



**SYMPOSIUM**

**Assessing 10 Years of the Caribbean Court of  
Justice in its Appellate Jurisdiction:  
Encouraging Signs of a Mature, Relevant  
Jurisprudence**

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**Keywords:** Myrie Case and CSME; International Norms;  
Independence and Fairness; Civil law

Ten years is not an exceedingly long time in the life of a court, especially a complex court such as the Caribbean Court of Justice (CCJ) that has two distinct jurisdictions: the original jurisdiction – to treat with regional issues falling under the Revised Treaty of Chaguaramas;<sup>1</sup> and an appellate jurisdiction – to hear appeals of law within the domestic legal sphere, involving a wide range of subject matters, whether that be criminal law, civil law, constitutional law, human rights and the like.

What is clear is that the CCJ has already developed a rich and significant jurisprudence which is deserving of an in-depth legal analysis. This paper undertakes to evaluate this body of law, focusing on broad, conceptual principles emanating from the Court and highlighting a few of what can be considered landmark CCJ cases with respect to the appellate jurisdiction of the Court.

**INTERNATIONAL JURISDICTION NOT IN CONTENTION  
BUT CAN GUIDE DOUBTERS**

In the broad social context of the Commonwealth Caribbean region, mention of the CCJ perhaps most often conjures up images of the

*Myrie Case*.<sup>2</sup> This case concerned a Jamaican woman who tried to visit Barbados and was harassed at the airport, strip-searched, and subsequently deported, despite the existence of a CARICOM Freedom of Movement regime<sup>3</sup> which posits an 'automatic' six month stay for CARICOM nationals in any CARICOM country. The case was widely reported in the Press and was a source of some contention between Barbados and Jamaica.

In fact, the *Myrie* case concerned the original jurisdiction of the court and not its appellate jurisdiction. The original jurisdiction is not in contention here today since all CARICOM jurisdictions, except the Bahamas, have already accepted this original jurisdiction. It is the appellate jurisdiction, that is, appeals from domestic law, as opposed to the law emanating from the Revised Treaty of Chaguaramas which produced the CSME regime, that remains in issue. This forum seeks to examine and from my own perspective, persuade those countries which have not already signed on, to adopt the appellate jurisdiction of the court. To some extent, therefore, we should not spend too much time discussing the cases from the original jurisdiction, as exciting as they have been.

Nevertheless, I do think that assessing, however briefly, the jurisprudence of the CCJ in relation to its original jurisdiction can be encouraging and indeed reassuring, with respect to how it measures up with regard to its appellate jurisdiction. It is because of this added value that the original jurisdiction will be mentioned briefly in my analysis.

In attempting to evaluate the court's performance I have devised some key denominators to have regard to. The following are the three main principles upon which I base my assessment:

1. The CCJ's adherence to established principles of independence, integrity and fairness;
2. The CCJ's consistency with internationally accepted norms of judicial decision-making by a superior court, both (a) Procedural; and (b) Substantive. Under this heading, I will look at reasoning, logic; ingenuity; consistency with accepted principles of law and keeping in touch with emerging judicial legal trends, such as the current coherence with international human rights evident in domestic legal systems, yet demonstrating the ability to be innovative when necessary; and the CCJ's authoritativeness so as to enable it to guide lower courts and legal

practitioners and it would appear CARICOM Heads of state where necessary, on issues of law and practice; and

3. The CCJ's ability and willingness to create an indigenous (Caribbean) jurisprudence, adapting to our particular local circumstances without sacrificing appropriate judicial principle, a long cherished goal of legal scholars like myself.

From the outset let me state emphatically that I believe that we can see clearly in all of these areas that the CCJ has already passed the test. However, the paper proceeds not on a personal testimony, but on empirical evidence. Thus, we will examine a few of the decisions.

### **ESTABLISHED PRINCIPLES OF INDEPENDENCE, INTEGRITY AND FAIRNESS**

It is difficult to believe that the core principles of independence and integrity of the CCJ are seriously in doubt at this juncture. In fact, the arrangements for protecting the independence and integrity of the CCJ are among the finest in the world and UK jurists themselves have remarked on this.<sup>4</sup> There is a separate and independent Judicial Services Commission made up of non-politicians that selects judges, unlike, for example, the political appointments that we see in the US and the UK. Moreover, the establishment of a special fund to support the Court financially is a considerable tool in securing its independence, by insulating it from financial pressures. Indeed, the Court is in a considerably better position than other courts in the region which must rely on governments for their funding, a matter currently in contention.

More importantly, the jurisprudence of the court to date makes it clear that it is no slave to any government. This is the heart of the issue and what onlookers want to know, or are suspicious of, that is, whether the courts are being influenced by politicians. If anything, the CCJ has been somewhat harsh toward governments. I was involved in the first case on the original jurisdiction of the court, *TCL v CARICOM*,<sup>5</sup> when CARICOM was sued. I was part of the legal team that represented CARICOM. Curiously, although we won every point of substantive law in that case, in the judgement for costs, the CCJ declared that it did not wish to discourage private litigants and therefore shared the costs, which ironically, was no problem for TCL but a great burden on cash strapped CARICOM and its governments.

Similarly, the CCJ did not bow to Barbados in the inflammatory *Myrie* case, mentioned previously, despite much comment in the nation's newspapers. More recently, in a case involving the rights of indigenous peoples against the Government of Belize, the Court found in favour of the indigenous community, despite the important economic and political interests at stake.<sup>6</sup> Even the CCJ's first case, *Boyce*,<sup>7</sup> on the contentious death penalty, considered further below, demonstrated that the Court is able to take firm decisions which run counter to and even directly challenging prevailing political and public opinion.

