

A CARICOM HUMAN RIGHTS REGIME

**A CRITICAL EXAMINATION OF THE ENFORCEABILITY OF SOCIO-ECONOMIC
HUMAN RIGHTS IN THE CARIBBEAN**

Tatiana G. Walters

TABLE OF CONTENTS

ABSTRACT	3
INTRODUCTION	4
CHAPTER I:	ECONOMIC AND SOCIAL HUMAN RIGHTS
	Socio-Economic Human Rights6
	International Covenants.....8
CHAPTER II:	THE CARIBBEAN BACKGROUND
	Constitutions in the Commonwealth Caribbean.....10
	European Human Rights System.....14
	Inter-American Human Rights System.....15
	African Human Rights System.....16
	Institutional Differences Between the Systems.....17
CHAPTER III:	CARICOM AND SOCIO-ECONOMIC RIGHTS
	Charter of Civil Society for the Caribbean Community.....19
	Justification for Enforcement.....20
	Extent of Protection.....21
	The Caribbean Court of Justice and its Original Jurisdiction.....21
	The Charter, CSME, and RTC.....23
	The RTC vs a Separate CARICOM Human Rights Regime.....25
	Potential Challenges to the CARICOM Human Rights Regime...29
CHAPTER IV:	FULLY FUNCTIONAL CARICOM HUMAN RIGHTS REGIME
	Justiciability of Social Rights.....31
	Moving Away from Dualism.....32
	Benefits of a CARICOM Human Rights Regime.....34
	Recommendations.....36
CONCLUSION	39
REFERENCE LIST	40

ABSTRACT

This study will critically analyze the obligations placed upon the governments of the Commonwealth Caribbean by the International Convention on Economic, Social and Cultural Rights 1966 and whether the states have conformed to their legal duty. It will advocate that there is an urgent need to have a balanced approach between Fundamental Civil and Political Rights which are enshrined in the Constitutions and Fundamental Social Rights to properly execute the obligations imposed upon the governments under International Law. Karel Vasak's concept of the three generations of rights adequately defines how human rights are interpreted. Civil and Political liberties make up the first generation of rights and require the state to not carry out actions that would interfere with the protection of these rights. Social, economic and cultural rights form the second generation and require the state to take positive actions to ensure the protection of these rights; and the third generation, "rights of solidarity" require collective action of individuals and the state.¹ An entitlement-oriented approach is mandated by the rights-status and justiciability of fundamental social rights. It will be argued that if domestic law incorporated fundamental social rights, they would be allowed to connect concretely to the needs that they purport to satisfy. That is, access and availability to fundamental socio-economic rights would contribute to individual empowerment, the alleviation of individual hardship, and facilitate meaningful social and political structural transformation in the Commonwealth Caribbean. The notion of individual positive entitlement will be explicitly articulated and developed in this study. In so doing, critical consideration will be given to the constitutional landscape in the Commonwealth Caribbean, the development of a CARICOM Human Rights Regime, enforcement of the Charter of Civil Society for the Caribbean Community, and important conceptual questions concerning the nature of socio-economic rights and their justiciability, with an argument being made in support of the Caribbean Court of Justice as the final arbiter, in its original jurisdiction.

¹Domaradzki, S., Khvostova, M. & Pupovac, D. Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse. *Hum Rights Rev* 20, 423–443 (2019).

INTRODUCTION

The unwarranted, unjustifiable gap between the two sets of human rights requires an urgent solution. It can be argued that the gap was created by political machinations and not by the law for legal reasons. With the Commonwealth Caribbean Constitutions being modeled from the United Kingdom, heavy emphasis has been placed on fundamental civil and political rights as was done by the United Kingdom and Western countries during the period of cold war division, and consequently the justiciability of fundamental social rights became stagnated. Citizens in the Commonwealth Caribbean, save in the exceptional circumstances, are unable to bring action for violation before an independent and impartial court appointed by law to request an adequate remedy for such a violation. As the matter now stands the promotion and protection of fundamental social rights are left almost exclusively to political institutions rather than judicial bodies.

While there exists an instrument which addresses socio-economic rights, the Charter of Civil Society for the Caribbean Community (“CCS”) which was adopted by members of the Caribbean Community in 1997, it is only a reality on paper as the Member States expressly indicated that it is not to be enforceable. It would appear that the Heads of Government have not glanced back at it since its inception as obligations stipulated under the CCS have not been met. The absence of enforceability, ergo the inability to access socio-economic rights does not propagate human dignity as the two are intricately connected. To redeem CARICOM citizens, a Human Rights Charter reflective of the history and cultures of the Community must be developed.

The three existing Human Rights Systems: the European, Inter-American, and African provide guidance on what the institutional design should and should not employ in the construction of CARICOM’s own unique system. To ensure that the protection of fundamental rights is strengthened, further guidance can be taken from the Revised Treaty of Chaguaramas (“RTC”) and how the Caribbean Court of Justice (“CCJ”) goes about interpreting and applying its provisions as this treaty recognises the CCJ as its highest judicial body. The burden of effecting change and supporting development as a region does not squarely lie with the Judicial Bodies in the region; it equally falls on the Executive to act in such a manner than aligns with the International Covenants, International Law and Regional Treaties. That requirement has already

proven to have its challenges, with a trail of case law emanating from the Caribbean Community pinpointing who, what, where and how positive obligations imposed by the state fell short. Therefore, mechanisms must be adopted to prevent Member States from any dereliction of their undertakings when they fail to ratify international and regional treaties.

ONESIMUS LEGAL

CHAPTER ONE

SOCIAL AND ECONOMIC RIGHTS

Socio-Economic Human Rights

Social rights are moral, legal and societal rules and provide understanding of what is necessary to fulfill people's social needs and to promote social solidarity. They are based on the concept of equality, and guaranteed access to essential social and economic opportunities and services. Fundamental social rights are labour-related rights, the right to health care, the right to housing, the right to education, the right to food. These Fundamental Social Rights have been part of international human rights since the Universal Declaration of Human Rights in 1948. However, when compared to fundamental civil and political rights, far less attention is given to fundamental social rights which form the content of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). It has been argued that there are fundamental differences between these two categories of rights as they have been viewed as two different concepts and their differences have been characterised as a dichotomy. Civil and political rights have been characterised by very precise language, imposing negative obligations which do not require States to splurge on resources for their implementation, and therefore can be applied immediately. Comparatively, economic, social and cultural rights are characterised by vague terms which impose only positive obligations, rendering them conditional on the existence of resources and involving progressive realisation.² Due to these alleged differences, some human rights commentators take the position that civil and political rights are justiciable while economic, social and cultural rights are non-justiciable.

I am fully cognizant that the extent to which the economic, social and cultural rights are available in a particular country depend on the level of economic development and resources that are available for distribution. A relief of this situation can be seen in the developed countries in terms of the availability and quality of education, healthcare, human services, and the level of unemployment and the level of income. For these reasons in Canada, the United States, and the United Kingdom these rights are well-developed but in the Developing countries such as the

²Domaradzki, S., Khvostova, M. & Pupovac, D. Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse. *Hum Rights Rev* 20, 423–443 (2019).

Commonwealth Caribbean, the rights may not be that advanced. The lack of development in Developing countries in turn impacts on the level of respect which is given to the civil and social human rights especially of the poor by government administrations such as the police, the court system, the civil service, and some non-governmental organizations. The availability of social justice should not depend on the level of material resources that are available in a particular country but this is frequently the reality. However, it is my considered opinion that the availability of social justice can be tied to satisfying certain basic needs of the poor that should be integrated into the developmental aspirations of the particular country. Economists identify it as the “Basic Needs” approach³ and it has been implemented in some Developing countries. This involves setting a timetable of action to bring about, within a reasonable time, the upliftment of the living standards of the poorer members of the population. This is a timetable that sets the period of limitation when they should have their basic needs satisfied.

Human dignity and socio-economic rights are inseparable as they are intricately connected. I contend that if basic social needs are satisfied, it would contribute to meaningful structural social transformation and the removal of unemployment, underemployment, and poverty in the Commonwealth Caribbean. This would result in greater respect for social rights and by extension for civil rights and peace in the world. States have a duty to promote and encourage the exercise of human rights which derive from the inherent dignity of humans, and are essential for the free and full development of persons.⁴

Although some of the Fundamental Social Rights have been adjudicated in common law countries such as the United States, Canada and the United Kingdom, in the Commonwealth Caribbean there is hardly any mechanism for the protection and enforcement of such rights because they are considered to be non-justiciable. Therefore, courts have not seriously engaged these rights based on traditional objections, and those that have been litigated in the courts have been sent away empty. It may be that dualism, which was previously axiomatic is giving way to a new era of dominance by monism in which the domain of international law is evolving to the position whereby state parties that have ratified international instruments create immediate legal rights on

³Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press; Rawls, J. (1993). The basic needs approach is the shortcut to the realization of social and economic human rights for many poor persons in the communities in a short period of time.

⁴ Charter of Civil Society for the Caribbean Community (1997): Article II (3), Article III, Article X(a), Article XIV(c).

the municipal plane which individuals can enforce against Member States as well as against their own states of nationality. State sovereignty has been pierced beyond recovery.

International Covenants

From a historical perspective, in the Commonwealth Caribbean there is a dearth of litigation stemming from the ICESCR in the municipal courts although there is statutory and administrative law that makes certain social rights enforceable, such as the Education Acts and Health Acts⁵ in Barbados. Most of the Caribbean jurisdictions are signatory to the ICESCR and the International Convention on Civil and Political Rights (“ICCPR”).⁶ The ICESCR does not set up any formal machinery for the protection of these rights even although the Optional Protocol provides *locus standi* for any citizens whose rights has been infringed to complain to the Committee.⁷

All of the independent states of the Commonwealth Caribbean, the monarchical as well as the republicans, have written rigid Constitutions with entrenched Fundamental Civil and Political Rights and Freedoms. These Constitutions are extremely difficult to amend because they require special majorities and in some cases referenda.⁸ The background to this constitutional analysis is the small island jurisdictions which are sometimes dominated by a single political party or multi-political party both in the presence of political and executive abuse of citizens’ rights by the Executive. The rigid Constitutions are intended to control Executive and political powers, keeping them within their respective sphere of operation and in accordance with the law. In a democratic state the only institution that stands between the freedom of the citizens and political tyranny is the court. Therefore, the court is regarded as the guardian of our democratic freedoms.⁹

⁵Health Services Act CAP 44; Education Act CAP. 41.

