Twenty Years of the Caribbean Court of Justice

The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of Justice

2025 Macfadyen Lecture

Scotland
27 March 2025

The **Scottish Council of Law Reporting**, a "not for profit" charitable company limited by guarantee, was established by the Scottish legal profession to manage publication of Session Cases and other materials intended to help promote the best practice of Scots law. The Scottish Council of Law Reporting was privileged that the late Rt Hon. Lord Macfadyen served as a member for many years until his untimely death in 2008. The Council has established a series of lectures in his memory, which it published on this website. Sir David Edward, who gave the first such lecture in March 2010, began his talk with a personal reminiscence of Donald Macfadyen.

Presentation

by

The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of Justice

At the

The Macfadyen Lecture 2025

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Introduction

I never had the privilege of meeting the late Donald Macfadyen, but since receiving your very gracious invitation to participate in this lecture series organised in his honour, I made it my business to learn more about his truly stellar career, both as counsel and latterly as a judge. He was clearly a much beloved, respected and admired Scottish icon. At the ripe age of 62, great judges are in their prime. They have accumulated and added to their knowledge and wisdom such a wealth of life experience that their best work surely lies ahead. I can, therefore, well imagine how devastating a blow it must have been, not just to his dear widow, Lady Macfadyen and their children, but also to his colleagues, to the administration of justice, and to the people of Scotland as a whole, when he lost his battle to cancer in 2008. The passage of time might ease, but it can never assuage the profound loss I know you all still feel at his untimely passing. However, one of the noble things about outstanding judges is that they live on. They live on in their recorded judgments that are repeatedly cited and followed. They live on in the manner in which they influence the shape and trajectory of the law. They live on in the wonderful example they set for their children, their peers and members of the legal profession. Lord Macfadyen surely lives on, and he will, I am sure, continue to inspire many lawyers and judges for generations to come. I am truly honoured to give this lecture in his memory, and I thank the Scottish Council of Law Reporting for affording me this tremendous privilege.

I am also extremely grateful for all that has been done to accommodate my wife, Marilyn, and me. We are extremely appreciative of the wonderful hospitality that has been extended to us. This is not my first visit to Scotland, and I have to say that on each occasion I have visited, I've always been struck by the warmth and friendliness of the Scottish people.

This year, in a few days, actually, the court on which I sit, the Caribbean Court of Justice, or CCJ, will celebrate its 20th Anniversary. Two decades is a short time in the life of an institution that has no predecessor. Many of you may not previously have heard of the CCJ and so I thought that, in lieu of attempting to expound on some esoteric or novel area of the law, I would take this opportunity to provide information about my court, how and why it was conceived and established, how it functions, the challenges it faces, and also give a taste of the jurisprudence we have fashioned. A bit of background to its establishment is helpful.

Those of you who follow the game of cricket would know that, among the teams that play the sport at an international level, there is only one that comprises players from several different nationalities: the West Indies. There was a period in the 1970s and 1980s when the West Indies cricket team was utterly unbeatable, but now, sadly, our fortunes have changed. If some have their way, the West Indies would be relegated to a second tier of test cricket.

West Indies Federation

For a brief period, the West Indies were, off the field of play, politically united as one in a fractious West Indies Federation that embraced ten Anglophone Caribbean islands. The primary goals of the Federation were to achieve political independence from Britain as a single State and to promote the economic development of the member islands. A feature of the Federation was a specially created Federal Supreme Court consisting of a Chief Justice and five other territorial Chief Justices. Interestingly, that court system also included British Guiana, which had *not* joined the Federation. The Federal Supreme Court functioned as an intermediate appellate tribunal hearing appeals from the individual colonies. It was a very highly respected court.

The Federation lasted a mere four years. The weight of political divisions, severe economic disparities among the member countries and an ill-conceived structure was too much to bear. The federal government had very limited powers. Each of the ten islands functioned as a separate economy. The

smaller islands were afraid of being overwhelmed by the economies of those that were larger. The bigger islands considered that, the smaller ones would be a huge economic burden. In 1961, a majority of the electorate of Jamaica, the largest and most populous of the ten islands, voted at a referendum for Jamaica to exit the Federation. The Prime Minister of Trinidad and Tobago, the second largest country, famously declared that one from ten leaves nought. Both Jamaica and Trinidad and Tobago proceeded to political independence from Britain in August 1962. And that was the effective end of the federal experiment. Never mind that the West Indies cricket team, under a new charismatic captain, Sir Frank Worrell, was precisely at that time playing the best cricket it had til then ever played[1]. Over the next 20 or so years, almost all the remaining islands that once constituted the Federation proceeded to independence as separate mini nations.

Enhanced Cooperation Among Caribbean Countries

Cricket is not, by a long stretch, the only thing that Anglophone Caribbean countries share in common. We inherited from England not just the language we speak but also a Westminster style parliamentary system, the English common law method and a range of political and constitutional conventions that were transplanted to the colonies. Many of these legacies are today captured in and carefully circumscribed by parameters and values enshrined in our respective national Constitutions and post-independence domestic statutes.

