Jurisdictional Synergies in the Caribbean

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Salvatore Caserta & Mikael Rask Madsen, *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, 79 **Law & Contemp. Probs.** 89 (2016).

Rising threats to judicial independence—in Hungary, Poland, and elsewhere around the world—are putting into stark relief the political and institutional challenges faced by "the weakest branch." It is more important than ever to think seriously about how courts gain and maintain the legitimacy necessary for effective authority; how they develop and retain their independence; and whether judicial design might provide insights or answers.

In *Between Community Law and Common Law: The Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies*, Salvatore Caserta and Mikael Rask Madsen shed new light on these questions through the experiences of the Caribbean Court of Justice (CCJ). In addition to providing a helpful exposition on the creation and early development of the CCJ, the Article explores the elements of judicial design that have contributed to the CCJ's growing authority and legitimacy. The most engrossing analysis is that anticipated by the title: the CCJ's "unique double jurisdiction," which results in "two relatively different constituencies and operational contexts" yet has created important synergies for judicial empowerment.

Caserta and Madsen are scholars at the University of Copenhagen, which houses iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts. The Centre produces excellent (and extensive) work on international courts (ICs), their role in a globalizing legal order, and their impact on politics and society. Given their vantage point, Caserta and Madsen naturally frame the article (part of a larger symposium) in light of broad theories of international court authority (although their insights have relevance to national courts as well). The contribution to the IC debate is expositional: the CCJ serves as a case-study of an international court that has progressed from "narrow authority" to one that has "intermediate authority." More specifically, between 2005 and 2016, a growing number of practitioners and litigants "acknowledge[d] the binding nature of [the CCJ's] rulings and act[ed] in accordance in words or deed" (P. 91.)

The project takes flight in its close attention to the *mechanisms* that have facilitated the strengthening of the CCJ, showcased in a deeply contextualized analysis that draws on data from forty-one interviews with a variety of key stakeholders in the broader CCJ system. For example, the authors demonstrate the importance of personnel, highlighting the critical role of appointments procedures and the political impact of the selection of Michael de la Bastide as the CCJ's first President. De la Bastide's stellar credentials and diversity of experiences satisfied both traditional and modern legal elites, straddling and transcending the (growing) divide in the profession. The Article brings into focus the contours of a post-colonial legal profession in an integrating region, including the nature of legal education and the changing socialization of lawyers. Of course, the critical role of individual judges in the development of an independent court is a familiar story, but the details of the Caribbean experience are fascinating.

The CCJ's dual jurisdiction is the most unusual mechanism that has fostered its authority and independence. The CCJ was designed to accomplish two distinct tasks: First, it serves as the court of the Caribbean Single Market and Economy. Twelve member states of the Caribbean Community (CARICOM) have accepted the court's jurisdiction, and from this perspective, the CCJ looks similar to the European Court of Justice or to other regional courts designed to implement trade or economic-based integrationist aims. The court has original jurisdiction over Community law and has interpreted its founding treaty to allow for direct applications from private litigants. Second, it functions as a

replacement for the Judicial Committee of the Privy Council as the court of last resort on issues of civil and criminal law for those Caribbean states that were former British colonies (and retained the JCPC's jurisdiction). Thus far, only four Caribbean countries have accepted the CCJ's appellate authority (Guyana, Barbados, Belize, and Dominica).[1]

The ways in which these powers have intersected and combined have served to enhance the CCJ's importance. The CCJ's first cases arose under its appellate jurisdiction, supported by nationalist and de-colonizing pressures to wrest common law from the JCPC in London. In "impos[ing] itself as the main interpreter and creator of a genuine Caribbean jurisprudence" under the common law, the CCJ took on a heightened stature in the region. Between 2005 and 2015, 143 cases were filed under its appellate jurisdiction, and the "case flow had a legitimizing effect even outside of those countries" that permitted appeals to the CCJ, producing a spillover effect. The acceptance of the CCJ's appellate decision strengthened the CCJ's authority over *community* law. And the virtuous circle has momentum: When the CCJ decided a major case under community law, *Myrie v. Barbados*, with a rights-promoting result, the decision was used in countries with JCPC jurisdiction as a justification for ending appeals to the JCPC and switching to the CCJ, "regardless of the fact that [*Myrie*] did not concern appellate jurisdiction."

The complicated dynamic of the CCJ's dual role raises other questions about whether general theories of court legitimacy are relevant to the CCJ. In a 2017 article, Caserta uses the CCJ to challenge the conventional wisdom that newly established international courts should avoid politically sensitive issues to guard against backlash. He argues that best practices devised for courts focused on regional integration and economic law may not apply to the CCJ, which was expected—and designed—to engage with important political issues under its appellate jurisdiction. (Indeed, as both articles note, the CCJ's very existence was in part driven by dissatisfaction with rights determinations made by the JCPC.)

Caserta and Madsen deftly trace the evolution of the CCJ's authority, but they make no predictions about the future. And, of course, even authority wisely husbanded can be quickly lost. But the experience of the CCJ reminds scholars (and designers alike) of the benefits to institutional stability and judicial effectiveness that may be hidden in jurisdictional grants or other, more mundane aspects of judicial design.

1. For a discussion of the role of the JCPC in the Caribbean, see Erin F. Delaney, *An Imperial Court in a Post-Colonial Context*, JOTWELL (May 30, 2017) (reviewing Tracy Robinson & Arif Bulkan, *Constitutional Comparisons by A Supranational Court in Flux: The Privy Council And Caribbean Bills of Rights*, 80 **Modern L. Rev.** 379 (2017)). [?]

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