

## Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices

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*Abstract:* The Caribbean Court of Justice (CCJ) is a relatively new legal institution in the Caribbean. This article explores the question of where this specific way of institutionalizing conflict resolution came from and in which way its success (or lack of it) can be accounted for. The authors analyse the support for and opposition to the CCJ found in four issues: economic progress, sovereignty, identity and trust. Their approach to institutionalization shows that only one of the four issues discussed – economic progress – has led to substantial and decisive support for the CCJ in its original jurisdiction as a CARICOM court. Lacking such economic drive, the other function of CCJ, which is becoming the successor of the British Privy Council as the shared regional appellate court, is still by and large withheld regional support. In general, the absence of common sovereignty, identity and trust continues to hamper regional cooperation in the Caribbean. *Keywords:* Caribbean Court of Justice, institutional development, regional development.

The increasing number of economic integration arrangements worldwide and their corresponding process towards legal convergence call for considering the introduction of dispute settlement mechanisms. However, whether extensive dispute settlement is needed will depend on the level of integration foreseen. Most Regional Trade Agreements (RTAs) are shallow forms of integration and do not ‘need’ regional courts to settle differences (Nyman-Metcalf and Papageorgiou 2005, 21). In the light of aspirations of the Caribbean Community and Common Market (CARICOM) to increase integration, however, some consider a court to be essential (Grenade 2006, 16). In 2005, CARICOM inaugurated the Caribbean Court of Justice (CCJ), which serves parties with conflicts within the Court’s original jurisdiction. The CCJ has a second and separate function: for some Caribbean states it functions as the highest appellate court for their national courts. In this article we explore the development of the CCJ through a closer inspection of its institutional history and its current standing. In our reconstruction of that history we ask ourselves *why* the Caribbean states decided to establish such a court, *what* led them to establish it in this specific institutional form, and the reasons behind its level of acceptance. This article starts with a short introduction of the Court as it currently exists and functions. It will look at the double function of the CCJ: that of the Court that applies the revised CARICOM treaty, and that of the (potential) replacement, and thus competitor, of the (British) Judicial Committee of the Privy Council as a regional appellate court for national courts in the Caribbean arena. We will (re)construct the process of design and establishment of the CCJ. What kind of ideas shaped the CCJ and what were the reasons or causes of the establishment and development of a regional Caribbean Court?

## Two courts in one

The double function of the CCJ leads us to sketch the two institutional histories for this one institution. CARICOM was established in 1973. It started out as a customs union with the aim of becoming a common market. The Revised Treaty of Chaguaramas (RTC)<sup>1</sup> of 2001 added the CARICOM Single Market and Economy (CSME), of which 12 of the 15 CARICOM countries are also a member. Effectively, this means that over a period of more than 40 years the goal of Caribbean cooperation moved from a free trade area in goods to a single market and economy. The CSME aims not only at the liberalization of goods, but also of services, labour and capital. However, the goals are a long way from being realized (Girvan 2010, 2-5).

Despite this limited progress, the CCJ was nevertheless established. It is two courts in one. The CCJ firstly has *original* jurisdiction, and in that function it guards the interpretation and application of the RTC.<sup>2</sup> Thus far, 12 states have signed the Court's founding agreement, thereby accepting its function as the CARICOM Court (CCJ 2012). Secondly, the court has national *appellate* jurisdiction for civil and criminal appeals as well as cases touching upon the interpretation of each country's constitution. The court functions as a shared highest appellate court for citizens of countries that recognize the appellate authority of the CCJ. Until now, however, only three countries (Barbados, Belize and Guyana)<sup>3</sup> have recognized the CCJ as the highest Court of Appeal (CCJ 2012). The other countries of the Caribbean that are part of the former British Empire still make use of the Judicial Committee of the Privy Council seated in London for their final appeal. Recently, however, the Organization of Eastern Caribbean States (OECS), an association of several small Caribbean states, confirmed that they will also recognize the appellate jurisdiction of CCJ once it has resolved some technical issues (*CARICOM News Network*, 8 September 2011). Additionally, in April 2012, the PM of Trinidad and Tobago (T&T) announced the intention of T&T to accede to the appellate jurisdiction of the CCJ. The debate in Jamaica over the accession to the appellate jurisdiction is of July 2012 still undecided (*Jamaica Gleaner*, 1 July 2012).

In terms of their legal status, the difference between the two jurisdictions of the court is important. The CCJ in its original jurisdiction has its legal basis in both the RTC and in the separate agreement establishing the Caribbean Court of Justice (the 'CCJ Agreement'). This gives the CCJ an original and exclusive jurisdiction as regards the interpretation and application of the RTC. The jurisdiction is exclusive (meaning that the CCJ is the only court that is allowed to interpret and apply the treaty) and the signatory states agree to comply with the judgments of the court (CCJ 2001, articles XII, XV and XVI and RTC articles 211 and 216; O'Brien 2011, 645). According to Article 217 of the RTC, the court will apply rules of (public) international law in its original jurisdiction.

