SYMPOSIUM

The Caribbean Court Of Justice And Regionalism In The Commonwealth Caribbean

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Not all international and regional courts survive the test of time. There is more literature on those that did as compared with those that failed. The Caribbean Court of Justice (CCJ) created in 2001 is today at a juncture where the usefulness and longevity of the Court sometimes comes into question by legal theorists and legal practitioners given the apparent lenticity of political adhesion to its appellate jurisdiction by some regional states. There has been substantial debate in the region over the readiness of the region to embrace the Court’s appellate jurisdiction, it centres on perceptions and debates around legitimacy, representativeness, bias, independence and indigenous jurisprudence. To understand and contextualise the apparent difficulties that this young court faces, this article puts these debates within the wider international relations contexts of regionalism and the growth and demise of regional and international courts. Within this context, four factors contribute to our understanding of the value and success, or lack thereof, of regional courts: the nature of their historical evolution; adverse public opinion on their legitimacy; the extent to which powerful states do not feel threatened by them and allow their development and the economic and political contexts within which they develop.
INTERNATIONAL COOPERATION AND REGIONAL COURTS

The CCJ, created in 2001 and inaugurated in 2005, is a Court of dual jurisdiction, appellate and original jurisdiction and one is one of the more recent examples of the regionalisation of international legal cooperation that began in the 1950s.

The CCJ has original jurisdiction, acting in effect, as an ‘economic court’ to determine disputes arising out of the Revised Treaty of Chaguaramas and exercises exclusive and compulsory jurisdiction in the interpretation of the Revised Treaty of Chaguaramas which established the Caribbean Community (CARICOM). It exercises appellate jurisdiction as the final court of appeal for some CARICOM states in civil and criminal matters thus replacing the Judicial Committee of the Privy Council for those states that accept its appellate jurisdiction.

The end of World War II two saw the beginning of a new era of international cooperation that included the proliferation of international courts and tribunals to settle transnational disputes. Later there was a second wave of mushrooming of international courts that followed the end of the Cold War. The European Court of Justice (ECJ), the European Court of Human and Rights (ECHR), and the World Trade Organization (WTO) are some of the most successful international courts are perhaps some of the strongest examples of an increasingly legalised international system. Courts had failed before at different stages of their life cycles: examples include the 1937 Terrorism Court and the International Prize Court of 1907 which were adopted but never entered into force; the 1950 Criminal Court that reached and failed at the stage of treaty negotiation and the earlier proposed 1920 Criminal Court which was proposed but never adopted.1

The international community today has 17 economic courts: four human rights courts, three criminal courts, and nine courts of general jurisdiction. Europe has 6 of these courts; Latin America and the Commonwealth Caribbean has five; Africa, nine and Asia one. These courts tend to link their genesis to the Court of Justice of the European Union established in 1952 that comprises three courts: the General Court (created in 1988), The Court of Justice and the Civil Service Tribunal (created in 2004). The CCJ’s counterpart in Latin America, the Central American Court of Justice (CACJ), was established in 1992. Africa has four general jurisdiction regional courts that are also economic courts: the West African

The uptake and acceptance of these courts have generally been slow. The European Court of Justice began with a small docket compared to its present scope. The Court of the Common Market for Eastern and Southern Africa (COMESA) for example was established in 1993 and since 2005 has both first instance and appellate divisions had few decisions in its first 20 years.

ASSESSING THE CCJ

Four factors contribute to our understanding of the value and use of regional courts: the nature of their historical evolution; adverse public opinion on their legitimacy; the extent to which powerful states feel threatened by them and inhibit their development and the economic and political contexts within which they develop. The nature, role and purpose of the CCJ can be best understood by seeing its genesis and development as part of the international economic system and a maturing process of cultural regionalisation.

The nature of the historical evolution of regional courts

Understanding the genesis and context of regional courts is important for analysing their success. The building and evolution of judicial authority requires time, practice and are always influenced by broader developments in the region or wider international community, international institutions, international economics and trade. The effectiveness of these courts should always be contextualized. States create courts to respond to a void in the international legal system caused by events that challenge entrenched and protected rules or laws (the legal crisis argument). While convenience is relevant, it does not explain why during the last century several courts failed while others survived and by itself context cannot forecast future success and viability of courts.