⁶Montserrat, St. Kitts and Nevis, St. Lucia are not signatories to either the ICESCR . The other Member States of CARICOM are signatories to both the ICESCR and the ICCPR.

⁷Article 11.1 and 11.2 of the International Covenant on Economic, Social and Cultural Rights (1966) outlines States Parties obligations to take appropriate steps to ensure the realization of the right to an adequate standard of living, and fundamental rights to be free from hunger.

⁸Constitution of Antigua and Barbuda section 47(5), Sch. 1 pt.1 (vii), Chapter IX including s.122 (2/3 valid votes); Constitution of the Commonwealth of the Bahamas, Articles 54 and 104 (majority vote); Constitution of the Commonwealth of Dominica Sections 42 and 106 (major valid votes); Constitution of the Co-operative Republic of Guyana Chapter 1:01 Articles.73 and 92 (majority, optional); Constitution of St. Kitts and Nevis Sections 38 and 99 (2/3 valid votes: Constitution of St. Lucia ss.41, 108 (majority valid votes); Constitution of St. Vincent and the Grenadines Sections 38 and 99 (2/3 valid votes). There is no referendum requirement in Barbados, Belize, and Trinidad and Tobago.

⁹*Maubury v. Maddison* 5 U.S. (1 Cranch) 137 (1803); *Collymore v. Attorney General for Trinidad and Tobago* (1967) 12 WIR 5; [1970] AC538.

The principal difference between the ICCPR and the ICESCR is that the rights contained within the ICCPR are immediately applicable upon ratification while the ICESCR recognises the principle of progressive realisation which describes a core aspect of States' obligations to recognize and protect economic, social and cultural rights under international treaties. Progressive realisation recognises that not all States will necessarily have the resources needed to implement economic, social and cultural rights.

When consideration is given to progressive realization, it is important to also acknowledge that it may be one of the more notable reasons why there remains a reluctance to constitutionalize or protect economic and social rights within the Caribbean Community. This is in light of the financial expenditure that would accompany the constant and efficient protection of these rights, which governments are not presently in a position to afford. Further to this, historical records prove that the governments in the region hardly ever live up to their regional financial responsibilities, as seen with the University of the West Indies, the West Indies Cricket, and the Treaty of Chaguaramas;¹⁰ ergo the Caribbean Court of Justice is funded by a Trust Fund set up by the CARICOM Heads of Government and has gone without financial blunder for the 19 years of its existence.

It is well established that the standard of living which is afforded to citizens would depend on the level of advancement and the material resources that are available to the particular country. It would be an insuperable problem to enforce these rights even if they fell within the purview of the courts. Therefore, the obligation on State Parties is to take steps to maximize available resources to progressively fully realize the rights of the ICESCR Covenant.¹¹ It follows then, the States Parties ratification of the Covenant furnishes the undertaking "to respect and ensure all individuals within its territory, and subject to its jurisdiction, recognize the rights in the ICESCR.

¹⁰ Nelson, R (Justice). (2007). *The Caribbean Court of Justice and the Caribbean Single Market and Economy* in Hall, K. & Chuck-A-Sing, M. *Caricom Single Market and Economy: Genesis and Prognosis*. Kingston: Ian Randle Publishers, at pp.164-185.

¹¹ Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (1966).

CHAPTER TWO

CARIBBEAN BACKGROUND

Constitutions in the Commonwealth Caribbean

At the present time, socio-economic rights which are enshrined in the International Covenant on Economics, Social and Cultural Rights 1966 are not reflected in the Constitutions, except for the case of Belize, Grenada, and Guyana.¹² Though the Charter of Civil Society for the Caribbean Community (CCS) exists, the scope of rights is not as expansive and lacks implementation and methods of enforceability; the Charter remains unutilized since its creation in 1997. The protection of social rights under the Covenant and the CCS have no practical proscription and may not be litigated in municipal courts of law as causes of action for fear of non-justiciability, and policy considerations which consider them to be outside the purview of judicial review.¹³ Their protection depends on regular reporting of abuse through the methodology of naming and shaming the perpetrator states, and international rhetorical invocation of condemnation for violations. These methods are inherently deficient. It can be argued that the arbitrary and discriminatory misconduct of public administrative authorities or governmental failure to implement appropriate social policies, can be remedied if these rights are constitutionally vested in the individual citizens who can enforce them in the same or similar manner as is done with civil and political rights in the municipal courts; or alternatively, rights vested under the CCS can be enforced through the Caribbean Court of Justice in its original jurisdiction. This must be done by vesting enforceable rights in individuals, instead of requiring progress reports to Parliament or any international organization on the achievement of these rights, or in the alternative, making both remedies available to the individual citizens on the international plane. Socio-economic rights will have no effect unless rights are protected under the Constitutions or such a Charter whose remedies are directly linked to judicial remedies, so that they cannot be easily overridden by the ordinary legislative processes of Parliament but rather litigated in the ordinary courts of law. These rights should ultimately be contingent upon duties and obligations.

¹² The Constitution of Belize 1981, the preamble; Part II, section 15 addresses the right to work (minimum protection); the Grenada Constitution Order 1973, Chapter I, section 1 speaks to the right to work; the Constitution of the Co-operative Republic of Guyana Chapter 1:01: Part 1, Chapter I addresses the Principles and Bases of the Political, Economic and Social System and Chapter II entails Fundamental Rights and Freedoms of the Individual.

¹³ *Aurelio Cal Et Al v. Attorney General of Belize*, Supreme Court of Belize (Claims No.171 and 172 of 2007) (18 Oct 2007) (Mayan land rights).

If socio-economic rights remain ephemeral things, they will offer no value to anyone. That is, they afford no legal rights, are ineffectually and legally impotent. To save them from being mere illusions and to give them the efficacy and the force of law they must be prescribed and enshrined in the Constitutions as is the case with civil and political rights or at least be incorporated by customary practice into the legal system.¹⁴ This move would truly be rights brought home constitutionally in the Commonwealth Caribbean legal system for the facilitation of the process of social and economic integration and the political advancement of the people.

It follows inexorably that Commonwealth Caribbean citizens who live in a culture of constitutional democracy cannot be fully empowered by the protection of civil and political rights alone; this must be balanced and supported by the equal protection of socio-economic and cultural rights by enacting an enforceable CARICOM Human Rights Regime. To this end there is a need to develop a feasible jurisprudential approach to the adjudication of claims based on socio-economic rights that are derived from the Constitutions, an appropriately implemented CCS and international treaties.

The Constitutions of all the independent states in the Commonwealth Caribbean which are former British colonial enclaves make provisions for human rights and the machinery for their protection. However, the Constitutions only largely recognise civil and political human rights, for instance the Constitution of Barbados at Chapter 3, ss.11-23.¹⁵ Generally, the Constitutions do not recognise socio-economic and cultural human rights, except in some instances where the preambles make special references to social goals which indirectly recognise some of the socio-economic rights as described by the United Nations Covenant on Social, Economic and Cultural Rights 1966. There are a few significant exceptions that are found in the Constitutions of Belize,¹⁶ Grenada,¹⁷ and Guyana¹⁸ which protects the most socio-economic rights as compared to other Caribbean

¹⁴ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 2 WLR 356.

¹⁵ The Constitution of Barbados, Chapter III: Protection of Fundamental Rights and Freedoms of the Individual.

¹⁶ *Ibid* 12.

¹⁷ *Ibid* 12. The Court of Appeal in *Duncan v. Attorney-General of Grenada* (1997) CA 3 explicated the meaning of this provision. See also *Attorney-General v. Mohammed Alli* (1987) 41 WIR 176; Protection under the Constitution of the Co-operative Republic of Guyana Chapter 1:01 Articles 39(2), 251, 149J; Preamble of the Constitution of Belize; and Charter of Civil Society for the Caribbean Community.

¹⁸ Constitution of the Co-operative Republic of Guyana Chapter 1:01: Part 1, Chapter I addresses the Principles and Bases of the Political, Economic and Social System and Chapter II entails Fundamental Rights and Freedoms of the Individual. Some notable socio-economic rights include: Article 149J provides the right to clean, healthy and sustainable environment; Article 142 provides

territories. Apart from these Constitutions, the socio-economic rights are protected by ordinary legislation, otherwise it is left to political policy or moral persuasion.¹⁹ However, none of these Constitutions offer protection for the right of cultural diversity, although it is available in a lesser extent in Belize,²⁰ and Guyana.²¹

Article 40 of the 1980 Constitution of Guyana provides: “Every person in Guyana is entitled to the basic right to a happy, creative and productive life, free from hunger, ignorance and want. That right includes the fundamental rights and freedoms of the individual. Part 11 Specific Rules, Title 1, Protection of Fundamental Rights and Freedoms of the individual includes all of the conventional rights found in Caribbean Constitutions but goes much further. It protects the right to work, the right of public sector workers to pension, the right to participate in the decision-making process of the state, equality before the law, equality of status, equality for women, rights for indigenous persons, right to free education, right to an environment that is not harmful.

Article 38(2) provides that in the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions and charters bearing on international law. The Title 1A Protection of Human Rights, under Article 154A(1) provides that every person is entitled to the human rights enshrined in the international treaties Guyana has acceded to. More generally, Article 39 provides that in the interpretation of fundamental rights provisions in the Constitution a court shall pay due regard to international law, international conventions, covenants, and charters bearing on human rights. A series of commissions have been created to promote and enhance the fundamental rights and the rule of law – a Human Rights Commission, Women and Gender Equality Commission, and Indigenous Peoples’ Commission, the Rights of the Child Commission.

The Preamble to some of the Constitutions mention the protection of social and economic rights. For example, the Constitution of Grenada, the preamble, declares how the ideals of freedom and the enjoyment of freedom.²² This can be contrasted with the recital found in the Bill of Rights of

protection from deprivation of property; the right to property and security of tenure including collective rights is also addressed under Articles 19 and 40; Article 40 recognizes the right to food.

¹⁹Ibid 14.

²⁰ The Preamble.

²¹ The Preamble, Article 23 Right to leisure, Article 27(2) Right to education, Article 35 National Culture, Article 74(2) Duties of Local Democratic Organs, Article 149F Equality for women, Article 149G Indigenous peoples’ right.

²² Whereas the people of Grenada, (e) reiterate that the ideal of freemen enjoying freedom from fear and want can be best achieved if conditions are created whereby everyone may enjoy the economic, social and political, civil and cultural rights.