The legal basis for accepting the appellate jurisdiction rests on the decision by each national parliament. Thus the highest national lawmaker decides how and when to accede. In its appellate jurisdiction, the court will function as the highest municipal court applying Common Law rules. A complication in recognizing the court's appellate jurisdiction can be anticipated for countries such as Suriname and Haiti, and to a lesser extent for St Lucia and Guyana (Belle Antoine 2008, 63). As

their legal systems are (partly) based on Civil Law tradition, they are not part of the Common Law tradition, and, contrary to other countries, they do not share the Privy Council (PC) as the predecessor to the CCJ.<sup>4</sup>

The court was established on 14 February 2001 and inaugurated on 16 April 2005 in Port of Spain, Trinidad and Tobago. Twelve countries have signed the court's founding agreement, of which only three have accepted the appellate jurisdiction of the court.<sup>5</sup>

In terms of the number of cases tried, the impact has thus far been limited. Between October 2005 and September 2012, 58 rulings were delivered in the appellate jurisdiction, and only 12 in the original jurisdiction (CCJ 2012). Both jurisdictions thus attracted a low number of cases, while the jurisdiction with the least signatory states has done comparatively well in terms of the amount of cases. Notwithstanding these low figures, there have been suggestions that in some cases the CCJ has had an effect without having tried a case. An example is the Caribbean Flour Mills case in which Trinidad's announcement to take its complaint to the court about Suriname's import of flour from the Netherlands without applying the CARICOM's common external tariff led to talks about a settlement, which, however, failed (interview with a CCJ judge, 14/16 June 2011; *Jamaica Gleaner*, 25 February 2012).<sup>6</sup>

### Shaping the CCJ

The process of forming and accepting the CCJ can be seen as a process of institutionalization informed by both cognitive ('descriptive') and normative ideas (Campbell 2004, 90-94). Cognitive and normative ideas respectively refer to '...descriptions and theoretical analyses that specify cause-and-effect relationships, whereas at the normative level ideas consist of values, attitudes, and identities' (Campbell 2004, 93). Campbell (2004, 94-100) distinguishes four kinds of manifestations of ideas: (1) *frames*, (2) *public sentiments*, (3) *programmes* and (4) *paradigms*.

Frames and public sentiments contain normative ideas. *Frames* (1) are intentionally developed by decision-makers and 'framers' to *enable* the identification of the *constituents* (general public, voters or other relevant interest groups including lower level decision-makers) with a programme. *Public sentiments* (2) provide general views of, for instance, voters, which may have a *limiting* effect on the possibility of acceptance of a policy programme by the public and by the decision-makers. Campbell shows that normative types of ideas can either bestow or deprive decisions of their legitimacy (Campbell 2004, 96-100). They are an important ingredient for decision-making as to whether to carry out a programme or not (Campbell 2004, 94). In the case of the CCJ, normative ideas can be assumed to be of importance as such courts tend to suffer from a lack of tradition and a lack of implicit loyalty of citizens. In addition, the courts may exhibit forms of behaviour that may not sit well with citizens, such as strong judicial review (Caldeira and Gibson 1995, 358).

Campbell identifies programmes and paradigms as developed by elites and containing cognitive ideas. *Programmes* (3) are 'elite prescriptions', enabling decision-makers to develop a strategy to reach their goals. *Paradigms* (4) are ideas of-

ten coming from the academic field which limit the programmes available to those making decisions. Paradigms form the cognitive lock on programmes, because they structure and limit (through assumptions) the discourse on a certain subject. Paradigms are dominant theories on the best way to deal with a specific problem (Campbell 2004, 94-95, 98-109).

These four kinds of ideas are recognizable in the debate on the CCJ. To show their roles in the success and failure of establishing the CCJ, we have identified four themes which we believe have been guiding the debate on the CCJ. These themes – economic progress, sovereignty, trust and identity – will be discussed below in terms of paradigms, the translation of these into programmes, and the way in which these have been framed in a certain way to appeal to public sentiments. The importance of these themes is illustrated by the debate about the CCJ in Jamaica, and to a lesser extent in T&T.<sup>7</sup> Jamaica is one of the largest traders in CARICOM<sup>8</sup> and therefore has (in quantitative terms) much to gain – or to lose – from integration and accompanying processes (O'Brien and Morano-Foadi 2009, 418). In addition, in 2008 Jamaica was the second most open economy in the CARICOM region, after Trinidad and Tobago (KOF Index on Globalization 2011).<sup>9</sup> As mentioned, Jamaica has accepted the CCJ in its original jurisdiction but not in its appellate function.

#### *Economic progress in the CARICOM-region*

Integration within CARICOM has been shaped by political programmes, which in turn were informed by paradigms about how progress could be made in economic and political areas. Over time, this has resulted in attempts towards deeper integration, and with these attempts the demands for a mechanism to settle interpretation differences considering the RTC have increased.

Mansfield and Solingen (2010, 147-148) show that regionalization has been the result of four waves, of which two occurred after World War II. The first post-war wave took place in the setting of the Cold War. According to Schiff and Winters (2003), in economic terms this period is characterized by an emphasis on import-substituting development and a strong role for the state in which trade blocks created high external barriers in the hope that protection from the world market and internal specializations would help them develop. In the 1990s, a second wave occurred with an enormous increase in regional activity, shifting the previous economic protection model to a more open form of regionalism in which export promotion took the lead above import substitution. In addition, the new wave was led by an urge for deeper integration among countries not only at a similar level of development but also among countries which were economically diverse, in which the focus was not only on decreasing tariff barriers but also on decreasing other kinds of barriers to stimulate trade and investment (Schiff and Winters 2003, 1-6). This new model, however, did not seek to embrace global liberalism. Rather, it was a response to the developments in the international trade system and globalization in general (Acharya 2002, 26; Fawcett 2004, 438).

