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The right to free movement of persons in Caribbean community (CARICOM) law: towards 'juridification'?

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Abstract: The Caribbean Community and Common Market (CARICOM) is one of the oldest, and arguably one of the most successful, regional organisations in the Commonwealth today. Influenced in large part by the European model of regional integration, CARICOM has, since the early 1970s, sought to progressively engage its constituent member states – for the most part English-speaking Caribbean countries – on a number of important developmental issues, such as the trade in goods and the free movement of services and capital. In more recent years, the free movement of persons has come to the fore. It is important to note that the process by which CARICOM has progressively achieved this particular (and important) goal has not been straightforward, fraught as it has been with a number of practical and institutional difficulties, many of which still continue today, notwithstanding what can be described as the recent trend towards the 'juridification' of the right to free movement in CARICOM law. Since this issue has not been adequately addressed in existing literature, this article provides a nuanced analysis of the extent to which the right to free movement of persons in CARICOM law has 'juridified', by reference to the theory of 'juridification', as posited by Spiros Simitis and Jon Clarke among others.

Keywords: human rights, free movement, Caribbean community, juridification, Revised Treaty of Chaguaramas (RTC).

Introduction

The European integration movement aptly demonstrates that the free movement of persons within a regional legal system, in relation to which member states have surrendered at least some of their sovereignty, is both necessary and appropriate.[2] As well as crystallising the concept of regional 'citizenship',[3] the right to free movement of persons serves to ensure that citizens are not discriminated against on the grounds of their nationality.[4] It ensures they feel a sense of belonging,[5] and that they are not isolated from other member states with which they may have certain attributes in common, including a shared history and culture, and where the same economic and social policies apply.[6] In theory the

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2 Sergio Carrera, 'What does free movement mean in theory and practice in an enlarged EU?', *European Law Journal* 11 (6) (2005): 699.
3 Elizabeth Meehan, 'Citizenship and the European community', *The Political Quarterly* 64 (2) (1993): 172.
4 Jürgen Gerhards, 'Free to move? The acceptance of free movement of labour and non-discrimination among citizens of Europe', *European Societies* 10 (1) (2008): 121.
5 Richard Bellamy, 'Evaluating Union citizenship: belonging, rights and participation within the EU; *Citizenship Studies* 12 (6) (2008): 597–611.
6 Clive Barnett, 'Culture, policy, and subsidiarity in the European Union: from symbolic identity to the governmentalisation of culture', *Political Geography* 20 (4) (2001): 405.

free movement of persons carried out in a legal manner – based on liberalisation and the removal of protectionist national barriers – ought to be one of the crowning aspects of an otherwise successful integration movement.[7] However, the development of the right to free movement of persons in Caribbean Community and Common Market (CARICOM) law has proven to be both controversial and difficult to effect in practice.[8] Notwithstanding this, however, there appears, at least in recent years, to be a subtle movement towards 'juridification', which has been marked by a more interventionist, rather than reactive, approach to the issue. By applying the theoretical framework of 'juridification', as advanced by Spiros Simitis,[9] this article argues that although the development of the right of free movement of persons in CARICOM has been painfully slow, at least when compared to the European Union,[10] there is a growing trend towards regulatory intervention in the realm of free movement rights. This has undoubtedly been influenced by the enactment of robust laws and administrative regulations, as well as the use of judicial decisions to firmly entrench such rights in CARICOM law. This article identifies a number of challenges that could be impediments the right to free movement of persons in CARICOM being fully realised; however, it will present an argument demonstrating that this important right can only continue to be strengthened with time, in contradistinction to what previously took place in the years immediately following the establishment of CARICOM.

