

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<sup>60</sup> H.R. Lim A. Po, *Bridging the Divide: The Interface Between the Civil Law System and the Common Law System, With Special Emphasis on the Role of the CCJ*, Address to the Symposium on “The Caribbean Court of Justice” in Paramaribo,

<http://www.caribbeancourtsofjustice.org/papersandarticles/Bridging%20the%20Divide.pdf> (Oct. 31, 2003).

<sup>61</sup> *Id.*

fraternity who turn up to argue the matters that engage the Court to ensure that the legal diversity is not an impediment to economic (and social) cohesion but rather – and rightly so – a boom to the integration process.”<sup>62</sup> It is currently thought by the noted jurist Sheldon McDonald that the appellate jurisdiction will provide the greatest harmonization in judicial interpretation in the Community and that the most desirable aspect of the integration of the systems is in the realm of human rights.<sup>63</sup> Certainly this will be slower in coming but will be essential to deeper and further integration of the region.

Finally, it logically can be concluded that the philosophical differences between an international tribunal that exercises the doctrine of *stare decisis* is not so different from the one that does not. Courts such as the European Court of Justice have found certainty in the consistency of their decisions, even though they do not employ *stare decisis* on its face.<sup>64</sup> On the other hand, the creativity that *stare decisis* can produce can be a beneficial in itself as law is created when decisions are made that must be qualified from previous decisions. This will also help the *Corpus Juris* of the new Court and within the Caribbean Community as a whole.

Article 221 of the Revised Treaty codified the use of *stare decisis* by stating, “judgments of the Court shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219.”<sup>65</sup> The Court also uses the position that “with respect to its appellate jurisdiction, is that decisions there can be amended by legislative enactments within the domestic legal order of the contracting parties. On the other hand, it is indeed a

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<sup>62</sup> McDonald, *supra* note 17, at 40.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 44.

<sup>65</sup> Revised Treaty, *supra* note 27, art. 221.

“practical impossibility” to anticipate amendment of the Revised Treaty to mitigate or otherwise amend the law developed by the Court with respect to the original jurisdiction.”<sup>66</sup> In other words, it is much easier for the legislatures of each individual state to create acts or pass amendments to counteract appellate jurisdictional decisions than it is for all the nations in the Community to agree to change tenants of the Treaty. As L. Neville Brown writes, “Inconsistency in judicial decisions affronts even the most elementary sense of justice. In this sense the principle of *stare decisis*, of abiding by previous decisions, figures prominently in most legal systems. . . .”<sup>67</sup> Using this, the Court may overturn laws of individual nations if the laws are found to be opposed to the Revised Treaty.

## **2. *Locus standi***

When examining *locus standi*, it is necessary to look at the trends in International Criminal Law and Humanitarian Law and the ways in which the natural person may invoke the judicial power of a particular court have changed so drastically in recent years. In the Treaty of Rome,<sup>68</sup> the European Union made a vast change from a system allowing only member states to bring a case before a tribunal on behalf of an aggrieved individual to a system allowing a natural and legal person to commence a case directly. CARICOM recognized this difference and also that “economic integration and the Single Market and Economy were not about abstract factors of production, but were intended to benefit

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<sup>66</sup> L. Neville Brown & Francis Jacobs, *The Court of Justice of the European Communities*, 314 (1989).

<sup>67</sup> *Id.* at 311.

<sup>68</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 173 [hereinafter EEC Treaty].

persons.”<sup>69</sup> Hence, Article 222 set out the ways in which a natural person could come before the Court in original jurisdictional matters.

First, the individual must establish that he or she has been “prejudiced in respect of the enjoyment of the right or benefit.”<sup>70</sup> Then the Court will need to decide whether “in any particular case this Treaty intended that a right or benefit be conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly.”<sup>71</sup> Finally, the individual bringing the claim must show that the Contracting Party entitled to bring the claim “omitted or declined” to bring the claim, or that the party has “expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled.”<sup>72</sup> In other words, the person must exhaust efforts within his own country in an attempt to have his country represent him before his case may be brought before the CCJ.