Unsurprisingly, the dream and goals of Caribbean integration survived the dissolution of the Federation. Regional institutions are continually being built to deepen functional cooperation among the various States. To cite only a few examples, the smaller islands have formed the Organisation of Eastern Caribbean States, an intergovernmental pact whose members share in common a Central Bank and currency and a court structure with one Chief Justice presiding over a single itinerant Court of Appeal. The University of the West Indies (UWI), established in 1948 as a college of the University of London,

[1] The 1961/62 tour of the West Indies cricket team to Australia is still today considered one of the greatest test series ever played. Each of the five matches was keenly contested and the series, narrowly won 2-1 by Australia, included the first ever tied test.

gained full university status in 1962. I obtained my Bachelor of Laws degree at its faculty of law, which commenced operations in 1970. The Council of Legal Education, a regional body currently operating Law Schools in three different Caribbean States, began graduating lawyers in 1975. The Caribbean Development Bank (CDB) was established in 1969 to support the economic growth and development of Caribbean countries. In 1972, the Caribbean Examinations Council was established to provide educational certifications in place of the General Certificate of Education (GCE) examinations, which I did as a teenager. I believe your equivalent is the Scottish Qualifications Authority (SQA).

In the wake of the break-up of the Federation, at an inter-state level, there was also established first the Caribbean Free Trade Association (CARIFTA). In 1973, CARIFTA was upgraded to the Caribbean Community and Common Market (CARICOM) established by the Treaty of Chaguaramas[2]. And then in 2001, the CARICOM treaty was revised with a view to establishing a Caribbean Community Single Market and Economy[3]. The full Members of the Caribbean Community are now Antigua and Barbuda, The Bahamas, Barbados, Belize, The Commonwealth of Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.

Establishment of the Caribbean Court of Justice (CCJ)

The Revised Treaty was accompanied by an Agreement Establishing the Caribbean Court of Justice signed by the member states of CARICOM. The countries of The Bahamas, Haiti and Montserrat are members of the Community but not signatories to the Agreement Establishing the CCJ. The CCJ was constituted with two different jurisdictions: an international or Original Jurisdiction whose remit is to interpret and apply the Revised Treaty and an appellate jurisdiction to substitute the CCJ for the Judicial Committee of the Privy Council. The Agreement's provisions obliged Member States to delink from the

[2] Treaty establishing the Caribbean Community (adopted 4 July 1973 and entered into force 1 August 1973) 946 UNTS 17.
[3] Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the Caricom Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002)

Privy Council and to send their final appeals to the newly established CCJ. Some governments entered a reservation to those provisions. Interestingly, neither Trinidad and Tobago nor Jamaica entered any such reservation. As a matter of international law, therefore, these two most populous Anglophone Caribbean States are committed to sending their final appeals to the CCJ instead of to the Privy Council. Suriname, a civil law jurisdiction, is one of the few States that entered a reservation to these provisions for the obvious reason that, in its appellate jurisdiction, the CCJ is established as *a common law* final court. Suriname, however, like Trinidad and Tobago and Jamaica, participates fully in the international or Original Jurisdiction of the Court.

The Agreement establishing the CCJ states that the Court was conceived as "a further step in the deepening of the regional integration process"[4] with a mandate to play "a determinative role in the further development of Caribbean jurisprudence through the judicial process".[5] The Agreement makes provision for a President and nine other judges, but from inception in 2005 the workload has only necessitated the appointment of six judges plus the President. For substantive hearings the Court usually sits with a Panel of five judges, but on occasions, and in particularly important cases, all seven judges may sit.

The CCJ's Original Jurisdiction

The Original Jurisdiction, so-called in contrast to our Appellate Jurisdiction, fills a crucial gap that previously existed. Under the original Treaty of Chaguaramas, there was no legally binding mechanism to compel Member States to fulfil the obligations they had undertaken. Those obligations were either voluntarily implemented or, with impunity, not at all complied with. Under the Revised Treaty, however, the CCJ is vested with compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of that treaty and to render binding judgments. Those disputes may be between or among Member

[4] See Preamble to the Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319.
[5] ibid

States or between Member States and the Community, or they may be cases brought by a national of a Member State to pursue or vindicate a right accorded by the Treaty. So as to ensure consistency and uniformity in its interpretation and application, the Revised Treaty requires national courts and tribunals to refer to the CCJ for determination of any question arising before them in proceedings where interpretation or application of the Treaty is necessary for resolution of the municipal proceedings.[6] The function of the Court in the Original Jurisdiction loosely approximates that of the Court of Justice of the European Union. Several provisions of the Revised Treaty were actually borrowed from the European Free Trade Agreement. Other provisions, especially those involving the movement of factors, were inspired by, if not borrowed from, analogous provisions of the EU treaty and the World Trade Organisation.[7] In its Original Jurisdiction, therefore, the CCJ frequently cites judgments of the Court of Justice of the European Union and of the WTO Appellate Panel. Unlike the case in the Appellate Jurisdiction, there is no room for dissenting opinions as the Court has imposed on itself a rule that it will, in each Original Jurisdiction case, render a single Opinion[8].