The theory of 'juridification'

Although the term juridification continues to appear with increasing regularity in the existing literature,[11] there nevertheless remains some uncertainty as to its exact meaning, scope and content.[12] Most commentators, including Spiros Simitis and Jon Clark,[13] agree that juridification is a process which, over time, moves legal regulation from the level of abstract guarantees to much more concrete and precise substantive and procedural rules. Specifically, for the purposes of this article, juridification is taken to mean the process by which CARICOM has intervened in the area of free movement of persons, particularly in ways which limit the autonomy of its member states when determining who is to be admitted and under what conditions. To support this argument the remaining article sections will assess this process through the Simitis' analytical framework, beginning with a diachronic evaluation of the right to free movement of persons in CARICOM, followed by an examination of the methods by which this right has been juridified in the CARICOM context.

A diachronic assessment

The 'reactive' phase

According to Simitis, the first phase of the juridification process can be described as 'reactive' in nature.[14] During this phase, the regional organisation, in this case CARICOM, takes no significant step to supplant the autonomy of its constituent member states with respect to the regulation of free movement of persons, and it only intervenes in a limited way to counter specific extreme cases of discrimination on the grounds of national origin. Simitis considers that throughout the duration of this 'contemplative' phase, the regional legal system is merely composed of a set of unrelated and, often non-binding, regulations. These, although aimed at countering abuses of power, are hardly ever enforced in practice. In other words, the regional institution (for this argument, CARICOM) regards the right to free movement of persons within the Caribbean community merely as an issue which ought to be regulated by the individual member states, without its intervention.

In hindsight, it appears that the right to free movement of persons within the context of CARICOM law underwent its 'reactive' phase between 1973, when CARICOM was formally established, and 2001 when the Revised Treaty

7 Nicolas Bernard, 'Discrimination and free movement in EC law', *International and Comparative Law Quarterly* 45 (1) (1996): 82–108.

8 Myrtle Chuck-A-Sang, *CARICOM Single Market and Economy: Challenges, Benefits and Prospects* (Kingston, Jamaica: Ian Randle Publishers, 2009), 188.

9 Spiros Simitis, 'To juridification of labor relations', in *Juridification of Economy, Labour and Social Solidarity*, ed. Kübier (Baden: Namos, 1984), 74.

10 Julian Schutte, 'Schengen: its meaning for the free movement of persons in Europe', *Common Market Law Review* 28 (3) (1991): 549.

11 Lars Blichner and Anders Molander, 'Mapping juridification', *European Law Journal* 14 (1) (2008): 36.

12 See Lars Chr. Blichner and Anders Molander, 'What is juridification?' (Hungary: Centre for European Studies, University of Oslo, Working Paper no. 14, 2005). It argues that juridification is an ambiguous concept with regard to both its descriptive and normative content. In descriptive terms some see juridification as 'the proliferation of law' or as 'the tendency towards an increase in formal (or positive, written) law'; others as 'the monopolization of the legal field by legal professionals', the 'construction of judicial power', 'the expansion of judicial power' and some quite generally link juridification to the spread of rule guided action or the expectation of lawful conduct, in any setting, private or public.

13 Spiros Simitis, 'Juridification of labour relations', in *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law*, ed. Gunther Teubner (Berlin, Germany: Walter de Gruyter, 1987), 113; Jon Clark, 'The juridification of industrial relations: a review article', *Indus*. LJ 14 (1985): 69.

14 Spiros Simitis, *The Juridification of Labor Relations*, 118.

of Chaguaramas (RTC) was officially, though somewhat belatedly, ratified by CARICOM member states. The years preceding the RTC's coming into effect were, as one might imagine, highly uncertain times for Caribbean nationals desirous of travelling and working in other CARICOM member states. This was because they could have been, and were in many instances, denied entry by immigration authorities in those states without reasonable justifications.[15] In fact, it would seem that when the Caribbean Free Trade Area (CARIFTA) was upgraded to the original CARICOM in 1973, the issue of persons' freedom of movement did not seriously occupy the attention of the framers of this agreement, evidenced not least by its Article 38, which explicitly provided that:

> Nothing in this Treaty shall be construed as requiring, or imposing any obligation on, a Member State to grant freedom of movement to persons into its territory whether or not such persons are nationals of other Member states of the Common Market.[16]