When these factors are met “the Court has found that the interest of justice requires that the persons be allowed to espouse the claim.”<sup>73</sup> This is a key feature of an international court as it brings more accountability to the particular states involved. In the European Union members are held financially liable for breaches of the Treaty in actions commenced by individuals.<sup>74</sup>

### **3. The Referral and Issuance of Advisory Opinions**

The Caribbean Court of Justice also has the power to issue advisory opinions. This power is given to it in the Revised Treaty in Article 212 stating: “The court shall

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<sup>69</sup> McDonald, *supra* note 17, at 47.

<sup>70</sup> *Id.*

<sup>71</sup> Revised Treaty, *supra* note 27, art. 22.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Klaus-Dieter Borchart, *The ABC of Community Law* 88-93 (2000).

have exclusive jurisdiction to deliver advisory opinions concerning the interpretation or application of the Treaty.”<sup>75</sup> The Court is permitted to do this “only at the request of the Contracting Parties or the Community.”<sup>76</sup> This feature will prove very important tool for the Community, allowing it to discover new rules of law sooner than it could otherwise while waiting for cases to be brought up before it. It will further allow for existing rules of law to be fleshed out by the Court, thus giving more certainty to the law of the Community in general, hence promoting more economic stability and growth as more foreign businesses feel that the Caribbean is a safe region in which to invest.

Although only the Community and Member States can obtain advisory opinions through a referral at present, there is nothing that prevents the CCJ from ruling on the treaties and treaty-making power of the Community under the terms of the Revised Treaty.<sup>77</sup> In other words, the treaties which CARICOM is negotiating are easily ruled upon solely by the Court’s own accord and choice to do so. Thus far the Community has completed Free Trade Agreements with Colombia, Costa Rica, Cuba, the Dominican Republic, and Venezuela.<sup>78</sup> These treaties could therefore, at any time, come under the scrutiny of the Court; if the Court finds them counter to the Revised Treaty, the treaty will not be pursued.<sup>79</sup>

Advisory opinions can also be issued by the Court when a Member State is negotiating a treaty with a third party State, groups of States or other entities.<sup>80</sup> This is done to be sure that a treaty of any kind would not adversely affect the Community as a

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<sup>75</sup> Revised Treaty, *supra* note 27, art. 212.

<sup>76</sup> *Id.*

<sup>77</sup> McDonald, *supra* note 17, at 65.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

whole in any way. “Organs of the Community or other Member States can allege breaches of those provisions and request advisory opinions from the Court.”<sup>81</sup>

#### 4. Selecting the Judges and President

The particular modalities for choosing members of the Court are *sui generis*.<sup>82</sup> The Caribbean Court of Justice is one of the few—if not the only—international judicial tribunal with an independent mechanism to place Judges on the bench and select a President. “While the bench of all other international tribunals are appointed by member governments either directly or via elections, the CCJ Agreement establishes in Article V a Regional Judicial and Legal Services Commission.”<sup>83</sup> In a further effort to insulate the Court from political pressures or possible bribery, and to prevent the government of one Country enjoying a disproportionate amount of power over the Court, there are no Government representatives allowed on the Commission. The members of the Commission are:

- a. the President who shall be the Chairman of the Commission;
- b. two persons nominated jointly by the Organization of Commonwealth Caribbean Bar Association (OCCBA) and the Organization of Eastern Caribbean States (OECS) Bar Association;
- c. one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;
- d. one chairman of a Public Services Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years;
- e. two persons from civil society nominated jointly by the Secretary-General of the Community and the Director-General of the OECS for a period of three years following consultations with regional non-governmental organizations;

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<sup>81</sup> *Id.*

<sup>82</sup> *Sui generis*, Latin for ‘of its own kind’

<sup>83</sup> CCJ Agreement, *supra* note 47, art. V.

- f. two distinguished jurists nominated jointly by the Dean of Faculty of Law of the University of the West Indies, the Dean of Faculties of Law of any of the Contracting Parties, together with the Chairman of the Council of Legal Education; and
- g. two persons nominated jointly by the Bar of Law Associations of the Contracting Parties.<sup>84</sup>

The President of the CCJ therefore has the dual role of leading the Court and leading the Regional Judicial and Legal Services Commission as Chairman of the Commission. The tasks that this entity must perform are described in Article V, paragraph 3, and include:

- a. making appointments to the office of Judge of the Court, other than that of President;
- b. making appointment of those officials and employees referred to in Article XXVII and for determining salaries and allowances to be paid to such officials and employees;
- c. the determination of the terms and conditions of services of officials and employees; and
- d. the termination of appointments in accordance with the provisions of this Agreement.<sup>85</sup>

Paragraph three then goes on to empower the Commission to use disciplinary control over the Judges, other than the President, as well as over the officials of the court.<sup>86</sup>

Article IV, paragraph 7 then lays out the procedure for appointing or removing Judges. “A majority vote of the Commission is required.”<sup>87</sup> Finally, with regard to the President, he shall be “appointed or removed by the qualified majority vote of three quarters of the Contracting Parties on the recommendation of the Commission.”<sup>88</sup>

CARICOM released in a press conference on August 17, 2004: “At the 25th Conference of Heads of Government of the Caribbean Community held in Grand Anse, Grenada June last, CARICOM Heads collectively endorsed the recommendation of the RJLSC for

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<sup>84</sup> *Id.*, para. 1.

<sup>85</sup> *Id.*, para. 3.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*, art. IV, para. 7.

<sup>88</sup> *Id.*, para. 6.

Justice de la Bastide's appointment.”<sup>89</sup> When it comes to appointing the President and Judges, “The President is appointed by letter under the hand of the Chairman of the Conference, while the Judges are appointed by letter under the hand of the Chairman of the Commission, that is, the President.”<sup>90</sup>

Article IV paragraph 10 establishes minimum qualifications for members of the Court, stating that the candidate must be: “for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission has distinguished himself or herself in that office.”<sup>91</sup>

The Court has found that valuable contributions to the law of CARICOM and the Caribbean can come from jurists outside both CARICOM and the region as a whole. The Agreement does not mandate that the bench come from the Member States. This is seen in the fact that Judge Jacob Wit is from the Netherlands Antilles, an observer state that is actually still a dependent of the Netherlands, and Judge David Hayton from the United Kingdom.<sup>92</sup>

Finally, one must note the importance of finding outside-the-Community legal talent is the requirement of Article IV paragraph 1: “the Judges of the Court shall be the

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<sup>89</sup> Press Release, Caribbean Court of Justice, *Caribbean Court of Justice President to be Sworn In* (August 17, 2004), [http://www.caricom.org/jsp/pressreleases/pres136\\_04.htm](http://www.caricom.org/jsp/pressreleases/pres136_04.htm).

<sup>90</sup> McDonald, *supra* note 17, at 72.

<sup>91</sup> CCJ Agreement, *supra* note 47, art. IV, para. 10.

<sup>92</sup> <http://www.caribbeancourtjustice.org/> (follow “The Judges of the CCJ” hyperlink).

President and not more than nine other Judges of whom at least three shall possess expertise in international law including international trade law.”<sup>93</sup>

## 5. Financing the Court

To finance the Court a new organization was formed. The Caribbean Court of Justice Trust Fund was set up to allay fears that the Court may be heavily influenced and manipulated by the political executives through financing and the like. The Conference of the Heads of Government accepted the recommendation that the Trust Fund be established. The original investment of US\$100 million was found to be enough to secure in perpetuity the financial solvency of the institution.<sup>94</sup> The Contracting Parties have also agreed to take loans from the Caribbean Development Bank.<sup>95</sup>

The Board of Trustees of the Caribbean Court of Justice Trust Fund is another unique feature of the CCJ designed to handle the finances of the Court. There are again no governmental representatives; instead, a number of “pan-Caribbean entities were invited to make nominations. All happily concurred.”<sup>96</sup> These nominated are:

1. the Secretary-General of the Community;
2. the Vice-Chancellor of the University of the West Indies;
3. the President of the Insurance Association of the Caribbean;
4. the Chairman of the Association of Indigenous Banks of the Caribbean;
5. the President of the Caribbean Institute of Chartered Accountants;

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<sup>93</sup> CCJ Agreement, *supra* note 47, art. IV, para. 1.

<sup>94</sup> McDonald, *supra* note 17, at 73.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 74.