The CCJ's Appellate Jurisdiction

In its Appellate Jurisdiction, the Court serves as the final court of appeal for those CARICOM States that, in compliance with their treaty obligation, have altered their national Constitutions to adopt the Court as a final appellate court. Currently, five States - Barbados, Guyana[9]Belize, the Commonwealth of Dominica, and Saint Lucia have done so. In the Appellate Jurisdiction, the Court functions much like any common law Supreme or final appellate court does.

Enforceability of Judgments and Court Rules

[6] (n 3), art 214
[7]Adrian D. Saunders, "A Commentary on the Early Decisions of the Caribbean Court of Justice in its Original Jurisdiction" I.C.L.Q. 2010, 59(3), 761-778.
[8] See: Part 3.4(4) of the Caribbean Court of Justice (Original Jurisdiction) Rules 2024.
[9] Guyana actually ceased to use the Privy Council as long ago as 1970. Between 1970 and 2005 that country had a single appellate tier

The judgments of the CCJ are enforceable in the same manner as municipal judgments are. Separate procedural Rules govern respectively the Original and the Appellate Jurisdictions of the Court. The CCJ Agreement, enacted into domestic law by the Member States[10], has given those rules the force of law.[11] As a rule of thumb, the Court undergoes a review and revision process of its procedural rules, if necessary, every two or three years to ensure that they are consistent with efficient and best practices.

Judicial independence of the CCJ

The Member States has instituted impressive measures to guarantee both the institutional and judicial independence of the CCJ. The judges enjoy security of tenure until the age of 72. Upon application, their terms may be extended to age 75. The President serves a non-renewable seven-year term or until age 75, whichever is sooner. Judges are selected by an eleven-member Regional Judicial and Legal Services Commission ("the Commission"). The President of the Court chairs the Commission and comprises persons selected by or drawn from regional Bar Associations and Law Schools, Judicial Service Commissions, Public Service Commissions and Civil Society. The judges are recruited on a competitive and merit-filled basis. Vacancies are widely advertised, and applications are received from individuals from within and outside the Caribbean. The Commission compiles and interviews those on a shortlist before making a final selection. Most judges are naturally Caribbean nationals, but a judge need not be a Caribbean national to be appointed. An appointed judge must, however, reside full-time in the Caribbean. Among the first cohort of judges selected, there was an Englishman, David Hayton, and also a

[10] See The Caribbean Court of Justice Act No. 10 of 2004 Antigua & Barbuda; Cap 117, Barbados; Act No. 16 of 2004, Belize; Act No. 23 of 2005, Commonwealth of Dominica; Act No 3 of 2005, Grenada; Act No 16 of 2004 Guyana; Act No 17 of 2005 Jamaica; Act No 7 of 2004, St Christopher & Nevis; Act No. 34 of 2003 Saint Lucia; Act No 32 of 2004 St Vincent and the Grenadines; Act No 22 of 2003 Suriname; Act No 8 of 2005 Republic of Trinidad & Tobago.

[11] See Section 3 of the respective CCJ Acts

Dutch judge. The latter, Justice Jacob Wit, tragically developed an aggressive form of cancer while still in service and died a little over a year ago.

The President of the Court is appointed by a vote of three-quarters of the Heads of Government of CARICOM Member States, following a nomination submitted by the Commission to the Heads. The Heads of Member States are not entitled to consider a candidate of their own choosing. Here, too, any vacancy is advertised, and the Commission carries out the same process as with a candidate for the office of judge of the Court.

The financial independence and autonomy of the Court are secured through a novel mechanism. In lieu of annual subventions from Member States, the Court was at the outset provided with a US$100 million trust endowment secured with monies raised by the Caribbean Development Bank. These monies were turned over to a group of Trustees whose role is to invest the funds prudently. The idea is that the yield on this investment should be sufficient to defray the operational budget of the Court over an indefinite period. The US$100 million raised by the Bank was repaid to the Bank over time by Member States in a manner agreed among them, roughly proportionate to the GDP of each Member State. The obligation to repay was premised solely on a Member State's participation in the Original Jurisdiction of the court so that those States that still send their final appeals to London had the same obligation to repay as those that de-linked from the Privy Council. The upshot of these arrangements is that the CCJ is simultaneously guaranteed its funding while not being required to interface with the political directorate of any of the States of the region on matters relating to the financing of the Court. The arrangement has worked remarkably well.

As a self-contained international organisation, unlike municipal courts, the CCJ is required, fundamentally, to handle or arrange for itself *all* its non-adjudicative and administrative matters, including its financial, protocol, human resource, communications, logistics, IT, training and security issues, among others. The price of such welcome independence and autonomy is the necessity to

undertake enormous responsibilities. The Court and the Commission have, therefore, placed great emphasis on the development of internal mechanisms to optimise good governance. To this end, the Court's operations are strategically directed and heavily policy-laden.

Strategic Planning and Policy Agenda of the CCJ

Five-year strategic plans have been devised as dynamic tools to guide the Court in continually improving its delivery of justice, adapting to challenges, building internal resilience, and enhancing operational efficiency and stakeholder access. A Monitoring and Evaluation Committee oversees adherence to the Strategic Plan.