This very concise history of two post-war waves in regionalization is mirrored by the developments which have taken place in the regionalization of the Caribbean. Girvan (2010) shows how different paradigms have motivated the different

phases in the Caribbean and Free Trade Association (CARIFTA)-CARICOM-CSME development, fuelled initially by the dependency theory and comprising an inward-oriented strategy aimed at import-substitution (Girvan 2010, 5-6; Hope 1974). Though troubled by the economic crisis of the 1970s, in the 1990s the integration process was characterized by an outward-looking strategy with neoliberal theoretical foundations from the 1980s (Payne 2008, 253-261; Girvan 2010, 7-8; Girvan 2004, 2-3). This outward-looking strategy was recorded in the Grand Anse Declaration (1989), and marked the beginning of a policy designed to create a single market among the countries that aimed at greater competitiveness in the world market (Girvan 2010, 7); that is to say, '[...] "Open Regionalism": the liberalization of internal markets for goods, services and factors of production is combined with opening up the region to the rest of the world. Production and trade is market led and driven by the private sector' (Girvan 2004, 3).

The above economic paradigmatic shifts and their associated programmes, in turn, gave rise to ideas about how to cope with conflicts or differences within the region. In 1993, the West Indian Commission published a report on the consequences of the worldwide political and economic developments taking place since 1989. This commission argued for the need of a CARICOM Supreme Court, in imitation of the decision taken by the CARICOM heads of government in 1988. The commission argued in favour of a court with both an appellate and an original jurisdiction. Considering an appellate function the commission believed that the low number of appeals taken up by the PC in London was an illustration of the inability of people – for example for financial reasons – to make use of the Council. With respect to the original jurisdiction, the commission calls the court 'essential', as there is a need for an institution to interpret the Treaty of Chaguaramas (TC), and where states, individuals and the CARICOM Commission can request a ruling (Report of the West Indian Commission 1993, 497-500).

This line of thought is also visible in the RTC, which can be seen as a programmatic materialization of 'deep-integration-needs-legal-framework' perspective. Here the heads of government, while drafting the RTC, had a detailed vision of how disputes were to be settled. A number of dispute settlement modes are listed under chapter nine of the RTC (RTC 2001). The establishment of the CCJ is regulated (CCJ 2001) in a separate agreement. In other words, the importance of at least the original jurisdiction of the court in order to deepen integration became the dominant view. It was seen as providing a necessary legal framework to support further integration (Grenade 2006, 12), an assumption which found its way into frames. For example, Pollard (2006, 9) argues that as CARICOM lacks supranationality, the CCJ is of crucial importance to integration as it fulfils '[t]he requirement of certainty and uniformity in the applicable law governing economic transactions in the CSME....' In addition, the chief justice of the Eastern Caribbean Supreme Court and the Jamaican attorney-general emphasized the need for the CCJ in solving trade disputes (*Jamaica Gleaner*, 3 October 2000 and 10 January 2001).

Although a court is important in solving interpretation problems with respect to the treaty when deeper integration is aimed for (Nyman-Metcalf and Papageorgiou 2005, 115), the question about whether it is a necessity is by no means undisputed, and additionally there is no clear need to combine it with an appellate function.

This perspective is illustrated by the debates in Jamaica. In the years leading to the signing of the CCJ agreement, the opposition Jamaica Labour Party (JLP) and other opposition members argued against a replacement of the PC, while at the same time supporting the establishment of a regional court to deal with trade disputes (*Jamaica Gleaner*, 25 November and 6 December 2000). The executive director of the Caribbean Export Development Agency (established by CARIFORUM) was quoted to have said, for example, that '[a]ll we need is a dispute settlement mechanism.... Let the CARICOM Secretariat pull together the individuals who have the expertise, and let them sit and adjudicate or arbitrate....' (*Jamaica Gleaner*, 27 May 2000). According to Jamaican Senator and Minister of State Delano Franklyn, this was also the position of the Jamaican Bar Association, while he himself argued against such a mechanism as being based on arbitration and thus too weak for the proposed CSME (*Jamaica Gleaner*, 18 May 2003). The *Jamaica Gleaner* also repeated the argument that deeper integration needs a court (*Jamaica Gleaner*, 3 December 2000).<sup>10</sup>

### *Sovereignty*

While there seemed to be support for the paradigm of open regionalism, and the dominant view that 'deep-integration-needs-legal-framework' seemed obvious for many involved in the debate, the specific institutional shape of the court is the result of particular ideas about the relationship among member states and institutions of CARICOM within the overarching framework of regional integration. The debate on CARICOM and on the CCJ has been framed especially in terms of sovereignty. Within the context of the Commonwealth Caribbean, sovereignty is a complex concept, having its origins in the colonial history of the islands. Bishop and Payne (2010, 10-20) argue that the Caribbean understanding of 'sovereignty' is in dire need of revision. They show that during decolonization the political elite of the Caribbean was not only motivated by the goal of national liberation of the islands, but also by the prospect of political control. Once achieved, however, the value of independence and sovereignty proved to be limited, as was illustrated by the US invasion in Grenada in 1983, and the vulnerability of these small island states in international economic developments and the economic recipes for recovery that have been forced upon them. However, the political leaders that fought so hard to gain control have not been able to establish that political control on a regional level. Such 'regional sovereignty' would have allowed them to regain some of the sovereignty not present at the state levels, Bishop and Payne argue. Bravo (2005, 158-160) also points to the colonial history as a source of an absolutist conception of sovereignty (159) and the limited reality of this concept. Ramphal, former secretary-general of the Commonwealth and chairman of the West Indian Commission, has also pointed to the emptiness of a notion such as local control: 'Powerlessness, not power, is the political reality at every island level. Sovereignty, still much touted, has lost much of its meaning. Yet West Indian governments seem more determined to assert it against each other than in the wider world' (Ramphal 2011, 8).