Belizean Constitution which is an explicit statement in relation to the right to work.²³ The 1973 Constitution of Grenada also provides a provision for the right to work but in a less extensive description.²⁴

In a decision which is not too far removed from the one above in *Attorney-General of Antigua and Barbuda v. Goodwin*,²⁵ the Court of Appeal of the Eastern Caribbean States rejected the claim that the right to life gave rise to protection for the right to work in a conventional constitution. However, in *Duncan v. Attorney-General of Grenada*,²⁶ the Court of Appeal of the Eastern Caribbean States explicates the meaning of the right to work in section 1 of the Grenada Constitution.²⁷

It is my considered opinion that social and political advancement can only be efficacious and redemptive when the fundamental freedoms and human rights of the citizens in a democratic body politic have a solid foundation,²⁸ are respected by public authorities, and form the core values of the way of life of the peoples – the innate, inherent culture of the society. The security of the citizens in this regard is crucially important for the enjoyment of those fundamental freedoms, and human rights that are accorded to them in a democratic state. In the absence of security, the civil and political liberties of the citizens would come under threat of infringement, abrogation, and/or extinguishment. What is meant by security of the people is the physical security of their persons and their homes, their travel to various places in the world, as well as their security in relation to adequate food, water, electricity, housing, reasonably free universal healthcare and education. This might very well be the catalysis for the redemption of the people in the Commonwealth Caribbean.

²³Section 15 of the Constitution of Belize. See: *Fort Street Tourism Village v. Attorney-General of Belize*, where the Court of Appeal explained that when the Constitution speaks of an opportunity to work, it is the opportunity that must not be denied to the citizen.

²⁴ Whereas every person in Grenada is entitled to the fundamental rights and freedoms, that is to say, the right ... to each and all of the following fundamental right: (d) the right to work.

²⁵ AG 1999 CA 5.

²⁶ (1997) CA 3; *Attorney-General v. Mohammed Alli* (1987) 41 WIR 176; Protection under the Constitution of Guyana Articles 39(2), 251, 149J; Constitution of Jamaica s.13(3)(1), Preamble in the Constitution of Belize.

²⁷ Chief Justice Byron stated “the Constitution also guarantees the right to work as a fundamental right in section 1(d). I do not think it necessary to do more than state that the right to work can be infringed even when one is receiving salary, if one is prevented from discharging the duties of one’s office. It is unthinkable that the constitution could intend that the PSC could arbitrarily order a public servant to be prevented from performing his job for an indefinite period.”

²⁸Malcolm Langford, *Social Rights Jurisprudence Emerging Trends in International and Comparative Law* (2008) p. 27: The position of the South African Constitutional Court is that socio-economic rights are expressly included in the Bill of Rights and the ‘question is therefore not whether socio-economic rights are justiciable under the Constitution, but how to enforce them in a given case. It can be argued that if social rights are included in a legal instrument, by definition they become legally binding and capable of enforcement.

There are three main regional human rights mechanisms which closely relate to the international approach, and have successfully implemented infrastructures and human rights regimes which allow for enforceability of said rights: the European Human Rights System, the Inter-American Human Rights System, and the African Human Rights System.²⁹

European Human Rights System

This System demonstrates how international cooperation can bolster the promotion and protection of human rights in a region as it offers a comprehensive set of legal instruments and supervisory mechanisms which ensure the effectiveness of the human rights regime in the region. The European Union primarily deals with economic and political issues within the Union while the Council of Europe is focused on promoting and protecting human rights, democracy, and the rule of law in Europe through the use of the European Convention on Human Rights (ECHR),³⁰ and the European Court of Human Rights.³¹ The Council of Europe is the leading human rights organisation, having developed more than 200 legally binding international treaties to protect individuals.³² It makes decisions by consensus among Member States while the European Union makes decisions through a system of qualified majority voting or unanimity.

Initially, the dual system was operating where only the Commission or Member States could bring cases before the European Court. This has since changed with the advent of Protocol 11 in 1998 which issued a number of procedural changes, including allowance for victims, organizations or

²⁹Alston, P & Goodman, R. (2013). *International Human Rights: The Successor to International Human Rights in Context*. London: Oxford University Press, Chapter 4: *Economic and Social Rights*; Palmer, E. (2007).

³⁰Entered into force in 1953, and applies to all 47 Member States of the Council of Europe. It is based on three pillars: Human Rights, Democracy and the Rule of Law. The Convention guarantees a wide range of rights such as: the right to life (Article 2), freedom (Article 5), freedom of expression (Article 10), freedom of assembly (Article 11), privacy (Article 8), freedom from torture (Article 3), freedom from slavery (Article 4), the right to a fair trial (Article 6), the right to the protection of property (Protocol 1, Article 1)

³¹ The European Court of Human Rights is the only international court with jurisdiction to deal with cases brought by individuals, rather than States.

³²For instance, the Inter-American Convention on the prevention, punishment and eradication of violence against women, European Convention on Offences relating to Cultural Property (ETS No. 119), Additional Protocol to the European Convention on Human Rights which provides for the abolition of the death penalty in peacetime, and the European Social Charter, which guarantees social and economic rights, such as the right to work, social security and protection of health.

any person to directly submit petitions to the Court.³³ Article 35 of the ECHR and Protocol 15, Article 4 outline the admissibility criteria.³⁴

It is noteworthy that civil and political rights enshrined in the Constitutions of the Commonwealth Caribbean follow a basic pattern that is derived from the United Nations Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.³⁵

Inter-American Human Rights System

Under this system, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the two principal entities. Both have jurisdiction to decide individual complaints concerning alleged human rights violations. The Commission engages in human rights monitoring and promotion activities, while the Court issues advisory opinions on issues in relation to interpreting the Inter-American instruments upon request of an Organization of American States Organ or Member State. There are two main human rights documents: The Inter-American Convention on Human Rights (IACHR)³⁶ under the aegis of the Organizations of American States and monitored by the Inter-American Commission on Human Rights as well as the Inter-American Court of Human Rights, and the American Declaration of Rights and Duties of Man.³⁷ A major drawback for this system is the limitation of only allowing the Member States or the Commission

³³Article 34 of the European Convention on Human Rights as amended by Protocols Nos. 11 and 14, Convention for the Protection of Human Rights and Fundamental Freedoms: Individual applications – The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

³⁴Article 35(1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken (Protocol 15, Article 4 directs that the words “within a period of six months” shall be replaced by the words “within a period of four months”); (2) The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information; (3)(a)The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal (Protocol 15, Article 4 directs the words “and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal” shall be deleted); (4) The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

³⁵It is arguable that the differences which previously existed in constitutional interpretation in the United Kingdom courts has since dissipated to some degree. This is due to the passing of the Human Rights Act 1998 which has incorporated into its domestic law, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

³⁶The Convention came into effect 13 December 1951.

³⁷The American Declaration was adopted at the Ninth International Conference of American States in Bogotá, Columbia.

to propose cases to the Court,³⁸ while the Court is responsible for interpreting and applying the IACHR, and issuing judgments. This dual step system was inherited from the European system, which has since changed their own infrastructure to establish the right of petition of victims.

The African Human Rights System

The African Commission on Human and Peoples' Rights (ACHPR) covers categories of rights and duties including civil and political rights, economic, social and cultural rights and the right to development.³⁹ This Charter makes provisions for bodies to promote and protect human and people's rights with the freedom, equality, justice and dignity being essential to the objectives of the ACHPR. The African Commission is the quasi-judicial body with its main mandates being to promote and protect the rights, and to interpret the Charter.⁴⁰ Its functions are similar to that of the committees established under international treaties such as conducting studies, researching human rights problems in Africa, making recommendations to the government, and hearing complaints.⁴¹

The judicial arm of the African Union is the African Court which is intended to complement the African Commission⁴², and is established under the Protocol to the African Charter. The Court has jurisdiction for all cases and disputes concerning the interpretation and application of the Charter, and can issue advisory opinions on any legal matter relating to the Charter.⁴³

³⁸ Article 46.1 of the American Convention on Human Rights sets out the necessary requirements for a petition on human rights violations to be admissible before the Commission: 46.1 In order for a petition or communication submitted in accordance with Articles 44 or 45 to be admitted by the Commission, the following shall be required: (a) that internal remedies have been exhausted, in accordance with generally recognized principles of international law (this can be mitigated under paragraph 20 of Article 46); (b) that it is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment; (c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and (d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile and signature of the person or persons or legal representative of the entity submitting the petition.

³⁹ Articles 1-27 of the African Charter on Human and People's Rights (1981).

⁴⁰ Article 30 African Charter on Human and People's Rights (1981).

⁴¹ Articles 56 (5)-(7) of the African Charter on Human and People's Rights (1981): To bring a complaint before the Commission, local remedies must be exhausted, unless the procedure was unduly prolonged, thus it must be brought in a timely manner. Rule 50 of the Rules of the Court direct that applications must: a) indicate their authors even if the latter request anonymity, (b) be compatible with the Constitutive Act of the African Union and with the Charter, c) not be written in disparaging or insulting language directed against the State concerned and its institutions or the African Union, d) not be based exclusively on news disseminated through the mass media, e) be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged, f) be submitted within a reasonable time from the date local remedies were exhausted or from the date the Commission is seized with the matter, and g) do not deal with cases which have been settled by those States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the Charter

⁴² Article 2 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

⁴³ Articles 3 and 4 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

Institutional Differences Between Systems

The *locus standi* requirements for both the Inter-American and African systems are very liberal, allowing for strong involvement of civil society and non-governmental organisations; it creates a framework for public interest litigation. In the Inter-American System individuals are not able to petition the Court directly as it must be assessed by the Commission first, ergo cases arrive at the court only when the Commission views that as being important enough for the Court. The request for advisory opinions is limited to member states as well as the organisations and its organs. Comparatively, in the African Human System, individual litigants are at liberty to approach the Commission or the Court directly without having their matter prematurely struck out. Compared to these two systems, the European System is older and more complex in structure, consisting of several different bodies and legal instruments.

Under the Inter-American Human Rights System, in a sense, the Court can be construed as a second body to compliment the role and responsibilities of the Commission which is where most of the work takes place due to the nature of human rights work being related to undertaking research, providing advice, assisting with capacity building, engaging stakeholders on the state of human rights in their respective countries, and how that ought to be improved. On the other hand, in the African System, individuals or non-governmental organisations can approach the Commission with their petition provided that the member state allows for it, and they can also approach the Court; it is also possible for either body to refer cases to each other.⁴⁴ As is the standard, when the Commission handles a petition, the result is a non-binding decision whereas the Court's decision is binding. In addition to the Court's advisory jurisdiction and contention jurisdiction, it can also adopt thematic reports from time to time, but only if the particular theme on which it wishes to speak is not on the agenda of the Commission; this does not occur in the Inter-American Human Rights System.