6. the President of the Organization of Commonwealth Caribbean Bar Associations;
7. the Chairman of the Conference of Heads of Judiciaries of the Member States of the Caribbean Community;
8. the President of the Caribbean Association of Industry and Commerce; and
9. the President of the Caribbean Congress of Labor.<sup>97</sup>

## 6. Location of the Court and Compliance with Judgments

One of the interesting features of the CCJ is the physical location of the Court. There was a problem with access to justice with the Privy Council in London, where it was seen that only large corporations, the wealthy, or those given *in forma pauperis*<sup>98</sup> status had reasonable access to the court.<sup>99</sup> With this in mind, it was decided that, although the Court would be headquartered in Port-of-Spain, Trinidad and Tobago, the Court is authorized to sit in different places—to “ride the circuit.” Article III, paragraph 3 of the CCJ Agreement states that the Seat of the Court will be in the territory of a Contracting Party as agreed to by a qualified majority vote of the Member States, “but, as circumstances warrant, the Court may sit in the territory of any other Contracting Party.”<sup>100</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *In forma pauperis*, Latin for ‘in the form of a pauper,’ someone granted this status does not have the means with which to pay for legal costs and those costs can be waived or counsel appointed. Almost exclusive to criminal cases.

<sup>99</sup> *Id.*

<sup>100</sup> CCJ Agreement, *supra* note 47, art. III, para. 3.

The CCJ Agreement finally states in Article XXVI, with regard to enforcement, that the Parties must take all steps necessary to ensure that the decisions of the Caribbean Court of Justice be enforced on the same basis as the decisions of that country's superior courts, and that the authorities of that country must act in aid of the CCJ.<sup>101</sup>

### III. History of Cases

To date the Caribbean Court of Justice has decided six cases that have been reported.<sup>102</sup> The first case was decided on February 26, 2005, and was an application for special leave from the Court of Appeal of Barbados.<sup>103</sup> In fact, all cases so far decided by the Court have involved only its *appellate jurisdiction*.

The first case noted the lack of clear rules to exercise the use of appellate jurisdiction. This was contrasted with New Zealand, which also recently stopped its use of the Privy Council in favor of a Supreme Court of New Zealand. The first case that the Supreme Court of New Zealand heard was on January 1st, 2004, and a bevy of statutes and provisions detailing how a case is permitted to come before the Court smoothed out the procedural issues. "One finds in sections 42, 50, 51, 52, 53 and 54, of that Act [that authorized the Court] detailed provisions specifying what is to happen in a variety of situations in which persons who wished to pursue or were in the course of pursuing an appeal against a decision of the Court of Appeal of New Zealand, found themselves on the 1st January, 2004."<sup>104</sup>

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<sup>101</sup> *Id.*, art. XXVI.

<sup>102</sup> All CCJ Judgments can be found on the CCJ web site at <http://www.caribbeancourtjustice.org/judgments>.

<sup>103</sup> 25 October 2005, CCJ Appeal No AL1 of 2005 at 6.

<sup>104</sup> *Id.*

When speaking to the CCJ Act, the Court noted the “sparse transitional provisions.”<sup>105</sup> This, however, allows the Court to create a body of law it may otherwise not find itself in the position to create, allowing the Court to use its judgment when deciding whether to hear a case. The Court went on to find that “the substitution of one court of final resort for another is to be regarded as a procedural rather than a substantive change in the law,”<sup>106</sup> and also noted that “[i]t is reasonable to infer that Parliament intended that in any case falling outside the ambit of that provision, an appeal would no longer lie to the Judicial Committee after the commencement date, but instead an appeal would lie to this Court, subject of course to the fulfillment of the conditions and the procedural requirements imposed by the new legislations.”<sup>107</sup> The Court finished the case by accepting it and more notably showing a sign of independence and boldness by stating:

“Ought we to grant special leave to appeal to this Court in the circumstances of this case? As [has been] pointed out, section 8 of the CCJ Act has no doubt quite deliberately, left it entirely to this Court to formulate the principles by which it will be guided in determining whether to grant or to refuse special leave to appeal to it. We do not propose at this early stage to attempt to make any comprehensive formulation of those principles. We propose rather to deal with the matter on a case by case basis and to limit ourselves to articulating in each case the principle by which we have been guided in granting or refusing special leave to appeal. Secondly, in shaping these principles we will of course pay attention to the practice adopted by the Judicial Committee, but we will not feel bound to adhere strictly to it. We will also pay attention to the practice and principles adopted by final courts of appeal in other Commonwealth countries, but we will develop our own jurisprudence in this area incrementally on an “as needed” basis.”<sup>108</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 7.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 10.