Whatever limitations this particular concept of sovereignty has, its specific shape is reality. It has influenced the discussion of the CCJ in two ways. First of all with regard to relations between CARICOM and states, the question was whether

they are willing to transfer a part of their national sovereignty to the regional level. The second concerns the relationship between the members of CARICOM and their former colonizers, in this case mainly the UK, where the PC is seated. Let us first look at the 'internal' concept of sovereignty before moving on to the second, 'external' concept. With respect to the internal relationships within CARICOM, the dominance of this particular idea of internal sovereignty has resulted in a fragile integration process with a weak institutional basis. This was not for a lack of proposals. In 1992, the West Indian Commission advised the establishment of a CARICOM Commission which would stand above the member states to overcome the obstacle that intergovernmentalism presents to integration. This was again recommended in the 2003 Rose Hall Declaration (although not without again emphasizing that CARICOM consists of sovereign states), and in 2006 a Technical Working Group of Governance was appointed which again recommended the establishment of a commission (mirroring the commission of the EU) within CARICOM, but again this recommendation was not acted upon (Bishop and Payne 2010, 8-9; O'Brien 2011, 645-646). Thus, the idea of a commission has not yet been realized and will not likely be realized in the near future (email correspondence with a former high-level officer CARICOM, 8 August 2011). As Bravo puts it, the '...privileging of sovereignty [by CARICOM states], and efforts to guard it, have led to the construction of an organizational structure lacking in cohesion and supranational scope, bereft of ability or power to enforce Member State implementation of the common market' (Bravo 2005, 176).

The shape of CARICOM clearly shows this 'privileging of sovereignty'. The dominance of intergovernmentalism is thus clear in the fact that there are all kinds of ways through which decisions can be avoided. For example, decisions may not be binding under certain circumstances, may be subject to more stringent voting procedures under certain conditions, or need to be transposed into national law before they can be enforced in national courts (Bravo 2005, 178-195; O'Brien 2011, 642-643). Thus, the notion of sovereignty has informed the weak institutional basis as states are not prepared to substitute national forms of control with regional ones. Binding decisions in CARICOM are made by the most important organ, the Heads of Government Conference, by the second most important organ, the Community Council of Ministers (primarily consisting of ministers responsible for community affairs), and the four functional Councils. Voting in the Conference takes place through unanimity, and in the Councils by qualified majority. With respect to the Councils, an exception is made in Article 29.4 for issues that profoundly affect '...the national well-being of a Member State'. In such case, Article 29.3 states that the Community Council and the four other Ministerial Councils take decisions by an affirmative vote. However, when a member state has objections against a decision, Article 27.4 provides an opt-out clause as long as '...the fundamental objectives of the Community ... are not prejudiced thereby' (see RTC, Articles 27, 28, 29). In order for a decision to have an effect, Article 240.1 on 'saving' provides that '[d]ecisions of competent Organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States'.<sup>11</sup> This shows that CARICOM and CCJ may have been inspired by other regional initiatives, such as the EU and the ECJ, and the Treaty of Rome,<sup>12</sup> but the CCJ is

different, for instance in the sense that there is no commission to back up the court's decisions. Furthermore, the appointment of judges does not need to take into consideration the nationality of the judges. Additionally, there is no strong role for national courts (O'Brien and Morano-Foadi 2009).

While the urge to maintain sovereignty is present in the institutional shape of CARICOM, the CCJ may alter this in practice. When performing in its original jurisdiction, the CCJ may override the states in a more supranational way, as O'Brien (2011) demonstrates. The compulsory character of CCJ means that in a conflict between two member states, the defending state is obliged to participate. Also, member states can be sued – under certain conditions – by individuals<sup>13</sup>, also of their own state. Interestingly enough, these two 'cracks' in sovereignty may not have been intended by the member states. O'Brien shows that there are reasons to assume that when the member states signed the RTC and the CCJ agreement, they expected that the restrictive conditions would significantly limit the rights of individuals to make use of the CCJ, and that states would still have a choice in whether or not a case between states would have to be resolved by the CCJ or by the Conference. Although the CCJ rulings may have more impact than the CARICOM states originally had foreseen, the CCJ rulings do not allow a significant role for individuals to make use of the RTC in national courts. This is because of the CCJ's exclusive and compulsory nature with respect to the RTC. In addition, the impact is limited as CARICOM does not have a supranational commission like the EU to bring cases to the court. For these reasons, it is unlikely that the CCJ will have a similar effect on the CARICOM integration process as the European Court of Justice has had on the EU integration (O'Brien 2011, 643-645). Framing of the CCJ debate in terms of the internal sovereignty only enabled the development of a rather weak court.