### **CONSISTENCY WITH INTERNATIONAL NORMS OF GOOD JUDICIAL DECISION MAKING**

The inevitable question that arises when one discusses courts in the region is about the calibre of the judges. Over the years we as a people have tended to devalue and even to fail to recognize our own contribution to the Privy Council's jurisprudence and record of good judges with this enduring question. In response, I quote from the Feature Address at the Inauguration of the CCJ in 2005 entitled 'Leap to Enlightenment',<sup>8</sup> made by the Lead Prime Minister of the CCJ initiative, Dr. Kenny Anthony, who encapsulated this in one word, 'confidence'. He reminded Caribbean peoples that the region's legal profession and judicial system had a 'glorious past, among the strongest in the Commonwealth, for three quarters of a century'.<sup>9</sup> He recalled the distinguished contribution that the region's legal practitioners had made elsewhere in the Commonwealth and internationally. This includes sitting as Chief Justices in many parts of Africa, judges at the International Court of Justice in the Hague and other international Tribunals. Indeed, he remarked, in 'per capita terms I doubt if any other community in the world has served the world-wide cause of justice more comprehensively and more consistently than has the Caribbean'.<sup>10</sup>

Consequently, he reasoned: 'The Caribbean is not a fledgling state approaching tentatively the threshold of the rule of law'.<sup>11</sup> Thus, establishing a CCJ was not 'a leap into the dark, to be feared, but a 'leap to enlightenment' to be embraced'.<sup>12</sup>

Further, a point which is often overlooked is one that is positive for Caribbean jurisprudence. This is that Commonwealth Caribbean legal practitioners and judges are often those who fashion the defining precedents in our jurisprudence through arguments in the lower courts, endorsed by the Privy Council who often merely

adopt the reasoning therein. Yet, it is the Privy Council judgments that we cite approvingly and the justices of that court which get the credit for these outstanding jurisprudential creations. This is particularly the case in constitutional jurisprudence. I often tell my students that we taught British judges how to interpret written constitutions, given that they did not have one of their own. We have made those arguments and fostered those rich arguments that have formed the bedrock of international human rights law in a number of issues that concern us. This is not always, or even usually, a top down approach.

We can say therefore, that Commonwealth Caribbean practitioners and judges have themselves contributed to the collective wisdom of the Privy Council and indirectly to the corpus of the common law. Indeed, the Privy Council itself has acknowledged the learning and reasoning of local judges in some of our landmark decisions. A fine example is the affirmation of Georges J in *Thornhill v AG*.<sup>13</sup>

Former President of the CCJ, Michael de la Bastide has also stated that in looking at the actual cases that went before the Privy Council, more often than not, the Privy Council agreed with the local courts' decisions. This practice endorses the strength of our local judiciary and indeed, those who present arguments before them.<sup>14</sup> Between 1983 and 1993, for example, 63 per cent of their decisions were upheld by the Privy Council.<sup>15</sup> Clearly, the evidence is that our judges are sound.

Statistics like these are of course to be welcomed. However, the paradox is worth noting that just as final courts are never wrong, so too final courts are not infallible. This is as true of the British Privy Council as it is for the CCJ. The fact that the Privy Council may overturn a judgment by a Court of Appeal does not mean that it has a monopoly over truth. Justice is an imperfect mistress, but it is true and loyal one. This is perhaps most evident in the instances where the Privy Council has had to overrule its own decisions in order to 'correct' a legal principle posited previously, as occurred most dramatically in the death penalty cases.<sup>16</sup> These former judicial precedents were no less legitimate as those which stood the test of time.

This fine tradition of sound judicial reasoning from Commonwealth Caribbean courts, from my purview, has been continued and enhanced in the CCJ. They have approached this task directly, dealing with a fair number of hard cases, including test cases, with independence, integrity and intellectual rigour.

## **ACTIONS CONSISTENT WITH A MATURE FINAL COURT**

### *Issues of Procedure*

In terms of procedural issues, the CCJ has acted with maturity and authority in the now numerous cases laying down guidelines for both judges and practitioners to aid in the administration of justice. For example, it ruled in order to assist judges in determining when to strike out for breach of orders in *Barbados Redifusion*<sup>17</sup> and to put forward appropriate legal principles on the enforcement of foreign judgments in *Reid v Reid*.<sup>18</sup> Similarly, it has issued advice as to how Mercy Committees should act with respect to pardons, as seen in the *Boyce Case*.<sup>19</sup>

Indeed, there are several cases in this vein, but understandably, this paper is primarily concerned with the rulings on substantive matters issued by the Court.

### *Issues of substance: Decisions of a Sophisticated Final Court*

Not surprisingly, many of the landmark cases that demonstrate the skill and depth of the Court in its appellate jurisdiction have had to do with public law, in particular, constitutional law and human rights, including international human rights matters. In these matters, it is clear that the Court is infused with a deep understanding and appreciation of cutting edge principles of fairness, proportionality and the scope of the separation of powers principles (and accordingly the appropriate balance of power between the Executive and the courts). These are all accepted parameters of a final court that are consistent with and well entrenched in universally accepted judicial traditions.

The Court has also displayed a remarkable ability to manoeuvre between competing schools of thought, often weaving through a multitude of precedents from several jurisdictions (usually from the Commonwealth, the UK, the international human rights system, as well as Caribbean jurisprudence). This, combined with a fine appreciation of the local circumstances at play have enabled the court to master the art of distinguishing precedent to find appropriate judicial balances in problem solving. This is certainly not a court that simply adopts the latest Privy Council decision. Of course, particularly in human rights matters, the Privy Council has been contradicting itself more often than not in recent times, especially when considering the death penalty cases, which

prompted some of their own judges to complain.<sup>20</sup> This is hardly a recipe for persuasion.

*Careful dissection of the Separation of Powers Principle and the Correct Approach to Severance*

In a recent case from Belize, *AG of Belie v Zuniga and BCB Holdings*,<sup>21</sup> the CCJ gives us a careful dissection of the separation of powers principle, examining in detail its scope and substance, in a way rarely seen, even at the Privy Council. The facts in the case are quite complex, involving a controversial attempt at a private company to use arbitration to frustrate attempts by the state to rectify allegedly bad investments made in Belize by a previous government administration. A new law was passed to foil such attempts, including the introduction of criminal contempt, a mandatory minimum penalty and a reversal of the burden of proof where injunctions were disobeyed. The company sought relief on constitutional grounds alleging a breach of the separation of powers principles on the basis that the law was for an improper purpose, was not according to the tenets of law made for peace, order and good government, but was really to target them, in other words, an abuse of power by the state.