From an operational standpoint, the Court holding this authority can be viewed as challenging given that it is primarily a judicial body resolving cases and it would not have the capacity to engage in the usual research and assessing empirical data to make the reports. Further to this, when the Court adopts these reports, consideration must be given to it potentially becoming problematic

⁴⁴ Article 2 and Article 5(3) of the African Court Protocol.

later on when cases which implicate positions the Court previously set, are now before the same Court. In theory, it seems well and good to have such a multifaceted court; however, it is a duplicating function as the Commission already has this task.

Despite the challenges mentioned hereinabove the African Human Rights Systems appears to be a more adequate system for CARICOM to model the infrastructure of a Charter due to its recognition of collective rights, its perspective of viewing individual and peoples rights are linked and its recognition of the right to development. Further, the goals of CARICOM are more in alignment with those of the African Union, in that both Communities are geared towards the integration of their countries and their differing cultures.

CHAPTER THREE

CARICOM AND SOCIO-ECONOMIC RIGHTS

Charter of Civil Society for the Caribbean Community

In February 1997, the Heads of Government of CARICOM Member States adopted the CARICOM Charter of Civil Society for the Caribbean Community (“CCS”) at the eighth Inter-Sessional Meeting in St. John’s, Antigua. It is argued later that publication by Ministers of government amounts to substantive legitimate expectation.⁴⁵ This Charter addresses civil and political rights, and socio-economic rights with its primary goal committing CARICOM Governments to an obligation of respect for the fundamental human rights and freedoms of the individual without distinction as to age, colour, creed, disability, ethnicity, gender, race, religion or social class.

Similarly to the African Charter on Human and Peoples’ Rights (“ACHPR”),⁴⁶ this Charter incorporates socio-economic rights. However, the Charter of Civil Society falls short where the issues of implementation and enforceability arise as the expressed desire of the founders was that it is not to be legally binding, and it was only referenced in the preamble of the RTC.⁴⁷ Socio-economic rights present a unique opportunity to promote a substantive interpretation of all human rights rather than a formalistic conception, which is unresponsive to the political and social context and power relations in society.⁴⁸ For that reason the Charter would be a great tool to operationalize in the CARICOM Member States for the benefit of citizens’ rights holistically. Though the provisions of the CCS direct for the establishment of a National Committee,⁴⁹ no such committee has ever come into being. Under the Charter, the National Committee is comprised of State representatives, representatives of other social partnerships, and other persons deemed to be of high moral character and recognised competence in their respective fields of endeavour.” It is empowered to receive reports of allegations of breaches, or non-compliance with the provisions of the CCS.

⁴⁵ *Attorney General of Barbados and Others v. Joseph and Boyce* [2006] CCJ 3 (AJ).

⁴⁶ African Charter on Human and People’s Rights (1981), Articles 1-27.

⁴⁷ The Hon. Justice Winston Anderson, JCCJ: *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions* pp.8.

⁴⁸ Malcolm Langford, *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014), p. 64.

⁴⁹ The Charter of Civil Society for the Caribbean Community, Article XXV.

The National Committee seemingly carries similar responsibilities to that of the African Commission's quasi-judicial body but falls short as there are no powers ascribed to the CCS Committee to hear matters, nor is there an assigned regional court. It would seem that the National Committee would be just as ineffectual as that of the Inter-American System where justice is hard to come by due to created institutional hurdles. It follows that it is imperative to have a court established to promote and enforce human rights; or as the RTC already exists, the socio-economic rights can be incorporated under it with the CCJ to hear complaints under in its original jurisdiction,⁵⁰ and award compensation.⁵¹

Justification for Enforcement

The CCS would be beneficial if it was enforceable as it would not only strengthen the protection of fundamental rights by making them more explicit for citizens, but it would also address the social rights which the constitution does not cater for. For instance, social rights are not expressly found in the Barbados Constitution, rather they are established in other legislative works such as the right to education which is governed by the Education Act Cap. 41, and the right to healthcare under the Health Services Act Cap. 44. These legislative instruments were established, not because of the fundamental rights in the constitution but rather, due to the obligations created when Barbados became a signatory to international treaties such as the Convention on the Rights of the Child (1989). The intended effect of the CCS was to incorporate socio-economic rights at a regional level to propagate the human dignity of CARICOM nationals. If this Charter was in effect, it can be argued that it would be recognised as a regional treaty, ergo the socio-economic rights would not need to be incorporated into the constitution of Member States, but rather they would operate under the Charter. Such regional integration is exactly what was intended when CARICOM was created.⁵²

⁵⁰ The Preamble, Revised Treaty of Chaguaramas (2001).

⁵¹ *Trinidad Cement Limited v. Caribbean Community* (2009) TT 2009 CCJ 1; *Trinidad Cement Limited Et Al v. The State of the Co-operative Republic of Guyana* (2009) GY 2009 CCJ 10.

⁵² David Berry, *Caribbean Integration Law* (2014) p.32. Integration involves greater intervention into existing domestic laws than mere cooperation. It is a means to a variety of ends, including those of economic, social, cultural, political and of legal nature.

Extent of Protection

International human rights in the first instance, creates obligations for states and when states carry out the obligations in the treaties it is beneficial to the citizenry. These obligations are casted in the form of rights. However, access to these legal rights becomes a challenge because many governments sign treaties but don't incorporate them into domestic law as required by their state obligation to respect.⁵³ The crux in making the Charter for Civil Society enforceable would be devising methods of enforceability which governments cannot escape without being held accountable since charters are discretionary for governments to enforce.

While the method of preparing annual reports undertaken by Human Rights Committees and Organisations is better than domestic political persuasion, it may not necessarily produce the degree of compliance that is desirable because rogue countries can dilly-dally with the submission of the report. This is indeed a very difficult area to monitor from a distance.⁵⁴ It then follows that there must be an independent institution serving as the final arbiter, built upon a jurisprudence reflective of Caribbean history, which can foster uniformity in the interpretation and application of the CCS. If the rights are not established as effectual rather than illusory they would be treated as unenforceable social rights. Though civil and political rights are enforceable, social rights are not for the traditional reasons, in that they place burdens on governments; and small governments in developing countries may not be able to manage such burdens as every individual would be entitled to commence civil litigation against the government if a social right is not satisfied. However, that fear can be allayed as it is unlikely that everyone whose right is infringed would sue the government, just as every infringement of civil and political rights is litigated.

The Caribbean Court of Justice and its Original Jurisdiction

The Caribbean Court of Justice (CCJ) is a regional judicial tribunal established by agreement among the member states of the Caribbean Community (CARICOM) in July 2003 and was

⁵³United Nations Office of the High Commissioner, *International Human Rights Law*, accessed February 23, 2024 <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law#:~:text=By%20becoming%20parties%20to%20international,the%20enjoyment%20of%20human%20rights.>

⁵⁴ 'Courts and the Legal Enforcement of Economic, Social, and Cultural Rights: Comparative Experiences of Justiciability', Human Rights and Rule of Law Series: No.2 (International Commission of Jurists: Geneva, 2008); James & Lutchman, *Law and the Political Environment in Guyana*, pp. 45 -46, 123 -135; Stephen Fraser, "The Evolution of Constitutional Protection of Fundamental Rights Provisions in Guyana" (2004) 32 Ga J. Int'l & Comp. L 613.

inaugurated in Trinidad and Tobago in April 2005.⁵⁵ The Court was funded by US \$100 million and a Trust fund was set up for the same by the Heads of Government to bolster the independence of the Court whereby the remunerations of the judges remain independent of any dispositions of governments in the region. This financial mechanism is an intelligent construction because it has given to the CCJ the control that is most important for the independence of the Court.

The Court delineates its jurisdiction in an original jurisdiction to interpret the RTC,⁵⁶ and an appellate jurisdiction as a final court of appeal, replacing the Privy Council. In its original capacity the CCJ is an international tribunal for the purposes of interpreting and applying the international treaty of the Caribbean Community, similar to the European Court of Justice, the International Court of Justice, and the West African Court of Justice. This is done by hearing and determining disputes between countries or between persons and countries, giving advisory and binding opinions when requested by member states, and having national courts and tribunals refer matters of an international nature to the CCJ for interpretation. All CARICOM Member States are obliged to accept the original jurisdiction of the CCJ; however, the appellate jurisdiction remains optional, with only five Member States having accepted this jurisdiction of the Court.⁵⁷ It seems that within the region there remains a continued reluctance to accept the CCJ in its appellate jurisdiction, which may be rooted in distrust or haunting from the atavistic colonial ghost of national sovereignty.

The objective for establishing this Court was to provide the Caribbean Community with an accessible, fair, efficient, innovate and impartial justice system built on upon a jurisprudence which reflects Caribbean history, values and traditions while maintaining an inspirational yet independent institution worthy of emulation by courts of the region and the trust and confidence of its people.⁵⁸ Anderson JCCJ acknowledged the existence of a significant human rights deficit in the regional integration movement,⁵⁹ and there have been proposals in the past to adopt a

⁵⁵ Agreement Establishing the Caribbean Court of Justice 64 WIR 447.

⁵⁶ The Hon. Justice Winston Anderson, JCCJ: *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions* pp.6.

⁵⁷ Ss.4-5 of the Caribbean Court of Justice Act, No. of 2003 as amended by Caribbean Court of Justice (Amendment) Act, No. 8 of 2005. Only Barbados, Belize, Dominica, Guyana and Saint Lucia have incorporated the Court into their legal system.

⁵⁸ Caribbean Court of Justice Annual Report 2008-2009, pp.2.

⁵⁹ The Hon. Justice Winston Anderson, JCCJ: *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions* pp.8.

CARICOM Human Rights Treaty reflective of the European Convention on Human Rights,⁶⁰ with its enforcement falling under the purview of the CCJ in its original jurisdiction. The Charter of Civil Society at its inception was not meant to be legally binding, and is merely mentioned in the preamble of the RTC as an acknowledgement that it exists, herein lies the problem. In its original jurisdiction, the Court is empowered to produce binding judicial determinations of disputes under the RTC. In this capacity, the Court is recognised as an international tribunal whose primary functions concern interpreting and applying the international treaty of the Caribbean Community, in a similar existence as that of the European Court of Justice, the International Court of Justice, and the West African Court of Justice.