From the historical evolution perspective, the Judicial Committee of the Privy Council (the Privy Council) has been the final appellate court for the Caribbean and its decisions are authoritative and binding. The irrelevance and weakening
legitimacy of the Judicial Committee of the Privy Council to independent Caribbean nations forty to fifty-three years after the end of colonial rule is an important contextual factor in the Caribbean. Much of the nature, role and purpose of the CCJ can be understood within the West Indian cultural-historical process of decolonisation and regional cohesion and creation.

The first recorded reference to a regional court was made in 1901 in a Jamaica Daily Newspaper, the Jamaica Gleaner that questioned the ability of the Privy Council to treat with ‘difficult local questions’. At the Sixth Meeting of the Heads of Government conference of Commonwealth Caribbean Countries in 1970, the Jamaican delegation tabled a proposal for the establishment of a Regional Court of Appeal. Since then the Attorneys-Generals of the Caribbean as well as the Commonwealth Caribbean Bar Associations deliberated on the nature and purpose of a regional court. In 1989 the Heads of Government of the Caribbean at its Tenth meeting agreed to the establishment of the Caribbean Court of Appeal. On the 14th February 2001, the Agreement Establishing the Caribbean Court of Justice was signed by the governments of Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname; and Trinidad & Tobago. The Court was subsequently inaugurated in April, 2005.

From the legal perspective, the CCJ was born of a desire for an indigenous judicial system, a Caribbean legal philosophy and a ‘Caribbean Common Law’ that would separate the region from the colonial legal heritage. This process bears within it the tension between a common regional purpose and a desire to hold on to the power that comes with the newly found state sovereignty. From this perspective, the development of the CCJ resembles the legal crisis argument that the growing fragmentation of international law as international legal system grapples with contradictions between international and national courts and realities and a balance is sought to promote better levels of coherence, organisation, efficiency and relevance for the people served by the court.

Adverse public opinion

The European Court of Justice (ECJ), the European Court of Human and Rights (ECHR), and the World Trade Organization (WTO) are some of the most successful international courts and are perhaps some of the strongest examples of an increasingly legalised
international system. They are not above criticisms of state influence and their ultimate independence.\(^8\)

The domestic contexts within which new courts develop are equally important for understanding their legitimacy. Courts survive and thrive in today’s interconnected world when public opinion supports their legitimacy and when in the perception of individuals served by the court, the system created are legitimate and helpful for them.\(^9\) The ‘justice cascade’\(^10\) in human rights tribunals are examples of the importance of legitimacy to the longevity of these tribunals.

In the Caribbean, the regional debate is still very recent on why Caribbean Governments and peoples have not unanimously embraced the appellate jurisdiction of the court. The Privy Council’s established and unquestioned legitimacy was inherent in the nature of colonialness and the political and legal fabric of Caribbean States as former colonies of the United Kingdom. That sense of legitimacy has not been easily replaced and Caribbean leaders, responding to their populations, are not unanimous on accepting the CCJ as the best venue for adjudicating on their nation’s matters as the final court of appeal.

States, Politics and the Court’s Development

Within an hegemonic power perspective, powerful states promote and oblige weaker states to join legal systems whose rules promote their interests.\(^11\) Functionalists consider that states relinquish sovereignty and autonomy and allow third parties to be the final adjudicators of their disputes as a way to overcome collective action problems, to reduce transaction costs; to endorse and support their credibility and to manage increasingly specialised and fragmented areas of international law.\(^12\) Regional courts allow states to share resources and settle disputes related to collective action- but sovereignty is ceded to an independent agency that is seen to be above the political pressures of the group.