Framing in terms of external sovereignty has supported the appellate function of CCJ. Thus, David Simmons, former Chair of the Preparatory Committee of the CCJ, argues that '...if Commonwealth Caribbean countries can legitimately claim political independence, it must surely be the case that they are not truly and fully independent while their highest court sits outside the region, in London, and is staffed by judges from outside the region' (Simmons 2005, 180). Also, former CCJ judge Duke Pollard argues: 'The establishment of the Caribbean Court of Justice in its appellate jurisdiction will not only sever the last remaining vestige of a colonial condition, but will signal the birth of autonomous judicial decision-making in Member States of the Caribbean Community and close the cycle of independence which commenced as early as 1962. (...) [T]he Court will mark the culmination of initiatives to create our own legal institutions to facilitate and promote the development of an indigenous jurisprudence reflective of the moral, political, social and economic imperatives of our Region (...)' (Pollard 2004, 204).<sup>14</sup>

The fact that it took years for the CCJ to be established, according to Bravo, can be understood as a result of the protection of sovereignty which – in the eyes of some – was under attack by the ruling of the PC in a Jamaican death penalty case in 1993 (Bravo 2005, 191-192). Indeed, in a report commissioned by the Preparatory Committee on the Caribbean Court of Justice, Rawlins pointed out that there had been several high profile cases in which the PC annulled decisions made by national courts involving, in some cases, death penalty sentences. This evoked,

Rawlins argues, a response which can be referred to as ‘emotionalism’: the replacement of the PC with the CCJ on the basis of the emotions that are being evoked by PC decisions that were seen as unjust by parts of the Caribbean population (Rawlins 2000, 14-26). Therefore, Rawlins argued that ‘[i]n the Caribbean, it will be difficult to divorce emotion-based issues from considerations which relate to the institution of the Caribbean Court of Justice’ (Rawlins 2000, 25). On the other hand, some argued that since the discussion and decision on the establishment of the CCJ was much older, there was no relation between the emotions about the PC’s decisions and the establishment of the CCJ, even though the PC’s decisions were seen in the region as Eurocentric (Simmons 2005, 172, 184-185).

So far we have identified two important ideas that have structured and framed the political debate about the CCJ, and which have influenced its specific institutional characteristics: economic necessity and sovereignty. The debate on the appellate jurisdiction is complex and deserves more attention. Therefore we now proceed by charting two other influential discourses in this debate: the question of (whether or not there is) a Caribbean *identity* and the issue of *trust* in politics.

### *Identity*

In addition to the debate about sovereignty and economic necessity, there has been another discourse working its way into the debate about the establishment of the CCJ: it is a discourse about *identity*. The identity issue is separate to the issue of sovereignty, although clear connections can be made. Again, we can distinguish ‘external’ and ‘internal’ variants, but first the idea of a Caribbean identity needs to be addressed in terms of providing an answer to the question: Who are ‘we’? Identity creates a potentially strong bond among individuals and groups not only by defining what ‘we’ are but also and perhaps more importantly what ‘we’ are not. A key element of the identity in the CCJ debate has been the question whether something such as Caribbean-ness, a Caribbean ‘we’, exists. And, if the answer is affirmative, what does this Caribbean identity mean for new institutions like the CCJ?<sup>15</sup>

The idea (and practice) of a common Caribbean identity is based on different frames. It has been defended in historical and in geographical terms. The historical constructions dominate the Caribbean identity discourse. A historic process of identity formation is seen in (the history of) slavery and (later) the indenture system, in the former English/European Colonial rule and in the experience of *diaspora* (both Black and Asian/Indian). The geographical construction of identity is based on the common fate this group of small island communities in the Caribbean Sea share. It is sometimes also based on another diaspora, the current one, which shows great numbers of Caribbeans living in the metropolises of the former colonial powers.

A powerful identity is based on the history of slavery in the Caribbean. It stresses the fact that most Black people in the Caribbean are descendants from the Africans who were brought and held as slaves by the Europeans from the seventeenth to the nineteenth century. This history has had a large impact on how people from the Caribbean define themselves in relation to the UK. The ‘external’ identity issue relates to how the Caribbean looks at the UK, which is also discussed under

the heading of sovereignty, as identity and sovereignty issues tend to overlap. The sovereignty issues are more focused on the question of who has actual power in a certain territory, while identity issues raise questions on the authenticity and independence of local ways of perceiving the world. The discourse of external identity framed by the elite is also reflected in strong public sentiment. David Simmons, quoted in the *Jamaica Gleaner* of 3 December 2000, argues that '[t]he independence of states in the region will not be complete, is not complete, when our constitutions entrench a foreign tribunal as our final Court of Appeal'. Within the frame used to support the CCJ it was argued that the rulings of the local courts are embedded in local norms and culture. As the CCJ judges are Caribbean jurists, the CCJ will develop a Caribbean Jurisprudence. As Ramphal states: 'The Privy Council, reflecting contemporary English and European mores and jurisprudence, has been rigorous in upholding Caribbean appeals in death sentence cases.... But in situations of heightened crime in the Caribbean, it is the regional mores that matter, and it is not for abolition' (*Trinidad and Tobago Newsday*, 3 October 2011). And T&T Chief Justice Ivor Archie stated: '...the notion that somehow we will receive a superior form of justice from London bespeaks a self-doubt and an unwillingness to take responsibility for our jurisprudential self-determination' (*NationNews Barbados*, 18 September 2010). In addition a chorus of voices has been raised against the perceived colonial mentality of those who are against a regional court. It was argued by PM Douglas of St. Kitts and Nevis that accession to the CCJ 'represents a needed and crucial break with our *colonial* past....' (*CARICOM News Network*, 8 September 2011 [italics added]). A statement mirrored in an editorial: 'The recurring question of the bewildered among us is: for how much longer must the rest of the independent CARICOM states... continue to maintain a *colonial* preference for accessing the PC in London instead of the CCJ...?' (*NationNews Barbados* Editorial, 4 October 2011' [italics added]). This line of thought is followed by Justice Seymour Panton, President of the Court of Appeal of Jamaica, who is quoted to have said that those wanting to keep the PC in place are '...the very wealthy, murderers and the ones with *colonial* mentality' (*Jamaica Gleaner*, 26 December 2010 [italics added]). In similar vein, a church minister sent in several contributions to the *Jamaica Gleaner*, arguing that the CCJ should be supported as he identified himself as '...basically a nationalist and believe that my sovereignty should reside inside the Caribbean – Jamaica, not in Europe' (*Jamaica Gleaner*, 30 July 2000). Some argue that there is such a thing as an indigenous jurisprudence, and that the CCJ as an institution '...will give full expression to the social, political and economic Weltanschauung of the region' (*Jamaica Gleaner*, 3 December 2000). In the Caribbean context, there seems to be a widespread acceptance of the relationship between law and culture (see Simmons 2005, 178-179), and the perception is that law should be an expression of underlying cultural beliefs and values. Simmons has thus argued that '[a] rational reason for the establishment of the CCJ is rooted in a desire to promote the development of Caribbean Jurisprudence giving its own flavour to the common law' (Simmons 2005, 178). The idea of indigenous jurisprudence also plays a role in the rulings of the CCJ (interview with a CCJ judge, 13 June 2011).