The Charter, CSME and RTC

The RTC was adopted in 2001 with the intention of deepening regional integration by creating the CARICOM Single Market & Economy (“CSME”), which the CCJ is mandated to oversee.⁶¹ CSME places an abundance of rights and obligations on CARICOM Member States which they must comply with in order for nationals of these State Parties to reap the benefits afforded under the treaty. In absence of the CCJ, the CSME would be inoperable. The CCS is mentioned in the RTC but only in the preamble as an acknowledge that it exists there, herein lies the problem, is this sufficient or should the CCS stand on its own as an enforceable document? An argument can be made that CARICOM needs to come to the point where the CCS is enforceable and in so doing have an established CARICOM Human Rights Regime stemming from this Charter. It follows that consideration must be given to how it would be enforced, that is, who is going to enforce it?

The CCJ is required to superintend CSME which creates a wide range of rights and obligations among the CARICOM State Parties to the treaty in order for the nationals of these State Parties to access the treaty’s benefits. Without the CCJ, CSME would be unworkable and unable to function effectively as was the case before the establishment of the CCJ.⁶² For instance, arbitration tribunals reach decisions that are binding only on the parties to the dispute. However, the CCJ will create

⁶⁰ Sheldon McDonald, Draft Final Report - Consultancy to Conduct and Formulate the Most Suitable Arrangements to Provide for the Protection of Human Rights in the Caribbean (Sept. 16, 2005); The Hon. Justice Winston Anderson, *The Inter-American System and Its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ* 35 W. INDIAN L.J. 27, 45 (2010).

⁶¹ Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy Article 211, July 4, 1973.

⁶² The CSME is intended to benefit the region by providing: (a) more and better opportunities for trade, (b) to attract investments both foreign and local in a single economic space, (b) to facilitate deeper Caribbean integration.

legally binding precedents (norms) for all Member States which are parties to the Agreement establishing the CCJ. This is similar to the requirement under section 2 of the United Kingdom's Human Rights Act (1998) that the domestic courts are to have regard to the decisions of the European Court of Human Rights. Despite the domestic courts adhering to the status of Constitutions as the *grundnorm* of their domestic legal order, they must pay due regard to the decisions of the CCJ because they are binding.

According to Anderson JCCJ, the original jurisdiction of the CCJ is of limited relevance to human rights litigation, but has the opportunity and responsibility to engage in human rights adjudication in its appellate jurisdiction.⁶³ With this, I have to agree. It is worth noting that a harmless dichotomy may arise if the socio-economic rights fall under the original jurisdiction while civil and political rights fall under the appellate jurisdiction. In the same reality that it is unrealistic to expect the individual courts in some fifteen jurisdictions to render interpretation of the RTC, it would be wise to have the CCJ as the final arbiter for matters concerning socio-economic rights to allow for uniformity in the interpretation of the CCS. It would be a more difficult task to insert civil and political rights in a Protocol to the CCS as it would require the individual CARICOM territories to amend the constitutions, which are rigid legal instruments requiring special majorities and sometimes referendum.

Despite Justice Wit's reasoning in *Attorney General of Barbados and Others v. Joseph and Boyce*⁶⁴ being described as weak, that "adoptionist" approach can win judicial acceptance; though the Legislature is regarded as the most important creator of law, it is not the sole creator and is competent to curb law-making activity of the other branches.⁶⁵ The varying differences and nuances in interpretation which are bound to arise, outside the use of a single court, would render the CCS unworkable as a common instrument throughout the Region. The multiplicity of interpretation would not be good for business in the Region as citizens would not have the comfort of certainty, uniformity, and consistency in the application of the law that affects their lives and livelihood. It would in turn impact the aim of regional integration to create a viable, sustainable,

⁶³ The Hon. Justice Winston Anderson, JCCJ: *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions* pp.32.

⁶⁴ [2006] CCJ 3 (AJ).

⁶⁵ *De la Bastide v Saunders* (2006) 69 W.I.R. at 238.

and prosperous Caribbean. It follows that this is the regional salvation which a uniformed court system can articulate,⁶⁶ and exemplifies the crux of the CCJ's existence, being a court designed and built upon the objective of developing jurisprudence which reflects Caribbean history, values and traditions.

The RTC vs a Separate CARICOM Human Rights Regime

In light of the foregoing discussion, two possibilities become apparent to effect the enforcement of socio-economic rights; as the CCJ's supervisory role is similar to that existing under the RTC, these rights can either be included in the RTC or a separate CARICOM Human Rights Regime, stemming from the CCS can be established with the CCJ as the final arbiter in its original jurisdiction.

In considering whether the socio-economic rights can be incorporated under the RTC, consideration must be given to the enforceability of those rights within the Caribbean Community. Obviously, the RTC is governed by international law which is based on rules and principles governing the relations and dealings of nations with each other, relations between states and individuals and relations between international organizations. The Caribbean Community is an association of sovereign States. Therefore, any decisions of the Organs of the Community must be enacted into domestic law through the domestic law-making procedures before such agreements can create rights and obligations for nationals in the particular territories of the Caribbean Community. In this regard the CCJ is not a supranational body which can transcend national boundaries or interest.

However, on the international plane, membership in an international community relieves each Member State of some of its sovereignty. In *Van Gen en Loos v Nederlandse Administratie der Belastingen*⁶⁷ and *Costa v ENEL*⁶⁸, the European Court of Justice (ECJ) ruled that the European Community Law takes precedence over domestic law. It then follows that this principle must be applicable in the Caribbean Community; membership in the Community has to curtail the law-

⁶⁶ Pollard, D. E. (2004). *The Caribbean Court of Justice: Closing the Circle of Independence*. Kingston: The Caribbean Law Publishing Company Limited; Berry, D. S. (2014). *Caribbean Integration Law*. London: Oxford University Press, Chapters 7 and 8; Report of the West Indian Commission: *Time for Action* (1993) (2nd ed.). Kingston: The Press-University of the West Indies.

⁶⁷ [1963] ECR 1.

⁶⁸ [1964] ECR 585.

making power vested in the supremacy of the domestic law Member States. Under Article 211 RTC, the CCJ has jurisdiction in its original capacity to apply international law rules, and it can decide *ex aequo et bono*, with the consent of the parties.

Establishing a CARICOM Human Rights Regime that is separate and apart from the RTC, requires the infrastructure to be modeled on an existing system that has proven to be effective where it needs to be. From the institutional design of the African Human Rights System, CARICOM can adopt the mechanism of allowing citizens to bring their matters directly to the Court, rather than having a Commission curtailing individuals acceptability to justice. This would allow more agility to the process of protecting human rights. With the CCJ as the final arbiter, it can be argued that the same principles of interpretation it utilizes for the RTC can be applied. The question then becomes whether the CCJ can interpret the substantive provisions of the RTC, and if it does, how?

Article 217 stipulates that the Court shall apply rules of international law.⁶⁹ Articles 9, 240(1) and (2) go further to allow the Court to adjudicate on matters that are brought before it in its original jurisdiction even if they are not incorporated into domestic law and are inconsistent with domestic law of the Member States. This saving clause appears to be intended to cover a dualistic approach in legal systems that are shaped by the Westminster model. However, it appears that the CCJ does not see the applicability of the principle of dualism in Community law as relevant in relation to the incorporation into domestic law of decisions which are made by organs or bodies of the Community under the RTC regime.⁷⁰

The CCJ may rely on parallel principles that are obtained in International Law and International Trade Law to bring clarity and efficacy to the interpretation of treaty rights. However, the narrow interpretation used by the European Court of Justice (ECJ) should not be followed when interpreting measures that derogate from human rights. Though limited, the CCJ should seek to rely on its own broad interpretation to create more precedents which they can keep in their arsenal.

⁶⁹ Article 217 of the Revised Treaty of Chaguaramas 2001: (1) the Court, in exercising the original jurisdiction under Article 211, shall apply such rules of international law as may be applicable; (2) the Court may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law; (3) the provisions of paragraphs 1 and 2 shall not prejudice the power of the Court to decide a dispute *ex aequo et bono* if the parties so agree.

⁷⁰ *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ), para. 51.

In *Shanique Myrie v Barbados*,⁷¹ the CCJ rejected Barbados' argumentation for legislative *ad hoc incorporation* and seemingly prefers the *automatic standing incorporation*. The Court applied the purposive/teleological approach rather than the literal/restrictive approach, as opposed to a narrow interpretation, to give efficacy to the treaty rights. After all, the objective of the CCJ's establishment is to provide the Caribbean Community with an accessible and impartial justice system built on Caribbean jurisprudence. Thus, the CCJ may rely on parallel principles that are obtained in International Law, International Trade Law, and the European Union Law (EU Law) to bring clarity and efficacy to the interpretation of treaty rights under the RTC that are similar or equivalent to EU Law.⁷²

The RTC creates a commitment to the principle that Community law ought to be supreme, and should be directly effective.⁷³ It is impossible to create a structure that is foreseen by the RTC without giving direct effect to it.⁷⁴ By creating a Community of unlimited duration, with its own institutions, its own legal capacity, and a transfer of power from States to Community, Member States would create a body of law capable of binding their nationals and themselves. The Court's acceptance of the international principle of *direct effect* of Community law allows citizens whose rights have been infringed to enforce their Community rights directly before the Court by commencing legal proceedings.⁷⁵ If the court finds that there is a breach of the person's Community rights, it can award any remedy, except exemplary damages, that is available in the circumstances of that case that is within its powers that is just and equitable.⁷⁶ It follows inexorably that a Member State, Organs or Bodies which act in breach of its responsibility under the RTC may be brought before the CCJ by the victim in the context of Article 211 whether juristic or natural persons pursuant to Article 222 relying on the *direct effect* of Community law.

⁷¹Ibid 70.

⁷²The application by the ECJ in Case C-415/93 *AEA v. Jean-Marc Bosman* where the Court of Justice held that the transfer fee system operated by the European football clubs (private entities) contravened the right of free movement of football players (workers) under Article 45 of TFEU if the duration of the players contract was deemed to be too excessive.

⁷³ Article 222 of the RTC permits natural or other juridical parties other than the Member States to espouse causes of prejudice, with leave of the Court.

⁷⁴ *Trinidad Cement Limited v. The Competition Commission* (2012), TT No.OA 1 of 2012.