In reality, independence of international tribunals is a point questioned more by international relations and political science scholars than by international lawyers especially when the tribunals are seen as tools of a larger political space dominated by powerful states or when decisions are seen to be influenced by the likelihood of non-compliance or override as was found in the case of some ECJ decisions\(^13\) and where tribunals are likely to limit the scope of verdicts through judicial economy so as to protect the
concerns of more powerful EU and US members as was seen in some WTO decisions.\textsuperscript{14}

The challenge to secure the independence of the judiciary from political influence in Caribbean States was the context for the creation of a model of individual and collective independence of judges that is built into the framework of the CCJ. This framework has impressive safeguards relating to the funding of the court, the integrity of the Court and the appointment of judges to guarantee the same - as discussed in the other contributions to this Symposium (see The Agreement Establishing The CCJ).\textsuperscript{15}

CARICOM has been the region’s tool for economic cooperation but to a large extent the political space to resolve conflicts also lies with the Meeting of the Heads of Government. There seems to be reticence on the part of some leaders to transfer this conflict resolution to the CCJ, in keeping with the much-discussed fear of losing sovereignty that many of these states face. Yet as has been the case with many new regional courts, time will be needed for the court to establish itself and overcome the existing skepticism with legal processes into which it was conceived.\textsuperscript{16} Strong efforts on the part of CCJ are needed to overcome public concerns and doubts about legitimacy and judicial independence.

\textit{The Economic and Political Contexts}

The terms region, regionalism and regional integration are often used interchangeably in the literature on regions.\textsuperscript{17} Regionalism or regional integration itself as a phenomenon has three discrete historical phases, the first from the late 1950s was theoretically nestled within an analysis of regional processes and responded to neofunctionalist perspectives and liberal intergovermentalism. The second phase of regional integration was in the 1990s and was closely tied to the expansion of global trade and the consequences of regional projects to promote the same. The third phase from the late 1990s was theoretically dedicated to examining the origins and processes of comparative and cross regional agreements and institutions.

The CCJ and many of its sister courts are the consequence of the era of globalisation and increased regionalisation of economic relations that also led to the creation of several regional economic organisations\textsuperscript{18} and fits within the phase of ‘New regionalism’ or ‘new wave of regionalism’ that refers especially to the movement
towards trade and economic agreements within states within geographic proximity, with substantial intra-regional trade and investment as the main thrust towards regional integration.  

Economic integration itself typically has four stages: the free trade area which is the most basic form of economic cooperation; the customs union; the common market which removes the restrictions to the movement of labour and capital between member states and provides for a common trade policy with states outside the common market and finally strongest form of regional integration which is the economic union which enables member states to have common trade and economic policies.

Sovereignty is a central element of international law and legal and political theory and militates against the success of supranational initiatives and courts. In each case, the subjects or actors involved resolve the debate on how much sovereignty should be transferred to their regional or international institutions.

Successful regional economic arrangements require as causal factors both the demand from the business community for greater integration of the regional market with technical, legal and administrative arrangements and regulations and economic exchange and the willingness and ability of regional leaders to conclude such agreements. Domestic political climates are important for these regional processes and politicians look to regional solutions when the domestic economy is weaker and national sovereignty is worth ‘limiting’ to ensure visible economic gains in the eyes of the electorate. National interest is a key determinant of the success of regional integration initiatives and the socio-economic interest of each jurisdiction determines the success of the regional arrangements. The stalled economic integration process in CARICOM is a good reflection of the present integration climate in the Caribbean.

Regional perspectives on politics and the link between domestic and regional realities is just as important for the success of these regional courts as are the merits of their formal mandates. The case of the disbandment of the Southern African Development Community Tribunal in 2011 by an agreement of the SADC heads of state because the tribunal held that Zimbabwe violated the rule of law by its land seizures is one example of the primacy of political over legal regional processes.

There is evidence to support the view that shared colonial legacies and linguistic ties facilitate bilateral trade in the Caribbean
space. However, the region’s recent legacy of colonial rule has been the cause of states’ unwillingness to cede sovereignty and to mistrust the demands of a political union. This legacy is also partly the cause of the failure of the early West Indies Federation and was the basis for CARICOM’s present institutional structure. This structure, though based on functionalism and intergovernmentalism, secures the autonomy of each state and limits the power and effectiveness of the regional institution to take common actions and implement common policy.