Since 2022, the CCJ has been an implementing member of the International Consortium of Court Excellence, an organisation of judiciaries, judicial institutions, and affiliated bodies from various parts of the world. The Consortium actively promotes court excellence principally by publishing, continually revising and encouraging the use of a framework (the International Framework for Court Excellence)[12] that enables courts to measure their performance against internationally recognised benchmarks. The Framework utilises a methodology that features continuous self-improvement through a cycle of self-assessment, planning, implementation and evaluation. The Court strives faithfully to follow this approach to its non-judicial work.

As the region's apex court, the CCJ is ever conscious of its obligation to set high ethical and operational standards that provide an example for other courts in the region. The Court publishes on its website[13] an Annual Report, which summarises the judicial and administrative work undertaken throughout the period under review. [14] The Report includes court performance data as well as audited financial reports.

The Court, in conjunction with the Commission, has also developed a raft of policies to govern various aspects of court administration and staff and judicial conduct. These policies support a rules-based environment that conduces to transparency, accountability, fairness and consistency. They also serve to

[12] See https://www.courtexcellence.com/resources/the-framework
[13] Caribbean Court of Justice: https://ccj.org/
[14] See: Caribbean Court of Justice Annual Reports: https://ccj.org/publications/annual-reports/.

provide clear guidance for judges and staff. Notable policies of relatively recent vintage include the third iteration of the Judicial Code of Conduct (on this occasion, accompanied by suitable Regulations that guide the public on how ethical complaints may be made against judges or staff), a Harassment Policy, a policy aimed to improve Access to Justice for Persons with Disabilities and a policy on the use of Artificial Intelligence.

The Commission plays a huge role in fostering this rules-based approach. It also provides financial oversight of the Court's budgeting and expenses as well as its human resource practices. The Court has been blessed to have always had a cadre of competent, hard-working Commissioners who demonstrate deep commitment to seeing the Court function in an optimal manner.

CCJ's Interface with other bodies

The CCJ maintains a warm relationship with several international bodies, including, for example, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. We also naturally enjoy a fraternal relationship with the judicial officers and municipal courts of the English and, slightly less so, the Dutch-speaking Caribbean. Three main vehicles help to nurture this relationship. The first is the Conference of Chief Justices and Heads of Judiciaries of Caribbean countries, which meets annually. The Conference serves as a platform for regional collaboration on judicial matters and the sharing and exchange of good and innovative practices. When Global Affairs Canada was moved to provide financial assistance to Caribbean judiciaries to the tune of Can$20million, the Judicial Reform and Institutional Strengthening Project or "JURIST" (as it was called) was executed by the CCJ for and on behalf of and in close collaboration with the Heads of Judiciaries of Caribbean countries.

Not long after the CCJ was established, the Heads of Judiciaries conceived the idea of establishing a Caribbean Association of Judicial Officers[15] as a complement to the CCJ. CAJO, as it is fondly called, facilitates Caribbean judicial officers of all stripes (from Registrars, Court Administrators and

[15] Caribbean Association of Judicial Officers: https://thecajo.org/

Magistrates right up to CCJ judges) to take advantage of opportunities to network, fraternise and collaborate in the building of a Caribbean jurisprudence reflective of our culture and our society in general and the common values laid out in our respective national Constitutions. To this end, CAJO organises continuing education programs that enhance the knowledge and skills of judicial officers in areas such as the use of modern court technology, judicial integrity, judicial well-being, gender sensitivity, appropriate dispute resolution, court administration and efficient judicial processes. The CCJ's role in sustaining CAJO has been critical. We provide CAJO with indispensable logistical and administrative support, and from its inception, the Association has been led by a Judge of the CCJ.

The Court has also created the CCJ Academy for Law[16] as its own vehicle to pursue initiatives and programmes that showcase the place of law in economic and social development. The Academy has played a huge role in recognising and celebrating the contribution of eminent jurists to the development of the Caribbean legal landscape. One of the Academy's main interests at this time is fundamental reform of the criminal justice system in the Caribbean. To this end, the Academy convened a major Conference in Bridgetown, Barbados, in 2022, attended by a wide variety of high-level representatives of the various bodies that play a role in criminal justice. As we understood that here in Scotland, you have also been engaged in similar reform initiatives, we were very pleased to have Lord Beckett join us on that occasion to deliver a Paper on Pre-Trial Proceedings, Enforcing Time Limits, and Active Case Management. The Conference culminated in the adoption of the Needham's Point Declaration[17], which contains 39 recommendations for criminal justice reform. The Declaration has not just received high commendations and significant interest from stakeholders across the entire region, but most importantly, it has served as a catalyst for urgent improvements to the criminal justice sector throughout the region.

E-filing and Digital Case Management

The litigants who come before the CCJ hail from as far north as Belize in Central America to Suriname and Guyana in South America. And then, of course, there is Jamaica and several islands of the Anglophone Caribbean. The Court's commitment to affording the highest quality of service at an

[16] CCJ Academy for Law: https://ccjacademy.org/
[17] See: https://ccj.org/needhams-point-declaration-on-criminal-justice-reform/

affordable cost for these stakeholders motivated us at an early stage to invest in the innovative deployment of modern information and communication technology.