⁷⁵ *Trinidad Cement Limited v. Caribbean Community* TT 2009 CCJ 1; *Trinidad Cement Limited Et Al v. The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ)

⁷⁶ *Id.*

This would mean that there are two methods of tackling enforcement of Community law: one by the individual litigant and the other by a Member State. These are clearly marked out in the *TCL v Caribbean Community* judgment.⁷⁷ The acknowledgement by the Court that individual litigants, with leave, can enforce rights under the RTC is one of the Courts most remarkable achievements and it is worthy that it addressed this matter at the early stage of its own development of a creative jurisprudence that is autochthonous to the life of the Community. However, what is not clear from *Shanique Myrie* is whether the principle of *indirect effect* is applicable under the RTC.⁷⁸

The RTC confers rights on individuals which can be enforced in the CCJ in its original jurisdiction,⁷⁹ both against the state and private individuals and companies as was done in *Shanique Myrie*. Given that the CCJ in *Shanique Myrie* used the purposive/teleological interpretation to give effect to Articles 45 and 46 of the RTC in relation to freedom of movement of Community nationals in Member States jurisdictions, it is reasonable to infer that the same broad interpretation can be adopted by an established and enforced CARICOM Human Rights Charter. The CCJ's decision makes it clear that Community law takes precedence over domestic law and that it is incumbent upon Member States to put the appropriate structures in place so as not to "jeopardize the attainment of the objectives of this Treaty."⁸⁰ The CCJ through the use of the purposive approach considered the intention of the Heads of States at the Conference of 2007 and the 'spirit' of the RTC regime rather than the strict 'letter' of the law.⁸¹

The Court has made it pellucidly clear that the rights and benefits under the RTC enures to the individual citizens of each Member States and that they can be enforced in the Court as seen in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet*.⁸² The Court here is developing Caribbean jurisprudence in Community law that is not unlike that which is found in parallel jurisdictions through the application of principles of international law, but yet peculiar to

⁷⁷ [2009] CCJ 1 at para.7.

⁷⁸ The principle of indirect effect provides the means of enforcing Community rights directly against private persons horizontally (including private companies or quasi-public bodies when they are carrying out their private functions). In these situations, where a private person or organization is involved, there is normally an indirect effect. This means that the law, whether statute, common law, subsidiary legislation, involving such private 'persons' must be applied and interpreted compatibly with the Community law.

⁷⁹ Articles 211, 212 and 213 of RTC.

⁸⁰ Article 9 RTC. See: Vienna Convention on the Law of Treaties 1969: Article 26 "Pacta sunt servanda" Every treaty in force is binding upon the parties to it and must be performed by them in good faith; Article 27 Internal law and observance of treaties A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

⁸¹ *Trinidad Cement Limited v. The Competition Commission* [2013] CCJ 2 (OJ); *Trinidad Cement Limited and TCL Guyana Incorporated v. the State of the Co-operative Republic of Guyana* [2009] CCJ 5 (OJ).

⁸² (No.3) [1992].

the Caribbean. The Court's decision on the RTC regime has created the fundamental effect that all legislations, regulations, and orders in compliance with the RTC insofar as it is possible. This would mean that where there are two possible interpretations of a statutory provision, the Court must give effect and enforce the one that is compatible with the RTC.

Potential Challenges to the CARICOM Human Rights Regime

It is clear from the discussion so far that the RTC adumbrated the aspirations of the policy makers that the creation of the CCJ is intended to give Caribbean integration greater impetus towards the breakdown of the barriers that were created by colonialism. The CCJ is hailed as the instrument that finally cuts the umbilical cord of colonialism and which would liberate Caribbean jurisprudence from its Eurocentric hegemony. Even if a separate Human Rights Regime is established, it is likely to face similar challenges experienced by the RTC. This gives rise to a consideration of what problems have been faced and how the powers that be would quell them.

The troubling history of resistance to regional integration poses a threat to the effectiveness of a CARICOM Human Rights Regime. The judicial omissions made in *Sparman v. Greaves, Et Al*⁸³ and *Linton v. Attorney General of Antigua and Barbuda*⁸⁴ reflect the fractured, fragmented political insularity in the ethos of the Caribbean. In *Linton*, the court was asked to answer the issue as to whether Mr. Linton was required to present his CARICOM Skilled National Certificate at the moment of entry in Antigua and Barbuda as stated in section 5(2) of the Act.⁸⁵ The judgment highlights that the failure by the Government of Antigua and Barbuda to incorporate the RTC into the domestic law failed to give force to rights of Community nationals in the receiving Member States, and as such it was not binding in the domestic law of Antigua and Barbuda. This is contrary to the views of the CCJ in *Shanique Myrie*.

The judge's decision in *Linton* was based on the finding that the Caribbean Community Act, No. 9 of 2004 was not in force in Antigua and Barbuda because the Act was not published in the

⁸³ BB 2004 HC 21.

⁸⁴ High Court of Justice, AG 2009 HC 23 (Blenman J), 29 Jun 2009 (unreported).

⁸⁵ Justice Blenman rejected the literal interpretation of the subsection of the Act because it manifested an absurdity which Parliament could not have intended. The Judge instead looked at the mischief the Act was intended to correct and concluded that a CARICOM Skilled National Certificate could be presented after a CARICOM national has entered the country. While the Judge's decision is in good measure, the Judge did not examine Article 46 of the RTC to which the Antigua and Barbuda Act (as well as the Barbados Immigration Act) was intended to give effect.

Official Gazette as required by s.1.⁸⁶ As the RTC was not incorporated into the domestic law of Antigua and Barbuda, the applicant asserted that he had a legitimate expectation that he would be able to access the right under the RTC. The Court was not persuaded that a legitimate expectation had arisen in Mr. Linton.⁸⁷ But the CCJ had decided in *Joseph*⁸⁸ that a legitimate expectation had arisen from the Government of Barbados' public announcement to abide by the terms of the Treaty. This case is the leading authority on the subject that unincorporated international human rights treaties create new rights in Caribbean domestic law.

It is evident from the objective of Article 214 RTC, that the goal is to create a partnership between CCJ and the domestic courts and the legal systems of CARICOM in interpreting and applying the RTC for the harmonization of Community law. This would promote uniformity and consistency of the legal principles that govern the common market. These principles are well developed in the jurisprudence of the ECJ.⁸⁹ A practical example of Article 214 of the RTC in play is seen in *Sparman*⁹⁰ where Kentish J, giving her decision on October 15 2004, erred in failing to recognize the compulsory and exclusive jurisdiction of the CCJ under the RTC and to refer the matter to the CCJ under Article 214 of the RTC,⁹¹ since it is fully transposed into the domestic law of Barbados both in its original and its appellate jurisdiction. It followed inexorably that the State was obliged to observe its Treaty obligations to which it had committed itself.

⁸⁶ Which states that the Caribbean Community Act "shall come into operation on such date as the which states that the Caribbean Community Act "shall come into operation on such date as the Minister may, by notice published in the Gazette, appoint". This is buttressed by s.3(3) of the Ratification of Treaties Act, CAP. 364 of the Laws of Antigua and Barbuda which provides: "No provision of a treaty shall become, or be enforceable as, part of the law of Antigua and Barbuda except by or under an Act of Parliament".

⁸⁷ The Court relied on the House of Lords decisions in *R. v. Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC696. and *R. v. Director of Public Prosecution, ex parte Kebiline* [2000] 2 AC 326. These decisions are only persuasive and are contrary to the majority decisions of the Privy Council (the highest appellate court for Antigua and Barbuda) in the cases of *Thomas v. Baptiste* (1999) 54 WIR 387, *Lewis, Taylor, McCleod, Brown, Taylor and Shaw v. Attorney General* (2000) 57 WIR 275.

⁸⁸Ibid 67.

⁸⁹ ECJ decisions under Article 267 of TFEU re preliminary referral in Case 6/64 *Costa v. ENEL* [1964] ECR 585; Case 26/62 *Van Gend en Loos* [1963] ECR1; Case 32/75 *Cristini v. SNCF* [1975] ECR 1085; Case 246/80 *Broekmulen v. Huisarts Registratie Commissie* [11981] 2311.

⁹⁰ Ibid 83.

⁹¹ Article 211 of the RTC.

CHAPTER FOUR

FULLY FUNCTIONAL CARICOM HUMAN RIGHTS REGIME

Justiciability of Social Rights

In the Commonwealth Caribbean fundamental social rights are deemed to be non-justiciable in the municipal courts, even though in many of the jurisdictions some social rights are provided for by statute such as education and health; however, they are not treated as rights that are government compellable. Furthermore, the issue as to whether individuals have or should have legal personality in international law is highly controversial. However, there is a growing body of academic opinions which are not hostile toward it. The rational basis justifying the justiciability of social rights is derived from individual legal personality on the international plane. Unlike the individual legal personality which has taken root in the United States, South Africa, Latin America, India, it may gain acceptance throughout the Commonwealth Caribbean. It is however, the counsel of despair which too readily concedes the impossibility of advocating a general rationale for the justiciability of social rights on the international plane. The advantage which such recognition would give to the individual makes it imperative that the circumstances in which the social rights are justiciable justifies the expansion of judicial control of the legislative and executive in Commonwealth Caribbean Public Law.

The fact is that the principle of jurisdictional control is judge-made as opposed to statute-made, which means that the court is not precluded from jettisoning the rule. For over 100 years, the juridical position has been that judges have no business concerning themselves with questions of policy. The pertinent question is whether this position is tenable in light of the prevalence of human rights norms and globalization. Justice Wit in *Joseph* posited that the Legislature was not the sole creator of law. Where judge-made law is concerned, judges have an affirmative responsibility to intervene to change the law to meet changed prevailing social circumstances rather than be anchored in one hundred years of inapplicable principles which have outlived their usefulness. Unless Parliament says otherwise, the self-imposed judicial fetters should be broken. Public law must be developed to the extent where it offers feasible protection of socio-economic rights such as those embodied in the CARICOM Human Rights Regime, by vesting enforceable rights in individuals. The limitations imposed on judges, set by precedents and logic which the Caribbean

judiciary has inherited from 500 years of British colonialism that prevents them from participating in social engineering as violating the principle of separation of powers is disingenuous, considering the traditional existence of judge-made law.

The traditional position of the office of a judge, according to constitutional theory, is to interpret the law. This must be combined with the more creative role of creating a body of case law that would more satisfactorily serve the social needs of living people in Caribbean societies. The traditional position that judges cannot be concerned with policy, and that the socio-economic rights are non-justiciable have both been belied by the recent adjudications coming out of South Africa and India.⁹² Having made the assertions that it is necessary to have a CARICOM Human Rights Regime stemming from the CCS, the question that arises is how would it be enforced? The human rights project involves multiple levels, multiple actors and for its continued success, at a domestic level, there must be an operative framework which is then enforced and supervised for the protection of human rights. This brings us back to the CCJ as the final arbiter which was discussed above in Chapter 3 herein.