The CCJ found that the separation of powers principle was not so lightly breached but did find violations of the constitution with respect to the mandatory minimum sentences, which it saw as undermining the inherent supervisory jurisdiction of the court in its power to exercise its discretion with regard to penalties. This was a sophisticated analysis of the issue clothed in modern principles of fairness and rights, in that the Court considered that the mandatory minimum sentence was grossly disproportionate and inhumane. We must consider that combined with the reversal of proof, any person associated with the offence could attract a harsh penalty.

The CCJ also identified violations with regard to the reversal of the fundamental presumption of innocence, though conceding that a reversal could be appropriate in other circumstances. An important aspect of this case is the guidance that the Court gives with respect to severance (striking out the parts of an Act declared unconstitutional), balancing the need to preserve the legislative intent and objective with the realization that changes to the legislative text could in fact frustrate that very objective and indeed usurp the functions of Parliament (itself a separation of powers

issue). These are not trite exercises in judicial logic and the CCJ handles these issues admirably.

### *Generous Approach to Commonwealth Cases*

In my view, the Court has been generous in its approach to law from the Commonwealth as a whole, understandably wishing to demonstrate its liberation from UK law. I think that when one considers the UK's own checkered history with respect to issues of human rights, challenged often by the European Court of Human Rights since its adoption of the European Charter on Human Rights, this is a justifiable approach. The CCJ has found more solace in Canadian, Australian and other Commonwealth precedents, perhaps understanding that we share not only a common destiny, but a wedding to supreme Constitutions. This practice has been supported by the similarities of Commonwealth Caribbean constitutions to European and international human rights instruments and the rich and often liberal jurisprudence available there on which to dine.

The approach is seen clearly in the *Boyce*<sup>22</sup> decision, a death penalty case, discussed further below. This was the first case to come before the CCJ. Tellingly, the CCJ was able to sidestep a limiting and controversial UK precedent and rely more heavily on the Australian case of *Teoh*<sup>23</sup> in constructing its deadly cocktail of a legitimate expectation to an international human right in procedural terms.<sup>24</sup>

### **IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW**

It is in the area of international human rights law that the CCJ has perhaps been making the most impact. It has made some very clear statements about the influence and import of international human rights law. I suspect that it has done this even more so than the Privy Council, the latter being a court entrenched in the UK's inherent suspicion of foreign law, particularly if European flavoured.

As discussed earlier, it has been Caribbean Courts and other Commonwealth Courts and their attorneys, who have really led the jurisprudence on constitutions and human rights, at least initially, before the Privy Council. Thus, it is unsurprising that the newly vested CCJ would be more liberal in its approach to international human rights law, especially in the now uncontested



acknowledgement of the commonality between the Bills of Rights existing in Commonwealth Caribbean Constitutions and the European and other international instruments of human rights.

*The Boyce Case: The CCJ and International Norms*

The first case to come before the CCJ in its appellate jurisdiction, *Boyce*, was in fact a good test of the CCJ's philosophy and viewpoint on international human rights. In issue were a number of grounds:- independence of the court in the face of public opinion; or conversely, indirect government pressure, indeed independence from the Privy Council without disturbing judicial prosperity; the impact of international law on our legal systems; the elasticity of our constitutions; the status of judicial precedent and the question of creating an indigenous jurisprudence. These were all large questions at stake before the Court.

More intriguingly, an important underlying issue was how to treat with a Privy Council decision which had prevented the death penalty from being applied using what to many was flawed logic, while maintaining the same result.<sup>25</sup>

To explain further, the Privy Council judgment *had already pronounced on* the matter of the status of unincorporated treaties in domestic law, which had been raised as a direct issue before it. The question was whether the Barbados Mercy Committee (also called the Barbados Privy Council (BPC), the body which had the authority to consider petitions for mercy, was compelled to await the outcome of a petition by a person on Death Row to the Inter-American Commission on Human Rights (IACHR), before coming to its decision, given that the jurisdiction of the IACHR emanated from the American Convention on Human Rights which Barbados had ratified and which provided for an individual right to petition. While Barbados had ratified the treaty instrument, it had not incorporated it into domestic law.<sup>26</sup> Accordingly, under the accepted premise of international law, in the dualist tradition, an unincorporated treaty (not written into local law) was not directly binding, but was of persuasive effect only.

In *Boyce*, the Court of Appeal of Barbados relied on the earlier Privy Council decision of *Lewis*,<sup>27</sup> and held that the BPC was in fact obliged to await the outcome of a petition to the IACHR before proceeding to rule on the issue of pardon. The question had been raised in the controversial *Lewis* case with respect to proceedings of the Jamaican Privy Council, (JPC) the body equivalent to the BPC.

The UK Privy Council in *Lewis* based its decision on the notion that due process, which it found to be a constitutionally protected concept, prohibiting the JPC from proceeding without considering the report from the international body. The premise of due process as a rationale for the obligation had been very controversial, given its assumption of a kind of osmosis of international law which could be implied into the Constitution.

Notwithstanding the much-criticised reasoning, the net result was that the Jamaican proceeding had been ultra vires the Constitution and the sentences of Lewis et al had to be commuted.

*Lewis* was therefore a contentious and troubling Privy Council decision and can also be faulted for not laying down clear principles for taking the positions that it did. It created confusion about the impact of international law, such as the suggestion that international law norms from unincorporated treaties could be directly enforceable in domestic law, as occurs in the monist tradition, evident in civil law jurisdictions such as those in Latin America and Europe. While the decision that persons on Death Row should be permitted to proceed to petition the IACHR could be defended, the judicial logic leading to that result was difficult to defend.