The Court closes by allowing the case to be heard saying that not hearing the case could result in a “miscarriage of justice.”<sup>109</sup> Very notable is that in closing, the Court has some strong words of reprimand for the Court of Appeal in Barbados and its Justice Husbands because of a seven year delay in the Court of Appeal. “We would be failing in our duty if we did not express our strong disapproval of judicial delays of that order. They deny parties the access to justice to which they are entitled and undermine public confidence in the administration of justice. We would like to think that such delays are now a thing of the past in Barbados.”<sup>110</sup> These are particularly strong words for a court that is writing its first opinion, but a sign of strong leadership with a view to efficiency and professionalism in the new Court.

In the Court’s second decision, the Court continued its criticism of the Barbados Court of Appeals. The second judgment was the ruling on the case previously granted *certiorari*. The case dealt with libel that “allegedly occurred when a radio station broadcast calypso songs that criticized the quality of a poultry farmer's produce. The farmer said he had to close his farm in 1990 as a result of the criticism.”<sup>111</sup> The Court of Appeals awarded the farmer damages and costs because the defendant failed to present all the pieces of evidence it initially claimed it had.<sup>112</sup> After much discussion the Caribbean Court of Justice concluded that the evidence was not necessary and that the Court of Appeals rationale in the case was “fatally flawed and plainly wrong.”<sup>113</sup> In other words, the Court took out only parts of the defense that the Court of Appeals had wholly

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<sup>109</sup> *Id.* at 13.

<sup>110</sup> *Id.*

<sup>111</sup> BBC News, *Caribbean Court Hears First Case*, <http://news.bbc.co.uk/2/hi/americas/4132328.stm> (August 9, 2005).

<sup>112</sup> 16 March 2006, CCJ Appeal No CV1 of 2005 at 24.

<sup>113</sup> *Id.* at 23.

eliminated. It then again spoke in hopes that the case could be decided in a more timely manner with the new corrections. Interestingly, the Court cited cases from not only the West Indies but also from England to back up its decision.<sup>114</sup> It is clear that the new Court will use many sources to defend and create law.

The third case was from the Court of Appeals of Guyana and is essentially a civil case dealing with wrongful termination. The Court was to decide whether special leave can be granted to the Appellant as the Appellant did not file on time. “Since the intended appeal was a constitutional matter, the appellant had an appeal as of right but was required by rule 10.2(a) of the CCJ Rules to obtain from the Court of Appeal leave to appeal to this court and by rule 10.3(1) to apply to do so within 30 days of the date of the Court of Appeal judgment. The applicant did not do so.”<sup>115</sup> The Court then found that the case brought before it is not substantial enough to necessitate a grant of special leave.<sup>116</sup> This essentially constitutes a ruling on the case, but does so under the argument of procedure. The Court went on to analyze the procedural, substantive, and *in forma pauperis* questions involved.<sup>117</sup>

In this case, as in the first case, the Court made its own law regarding when a case can be properly brought before it, this time with respect to Guyana instead of Barbados.

In considering the procedural question the court stated:

“In other words the grant of special leave is always a matter of discretion and never a matter of right. Thus it is a condition precedent of the exercise of that discretion in favor of the applicant that he or she should have an arguable case. Accordingly where it is clear that the appeal as presented is wholly devoid of merit and is bound to fail special leave will

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<sup>114</sup> *Id.* at 17.

<sup>115</sup> 12 May 2006, CCJ Appeal No 1 of 2006 at 3.

<sup>116</sup> *Id.* at 13.

<sup>117</sup> *Id.* at 4.

not be granted. The respondents have contended that the instant application should be dismissed on that ground.”<sup>118</sup>

In looking at the substantive question, the Court maintained,

“The applicant has not succeeded in demonstrating that his intended appeal has any real prospect of success by showing either that he held public office during his service with the Revenue Authority or that he had an existing right to property in the form of superannuation benefits or that he had a constitutional right to natural justice in respect of the termination of his employment with the Revenue Authority. We therefore refuse to grant him special leave to appeal against the decision of the Court of Appeal. Although we have carefully considered this application, we do not consider it to be a viable appeal worthy of a fuller hearing.”<sup>119</sup>