Of the three human rights systems, the African system is the best choice for a model infrastructure. In many respects, it is similar to the other two but in what is most significant is how it reflects the different African cultures on the content that is the preeminence of a sense of unity and responsibility to the community, and culture that is reflected in the substance as well as the operation of the system where it creates a strong framework for public interest litigation or for civil society to participate because it can litigate as well as request advisory opinions from the court which is something that is not obtained in the other systems.

Moving Away From Dualism

Given this context, the new Regime would have to be effective enough to remove dualism from the system. This may be why the shift to monism is the best step, it removes the necessity for there to be ratification. Even the CCJ is seemingly drifting away from dualism, as was seen Jamadar JCCJ's decision in *Commissioner of Police v Stephen Alleyne*⁹³ seems to imply that it becomes

⁹²*Olga Tellis v. Bombay Municipal Corporation*, Supreme Court of India, 1985, AIR 1986 SC 18.

⁹³ [2022] CCJ 2 (AJ) BB at para 24.

superfluous for a country to ratify the treaty in accordance with the principle of dualism, that is going to Parliament where the treaty has already been signed by the respective Head of Government. It infers that it is acceptable for the treaty to be implemented without the approval of Parliament. This line of reasoning is in *Joseph*⁹⁴ where Justice Wit, who is of monist background, advocated for a departure from the traditional dualist approach in order to recognize that treaties adopted by States could confer rights on individuals.

I have to agree with Justice Wit's reasoning that the three organs of the State are responsible for ensuring compliance with international treaty obligations; where the executive and legislature fail, it falls to the judiciary but the drawback to this is that it then falls within the confines of the constitutional order. This can lead to a greater conflict, in that the domestic courts have the role of being guardians of their respective Constitutions.⁹⁵ However, this can be quelled by questioning, if not our own courts and our own CARICOM Human Rights Regime, then whose? Are we eternally bound to outsource our juridical guidance? Anderson JCCJ described Justice Wit's monist approach in *Joseph* as falling short in providing a requisite foundation since he also acknowledged the rules in the "adopted" convention were subservient to legislation and the Constitution. Yet Anderson JCCJ also pointed out that international bodies such as the Inter-American Court have taken issue with this premise, who give primacy to their Conventions over Caribbean constitutions; a greater indication that we should be taking directives from our own Human Rights Conventions, Bodies and Courts in the continued feat of developing our own unique jurisprudence.⁹⁶

The Privy Council in *Briggs v Baptiste* took a contrary stance to the Inter-American Court in *Joseph and Cadogan*.⁹⁷ The Court reiterated the understanding of Caribbean courts as sentinels to their Constitutions, whereas the Inter-American Court seemingly required the savings law clause in Barbados' construction to be entirely removed. But for us having to resort to the Inter-American

⁹⁴ The CCJ in *Joseph* affirmed the ability of the Executive to create domestic rights for citizens through legitimate expectation. See: *The Parlement Belge* (1879) 4 P.D. 129, 138, 149-55, *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] EWCA Civ J0113-3.

⁹⁵ *Mitchell v. DPP*, (1986) L.R.C. 35 (P.C.). They have also emphasized the status of their Constitutions as the *grundnorm* of their domestic legal order. Chief Justice Wooding in *Collymore v Attorney General of Trinidad & Tobago* (1967) 12 W.I.R 5, 9 also affirmed that Caribbean courts are the guardians of the Constitution and constitutional supremacy.

⁹⁶ Winston Anderson, Treaty Making in Caribbean Law and Practice: *The Question of Parliamentary Participation*, 8 Caribbean Law Review 75 (1998).

⁹⁷ *Cadogan v. R* (No. 2), (2006) 69 W.I.R. 249.

Court, they would not have been involved in making radical pronouncements on our domestic law. This underscores the objective of the establishment of the CCJ as the region's autochthonous Court; have our own judge our own.

Another pertinent question that arises is whether the CCS could be seen as a treaty? It can be gleaned that the CARICOM Heads of Government came together for a reason; what was the purpose of creating an interregional document which recognises socio-economic rights if it was not to be utilised? Despite the absence of the intention to recognise it as a treaty, arguments that the CCS itself is unenforceable can be pacified by the reasoning of the court in *Joseph*,⁹⁸ that is, the Charter can be enforceable through substantive legitimate expectation even though it was the intention of the Heads of Government not to have it enforced at the regional or municipal level. *Joseph* is very important in this regard as it affirms the ability of the Executive to create domestic rights for citizens through substantive legitimate expectation. Once the treaty is recognised, the question of justiciability is then settled. The CCS has the same position as the Treaty of Chaguaramas 1973 where enforceability is considered. It follows then that in the same manner the RTC 2001 became enforceable, so too can the CCS.

Benefits of a CARICOM Human Rights Regime

Holistically, establishing a CARICOM Human Rights Regime would foster the development of an indigenous Caribbean jurisprudence. Operation at the municipal level is further ruled out if the CCJ is to operate in a similar nature as its existing original jurisdiction under the RTC⁹⁹ since this approach can only function at a regional level. If the CARICOM Charter is to be made enforceable, consideration must be given to whether it would be incorporated as part of the existing regime of the RTC or whether it should stand on its own as a separate human rights regime?

Since the RTC is already there, the socio-economic rights captured in the CCS can be included under the RTC. However, the process of amendment may be more complex. Conversely, a separate human rights regime stemming from the CARICOM Charter should stand alone, separate and apart from the RTC. Creating a standalone regime is not an unfounded concept; the European Union has

⁹⁸ Ibid 45.

⁹⁹ Ibid 61.

a separate treaty for human rights¹⁰⁰, as well as a separate treaty for trade and movement¹⁰¹ which operates similarly to the RTC. In the same manner that the RTC affords greater integration within the region, having a singular CARICOM Human Rights Regime modeled similarly would only magnify same.

One of the most important aspects of establishing a CARICOM Human Right Regime is the remedies that would be available when there is a breach of its provisions. The RTC provides no specific terms on remedies but it is necessarily implied from the RTC itself. A parallel can be found in the European Community which has no specific remedies. The liability of the Member States for breaching their responsibility which they have voluntarily undertaken must be subject to remedies for their failure to comply with Community law. The Court applied the ruling of the European Court of Justice (ECJ) in this regard in *Trinidad Cement Limited Et Al v. The Cooperative Republic of Guyana*.¹⁰² In addition to the discussion on *direct effect* in Chapter 3, the CCJ has the power, once it is just and equitable, to award any remedy except exemplary damages, where there is a breach of an individual's Community rights. This position was also pointed out by the ECJ in *Costa v ENEL*, and this line of reasoning further supports the argument to have the CCJ as the final arbiter in its original jurisdiction.

The Court also relied on the ruling of the ECJ in the case of *Francovich v. Italy*¹⁰³ where it stated that "the principle of State liability was inherent in the new legal system created by the EEC Treaty. The ECJ based its ruling on two grounds: the principle of effectiveness and Article 5 EC (equivalent to Article 9 of the RTC). The Court has put it beyond doubt that it has jurisdiction to impose a remedy on the Party who is wrong. In *Trinidad Cement Limited v. the Caribbean Community*, the Court held that it has the power to make coercive orders against Member States and the Community, and also has the power to enforce its judgment.¹⁰⁴ Therefore, if in a proper case it is held that a Member State has violated the Applicant's Community rights, then the CCJ is empowered to "grant such relief or remedy, or make such orders, within its powers as it considers

¹⁰⁰ European Convention on Human Rights 1950.

¹⁰¹Article 21 of the Treaty on the Functioning of the European Union (TFEU) 1958, and Article 45 of the EU Charter of Fundamental Rights 2009.

¹⁰² Ibid 75.

¹⁰³ [1991] ECR-5357.

¹⁰⁴[2009] TT 2009 CCJ 1, para.42 and para. 43: "In those circumstances there would be grave consequences for the rule of law in the CARICOM Single Market if a coercive order were not made."

just and appropriate." This can include an award of damages, although the Court's jurisdiction to make such orders will be accepted, guided and restricted by general principles of law.

Recommendations

Since the enforceability and institutional framework of the CARICOM Human Rights Regime must now be determined. It is my considered opinion that the Heads of Government should adopt additional Protocols to the CCS to allow for the following:

1. The National Committee should be established in each State,¹⁰⁵ and operate in a manner modeled on that of the African Commission tasked with promoting and protecting the socio-economic rights enshrined in the CCS, rationing similar to the committees constructed under international treaties. In addition to monitoring and ensuring implementation of this Charter, the main mandates should include conducting studies, researching human rights problems in the Commonwealth Caribbean and making representations to the state in breach. Where the member states refuse or fail to resolve the breach, then the Committee would be empowered to bring the matter before the CCJ in its original jurisdiction, or in a CARICOM Court should one be established. The National Committee would be a crucial quasi-judicial body since the CCJ does not have the resources to conduct the research, and the Committee can relieve the CCJ from being overburdened with cases. It follows that a person with a legal background in human rights should be included on the National Committee.
2. The recognition of the CCJ as the final arbiter.¹⁰⁶
3. Individuals and non-governmental institutions must also be able to bring their matters directly before the CCJ without the matter being prematurely struck out by another body prior to the CCJ's hearing. Admissibility criteria can also be adopted from Article 56 of the ACHPR and Rule 50 of the Rules of the African Court. To bring a complaint before the CCJ:

¹⁰⁵ In keeping with Article XXXV(4)(1) of the Charter of Civil Society for the Caribbean Community.

¹⁰⁶ The CCJ in *Boyce and Joseph v R.* [2005] 1 AC 400 took the position that States are obliged to fulfill the obligations undertaken by signing treaties. Given this precedent along with *Shanique Myrie v The State of Barbados* [2013] CCJ 3 (OJ), the CCJ is empowered in its original jurisdiction under the CCS, this position would be implemented in the enforcement of the Charter's rights

- a. Local remedies must be exhausted, unless there was inordinate delay of the procedure, thus it must be brought in a timely manner.
 - b. The complaint must be submitted within reasonable time from the date the National Committee is seized with the matter
 - c. It must not be a matter which has already been settled by the State(s) involved.
4. The inclusion of the right to work which has been recognised in the Constitutions of Guyana, Grenada and Belize.
5. The inclusion of the right to development as it is not an express provision mentioned in the CCS. The right to development is an inalienable human right and equality of opportunity for economic, social, cultural and political development is a prerogative both of nations and of individuals who make up nations.¹⁰⁷ The African Commission recognised this in *Centre for Minority Rights Development*¹⁰⁸ where the Endorois people were displaced by the Kenyan government who took their lands to create a reserve for tourism. The Commission found the government had violated the Endorois' rights under Articles 14, 17, 21, and 22;¹⁰⁹ and was of the view that the State carried the burden for creating conditions favourable to its peoples development, that is a positive obligation to foster conditions favourable to the development of indigenous people. This right would be critical for CARICOM for example, for the need for housing, employment, and even as simple as preserving our cultural heritage in territories which largely depend on tourism to keep the economy afloat.