Many of the Court's systems, including its core court and judicial operations, are paperless. E-filing was first introduced at the CCJ in 2013, and electronic case management was implemented in January 2017. By providing 24/7 access to stakeholders, e-filing eliminated a variety of constraints imposed on litigants by geographical boundaries and fixed day-time court hours. Our e-filing and digital case management systems have allowed for efficient management and easier statistical analysis of filed cases.

Video conferencing, live streaming, and virtual hearings have complemented e-filing and digital case management systems. Many litigants and their lawyers are content to have their cases heard online as this offers them greater convenience and economy. The public can view our hearings in real time on the Court's YouTube platform. By eliminating the need for both physical travel to the seat of the Court and the use of paper, the adoption of these technologies aligns fully with the Court's "Go Green" initiative to encourage and promote environmentally friendly practices.

Deployment of these modern technologies permitted the Court to maintain business continuity seamlessly during the COVID-19 pandemic. Most of all, these technologies contribute to the arduous task of building and sustaining public trust and confidence in the region's apex court.

With the rapid evolution of artificial intelligence (AI), the Court has partnered with the Caribbean Agency for Justice Solutions to explore the potential benefits of Generative AI. This has resulted in the development of an AI tool the Court refers to as "Ask CCJ". The tool has been trained specifically on our judgments, court procedures, rules, and papers and speeches delivered by our judges. The use of this tool, as of now restricted to internal stakeholders, lightens the workload of our judges and research assistants.

Challenges Faced by the CCJ

I hope I have not painted too rosy a picture of a court that actually faces important challenges. The main challenge faced by the Court in pursuit of its mandate (to play "a determinative role in the further development of Caribbean jurisprudence through the judicial process"[18]) is the relatively modest uptake in cases filed in both the Original and Appellate jurisdictions. The reasons for this are varied. In the Original Jurisdiction, the bulk of the legal fraternity in the Caribbean is not particularly experienced in litigation that is based on international law. Nor are the lawyers well-versed in the provisions of the Revised Treaty. They are often, therefore, not particularly alert to advise on or exploit potential opportunities for advancing the causes of their clients in matters related to the Revised Treaty. Municipal judges, on the other hand, have not referred any of the few disputes that have come before them which could benefit from an interpretation by the CCJ of this or that provision of the Treaty. To try to address this problem, over the last two years, the Court has been hosting a series of seminars with these stakeholders and the business community in order to explain the provisions of the Revised Treaty, the rights it confers on Caribbean nationals and the role of domestic courts in the implementation of the Revised Treaty. Funding for that project has been generously supplied by the European Union.

In the Appellate Jurisdiction, the question that is always asked of us is why less than one-half of eligible Caribbean States altered their Constitutions to accede to the Appellate Jurisdiction of the CCJ. Why don't the other States also send their final appeals to a court for which their tax dollars have been handsomely paid? The reasons here are also varied. One of them is that there are extraordinary constitutional hurdles that must first be overcome. The States of Grenada and Antigua & Barbuda, for example, have been saddled with independence constitutional provisions that absolutely require those Governments not just to obtain a qualified parliamentary majority in support of the measure but additionally to garner a two-thirds vote at a popular referendum. On three separate occasions, the Governments of these two States easily obtained the qualified parliamentary majority, but on each occurrence, the measure failed at the level of the popular referendum. In Jamaica, where the Constitution does not ostensibly prohibit parliament by ordinary majority from altering that country's Constitution when the Jamaica parliament did so in 2004 using a bare parliamentary majority, the Privy Council, overriding the local courts, voided

[18] See Preamble to the Agreement Establishing the Caribbean Court of Justice (adopted 14 February 2001, entered into force 23 July 2002) 2255 UNTS 319.

the measure by implying into the Constitution the need for at least a qualified majority parliamentary vote.[19]

Quite apart from the objective constitutional hurdles, there are other factors at play. In any country, only an extremely small number of cases ever reaches the final appellate court. In the countries that have not yet acceded, the mass of people still know relatively little of the CCJ or fully appreciate its seminal value to the development of Caribbean society and Caribbean jurisprudence. Many consider that there are far more important bread and butter issues with which their government should concern itself. It is also true that, in spite of the impressive institutional and administrative measures employed by the CCJ to ensure transparency, consistency, access to justice and judicial independence, some people still consider that British justice will always be purer. Regrettably, such thinking is also a legacy of colonialism. To be fair though, generally speaking, there is not the highest regard for municipal and State institutions in the region. Only the countries of Barbados, The Bahamas, St Vincent and the Grenadines and Dominica join the United Kingdom in ranking in the top 20% of Transparency International's 2024 Corruption Perception Index[20] and many persons make no distinction between the CCJ, a self-governing international entity, and local municipal institutions.