The Court went on to find that because the court did not find for the applicant in the first two elements it cannot for the third. For refusing to address the third issue of *in forma pauperis*, the Court adopts the reasoning Lord Keith in *Farrington v. R*: “For the avoidance of doubt . . . their Lordships consider that it would be inappropriate to grant special leave to appeal as a poor person where it is plain beyond rational argument that the appeal is doomed to fail.”<sup>120</sup>

Perhaps equally as important as the rule of law being developed is the Court’s decision regarding costs. The Court explains, “We have anxiously considered the question of costs. This is the first application to this court from Guyana. For thirty years and more there has been no second tier of appeal so that the jurisdiction is as yet unfamiliar. In addition the application has provided an opportunity to clarify some points of practice for the benefit of practitioners generally. In all the circumstances there will be no order as to the costs of this application.”<sup>121</sup>

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<sup>118</sup> *Id.* at 6.

<sup>119</sup> *Id.* at 12.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 12.

The fourth case that came before the court dealt with two men convicted of murder in Barbados.<sup>122</sup> There the Barbados Privy Council did not commute the mandatory death sentence which created an automatic appeal to the CCJ, which overturned the sentence unanimously.<sup>123</sup> This case is one of the more important that the Court has decided in that it is here that the idea that the Court will be one prone to handing out the death sentence in attempts to gain popularity amongst the citizenry of the Caribbean has been eroded. The Court in this case found that there was a prerogative of mercy in the Constitution that the Barbados Privy Council failed to utilize,<sup>124</sup> and further that the death warrants should have not been read until an opinion from the Inter-American Commission for Human Rights had been returned.<sup>125</sup>

Briefly, the fifth case is similar to the third except it is a criminal case, more specifically a murder case which carries the mandatory death penalty coming from Barbados. The application for special leave was denied as was the *in forma pauperis* appeal.<sup>126</sup>

The sixth and most recent case the Court has reported was heard on January 25th, 2007 and was reported on March 19th of that same year. The case concerned a claim for land appealed from the Guyanese Courts. The Court in this case said that it would allow an attorney who had not filed the proper paperwork for his client indicating that he was taking over for a former attorney the ability to act “on the record.” Here an attorney filed an appeal from a client who had clearly given his consent and “was acting with the

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<sup>122</sup> 8 November 2006, CCJ Appeal No CV2 of 2005 at 2.

<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> 4 December 2006, CCJ Appeal No AL6 of 2006 at 8.

appellant's actual authority."<sup>127</sup> The lower court initially had refused to hear the appeal because of this failure; however, the case has since been sent back for the proper appeal process.<sup>128</sup> After the decision the Court then gave guidance to other cases or controversies that have not yet presented themselves.<sup>129</sup> This is significant in that the Court is answering questions it is not specifically asked in order to create law at a faster rate than it could by waiting for specific cases to come before it.

#### **IV. On the Issue of Pratt & Morgan**

No discussion of the Caribbean Court of Justice would be complete without a discussion of the notion that the CCJ was feared to be a "hanging court."<sup>130</sup> The feeling among many scholars is that the CCJ was created to enforce death penalty laws that the Privy Council began to disallow.

The case of Pratt and Morgan was the seminal case in which the Privy Council effectively outlawed the death penalty. This was not something that was done out of hand, meaning the Privy Council did not outright claim the death penalty to be unconstitutional. The Council found that if a prisoner is on death row for more than five years, this is considered cruel and unusual punishment, and the individual may not be put to death.<sup>131</sup> It also found that the mandatory death sentence was unconstitutional, stating

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<sup>127</sup> 19 March 2007, CCJ Appeal No CV2 of 2006 at 4.

<sup>128</sup> *Id.* at 3.

<sup>129</sup> *Id.* at 2.

<sup>130</sup> The Honourable Kenny D. Anthony Prime Minister of Saint Lucia, *The Caribbean Court Of Justice: Will It Be A Hanging Court*, Address to The Norman Manley Law School, [http://www.stlucia.gov.lc/primeminister/former\\_prime\\_ministers/kenny\\_d\\_anthony/statements/2003/the\\_caribbean\\_court\\_of\\_justice\\_will\\_it\\_be\\_a\\_hanging\\_court\\_june\\_28\\_2003.htm](http://www.stlucia.gov.lc/primeminister/former_prime_ministers/kenny_d_anthony/statements/2003/the_caribbean_court_of_justice_will_it_be_a_hanging_court_june_28_2003.htm) (June 28, 2003).