Nowhere has this idea of legal indigenusness been more prominent than in the issue of the death penalty. The PC is widely considered as not representing the

dominant sentiment of the Caribbean public on the death penalty and can even be considered, as the quote of Simmons shows, to be Eurocentric. The PC has repeatedly ruled unfavourably in the eyes of those supporting the death penalty in cases such as Pratt and Morgan,<sup>16</sup> Lewis,<sup>17</sup> and Lambert Watson,<sup>18</sup> and it was felt that some of the judges of the PC were not basing their rules on legal argumentation but rather upon their wish to abolish the death penalty altogether (Vasciannie 2009, 839-841; *Jamaica Gleaner*, 8 December 2000; interview with a CCJ judge, 13 June 2011). Polls taken in Jamaica in early 2008 showed that about 97 per cent of the population supports the death penalty in light of the enormous crime rates. Caribbean support for the death penalty was also illustrated by the Caribbean vote against the UN resolutions relating to the death penalty<sup>19</sup> (*Jamaica Gleaner*, 24 February 2008). On the other hand, the expectation that the CCJ would be more willing to carry out the death penalty has made some oppose it (*Jamaica Gleaner*, 3 December 2000).

With the exception of the discussions relating to the issue of death penalty, public sentiment concerning the CCJ seems to play a limited role in the debate on the CCJ. A study published in 2008 including a sample of the population of T&T by the CCJ Court Protocol and Information Officer confirms this. While more than 73 per cent had heard about the CCJ, only 22 per cent had knowledge about its two jurisdictions (most did not know that the CCJ also has an original jurisdiction). Most respondents were in favour of the CCJ replacing the PC, not only because they cared about the development of indigenous jurisprudence or sovereignty, but especially because they expected it to be a 'hanging court'. The study also cited a Jamaican study on regionalism, which showed a similar lack of knowledge about the mandate of the CCJ (Lilla 2008, 76-91). In Jamaica, the debate about the replacement of the PC also seems to be a political one, where the position on the CCJ depends on whether a party is the ruling party or the opposition party (see for example Franklyn's comment on Edward Seaga, *Jamaica Gleaner*, 18 February 2001, and the article by Brown, *Jamaica Gleaner*, 1 December 2000).

In addition to the external identity of the Caribbean versus the UK, the question is whether a coherent internal identity can be distinguished. The idea of a common identity among people from the Caribbean – resulting in the idea of legal indigeneness – is discarded by some as fiction, leading to the notion of multiple internal identities. History did not stop with the formal abolishment of slavery. Both Mohammed (2009, 57-71) and Lokaisingh-Meighoo (1998, 1-16) point out two different *diasporic* movements, leading to two separate identities: Afro-Caribbean and Indo-Caribbean, the latter one referring to people coming to the Caribbean from Asia (Lokaisingh-Meighoo 1998, 1-16). The separation of these two groups leads to questions about, for instance, the (lack of) representation of the Asian-Caribbeans among the CCJ judges, and this may also affect further support for the CCJ (Letter from Vijay P. Kumar to the Guyanese *KaieteurNewsOnline*, 4 June 2011). T&T former PM Panday also hesitated acceding to the CCJ on this point of representation (*Stabroek News*, Editorial, 9 February 2011). A similar internal Caribbean multiplicity is apparent when looking at the relations between Caribbean states. A powerful force *against* the idea of a shared Caribbean identity is of course the strong sense of nationalism felt by countries in the region. Here, identity and sovereignty issues seem to collide. Economic competition, the lack of free move-

ment of people in CARICOM and the scuffles concerning it, and nation-building processes have created and still create strong national identities, especially in the bigger countries of CARICOM, leading to the importance of sovereignty, as pointed out earlier. This nationalism may have an effect on how the CCJ is looked at in terms of representativeness. Currently, the CCJ judges come from only five CARICOM countries (Jamaica, St. Kitts and Nevis, Guyana, Trinidad and Tobago, and St. Vincent), while two judges originate from non-CARICOM countries. This leads some to question the extent to which the CCJ represents the CARICOM countries: '[i]t is evident that greater "representativeness" of countries and of their populations may well go some way to enhancing the attractiveness of the CCJ' (email correspondence with former high-level official of CARICOM, 8 August 2011).