Mixed messaging from London has not helped. Consider these two related questions. In principle, Is an independent, well-staffed Caribbean court the most suitable vehicle for determining Caribbean final appeals? Are the UK's top judges spending an inordinate amount of their time in the Privy Council hearing appeals that should ideally be heard by a Caribbean court that has been established specifically to hear these appeals? It might surprise you to learn that since the Agreement Establishing the CCJ was signed, fulsome but contradictory answers to these straightforward questions have been publicly advanced by the most senior British judges.[21]

[19] See *Independent Jamaica Council for Human Rights (1998) Ltd and Others v Marshall-Burnett and another* [2005] UKPC 3.
[20] See: Transparency International, Corruptions Perceptions Index 2024, <https://www.transparency.org/en/cpi/2024 > accessed 15 February 2025.
[21] Compare for example, remarks respectively of Lord Hoffman in October 2003 as quoted in *The JAMAICA OBSERVER* found at https://www.jamaicaobserver.com/news/author-calls-for-recognition-of-the-colon-

For my part, the most important roles of a final appellate Caribbean court are to protect and advance democracy and the rule of law and to expound the country's written Constitution. In fulfilling these roles, it is often necessary to tackle difficult or 'grey areas' of the law and, in the process, to weigh and settle on one of almost equally persuasive contending views. Appropriate resolution of these grey areas necessarily involves *judgment* and an element of judicial policy-making. Law, after all, is not mathematics, and a written Constitution is not to be interpreted as one might a Tax Code. Construction of a Constitution cannot be divorced from its social, environmental and cultural context and a deep appreciation of its historical roots. Judges who are naturally alienated from the pulse of a society, from the narrative that guides and animates that society and, moreover, who do not personally experience the consequences of the decisions they make are not ideally positioned to offer binding prescriptions to govern that society.

Jurisprudence of the CCJ

What of the jurisprudence of the CCJ? We have heard some 37 cases in the Original Jurisdiction. In one of the first such cases, we grasped the opportunity to make clear that, under the Revised Treaty, Member States of the Community are now operating under a regime that is quite different from the one that prevailed under the original treaty, where there was a voluntary system of compliance with agreed undertakings. We stated then that –

> *By signing and ratifying the Revised Treaty and thereby conferring on this Court ipso facto a compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Revised Treaty, the Member States transformed the*

man/?q=FULTON%20WILSON%2C%20Trinidad%20Express%20reporter; of Lord Phillips in 2009 quoted in *The Financial Times* at https://www.ft.com/content/3c5b14a6-a61d-11de-8c92-00144feabdc0; of Lord Hodge published in the *Jamaica Gleaner* on Sunday December 10, 2023 accessed at https://jamaica-gleaner.com/article/lead-stories/20231210/privy-council-and-ccj-can-exist-side-side-says-uk-court#google_vignette; and of Lord Reed published in *The Jamaica Gleaner* on Thursday November 23, 2023 accessed at https://jamaica-gleaner.com/article/letters/20231123/letter-day-privy-council-here-serve-jamaicans#google_vignette.

erstwhile voluntary arrangements in CARICOM into a rule-based system, thus creating and accepting a regional system under the rule of law.[22]

In another case brought by a cement manufacturer against Guyana[23] the Court clarified the circumstances in which private entities were entitled to commence proceedings. In that suit, brought by nationals respectively from Trinidad and Tobago and Guyana, the defendant State of Guyana argued that it was not permissible for the Second Claimant to sue its own State. The Court held essentially that the Revised Treaty's provisions on non-discrimination took precedence, and the Guyanese Claimant could not be placed in a position that rendered it less advantageous in pursuing its rights than its Trinidadian co-Claimant.

Several of the cases in the Original Jurisdiction concern such matters as the imposition or failure to impose applicable tariffs, economic policies that affect regional trade, or disputes where CARICOM nationals are denied their right to live, work, or travel freely. Almost all of the cases filed in the Original Jurisdiction have been brought by private entities. It was, therefore, very pleasing when the Court received a request from the Community and several States to render an Advisory Opinion on the interpretation and application of certain Articles of the Revised Treaty.[24]

In its Appellate Jurisdiction, the CCJ is perhaps best known for its judgments that advance the rule of law and address circumstances where litigants seek redress for alleged breaches of their constitutionalised rights. An interesting case we heard early on was one from Barbados[25] where the critical material linking an accused to a homicide was the evidence of a dentist. The accused was arrested very shortly after the discovery of the lifeless body of the victim in a wooded area. The dentist was allowed to see the accused while the latter was in custody. The dentist informed the police that a wound on the arm of the accused resembled a bite mark. The dentist then examined the body of the deceased woman, and his further investigations and measurements convinced him that not only was the accused's wound a bite mark but that this particular bite mark could only have been made by the deceased.

[22] *TCL v The Caribbean Community* (2009) CCJ 2 (OJ) at [32].
[23] *TCL & TGI v Guyana* (2009) CCJ 5 (OJ).
[24] See [2020] CCJ 1 (OJ) (AO).
[25] *Gibson v The Attorney General* (2010) CCJ 3 (AJ).