The discourses in the regional integration international relations literature helps to put the CCJ experience within a new perspective. In spite of the merits of the CCJ: its design and robust and independent structure and its important treaty interpreting role for the regional integration project, it rests within a historic-socio-economic regional space that determines the demand for its use. This demand transcends its legal value to the economic relevance of the Caribbean space and single market more generally. Its success is tied to the vagaries of the economic integration project the success of which is itself under debate, and the obstacles and challenges related to the strengthening of regional trade capacity through the EU-Caribbean Economic Partnership Agreement (EPA).

Viewing International courts as mere forums of dispute settlement amounts to ‘functional myopia’ that leads to an unnecessary questioning of their legitimacy. Rather from an international relations-social interactions perspective these courts play a wider role: they stabilise expectations on the validity of the international law and of its enforcement, they help to develop normative expectations and they control and legitimate the authority exercised by other agents.

**Analysing the CCJ’s Success**

The fears that the CCJ may be little used in the future comes from the limited number of cases in its docket today and the unwillingness of Trinidad and Tobago's unwillingness to accede to the Court’s appellate jurisdiction. Trinidad and Tobago is one of the larger, wealthier Caribbean nations and the host country for the Court and withholding this accession is seen as a failure to fully endorse the CCJ. The ECJ for the first 20 years of its existence was also barely used and most disputes were settled out of court.
through negotiation while the ECJ focused on matters of procedure.\textsuperscript{31}

In context, however, the CCJ's relevance, success and legitimacy goes beyond this reality, if judging only from the experience of similar institutions. The ECJ was not above its member states concerns of sovereignty, nor concerns about its place and role in the normative space of domestic concerns and populations\textsuperscript{32}. Courts like the CCJ and the ECJ that have supranational regional reach are slow to develop, often suffer from an initial lack of state commitment to both economic and regional integration processes. In the early years of regional courts, private citizens are often ignorant of how to engage regional courts or are deterred by perceptions of the high cost of litigation. Particularly in small jurisdictions, individuals may be unwilling to bring actions against governments for fear of reprisals\textsuperscript{33}. Time is needed to develop the practice of the law by litigants, lawyers and judges and for member states to pass implementing legislation for the common market that gave litigants material to challenge at the regional platform.\textsuperscript{34} This process is slower because of political regional reality: states are slow to institute formal proceedings against other states especially with those that share a common regional ethos.

\textbf{CONCLUSION}

It is open to debate whether the push towards the Court was fuelled more by the invisible hand of global trends in the political economy than the need for an indigenous legal system. The possibilities of the Court's development may weigh as much on how the regional economic integration develops as on the cultural and historical sense of building a region that the CARICOM project sought to develop. Its success is linked to the success of the economic union of CARICOM and to the strengthening of perceptions of common cultural, economic and development goals between the citizens of the region.

Time is needed for the economic process to develop. The legal process will follow. Then, if the court can be seen to be useful, its legitimacy will increase and with it, the perceptions of relevance for regional jurisprudence at the appellate level.
NOTES ON CONTRIBUTOR

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NOTES

2 Ibid.
4 Katzenstein.
7 Katzenstein.
15 See: www.caribbeancourtofjustice.org/
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18 Central African Economic and Monetary Union Court created (2000) Community Court of Justice of the East African Community (EACJ) (2001); the Caribbean Court of Justice (CCJ) (2001); the Economic Community of West African States (ECOWAS) Court of Justice (2001) the Southern Common Market (Mercosur) (2002); the Association of Southeast Asian Nations (ASEAN) Dispute Settlement System (2004); the Southern African Development Community Court (SADC) created (2005)
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21 Walter Mattli, The Logic of Regional Integration: Europe and Beyond, (Cambridge University Press, 1999).
29 Patsy Lewis, Surviving Small Size: Regional Integration in Caribbean Ministates, (Barbados: University of the West Indies Press, 2002), 28
31 Stuart A. Scheingold and Malcolm M. Feeley, The Rule of Law in European Integration: The Path of the Schuman Plan, (Quid Pro LLC, 2013).
32 Alter.