Notwithstanding this, however, Wickham, Wharton, Marshall and Darlington-Weekes recalled that immediately following the establishment of the original CARICOM regime in 1973, 'informal' mechanisms were put in place to allow for the movement of employees of regional institutions,[17] such as the University of the West Indies (UWI), as well as lawyers. However, despite these Demas has argued that, particularly during the 1980s, a climate of suspicion remained, according to which the right to free movement of persons would lead to large-scale migration to the more prosperous islands.[18] In what Simitis describes in his juridification piece as an inherent 'reactive' attitude,[19] CARICOM responded, albeit belatedly, by approving 'the Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement',[20] which sought to address the then controversial free movement question. This declaration provided, somewhat unassertively, for the implementation of various arrangements, including the free movement of skilled and professional personnel, as well as contract workers employed on a seasonal or project basis, coupled with the elimination of the requirement for passports for CARICOM nationals travelling to other CARICOM countries.

While the declaration was a non-binding instrument and therefore did not receive the degree of compliance that might otherwise have been achieved, it did, however, pave the way for the 1993 Independent West Indian Commission (WIC) Report, which introduced the concept of 'hassle-free travel'.[21] Apart from expressly endorsing the Grand Anse's call for the elimination of the passport requirements for intraregional travel, the WIC Report also considered that personal contact, as encapsulated in the free movement of persons, was an important precursor to greater Caribbean integration. As Wickham, et al. have pointed out, however, the significance of this objective was implicitly undermined by the fact that the WIC endorsed the Grand Anse's approach to limited free movement,[22] albeit that it encouraged the addition of UWI graduates and media workers to the list of CARICOM nationals who were somehow deserving of the right to move freely and work. In other words, the WIC Report implicitly contradicted itself by suggesting that personal contact was an important precursor to regional integration, while at the same time refusing to recommend full juridification of the right to freedom of movement for CARICOM nationals. More than this, it was only in 1995, some two years after the WIC Report was first published, that CARICOM heads of government finally agreed to the free movement, and consequent elimination of the need for work permits, for what Wickham et al. describe as an 'elite group of persons',[23] that is, university graduates. On a positive note, however, during this 'reactive' phase, the social rights and family status of persons moving from one country to another within the Caribbean community was formalised in 1997, pursuant to an Agreement on Social Security,[24] which expressly allowed for the payment of pensions for invalidity, disablement, old age or retirement, survivors' benefit and death benefit. Notwithstanding this, however, it was generally felt that, unlike the European integration movement which had, from the very outset, recognised

15 Oscar Ramjeet, 'Small numbers of CARICOM nationals denied entry, says Secretary General', *Caribbean News Now*, 15 Dec. 2008.
16 Treaty Establishing the Caribbean Community (adopted 4 June 1973), in force 1 August (1973) 949 UNTS 17.
17 Peter W. Wickham, Carlos L. A. Wharton, Dave A. Marshall and Hilda A. Darlington–Weekes, Freedom of Movement: The Cornerstone of the Caribbean Single Market and Economy (CSME) (Bridgetown, Barbados: Caribbean Policy Development Centre, 2004) 19.
18 William Demas, 'Critical issues in Caribbean development: West Indian development and the deepening and widening of the Caribbean community' (Kingston, Jamaica: Ian Randle, 1996), 15.
19 Spiros Simitis, *The Juridification of Labor Relations*, 119.
20 Grand Anse Declaration and Work Programme for the Advancement of the Integration Movement, Grand Anse, Grenada, 7 July 1989.
21 West Indian Commission, *Time for Action: Report of the West Indian Commission* (Black Rock, Barbados: West Indian Commission, 1992) 474–501.
22 Peter W. Wickham, Carlos L.A. Wharton, Dave A. Marshall and Hilda A. Darlington-Weekes, *Freedom of Movement: The Cornerstone of the Caribbean Single Market and Economy* (CSME), 20.
23 See above n. 20.
24 CARICOM Agreement on Social Security (adopted I March 1996, entered into force 1 April 1997).

the indispensable importance of the right to freedom of movement,[25] CARICOM was undoubtedly 'reactive' in its approach to this important right.