The process in which the RTC was fully transposed and incorporated into Barbados' domestic law should also be used as guidance for implementing the CCS in all the member states. For instance, in Barbados, this was done by way of the Caribbean Community Act, Cap. 15, which now gives the CARICOM full juridical personality in the state, and as such Barbados is obliged to observe

¹⁰⁷ Declaration on the Right to Development (1986).

¹⁰⁸ 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya.

¹⁰⁹ The African Charter on Human and People's Rights (1981).

its Treaty obligations.¹¹⁰ Further, member states are prohibited from invoking its own domestic legislation and/or policy as a reason for not fulfilling its treaty obligations.¹¹¹ This principle is supported by the principle of *pacta sunt servanda*.¹¹² Similarly, and in keeping with this principle, the CCS can be incorporated into the domestic legislative framework of the member states by way of an Act of Parliament because each Member State is sovereign and presently follows the dualist approach. However, in advocating for a shift from dualism to monism, it must be appreciated that once the CARICOM Heads of Government sign to abovementioned Protocols to the CCS, it would take direct effect in the Member States' domestic law.

¹¹⁰ The Parliament of Barbados has also incorporated the Caribbean Court of Justice into its domestic law both in its original jurisdiction re the Treaty of Chaguaramas and its appellate jurisdiction being the final appellate court of Barbados by way of the Caribbean Court of Justice Act, No. 9 of 2003, Caribbean Court of Justice (Amendment) Act, No. 8 of 2005. In order to facilitate the incorporation of the Caribbean Court of Justice into the domestic law of Barbados, Parliament had to amend the Constitution of Barbados by way of the Constitution (Amendment) Act, No. 10 of 2003.

¹¹¹ *Shanique Myrie v The State of Barbados* [2013] CCJ 3 (OJ).

¹¹² Article 26 of the Vienna Convention on the Law of Treaties (1969): Every treaty in force is binding upon the parties to it and must be performed in good faith.

CONCLUSION

Socio-economic rights offer another layer of security which is crucial for the enjoyment of fundamental freedoms in democratic states, and can serve as a catalysis for redemption of Caribbean people. Progressive realisation may be one of the main reasons behind the reluctance to constitutionalize or enforce the CCS which promotes and protects socio-economic rights. However, State Parties have a duty to take steps to maximize available resources to progressively fully realize the rights enshrined in the international covenants such as the ICESCR and ICCPR.

The success of regional integration in CARICOM can be bolstered by empowering the CCS to be a substantive and binding instrument, establishing the rights within as real and effectual rather than illusory. Of the three human rights systems, the African System stands out as its goals align with that of CARICOM, insofar as it supports the integration of countries with differing cultures and seeks to protect and develop laws reflective of same. To enforce the rights enshrined in the CCS, the CCJ should be appointed as the final arbiter, in its original jurisdiction, applying principles in a similar manner as it does with the RTC and principles of international law. The CCJ's rulings in *Shanique Myrie* and *Joseph* illustrate the impact of applying a broad interpretation of provisions, and the necessary shift from dualism and monism to constrain Member States to the rights to be conferred upon their citizens, and the obligations undertaken when they became signatories to the CCS.

To effectively propagate human dignity in the region as intended by the CARICOM Heads of Government, it must be impressed upon Member States that it is virtually impossible to avoid the primacy of Community law.

REFERENCE LIST

Case List

Attorney General of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ).
Boyce and Joseph v R. [2005] 1 AC 400
Cadogan v. R (No. 2), (2006) 69 W.I.R. 249
Francovich v. Italy [1991] ECR-5357.
Case 246/80 *Broekmulen v. Huisarts Registratie Commissie* [11981] 2311.
Case 26/62 *Van Gend en Loos* [1963] ECR1
Case 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya*.
Case 32/75 *Cristini v. SNCF* [1975] ECR 1085
Collymore v Attorney General of Trinidad & Tobago (1967) 12 W.I.R 5
Collymore v Attorney General of Trinidad & Tobago (1967) 12 W.I.R 5
De la Bastide v Saunders (2006), 69 W.I.R.
Fisher v Minister of Public Safety and Immigration (No.2)
Lewis v Attorney General of Jamaica (2000) 57 WIR 275.
Linton v. Attorney General of Antigua and Barbuda High Court of Justice, AG 2009 HC 23
Maubury v. Maddison 5 U.S. (1 Cranch) 137 (1803);
Fort Street Tourism Village v. Attorney-General of Belize (2008) 74 WIR 133
Wade v. Roches 9 March 2005 Court of Appeal (Civ App No.5 of 2004
Cal and Others v. Attorney-General of Belize (2007) 71 WIR 110
Duncan v. Attorney-General of Grenada (1997) CA 3
Attorney-General of Antigua and Barbuda v. Goodwin AG 1999 CA 5.
Maya Leaders Alliance v. Attorney General of Belize (2010) 77 WIR 108
Mitchell v. DPP (1986) L.R.C. 35 (P.C.)
Mitchell v. DPP, (1986) L.R.C. 35 (P.C.)
Olga Tellis v. Bombay Municipal Corporation, Supreme Court of India, 1985, AIR 1986 SC 18.
Parlement Belge (1879) 4 P.D.
R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No.3) [1992]
R. v. Secretary of State for the Home Department, ex parte Brind [1991] 1 AC696
R. v. Director of Public Prosecution, ex parte Kebiline [2000] 2 AC 326
Sparman v. Greaves, et Al BB 2004 HC 21
Shanique Myrie v The State of Barbados [2013] CCJ 3 (OJ).
Thomas v Baptist (1999) 54 WIR 387
Trendtex Trading Corp. v. Central Bank of Nigeria [1977] EWCA Civ J0113-3.
Trinidad Cement Limited and TCL Guyana Incorporated v. the State of the Co-operative Republic of Guyana [2009] CCJ 5 (OJ).
Trinidad Cement Limited Et Al v. The State of the Co-operative Republic of Guyana [2009] CCJ 1 (OJ).
Trinidad Cement Limited v. Caribbean Community (2009) TT 2009 CCJ 1
Trinidad Cement Limited v. The Competition Commission [2013] CCJ 2 (OJ)
Van Gen en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.
Costa v ENEL [1964] ECR 585.

Legislation

Agreement Establishing the Caribbean Court of Justice 64 WIR 447
Caribbean Court of Justice Act, No. of 2003 as amended by Caribbean Court of Justice (Amendment) Act, No. 8 of 2005
Caribbean Court of Justice Annual Report 2008-2009
Declaration on the Right to Development 1986
Education Act Cap. 41
Health Services Act Cap. 44
The Constitution of Barbados
The Constitution of Belize
The Constitution of Jamaica
The Constitution of the Co-operative Republic of Guyana
The Constitution of Trinidad and Tobago
The Grenada Constitution Order 1973
United Kingdom's Human Rights Act 1998

Treaties

African Charter on Human and People's Rights 1981
African Court on Human and Peoples' Rights 1998
CARICOM Charter of Civil Society for the Caribbean Community 1997
CARICOM Single Market and Economy 1989
Convention on the Rights of the Child 1989
European Convention on Human Rights 1950
European Convention on Human Rights 1950 as amended by Protocols Nos. 11 and 14
European Union Charter of Fundamental Rights 2009.
Inter-American Convention on Human Rights 1951
International Convention on Civil and Political Rights 1966
International Covenant on Economic, Social and Cultural Rights 1966
Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.
Revised Treaty of Chaguaramas 2001
Vienna Convention on the Law of Treaties 1969

Articles and Reports

Courts and the Legal Enforcement of Economic, Social, and Cultural Rights: Comparative Experiences of Justiciability", Human Rights and Rule of Law Series: No.2 (International Commission of Jurists: Geneva, 2008)
De la Bastide v Saunders (2006) 69 W.I.R.
Domaradzki, S., Khvostova, M. & Pupovac, D. Karel Vasak's Generations of Rights and the Contemporary Human Rights Discourse. *Hum Rights Rev* 20, 423–443 (2019)
James & Lutchman, *Law and the Political Environment in Guyana*,
Report of the West Indian Commission: *Time for Action* (1993) (2nd ed.). Kingston: The Press University of the West Indies.
Sheldon McDonald, Draft Final Report - Consultancy to Conduct and Formulate the Most Suitable Arrangements to Provide for the Protection of Human Rights in the Caribbean (Sept. 16, 2005)

Stephen Fraser, "The Evolution of Constitutional Protection of Fundamental Rights Provisions in Guyana" (2004) 32 Ga J. Int'l & Comp. L 613;
The Hon. Justice Winston Anderson, JCCJ: *The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions*
The Hon. Justice Winston Anderson, *The Inter-American System and Its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ* 35 W. INDIAN L.J. 27, 45 (2010).

Texts

Berry, D. S. (2014). *Caribbean Integration Law*. London: Oxford University Press
Pollard, D. E. (2004). *The Caribbean Court of Justice: Closing the Circle of Independence*. Kingston: The Caribbean Law Publishing Company Limited
Karel Vasak Generation of Rights and the Contemporary Human Rights Discourse
Rawls, J. (1971). *A Theory of Justice*. Cambridge: Harvard University Press
Nelson, R (Justice). (2007). *The Caribbean Court of Justice and the Caribbean Single Market and Economy in Hall, K. & Chuck-A-Sing, M. Caricom Single Market and Economy: Genesis and Prognosis*. Kingston: Ian Randle Publishers
Alston, P & Goodman, R. (2013). *International Human Rights: The Successor to International Human Rights in Context*. London: Oxford University Press
Malcolm Langford (2008), *Social Rights Jurisprudence Emerging Trends in International and Comparative Law*. Cambridge: Cambridge University Press.
Malcolm Langford (2014), *Socio-Economic Rights in South Africa: Symbols or Substance?* Cambridge: Cambridge University Press.