The CCJ had a ripe opportunity to pronounce clearly on this issue, not only to clarify the meaning of *Lewis*, but also to identify appropriate legal principles on the issue. It proceeded to reject the Lewis approach and rightly so.

#### *Implications of Boyce for the Legitimacy of the CCJ*

In *Boyce*, the CCJ answered the question of the impact of the OAS treaty provision differently by referencing to the doctrine of legitimate expectation, a doctrine born out of judicial review in administrative law and not without some difficulty itself. The courts in the Death Row cases were, of course, faced with several serious dilemmas. Perhaps the most difficult was presented by the now well-known *Pratt and Morgan*<sup>28</sup> principle on undue delay and inhuman punishment in Death Row cases. Governments, in attempting to avoid the international treaty process, were trying to avoid the problem of undue delay in administering justice identified in *Pratt*. They could do this only by preventing the lengthy process of petitions to international bodies, a process which they could not expedite as they had no control over it. In some cases, this was done by issuing written instructions as to the

relevant time period before capital punishment would issue, as occurred in the *Lewis* case. The CCJ found that a petitioner had a right to adequate time for his petition to be heard and later considered by the Mercy Committee. However, it did so by way of a different legal principle from that espoused by the Privy Council.

The *Pratt* ghost also had ramifications for the very existence and legitimacy of the CCJ as a final court of appeal in the region. On the one hand, many jurists, including the distinguished President of the CCJ, while still Chief Justice of the Trinidad and Tobago Supreme Court, had made it quite clear that the *Pratt and Morgan* line of decisions was inappropriate and that the Privy Council was out of touch with Caribbean realities.<sup>29</sup> On the other hand, the CCJ came into being surrounded by accusations that its purpose was to be a 'hanging court'. Had it given its first important decision and permitted a hanging, this would have made the accusation a self-evident truth.<sup>30</sup> This was therefore a difficult position to be in and it is testimony to the ingenuity and creativity of the court that it was able to come up with a workable solution without sacrificing sound jurisprudential principle.

#### **DUE PROCESS AND LEGITIMATE EXPECTATION: NEW RIGHTS OR NEW ROUTES?**

In truth, what the death penalty cases purport to do, is to lay down guidelines for procedural rights in accordance with notions of due process, natural justice or legitimate expectation where a country has ratified the relevant human rights Convention and an application is duly made to the relevant international human rights body.

The majority view in *Lewis* saw these procedural rights as stemming not from the treaty, but from constitutional due process or protection of the law.<sup>31</sup> This was viewed as unsupportable even by the dissenting judgment. There are, therefore, several reasons for viewing the Privy Council's majority judgment in *Lewis* as a weak one, a conclusion which the CCJ itself came to.<sup>32</sup> The CCJ's answer to the question of unincorporated treaties and their impact on the death penalty is to be preferred to the Privy Council's response in *Lewis*.<sup>33</sup>

In *Boyce*,<sup>34</sup> the CCJ, in contrast to the Privy Council<sup>35</sup> found that while unincorporated treaties were not directly enforceable, citizens had a legitimate expectation to the procedures established by such treaties. This then, was the genesis of the procedural right,

not a controversial notion of due process. Indeed, it is a credible approach. It is clear however, that the *Teoh* decision cannot be read to mean a reversal or abolition of the dualist tradition. All that the doctrine of legitimate expectation does with respect to treaties, is to give rise to procedural expectations, that a particular (fair) procedure will be followed, in this instance, a hearing of the issue before the relevant international body.<sup>36</sup> It was emphasised that it was only the entitlement to the actual hearing before the international body that was being protected and a subsequent consideration of any report which that body made by the local mercy committee. In such cases, therefore, the fairness of the hearing is simply a duty to *consider* the rights enshrined in the treaty before making a determination.

The legitimate expectation route to procedural rights therefore, avoids a decision which challenges the dualist tradition to which common law states subscribe. The CCJ did warn that the *Boyce* 'decision should not be seen as opening up avenues for the wholesale domestic enforcement of unincorporated treaties'.<sup>37</sup> This was, unlike *Lewis*, no loose precedent that could suggest the changing of a dualist model to a monist model through judicial law making which is unacceptable. The CCJ went to lengths to dispel this, as a responsible court ought to do.

Certainly, the doctrine of legitimate expectation in this context can also find critics.<sup>38</sup> However, in these circumstances it is an approach infinitely more grounded in good law than the Privy Council precedent in *Lewis*. This is what we ask of a final court, a superior court – we ask for legitimacy, and we have it. Legitimacy and integrity do not mean that we will agree with every decision.

#### *The Myrie Case: Human Rights Indicators*

Our jurisprudential evaluation in this paper revolves around the appellate jurisdiction of the CCJ. However, the *Myrie* judgment<sup>39</sup> identifies international and community law principles which are also useful for assessing the appellate jurisdiction of the Court. *Myrie* determines that treaty obligations under the CSME freedom of movement regime encompass human rights requirements and are indeed directly enforceable. In so doing it elevates the international human rights dimensions of our law in a modern context. When one considers the place of human rights today, it is not at all surprising.

Certainly in *Myrie*, we have gone one step further than *Boyce*, but this is in the context of the original jurisdiction and the special regime therein. The case, in its clear reasoning of the *raison d'être* of the CSME regime, gives us the rationale for a different treatment to *Boyce*. It provides important lessons as to how a stellar court must approach complex questions of international law.