The 'activist' phase

Jon Clark and Lord Wedderburn see juridification as arising when a legal system, in this case CARICOM's regional integration machinery, gradually replaces the autonomy of member states in the area of free movement of persons by what they describe as a 'law-driven' regime.[26] Here, the 'activist' institution – CARICOM – is no longer as contemplative as described in the foregoing section, but is rather more assertive in its approach to the question of free movement. According to Simistis, this 'activist' phase is characterised by CARICOM's imposition of increasingly objectivised decision-making process requirements on its member states, in which case they may only refuse to admit CARICOM nationals into their respective territories on condition that they conform to the mandatory criteria laid down by CARICOM law, as confirmed by judicial prescriptions. Simitis sees this process as being effected through the prism of four different though interrelated methods, which ultimately contribute to the ongoing process of juridification: legislation, administrative decisions, judicial decisions and 'indirect steering'.[27] These methods, and in particular judicial decisions, are discussed in detail in the following sections.

i) Legislation

The 'normal vehicle of juridification', according to Carl Mischke,[28] was somewhat belatedly enacted by CARICOM in 2001 in the form of the RTC.[29] In this context, it is important to note that Article 45 of the RTC specifically stipulates that the free movement of CARICOM nationals within the community is one of the institution's overriding objectives, while Article 46 places an obligation on member states to accord university graduates, media workers, sportspersons, artistes and musicians the right to seek employment in their jurisdictions. More pointedly, the treaty calls on member states to implement the necessary legislative, administrative and procedural arrangements to facilitate the movement of Caribbean community nationals into and within their jurisdictions without harassment or the imposition of impediments. In other words, it envisages that member states will eliminate the requirement for passports for community nationals travelling to their jurisdictions, as well as that for work permits for community nationals seeking approved employment in their jurisdictions. This does not, however, prejudice member states' power to restrict freedom of movement where public interest considerations so require.[30]

In hindsight, it appears that although legislation in the form of the RTC is, at least in theory, touted as providing the strongest form of protection insofar as the right to free movement of persons is concerned, challenges nevertheless continue to arise in the context of CARICOM, including the 'unfair, unlawful, unconscionable, and discriminatory treatment'[31] that some community nationals by some states' immigration authorities mete out at times against some community nationals. Given this rather unfortunate state of affairs, the question has arisen as to what other methods of juridification, apart from the RT,C are available, if any, which could ensure that the right to free movement of community nationals is afforded the degree of primacy it truly deserves. This has led CARICOM heads of government to adopt various administrative decisions which are examined below.

ii) Administrative decisions

According to Simitis, the enactment of regulatory acts, which are referred to as 'decisions' in the CARICOM regime, is the second method of juridification which characterises the so-called 'activist' phase. More pointedly, in order to secure the successful implementation of the CARICOM Single Market and Economy (CSME), of which the right to free movement is indispensable, CARICOM heads of government have, in the years following the ratification of the RTC, progressively agreed via decisions to put in place appropriate legislative, administrative and procedural arrangements to facilitate the free movement of at least ten categories of CARICOM nationals, pursuant to national legislation.[32]

25 Adrian Favell, *Eurostars and Eurocities: Free movement and mobility in an integrating Europe*, 56. (London, England: John Wiley & Sons, 2011), 50.

26 Jon Clark and Lord Wedderburn, 'Juridification – a universal trend? The British experience in labour law', in *Juridification of Social Spheres: a Comparative Analysis in the Areas of Labour, Corporate, Antitrust and Social Welfare Law*, ed. Gunther Teubner (Berlin, Germany: Walter de Gruyter, 1987), 163.

27 Spiros Simitis, *The Juridification of Labor Relations*, 168.

28 Carl Mischke, 'Conflict colonization – the juridification of industrial action', S. Afr. Mercantile LJ 4 (1992): 157.

29 Revised Treaty of Chaguaramas (adopted 14 Feb. 2001, entered into force 23 July 2002) 2255 UNTS 319.

30 Article 46 (3) Revised Treaty of Chaguaramas.

31 Ralph Gonsalves, *Freedom of Movement in CARICOM* (Kingstown, St Vincent and the Grenadines: Statement to Parliament of SVG, 14 May 2009), 1.