Within the frame opposing the CCJ it was argued that the development of local jurisprudence is better left to the Caribbean state's own *national* judiciaries. This is in line with the internal notion of sovereignty and identity, which emphasizes the differences within the Caribbean. Thus the point is made that the CCJ judges do *not* have, cannot have, the sense of Caribbean identity needed for the development of a distinctive Caribbean jurisprudence. It has been emphasized by others that next to national identity it is global identity that counts: either the PC should be replaced by a national final appellate court, or the PC should stay. A regional court, according to this view, is superfluous. In 2009, PM Kamla Persad-Bissessar proposed replacing the PC with a national final court of appeal for Trinidad and Tobago. In 2011 she made clear that that her proposal was not meant as an internal sovereignty argument: 'The whole argument about the CCJ is not about justice. The argument was that we want to be a sovereign nation, we want to be independent and you know, the world is not like that anymore. This world is a *global* village so what's wrong if judgments are being made by the Privy Council?' (quoted on BBC Caribbean.com, 23 March 2011). PM Golding of Jamaica also raised the possibility of a national final appellate court replacing the PC. He also used an identity argument to support it: 'We believe we have the judicial experience, we believe we have the maturity to do it' (*Caribbean360*, an internet news site, 22 December 2010).

The idea of *identity* has thus been used as a key ingredient in the public debate in framing the positions both by the defenders of the establishment of the CCJ as an appellate court as by their national opponents. Interestingly enough, while the external identity and sovereignty frames and public sentiments have been important in establishing the appellate court, they have not been able to secure the functioning of the court. One of the reasons for this is the issue of trust.

### *Trust*

One of the implicit assumptions of institutional programmes in general is that the people who lead the new institutions are competent and deserve the trust of the general public. Without such trust, the legitimacy of the whole project is compromised. In the case of establishing the CCJ, the paradigm stating that the judicial process can and should be insulated from political interference, a perceived condition for trust in the judiciary, is clearly limiting the room for both the choice of

programmes and the framing of these programmes. That trust is a real issue among the public was illustrated by Lilla's study among the population of T&T, which showed that the majority of respondents were more convinced of the quality of the PC than of the CCJ (Lilla 2008, 80-82). Therefore, in the discussion on the establishment of the CCJ as an appellate court, both the defenders of the new institution as well as their political opponents on the national level have used the concept of *trust* as a key ingredient in framing their position in the public debate.

The two modes of framing roughly use the following lines of reasoning. On the one hand, it was argued that local politicians cannot be trusted, that the CCJ can be manipulated by these politicians, and that therefore the CCJ cannot be trusted. A similar reasoning was evoked for the judges of the CCJ themselves, who were said to be products of the local untrustworthy political culture, which naturally reflects upon the trustworthiness of the CCJ. This feeling was amplified by the fact that only three countries accepted the CCJ as an appellate court. This can be seen as an expression of the trust most states place in the PC, and their distrust of the CCJ (*Trinidad Express*, 3 October 2010). A statement to such effect was made by Senator Wade Mark<sup>20</sup> on 8 March 2005 when in the T&T Senate he attacked the new CCJ as a 'political tool in the hands of politicians' who are only interested in staying in power (*Senate Proceedings* 2005, 625). He praised the decision of the PC (Judgement 41/2005) barring Jamaican legislation from establishing the CCJ (in its appellate jurisdiction) as maintaining '...the buffer between the masses...and a marauding band of potential oppressors, dictators and power hungry megalomaniacs...'. In his contribution to the debate Senator Mark echoed the idea present in the PC ruling mentioned above that politicians can too easily influence the choice and tenure of the CCJ judges, potentially endangering the independence of the CCJ vis-à-vis 'politicians'. Other senators joined Senator Mark in this line of thought. In their view, the establishment of the CCJ is thus an attempt to replace the current independent judiciary by a politically dependent one. The CCJ is also seen by others as more subject to political interference than the PC has shown to be (Seaga in Franklyn 2005, 17). In Jamaica another argument touches on trust. The supposed lack of local and regional legal talent is often cited as an argument against the CCJ (*Jamaica Gleaner*, 3 December 2000; *Jamaica Gleaner* Editorial, 17 June 2010). Earlier we stated that PM Golding expressed his trust in the national legal talent of Jamaica to do the job. Edward Seaga, then leader of the opposition in Jamaica, expressed his reservation about the CCJ in that it could be too much of an indigenous court, making some hesitant to embrace the Court as a court that would take into account the local values and circumstances, and thus having less use for universal values (Seaga in Franklyn 2005, 11-14).

On the other hand the idea of trust was used to support the establishment of the CCJ. Voices were heard arguing that regional judges should be trusted, that Caribbean people should believe in themselves to be able to appoint eminent jurists to the CCJ, which would in turn add to the trust in the CCJ (*Trinidad and Tobago Newsday*, 11 April 2011). During May 2003 Jamaican PM Patterson supported the CCJ in debate in the Lower House, focusing on the quality and integrity of the Caribbean jurists and thus their trustworthiness and resistance to political pressures. Rhetorically he asked why all other peoples have competent judges and why the people of the Caribbean countries cannot have them. He was opposed by Edward

Seaga who viewed the move of the PM towards abolishing the PC and establishing the CCJ as part of a power game: 'They want to set up a court over which this...government has influence. That's what they want' (*House Proceedings* 20 May 2003, 82 in Jones 2004). In other words, the debate about the CCJ addressed the question of whether certain minimum requirements of independence and fair justice – such as the political appointment of judges or the replacement of poorly functioning judges – would be attainable. Because of such reservations, safeguards and provisions have been incorporated into the institutional design of the CCJ, such as the fact that the judges are appointed by a special independent commission and that they are not paid directly by governments (Rawlins 2000, 28-43; CCJ 2012).