What *Myrie* does is to establish firmly the meaning and value of a Caribbean Community, at a time, I might add, when the typical man on the street was beginning to doubt its very existence. In affirming the enforceability of CARICOM Heads of Government decisions, *Myrie* demonstrates to us, albeit indirectly, that there are now three separate spheres of jurisdiction for us to contemplate:

- (a) The domestic sphere (which will reference the appellate jurisdiction of the CCJ when accepted);
- (b) An international sphere –often concerning international human rights with which *Boyce* was concerned and where the dualist tradition of requiring further domestic laws for incorporation in a substantive sense still survives, though limping along, in contrast to the clear procedural obligations that have now been identified (legitimate expectation etc.); and
- (c) A clearly demarcated Caribbean Community sphere within the context of the Treaty of Chaguaramas and the CSME regime. This CARICOM sphere invokes a unique jurisdiction of the CCJ and one which it guards jealously. Since *Myrie* we now know that this special regime is indeed enforceable because CARICOM decisions are treated as binding.

As the CCJ said in its impeccable reasoning and its full appreciation of the CARICOM CSME regime in the *Myrie* case, on the question whether Article 24 of the Treaty as decided by CARICOM Heads of Government gave rise to an enforceable right of CARICOM nationals to enter freely a sister CARICOM state with a right of stay for a minimum of 6 months:

...if binding regional decisions can be invalidated at the Community level by the failure on the part of a particular State to incorporate those decisions locally the efficacy of the entire CARICOM regime is jeopardized and effectively the States would not have progressed beyond the pre 2001 voluntary system that was in force. The original jurisdiction of the Court has been established to ensure observance by the Member States of obligations voluntarily

undertaken by them at the Community level. . . It is the obligation of each State, having *consented to the creation of the Community obligation*, to ensure that its domestic law, at least in its application, reflects and supports Community law.<sup>40</sup>

The Court continued:

To state [that]... international rights and obligations resulting from a Conference Decision are created and binding at the Community level only when they are incorporated into domestic law leads to absurdity . . . in the absence of any indication to the contrary a valid decision of a Community Organ or Body taken in fulfilment or furtherance of the RTC or to achieve the objectives of the Community is immediately binding at the Community Level.<sup>41</sup>

Incidentally, the CCJ had already ruled on this point in an earlier case: *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*.<sup>42</sup> The obligation on states after ratifying treaties to act to bring domestic law into line with the treaty provisions is not a new idea in international law, but it is one that Caribbean Commonwealth Courts have often ignored.

#### *New Case on Mayan Rights*

The CCJ recently examined a new case on the enforceability of international human rights law, this time with respect to the Mayan indigenous peoples, from Belize.<sup>43</sup> The case concerns the recognition of Mayan customary land tenure in Belize giving rise to collective and individual property rights and non-discrimination under the Constitution. These rights, as established under international law pertaining to indigenous rights are identifiable even where no land title is held. The question of rights to land for indigenous peoples is especially important given the issue of minerals existing on such land and the thrust of governments such as Belize, to engage in extractive industries so as to exploit such land.

This case is a landmark one for the entire region, and in particular those countries with significant, recognisable indigenous populations, such as Guyana, Belize, Suriname, Dominica and to some extent Trinidad and Tobago, given that the issue of the land rights of indigenous peoples is a key concern in these countries and the wider region. As Rapporteur for Indigenous Peoples in the Inter-American Commission, I emphasise that it is the most important issue for such peoples and one of the most troubling

questions concerning international human rights bodies. To date, the international human rights community has been framing this question with reference to the ILO's Convention on Indigenous Peoples, Convention 169, which, although an instrument designed for the workplace, has become the basis for defining those rights since there is no other Convention.

#### *Embrace of a Common Law Tort of Misfeasance in Public Office*

There have been some surprises in terms of content in the CCJ's decisions. For example, a bold step which might send shivers down the backs of politicians is the finding in another landmark case, that of *Marin and Coye v AG Belize*,<sup>44</sup> which identified and embraced a common law tort of misfeasance in public office. It remains to be seen how this will be developed in a region where persons in high office are often and easily criticised and where Commissions of Inquiry have traditionally carried out the role of prosecutor.

### **CREATING AN INDIGENOUS JURISPRUDENCE**

An important category for assessment concerns the analysis of the CCJ as a Court committed to advancing the goal of creating an indigenous Caribbean jurisprudence, whilst maintaining the integrity of an essentially common law legal tradition. We should first consider the theoretical justification for such an approach, hearkening to the notion of the divergent, as opposed to the unitary model of the common law.<sup>45</sup> Perhaps the most damning indictment against the Privy Council is its failure to adapt to its role as a final appellate court reflecting the needs and mores of its adopted countries. This is so particularly in relation to its use of precedent. I have previously aired many of my concerns with respect to the failure to create an indigenous jurisprudence for the region and these concerns are relevant here also.<sup>46</sup> The observations by Justice Saunders and President de la Bastide of the CCJ in *AG et al v Joseph and Boyce*,<sup>47</sup> that the CCJ is mindful of its role in this regard is to be welcomed. Hopefully, this will not be mere rhetoric. There it was said:

The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of final courts of other Commonwealth

Caribbean countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court.

This is, therefore, a firm indication that the CCJ does not consider itself bound to precedents from the Privy Council or any other court.

The liberation of Caribbean jurisprudence from restrictive attitudes to precedent is furthered with the abolition of appeals to the Privy Council. Caribbean Courts of Appeal will be less self-conscious and timid in their approach to decision making, mindful of the fact that no longer do they have a British Privy Council as an overseer, eager to impose centuries old British doctrine and legal philosophy contained in English precedent, no matter the circumstances.

In this collection of essays, Justice Logan of the Australian courts has demonstrated clearly how the abolition of appeals to the Privy Council in Australia led to the formation of a dynamic, rigorous, Australian version of the common law. This has also been the experience in Canada, so much so that the UK courts now often turn to Australian and Canadian precedents for guidance.

An interesting observation in the *Joseph and Boyce* case is that the CCJ, in particular, the joint judgment of Justices de la Bastide (President) and Saunders, was grounded in arguments not even introduced by counsel on either side, i.e. the doctrine of legitimate expectation. This is reassuring since it points to the capability and independence of the Court, demonstrating its confidence in doing its own research.