32 The persons envisaged to benefit from the right to free movement include university graduates, media workers, sportspersons, artistes, musicians, professional nurses, qualified teachers, artisans with a Caribbean Vocational Qualification (CVQ), holders of associate degrees or equivalent qualifications such as two CAPE or A-Level subjects and National Technician Certificates and household domestics with a

These categories of persons do not need to acquire work permits in order to enter and work in other CARICOM jurisdictions, but can simply exercise their right to freedom of movement once they have acquired CARICOM Skills Certificates, which are issued by their respective countries of origin.[33] Although a laudable development, which has undoubtedly buttressed the juridification of the right to free movement in CARICOM, it is regrettable that quite a number of member states still have not achieved full legislative compliance with regard to all approved categories of community nationals.[34] Furthermore, as a consequence of the glaring weaknesses in the regulatory arrangements of these states, there have reportedly been differential treatment of skilled nationals at the border in some member states, which has resulted in significantly fewer skilled nationals travelling for the purposes of work between the islands than was initially envisaged. Even further, artisans, in particular, are reportedly constrained in the exercise of their right to freedom of movement, because most member states have been unable to issue the required Caribbean Vocational Qualification (CVQ) to this category of persons, which has meant that a number of artisans simply cannot apply for Skills Certificates.[35] As a result of the foregoing challenges, CARICOM nationals have continued to express scepticism, apprehension and frustration over the implementation of the CSME, and the benefits that can be obtained in relation to exercising their right to freedom of movement in the community.[36]

Notwithstanding these challenges, however, CARICOM has recently taken a bold, and undoubtedly crucial, step towards juridification by extending the right to free movement to *all* CARICOM nationals, not just the exhaustive categories of skilled nationals identified above. This important development came in the form of a Conference Decision, which was approved in 2007 by CARICOM heads of government. This important, though controversial, instrument explicitly provided that,

> All CARICOM Nationals should receive entry of six months upon arrival in a Member State in order to enhance their sense that they belong to and can move in the Caribbean Community, subject to the right of member states to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds.[37]

Although undoubtedly a step in the right direction, as the subsequent section will demonstrate, this decision has been met with intense resistance from some governments across the region, who have consistently refused to honour the free movement obligation imposed thereunder.[38] In fact, notwithstanding the existence of this important decision, there continues to be an outpouring of what has been described as a 'malignant xenophobia',[39] which arguably has serious implications both for the juridification of the right to free movement in CARICOM, as well as the legitimacy of the CARICOM institution itself.

iii) Judicial decisions

Carl Mischke, building on Simitis' analytical framework, has argued that the third method of juridification involves judicial pronouncements about the nature, scope and content of the right in question,[40] in this case, the right to free movement of persons in CARICOM law. Simitis, who characterises this method as essentially 'judicial activism', argues that the institution (in this case, CARICOM) successfully avoids direct involvement in the ongoing conflicts between member states, relating to the right to free movement, by assuming a spectator's role while the juridification process is carried out by the courts.[41] In other words, CARICOM tacitly uses the Caribbean Court of Justice (CCJ) as

Caribbean Vocational Qualification (CVQ).

33 Antigua and Barbuda Caribbean Community Skilled Nationals Act, 1997, no. 3; Barbados Immigration (Amendment) Act, 1996, Cap. 190; Belize Caribbean Community (Free Movement of Skilled Persons) Act, 1999, no.45; Dominica Caribbean Community Skilled Nationals Act, 1995, no. 30; Grenada Caribbean Community Skilled Nationals Act, 1995, no. 32; Guyana Immigration (Amendment) Act, 1992 no. 9, section 12 (Suriname must be included) and Caribbean Community (Free Entry of Skilled Nationals) Act, 1996, no. 6; Jamaica Caribbean Community (Free Movement of Skilled Persons) Act, 1997, no. 18; St Kitts and Nevis – Caribbean Community Skilled Nationals Act, 1997, no. 12; Saint Lucia Caribbean Community Skilled National Act, 1996, no. 18; St Vincent and the Grenadines Immigration (Caribbean Community Skilled Nationals) Act, 1997 no. 4; Trinidad and Tobago Immigration (Caribbean Community Skilled Nationals) Act, 1996, no. 26