Bite mark evidence belongs to a highly specialised scientific field called forensic odontology. Some controversy surrounds its reliability as compared with say, fingerprint or DNA evidence. The dentist was not himself a forensic odontologist, but his bite mark conclusions were effectively the only solid evidence in the possession of the Director of Public Prosecutions. The accused, insisting on his innocence, invoked the provisions of the Barbados Constitution that are analogous to the right to a fair trial set out in Article 6 of the European Convention on Human Rights. He demanded that the State provide him with the funds to retain a forensic odontologist as part of his right to "facilities" for the preparation of his defence. The CCJ disagreed with the applicability of this particular premise for invoking his right to a fair trial. Bearing in mind, however, that the accused was a man of very limited means facing a possible death sentence, the Court concluded that a fair trial could only be guaranteed if he was placed in a position to test the evidence being adduced by the State. We, therefore, instructed the State that it either had to pay for the services of a forensic odontologist to assist the defence or else they had to stay the proceedings against the accused. The reasoning in the judgment was carefully calibrated to forestall the opening of a floodgate.

In the case of *Lucas v Chief Education Officer*[26], I noted in my Opinion that

> *The [constitutional] right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial.*

This approach to granting relief for breaches of the rule of law has since been adopted in a few of our judgments. Perhaps the most memorable was the case of *Maya Leaders Alliance v Attorney General of Belize*[27].

The Belize National Assembly, commendably, had altered that country's Constitution in 2001 to include in the Preamble the obligation of the State to adopt policies "which protect the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples". The Belizean courts took up

[26] [2015] CCJ 6 (AJ), 86 WIR 100, at [138].
[27] [2015] CCJ 15 (AJ).

the mantle and, partly on the strength of this amendment to the Preamble, have recognised the rights and interests of the Mayan community in Southern Belize to their customary land tenure. In the celebrated *Maya* case the CCJ held that, as part of the Court's duty to afford the Maya their right to the protection of the law, the State of Belize had a responsibility to take positive steps to recognise and protect Mayan indigenous land rights. Our judgment required the Government to engage in a range of complex measures designed to satisfy the reasonable interests of the local Mayan community. Since delivering the judgment in 2015, the Court has presided over regular hearings to monitor compliance with the intricate undertakings required of both the State and the Maya.

Generally, the Court's jurisprudence is consistent with that fashioned over the years by the Judicial Committee of the Privy Council. There is one area, however, in which our jurisprudence has diverged. It has to do with the interpretation of a clause (the "savings clause") found in the Constitutions of certain Caribbean States. In isolation, read literally or textually, the clause appears to preclude the courts from invalidating or modifying any existing law first enacted during the colonial era, with little or no regard to whether the law deprives the citizenry of their fundamental rights.

The issue of appropriate interpretation of the savings clause repeatedly came before the Privy Council in the early noughties in relation to the mandatory death penalty for murder. In most independent Caribbean States, that punishment is contained in a law first enacted during the colonial era. Everyone now accepts that this punishment is arbitrary and inhumane, not least because of its automatic character coupled with the grave and irrevocable consequence attending its execution. The question is whether the constitutional savings clause has the effect of "*saving*" this penalty, and all other colonial laws, from being declared by courts to be unconstitutional? In 2004, the Privy Council assembled a nine-member Bench in the combined hearing of the cases of *Watson*[28], *Matthew*[29] and *Boyce*[30] to determine finally this question that had generated great controversy and contrasting Privy Council judgments. A bitterly divided Privy Council ultimately decided 5 - 4 to interpret the clause at face value. Writing for the majority, Lord Hoffman preferred to read the clause literally. He determined that if and when colonial laws were found

[28] [2004] 3 WLR 841 | Privy Council.
[29] *Matthew v The State of Trinidad and Tobago* [2004] UKPC 33; [2005] 1 AC 43.
[30] *Boyce & Anor v R (Barbados)* [2004] UKPC 32 (07 July 2004).

to be inconsistent with the rights and freedoms that were declared in the Constitution, it was for Parliament, not the courts, to provide the remedy. This decision produces interesting practical consequences. It has the effect of creating a curious double standard. If a statute was enacted during the colonial era, the savings clause effectively hobbles the court in the carrying out of its duty to afford effective relief to persons whose human rights are infringed by that law. If, however, the fundamental rights of the citizen are infringed by a statute enacted in the post-independence period, courts are under a specific duty to modify or render void the post-independence law so that the fundamental rights of the citizen are secured.

In a trilogy of cases - *Nervais*[31], *McEwan*[32] and *Bisram*[33] - the CCJ differed from the view of the Privy Council majority. In somewhat strident language, the CCJ stated in *Nervais* that interpreting the savings clause in the way in which the 2004 Privy Council majority did evince -

> *... an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the [provision] formed part of the inherited laws from the colonial regime must be condemned.*[34]

It seems to me that at the heart of the divergence lies profound differences in our respective understandings of the essence of Caribbean constitutionalism, of the meaning and consequence of independence and the manner in which judges can and should deploy the range of tools that are available to interpret a written Constitution in a purposive manner.