I confess that I was among those cynics who waited to see whether the CCJ would simply follow UK precedent, without meaningful responsiveness, or even sensitivity to our Caribbean context, in other words, 'business as usual'. I even, rather unkindly, in one of my books, cautioned them not to be 'mimic men'<sup>148</sup>

This to me, is the most difficult aspect of this discussion, despite the fact that it is the one that we pay most lip service to. Is there truly a desire to create an indigenous jurisprudence? Lawyers and even judges are all too eager to point out that a judgment goes against some precedent from the UK and elsewhere, suggesting that that, in of itself, is sufficient to render it unsound.

The CCJ was perhaps boldest in this regard in its first judgement, the *Boyce case*, when it deviated from the Privy Council decision of *Lewis*.<sup>49</sup> Yet, even here, perhaps it found the courage to do so because that decision was already criticized heavily. Notably,



its result was the same – a stay of the death penalty, but, as we have seen, its reasoning was very different from that of the UK court, although influenced by other Commonwealth courts. One appreciates that there is merit even in that step, since moving away from the ‘navel string’ of a colonialist jurisprudence is an achievement in itself.

Thus far, therefore, the CCJ has not been extremely radical in this regard, but there are encouraging signs. At minimum, there is a better appreciation of what obtains here in the region and a conscious and thoughtful reflection as to how best to address our own situations, while still giving credence to established legal mores.

At the very least, one can say that although the CCJ's jurisprudence may not be as indigenous as it could be as yet, it has broken new ground in several cases. A good label might be proactive. In *Gibson v AG of Barbados*,<sup>50</sup> for example, the CCJ held that in certain circumstances as fairness determined within the rubric of a fair trial, a person on trial for murder could be entitled to funding from the state to provide a forensic expert (orthodontologist) to aid in his defence. Here, the CCJ considered the significance of teeth marks as persuasive evidence which could determine guilt or innocence. The court was mindful of the fact that this was an indigent person, a situation often met in the Caribbean.

In the *Gibson case*, the way in which the CCJ artfully avoided the floodgates argument, while at the same time ensuring a just solution for Mr. Gibson, is impressive. This is a fine example of a final court being able to make determinations based on skillful logic and reasoning. Clearly, in relatively poor countries such as those in the Caribbean, a principle that asserts that the State has a duty to provide funding for an expert witness to benefit a defendant in each case, because of the provision in the Constitution that speaks of providing ‘facilities’ for a defence so to ensure a fair trial, would have been too wide. The CCJ was able to limit the principle, first upon a narrow construction of the word ‘facilities’ and then to construct a relevant framework for such a person in a Caribbean landscape, that is, one who is poor and in circumstances where the only evidence is the forensic evidence. It identified such a person within this narrow construct as the person to whom it might be unfair to withhold funding for the expert.

In another case dealing with forensic evidence, *R v Gazette*,<sup>51</sup> the Court clearly defined the appropriate standard for the admissibility of forensic evidence. This is to be on a balance of

probabilities test and not the standard of 'beyond a reasonable doubt'.

### **CCJ UNAFRAID TO CRITICISE UNHELPFUL PRIVY COUNCIL PRECEDENTS**

Certainly, the CCJ has not been afraid of criticizing unhelpful precedent emanating from the Privy Council. This was clearly demonstrated in *Boyce*, but also in *Gibson*,<sup>52</sup> where it alluded to the 'mathematical formula' attached to the death penalty issue in the case of *Pratt and Morgan*,<sup>53</sup> an artificial construction if ever there was one. As is well known, *Pratt and Morgan* had held that a person on Death Row could not be hung after five years on Death Row, or else this would constitute cruel and inhuman punishment. In an eminently sensible and aware statement in *Gibson* (considering the havoc the Pratt line of cases has caused), the CCJ noted:

A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying a mathematical formula although the mere lapse of an inordinate time will raise a presumption, rebuttable by the State, there has been undue delay.<sup>54</sup>

There is a certain pragmatism here, a grounding in the local circumstances of the jurisdiction that is welcome, while at the same time avoiding the sacrifice of the principle of fundamental fairness.

Similarly, in *Gibson*, the CCJ alluded to the 'profound interest in criminal trials being heard within a reasonable time. Delay creates and increases the backlog of cases clogging and tarnishing the image of the criminal justice system'.<sup>55</sup> On the other hand, it recognised that releasing alleged offenders on bail for long periods could create a danger for society. This is a court bent on real solutions.

Certainly, one may not agree with every aspect of the decision, or indeed any decision. One could, for example, scrutinize the conclusion relating to the right to silence and the privilege against self-incrimination which I believe should be more strongly upheld, but this does not tarnish the judgement.<sup>56</sup>

## DEVELOPING AN INDIGENOUS JURISPRUDENCE WITH RESPECT TO OUR HYBRID LEGAL TRADITIONS

One aspect of the value of the CCJ that is often overlooked is its great potential to develop the hybrid legal tradition that is still prevalent in the region and to facilitate the civil law tradition. I refer here to the fact that in two countries of the region, Guyana and Saint Lucia, there is a mixture of the common law legal tradition or law and civil law legal traditions existing side by side.<sup>57</sup> Suriname, a civil law country, is also a member of CARICOM.

This is already proving to be of tremendous value to Guyana, one of the first countries to accept the CCJ's appellate jurisdiction. The fact that a civil law lawyer<sup>58</sup> sits on the court is vital to this development. Current President Byron, through his distinguished tenure as Chief Justice of the OECS Supreme Court, where he confronted mixed legal tradition issues from Saint Lucia, such as the law surrounding the Queen's Chain,<sup>59</sup> is also experienced in adjudicating on the civil law/ hybrid legal tradition. These legal luminaries are well placed to advance this important jurisprudence of the region.