The issue of trust is a recurring feature in the political discourse on the desirability of the CCJ. It appears that trust is a concept similar to sovereignty and identity in that it can be used in frames that either support or oppose the CCJ as an appellate court.

### **Concluding remarks**

We have discussed four key elements in the discourse surrounding the establishment of the CCJ as a regional court of justice. Our discussion showed that the establishment of the original jurisdiction of the CCJ, the CARICOM court function, has clearly been dominated by the paradigm that economic progress can be served by regional cooperation in an open manner, and that establishing such a court is an instrumental institution for economic progress. Seen from this perspective, it cannot come as a surprise that the original jurisdiction of the CCJ has been widely accepted, even though its impact is still limited by concerns about giving up national sovereignty.

The paradigmatic influence – and with it its programmes – is also limited by public sentiments and frames about the legitimacy of the CCJ. Contrasting frames and public sentiments about sovereignty, identity and trust do not clearly point towards either accepting the CCJ as an appellate court or dismissing it. Those supporting the CCJ have attempted to frame their support in terms of sovereignty, identity and trust, but where confronted by opponents they have also used the same ideas to oppose the CCJ. The framing of the establishment of the CCJ as an appellate court has thus far been less successful than the framing of the CCJ as the Court of CARICOM, largely due to strong public sentiments regarding the death penalty and trust. Although the project to create a powerful CCJ may be faltering, it has not yet fallen down. There is a strong possibility that the appellate jurisdiction of the CCJ will be accepted by most of the regional countries in the future. Our discussion of the debates show that these political decisions will largely be part of the mundane process of political bartering and will not be dominated by a convincing discourse unifying Caribbean citizens in their choice for or against the CCJ as an appellate court.

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## Notes

1. The original treaty established the Caribbean Community and Common Market or CARICOM, while the revised treaty aimed at a CARICOM Single Market and Economy.
2. The Treaty Establishing the Caribbean Community and Common Market signed at Chaguaramas on 4 July 1973. The current treaty is a revised version of the original treaty. Article 211 states the *original* jurisdiction as follows: 'Jurisdiction Of The Court In Contentious Proceedings
  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 the Agreement;
    - (b) disputes between the Member States to the parties to the Agreement and the Community;
    - (c) referrals from national courts of the Member States parties to the Agreement;
    - (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.
  2. For the purpose of this Chapter, "national courts" includes the Eastern Caribbean Supreme Court.'
3. Jamaica did pass legislation to accept the CCJ as appellate court, but because it was passed by an ordinary majority, it was not accepted by the Privy Council (Hayton 2006, 3).
4. To deal with the different systems, the CCJ included a judge from a jurisdiction within the Civil Law tradition – Judge Jacob Wit from the Netherlands Antilles.
5. Antigua and Barbuda, Barbados, Belize, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, Suriname and Trinidad and Tobago signed in 2001, Dominica and St. Vincent and The Grenadines signed in 2003.

6. In this article we make use of information obtained while interviewing different people involved in the CCJ (CCJ judges, a former high-level CARICOM official, and a high-level official involved in the preparation of the CCJ).
7. To analyse the Jamaican debate we especially studied articles that have appeared in the *Jamaica Gleaner* (also called the *Gleaner*) in the period 2000-2001, as the CCJ was established in 2001. We choose to focus on Jamaica because of the quality of the *Jamaica Gleaner* and the accessibility of its articles online.
8. See for references to the importance of Jamaica, Hornbeck 2008, 8; Grenade 2006, 4.
9. Statistics were not available from all CARICOM countries, but as the largest economies are included it seems to give a fair representation.
10. Interestingly, the analysis of newspapers shows that lecturers from the University of the West Indies (UWI) often act as 'brokers' in favour of CARICOM and CCJ. Simmons (2005) links the 1970 establishment of the Faculty of Law of the University of the West Indies (UWI) to the call for regional replacement of the Privy Council, as the staff of the Faculty had an intellectual commitment to the project of an appellate court (Simmons 2005, 173). According to Campbell (2004, 101-107), brokers link programmes, paradigms, frames and sentiments.
11. See Bravo (2005) for a detailed analysis of the powers and functions of the CARICOM.
12. During one of the interviews it was said that the ECJ and the Treaty of Rome were seen as models for the design of the CCJ (interview by phone with a high-level official involved in the preparation of the CCJ, 15 June 2011).
13. The conditions under which individuals can make use of the Court in its original jurisdiction are clarified in article 222 of the RTC and includes the condition that 'the Court has determined in any particular case that this Treaty [RTC] intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly'.
14. See also Rawlins (2000, 44-47) for an overview of the debate on sovereignty.
15. When we speak of a Caribbean identity, please note that we focus on the discussion within and among the countries of the former British Caribbean.
16. *Pratt and Morgan v Attorney General* (1993) 43 WIR 430.
17. *Neville Lewis and Others v Attorney General* (2000) 57 WIR 275.
18. *Watson v R* (2004) 64 WIR 241.
19. These three resolutions are A/res/62/149, A/res/63/168, and A/res/65/206. They call for a moratorium on the use of death penalty. The vast majority of CARICOM countries have voted against these resolutions (see <http://www.un.org/en/ga/62/>, accessed 19 July 2012).
20. Wade Mark has been Speaker of the House in Trinidad and Tobago since 2010.

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