Political independence and the Constitutions that ushered in the same represent, in some respects, a continuation of governance systems and structures. Save Guyana, the parliamentary and electoral systems, for example, for the most part, are inspired by Westminster. But it is also true that, in important

[31] *Nervais v R* [2018] CCJ 18 (AJ).
[32] *McEwan v the AG of Guyana* [2018] CCJ 30 (AJ).
[33] *Bisram v DPP* [2022] CCJ 7 (AJ).
[34] *Nervais v R* [2018] CCJ 18 (AJ) at [58].

respects, Caribbean Constitutions herald a break from the colonial past. These Constitutions proclaim deep-seated values that were not always manifest during the colonial period. The Constitutions proclaim with pride the citizenry's right to enjoy in peacetime certain fundamental rights that are laid out. These Constitutions exalt self-determination. They break with British tradition in that they are not premised on parliamentary supremacy. In most Constitutions, Parliament, even when it acts unanimously, is incapable of enacting certain legislation without the support of the people in a popular referendum. In each of the Constitutions, responsibility for protecting the rights of the citizenry is specifically entrusted to the judiciary, which is authorised in appropriate instances to constrain both legislative and executive acts. Neither parliamentary inertia (for which there may be myriad explanations) nor parliamentary indifference to the harmful consequences of an existing law provides, in my respectful view, justification for constitutional interpretation that precludes courts from affording effective remedies to persons affected by laws that trample on constitutionalised human rights, irrespective of when those laws happen to have been enacted.

The respective appellants in the 2004 Privy Council cases of *Watson*, *Matthew*, and *Boyce* were all seeking to avoid automatic death penalties for murders for which they had been convicted. It would have been unfortunate enough if the precedent set by those cases "concern[ed] only, the constitutionality of the mandatory death penalty for murder"[35]. Immunising pre-independence laws from human rights challenges, however, goes well beyond persons found guilty of murder.

Throughout various parts of the Anglophone Caribbean, colonial laws remain on the statute books that, to cite one example, justify and reinforce a climate of intolerance of and even hostility towards the LGBTI+ community. Given that notorious climate, Parliament is hardly likely to be the institution that will boldly step in to protect the rights of persons who fall within that vulnerable minority. Legislatures are not always quick to address very contentious issues when only a minority is affected. The reasons are varied. Sufficient votes in the Assembly may not be available. There may be vociferous opposition from influential conservative or religious groups. Legislators may fear political backlash. In circumstances such as these, parliaments are often content for courts to take the heat by doing what courts are called to

[35] [2005] 1 AC 433 at [35].

do – rendering without fear or favouring justice according to law. And, true to form, in recent times, trial judges throughout the region have been striking down sodomy laws enacted during the colonial period.[36] And the State has rarely appealed these decisions.

Conclusion

In conclusion, I believe it says something for the vitality of the rule of law in the Caribbean that all the judgments of the CCJ have been fully and promptly complied with, especially given that, in not a few of these cases, incumbent governments were on the losing side of the litigation and the orders made by the Court must have been very bitter pills to swallow.

Despite our challenges, the CCJ remains resilient and optimistic. The Judges and Staff of the Court are fully cognizant of the fact that the establishment of the Court is perhaps the most impactful decision ever made by the Caribbean Community. We see ourselves as stewards. As should be the case in a well-functioning democracy, through our decision-making, a healthy dialogue takes place between the CCJ and the Parliaments of the various States. In not a few instances, legislatures have enacted new or amended existing legislation and legal procedures to accord either with our judgments or intimations contained in those judgments[37].

No Court, anywhere in the world, can honestly state that it has attained a state of perfection, but every court must continuously aim for perfection. A court is one of excellence if it always so strives, and, in this regard, the CCJ makes every effort to live up to its vision *"To be a Model of Judicial Excellence"*.

Esteemed Colleagues, ladies and gentlemen, this has been an enormous privilege. I thank you for your kind attention, and I reiterate my gratitude to the Scottish Council of Law Reporting for affording me the signal honour of addressing you on an occasion such as this.

[36] See the cases of: *Caleb Orozco v AG* [2016] No. 668 of 2010 in Belize*; Jason Jones v AG* Unreported CV2017-00720 in Trinidad and Tobago; *Orden David v AG* [2022] ECSC J0705-1 in Antigua and Barbuda*; Jamal Jeffers v The AG* [2022] ECSC J0829-2 in St. Kitts and Nevis*; McClean-Ramirez et al v AG* BB 2023 HC 17 in Barbados and *BG v AG* DOMHCCV2019/0149 in Dominica.

[37] See for example: *Shanique Myrie v The State of Barbados* [2013] CCJ 3 (OJ) which triggered an overhaul of Immigration Procedures across the Caribbean; *Cruise Solutions Ltd Discovery Expeditions Ltd v The Commissioner of General Sales Tax and The Attorney General* [2018] CCJ 27 AJ where the Parliament of Belize amended legislation to conform with an Opinion expressed in the Court's judgment; *McEwan v AG* [2018] CCJ 30(AJ) and *Bisram v DPP* [2022] CCJ 7 (AJ) GY where the Guyana Government amended relevant legislation to comply with the Judgments of the Court.