<sup>131</sup> Kristy Brimelow, *A Shadow of Death Hangs Over Jamaica and its Criminals*, *The Times* (London), October 17, 2006, at Features, Law, Pg. 4.

that murder convictions should be construed as discretionary, not mandatory.<sup>132</sup> This was felt by the Caribbean Community as a usurpation of their rights of self determination, which further indicated that the Privy Council does not reflect the general sensibilities, cultural values, and feelings of justice in the region.<sup>133</sup> Many in Jamaica, for example, favor executions as a way of staying the violent crime reported in the news daily.<sup>134</sup> The CCJ has explicitly denied that this is a reason for its founding on its website, stating:

“What is often forgotten by detractors of the Court is that the revived interest in the Caribbean Court of Justice, as it is now called, had its origin in the Report of the West Indian Commission (1992) which predated the landmark decision of the Privy Council in Pratt and Morgan (1993) by one year.

Indeed, the recommendation for the establishment of a Caribbean Supreme Court in substitution for the Privy Council and vested with original jurisdiction concerning the interpretation and application of the Treaty of Chaguaramas, even though one of the most seminal determinations of the West Indian Commission, was anticipated twenty years before by the Representative Committee of OCCBA set up to examine the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council. In short, if Pratt and Morgan was a watershed in Caribbean jurisprudence, the West Indian Commission's recommendation for a Caribbean Supreme Court was not an innovation in Caribbean judicial institutional development and is largely unrelated to popular perceptions of required sanctions for socially deviant behaviour.

In point of fact, one of the most compelling arguments for the establishment of the Caribbean Court of Justice is the need to have an authoritative, regional institution to interpret and apply the Treaty, as amended, in order to create the CARICOM Single Market and Economy. But, unfortunately, the original jurisdiction of the Caribbean Court of Justice and its importance for the success of the CSME is little understood and even less appreciated by many members of the legal fraternity at the present time.”<sup>135</sup> Not all agree with this line of reasoning however, “in striking down Caribbean death penalty laws, the Privy Council's tendency

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<sup>132</sup> Bruce Zagaris, *Capital Punishment and International Human Rights v. U.S. Detention Policy*, Vol. 22, No. 5, International Enforcement Law Reporter (2006).

<sup>133</sup> DUKE POLLARD, *THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE* (2004).

<sup>134</sup> Brimelow, *supra* note 131.

<sup>135</sup> <http://www.caribbeancourtofjustice.org/> (follow “About the Court” hyperlink then the section II hyperlink).

to focus primarily on the views of international jurists [as opposed to those in the Caribbean] certainly contributed to its downfall.”<sup>136</sup>

Lastly, however, it must be understood that the decision of Pratt and Morgan at the very least afforded the everyday citizens of the Caribbean the impetus to decide that they were ready to be the arbiters of their own decisions in a Court of Law, and the decision in Pratt and Morgan certainly promoted popular support for an indigenous court of last resort.

## V. Conclusion

The Caribbean Community has been in existence for over thirty years now and is the oldest regional integration system in the developing world.<sup>137</sup> Since 2005, it has a Court to provide unity and stability. It was time for this region to have a court of its own with both original and appellate jurisdiction. Most nations in the Community have been independent for well over forty years, and in that time former colonies have proved they are able to support themselves in most ways. It is now possible for the Privy Council, which has been called “an affront to sovereignty . . . inconsistent with independence” by the Chief Justice of Barbados,<sup>138</sup> to be replaced by a Caribbean institution: the Caribbean Court of Justice. As the Court is so new, only time will tell whether it can have the staying power, authority, and respect it needs to be a meaningful contributor to the international legal body. But when looking at the extensive planning of its existence, and the strength of its first decisions, one can safely say that the Court is on the right track.

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<sup>136</sup> Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 690 (2007).

<sup>137</sup> McDonald, *supra* note 17, at 79.

<sup>138</sup> Dennis Morrison, *Caribbean Legal Affairs: The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*, 30 NOVA L. REV. 403, 406 (2006).