As CARICOM expands and deepens links with Haiti and perhaps Puerto Rico, adding to the existing relationship with Suriname, this role for the Court becomes even more important. Indeed, the jurisprudence of this hybrid legal tradition is itself indigenous, because we have recognised that when civil law is mixed with common law, often what bears fruit is something entirely new, hence the term hybrid. The result is not the same as French law, or Dutch law entirely, as the case may be. Already, there exists a fascinating line of cases decided by the CCJ exploring this hybrid or mixed legal tradition of the region. These include, for example, the case of *Ramdass v Jairam*,<sup>60</sup> on the question of equitable interests in land within the context of Roman Dutch Civil Law in Guyana. While equity does not form part of the civil law, in this unique context of a mixed legal tradition in Guyana, the CCJ found that specific performance, an equitable concept, could be ordered.

Similarly in *Ramkishun v Fung Kee Fung*,<sup>61</sup> involving another land issue, the CCJ looked at three different systems of law to resolve the dispute: English common law, European Roman civil law and modern South African Roman Dutch law decisions. It is anticipated that we will see even more significant and interesting cases when Saint Lucia joins the court's appellate jurisdiction.<sup>62</sup>

## CONCLUSION

On examining the various aspects of the CCJ's appellate jurisdiction, it is evident that this is a Court that has matured and accepted with dignity its rightful place as a premier legal institution and an independent, informed judicial body in step with international juridical mores, firmly grounded in its environment and shaping appropriately the destiny of Caribbean peoples.

## NOTES ON CONTRIBUTOR

Rose-Marie Belle Antoine is the Dean of the Faculty of Law and Professor of Labour Law and Financial Law, University of the West Indies. She is an attorney and award winning scholar who served as President of the Inter-American Commission on Human Rights, OAS, Washington, the Rapporteur for Persons of African Descent and Rapporteur for Indigenous Peoples. Currently, she is the Chair of the CARICOM Regional Commission on Marijuana and CARICOM Chair on HIV and Migration. Dean Antoine holds a doctorate in law from Oxford University, an LLM from Cambridge and certificates in international human rights from the IIHR in Strasbourg. She has been a Consultant to all of the governments in the Caribbean, UK, Venezuela, USA and Canada states, the judiciary and international organizations, including the EU, OAS, IADB, World Bank, CDB, CARICOM, OECS, UNICEF, ILO, UNIFEM, CAREC, PANCAP, UNAIDS and UNDCP, drafting legislation and authoring Policy Reports on several varied issues including public law/ human rights, health, public service, juvenile justice, financial and labour law. She has written 12 books and numerous articles, including the well-known *Commonwealth Caribbean Law and Legal Systems* which devotes several chapters to the CCJ – Privy Council debate and the creation of an indigenous jurisprudence in the Caribbean.

## NOTES

- <sup>1</sup> The Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy (CSME), 2001 signed by Member States of the Caribbean Community (CARICOM).
- <sup>2</sup> *Myrie v Barbados* [2013] CCJ 3 (OJ).
- <sup>3</sup> The Caribbean Community (CARICOM) is the regional economic and political grouping in the Commonwealth Caribbean. It established an economic, free trade regime for its Member Countries, one component of which is the ability of CARICOM nationals to move between the states without restrictions, for a minimum of six months, including the ability to work without a work permit for qualified nationals, under the Revised Treaty of Chaguaramas, referred to in note 2.
- <sup>4</sup> BBC Caribbean, 'Forum: CCJ vs Privy Council', 22 September 2009. Available at: [http://www.bbc.co.uk/caribbean/news/story/2009/09/090925\\_forumccjprivy.shtml](http://www.bbc.co.uk/caribbean/news/story/2009/09/090925_forumccjprivy.shtml).

- <sup>5</sup> *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (OJ).
- <sup>6</sup> 'Maya Indigenous People of Belize Win Major Land Rights Victory in Caribbean High Court' <http://ireport.cnn.com/docs/DOC-1235405>; 'IPLP Wins Landmark Human Rights Case in Belize,' <https://law.arizona.edu/iplp-wins-landmark-human-rights-case-belize>. The judgment of the Court was delivered in April 2015, but publication reserved pending assessment of compensation, *The Maya Leaders Alliance & The Toledo Alcaldes Association on behalf of the Maya villages of Toledo District & 23 Others on their own behalf & on behalf of 23 other Maya villages v The Attorney General of Belize*, BZCV2014/002.
- <sup>7</sup> *AG of Barbados v Josephs & Boyce* [2006] CCJ 3 (A).
- <sup>8</sup> Kenny D. Anthony, 'Leap to Enlightenment', *Address by Dr. The Hon Kenny D Anthony Prime Minister of St. Lucia and Lead Prime Minister on the Establishment of the CCJ at the Inauguration of the Caribbean Court of Justice*, Port of Spain, Trinidad and Tobago, April 16, 2005, p7.
- <sup>9</sup> *Ibid*, p 3.
- <sup>10</sup> *Ibid*, p 5.
- <sup>11</sup> *Ibid*, p 5.
- <sup>12</sup> *Ibid*, p 7.
- <sup>13</sup> [1981] AC 61.
- <sup>14</sup> In addition, many decisions of the Privy Council which have overturned the decisions of the lower courts, have been severely criticised by the English counterparts of that court. More recently, at a book launching in Port of Spain on September 17, 2015, Justice Adrian Saunders noted that he had examined Privy Council decisions for the past year and only two decisions out of seven had been disapproved.
- <sup>15</sup> De la Bastide, above.
- <sup>16</sup> See, e.g. *Roodal v The State of Trinidad and Tobago* (2003) 64 WIR 270; *Watson v The Queen* [2005] 1 AC 475.
- <sup>17</sup> *Barbados Redifusion Service Ltd v Mirchandani* [2005] CCJ 1 (A), (2005) 69 WIR 35.
- <sup>18</sup> *Reid v Reid* [2008] CCJ 8 (A), (2008)73 WIR 56.
- <sup>19</sup> *AG of Barbados v Josephs & Boyce* [2006] CCJ 3 (A).
- <sup>20</sup> See Lord Hoffman's dissent in *Lewis*, above, p. 89.
- <sup>21</sup> [2014] CCJ 2 (A), (2014) 84 WIR 101.
- <sup>22</sup> *AG of Barbados v Josephs & Boyce* [2006] CCJ 3 (A).
- <sup>23</sup> [1995] 3 LRC 1.
- <sup>24</sup> For a fuller discussion of this, see Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, Routledge-Cavendish, UK, 2<sup>nd</sup> edn, 2008, chapter 12, 'International Law as a Source of Law'.
- <sup>25</sup> This was the case of *Lewis v AG of Jamaica*, (2000) 57 WIR 275 (PC).
- <sup>26</sup> A collateral issue was the reviewability of the exercise of the prerogative of mercy, another constitutional law trend. The *Lewis* line of cases and now *Boyce* (CCJ) holds that this prerogative power can be reviewed to ensure that procedural fairness obtains.
- <sup>27</sup> *Lewis v AG of Jamaica*, (2000) 57 WIR 275 (PC).
- <sup>28</sup> From the case of *Pratt and Morgan v AG of Jamaica* (1993) 43 WIR 340.
- <sup>29</sup> See de La Bastide CJ, in *Boyce*, above, n 8, para 126.
- <sup>30</sup> Indeed, the de La Bastide/ Saunders judgment demonstrates quite clearly that the CCJ was aware of these reservations when they admitted that there was a lot of 'speculation' surrounding the approach the CJJ would take to death penalty cases, *ibid*.