34 Oliver Joseph, *Implementation of the Regime for the Free Movement of CARICOM Nationals: Issues and Challenges* (Bridgetown, Barbados: CSME Unit, 2011), 1.

35 *Review of the Schedule of Free Movement of Persons* (Georgetown, Guyana: CARICOM Secretariat, 2009), 5.

36 Clement Sankat, Remarks by the Campus Principal: Distinguished Lecture on 'Free movement of people, Shanique Myrie and our Caribbean civilization' (Port of Spain, Trinidad and Tobago: UWI St. Augustine, 17 June 2014), 1.

37 CARICOM Secretariat, Draft Report for the Twenty-Eighth Meeting of the Conference of Heads of Government of the Caribbean Community (Georgetown, Guyana: HGC/2007/28/DR, 1–4 July 2007), 8.

38 Derek O'Brien, 'CARICOM: "a new legal order?"', UK Const. L. blog, 8 Nov. 2013.

39 Ralph Gonsalves, *Freedom of Movement in CARICOM* (Kingstown, St. Vincent and the Grenadines: Statement to Parliament of SVG, 14 May 2009), 1.

40 Carl Mischke, *Conflict Colonization*, 165.

41 Spiros Simitis, *The Juridification of Labor Relations*, 122.

a meta-juristic paradigm to filter out lawful and unlawful state conduct, through stipulating stringent substantive and procedural rules with which state officials must comply.

In the recently decided case of *Shanique Myrie v Barbados*,[42] the use of this third method of juridification was most evident. This case dealt with some highly important CARICOM law issues which, prior to 2013, the CCJ had not previously addressed. The most prominent doctrinal and practical issue raised by this case was whether, and to what extent, CARICOM nationals have a right to free movement within the Caribbean community. While the Court of Justice of the European Union (CJEU) has for quite some time established concrete principles relative to this issue,[43] this was the first time the CCJ had been called upon to address this vexing question, the answer to which would set an authoritative precedent for all CARICOM member states, as opposed to being confined to the parties to the dispute in question.[44] In this context, this judgment is especially instructive, at least in the realm of the juridification debate, as it demonstrates in no uncertain terms the extent to which free movement rights within the Caribbean community have gained normative and institutional significance, moving from mere political aspirations to concrete legal obligations.[45]

The facts of the case were as follows: on 14 March 2011, the claimant, a Jamaican national by the name of Shanique Myrie, arrived at the Grantley Adams International Airport in Barbados on a Caribbean Airlines flight that had departed earlier from Jamaica. The claimant was denied entry into Barbados, detained overnight in an airport cell and deported to Jamaica the following day. The evidence adduced before the CCJ revealed that the claimant was made to undergo a painful and humiliating body-cavity search by a Barbadian border official, as well as endure a horrid night in an unsanitary detention cell. The net effect of these circumstances was that the claimant continued to suffer from post-traumatic stress disorder even after the ordeal had long passed. In light of the foregoing, the claimant sought the CCJ's assistance in determining whether she had a right to free movement within the Caribbean community, and whether the treatment to which border officials in Barbados subjected her amounted to a violation of this right. Barbados, by contrast, maintained that the claimant was lawfully denied entry, in accordance with the exceptions provided for in Caribbean community law. A critical examination follows of the question of how the court approached these diametrically opposed viewpoints, and the implications that its conclusions might potentially have in relation to the juridification of the right to freedom of movement of CARICOM nationals within the region.