- <sup>31</sup> *Lewis* however conceded that the recommendations of the Commission were not binding on the Governor General in the exercise of the prerogative of mercy, but given the terms of the treaty which the government ratified, the Mercy Committee should await a ruling from the international body. The court took pains to remind us that unincorporated treaties, though they create ‘obligations for the state under international law, does not . . . create rights for individuals enforceable in domestic courts’. Above, at p 32.
- <sup>32</sup> The CCJ noted: ‘It seems to us that the effect which the majority gave to the treaty i.e. expansion of the domestic criminal justice system so as to include the proceedings before the Commission, was inconsistent with their protestations of support for the strict dualist doctrine of the unincorporated treaty. In the result [the reasoning was] . . . unsupported by legal principle’. *Boyce*, above, n 8, page 36, para 76.
- <sup>33</sup> Hoffman’s dissent in *Lewis* is instructive. It hinges on the fundamental principle of the separation of powers doctrine which clothes the dualist doctrine. Law making power is given to the Legislature, not to the Executive. Accordingly, the signing of a treaty by the Executive cannot promulgate law. Lord Hoffman laments, somewhat poetically:  
The majority have found in the ancient concept of due process of law a philosophers stone, undetected by generations of judges, which can covert the base metal of executive action into the gold of legislative power. It does not, however, explain how the trick is done, *Lewis*, above, n 28.
- <sup>34</sup> Above, n 8.
- <sup>35</sup> [1995] 3 LRC 1.
- <sup>36</sup> The CCJ perhaps confused the question of whether such an expectation was substantive or procedural, yet this does not take away from the essence of the argument.
- <sup>37</sup> *Boyce*, above, n 8.
- <sup>38</sup> I criticized some aspects of it in an earlier work, for example. See Rose-Marie Antoine, *Commonwealth Caribbean Law and Legal Systems*, Routledge-Cavendish, 2008, 2<sup>nd</sup> ed, UK.
- <sup>39</sup> Above, n 3.
- <sup>40</sup> *Ibid*, at para 52.
- <sup>41</sup> *Ibid*, at para 53.
- <sup>42</sup> *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community* [2011] CCJ 1 (OJ).
- <sup>43</sup> *Maya Leaders Alliance v AG of Belize* (CCJ Appeal No BZCV 2014/002). At the time of the Symposium, the judgement in this case was pending. Subsequently, it was received, in April of 2015. The Court issued a consent order in favour of Mayan land rights, but had reserved judgement on compensation. The Consent Order dictates the terms of an Agreement supervised by the CCJ over the full recognition and implementation of those rights.
- <sup>44</sup> *Florencio Marin and Jose Coye v AG of Belize* [2011] CCJ 9 (AJ)
- <sup>45</sup> See, e.g. the discussion in the *Uren* case from Australia, where the court laid out the justification for deviating from established English precedents using this approach: *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (Privy Council).
- <sup>46</sup> See above, Antoine, supra, n 25, Chapter 8, ‘The Common Law and the Doctrine of Precedent’.
- <sup>47</sup> No CV 2 of 2005, decided 8 November 2006.
- <sup>48</sup> See Rose-Marie Antoine, *Commonwealth Caribbean Law and Legal Systems*, supra, n 25, chapter 17, at p 344.

<sup>49</sup> Above, n 29.

<sup>50</sup> *Gibson v A-G Barbados* [2010] CCJ 3(A)

<sup>51</sup> [2009] CCJ 2 (A)

<sup>52</sup> Above, n 51.

<sup>53</sup> Above, n 29.

<sup>54</sup> *Ibid*, at para 58.

<sup>55</sup> *Ibid*, at para 48.

<sup>56</sup> The CCJ also held that if the state paid for the expert evidence, it could compel disclosure of its findings.

<sup>57</sup> See Kenny D. Anthony, 'The Viability of the Civilist Legal Tradition in Saint Lucia' in Landry, HA and Caparros, E *Essays on the Civil Codes in Quebec and St Lucia*, Ottawa UP, Ottawa, 1984.

<sup>58</sup> In the person of Justice Wit, who is Dutch.

<sup>59</sup> See, e.g. the case of *Caplan v DuBoulay* No 29 of 1999, dec'd 21 May 2001 (HC, Saint Lucia).

<sup>60</sup> *Ramdass v Jairam* [2008] CCJ 6 (A).

<sup>61</sup> *Ramkishun v Fung Kee Fung* [2010] CCJ 2(A).

<sup>62</sup> Saint Lucia in 2015 signaled its intention to accept the CCJ's appellate jurisdiction.