A. The right to enter and reside

As discussed in the previous section,[46] nationals of CARICOM member states are entitled to an automatic stay of up to six months upon arrival in any CARICOM country in order to enhance their sense of belonging to the Caribbean community.[47] Importantly, as the CCJ explained in the instant case, this right to 'automatic stay' or 'definite entry' upon arrival does not depend on the discretionary evaluations of immigration officers or other authorities at the port of entry.[48] In light of this, the CCJ found that the claimant, as a national of the CARICOM member state, Jamaica, had been entitled to exercise her right to enter Barbados 'without harassment or the imposition of impediments'.[49] Given that the claimant had been subjected to a degrading body-cavity search, as well as deplorable conditions while in overnight detention, the court held that Barbados had prejudiced this right, in breach of its obligations at the *community level*.[50] To reach this decision, however, the court engaged in a thorough step-by-step analysis of the prevailing circumstances of the case, in light of both established and emerging principles of CARICOM law. This case's analysis revealed, in the same vein as comparable CJEU jurisprudence,[51] that the right of automatic entry afforded CARICOM nationals,[52] while an indispensable feature of the Caribbean community, could in different circumstances have been restricted in

42 *Shanique Myrie v Barbados* [2013] CCJ 3 (OJ).
43 See e.g. Orfanopoulos and Oliveri, [C-482/01] and [C-493/01], 29.4.2004, para. 82; Case 67/74 *Bonsignore v Stadt Köln* [1975] ECR 297, para. 7; Case 30/77 *Regina v Bouchereau* [1977] ECR 1999, para. 35.
44 *Shanique Myrie v Barbados*, para. 22.
45 Ralph Gonsalves, 'Free Movement of Community Nationals, CCJ, Shanique Myrie, Community Law and Our Caribbean Civilisation' (Port of Spain, Trinidad and Tobago: Distinguished Lecture sponsored by the University of the West Indies, St Augustine, 17 June 2014).
46 Decision of the Conference of Heads of Government of the Caribbean Community taken at their Twenty-Eighth Meeting.
47 *Shanique Myrie v Barbados*, para. 62.
48 *Shanique Myrie v Barbados*, para. 64.
49 Article 46(2) (b) of the Revised Treaty of Chaguaramas (2001).
50 *Shanique Myrie v Barbados*, para. 55 (noting that a valid decision of a community organ or body, such as the 2007 Conference Decision, taken in fulfilment or furtherance of the RTC or to achieve the objectives of the community is immediately binding at the community level). See also *Hummingbird Rice Mills Limited v Suriname and the Caribbean Community* [2012] CCJ 1 (OJ), (2012) 79 WIR 448 [17].
51 See Orfanopoulos and Oliveri [C-482/01] and [C-493/01], 29.4.2004, paras. 66, 67 (concluding that any restrictions on the right to free movement could only be justified where the circumstances are such that the person desirous of entering another EU member state poses a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society).
52 *Shanique Myrie v Barbados*, para. 100 (referring to 'definite', 'hassle free' or 'entry without harassment or the imposition of impediments').

two situations; this was so albeit these so-called 'exceptions'[53] could not be regarded as a condition precedent to the acquisition of the right, and therefore had to be interpreted restrictively.[54]

An 'undesirable' person: according to the CCJ, CARICOM member states could, in general, legitimately refuse entry to nationals of other CARICOM member states if these persons are deemed to be 'undesirable' persons, a term which the court has construed as meaning persons posing a threat to the maintenance of public morals, public order, public safety, life and health.[55] In this context, however, it must be noted that in accordance with the *principle of proportionality*, such restrictions can only be invoked if such persons present 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society'.[56] In the same manner, as practised by the ECJ,[57] the CCJ held that to invoke this restriction at a basic level, the state in question must prove that the persons desirous of entering the country in question pose a threat of doing something prohibited by domestic law, and that if locals were to engage in similar conduct, they would be subjected to some legal sanction.[58]

In the context of the *Shanique Myrie* case, although the circumstances suggested that the claimant might have intended to stay with a person who might not have been 'of good repute', and might therefore not have been a 'bona fide visitor', the CCJ nevertheless found that this, *without more*, was not sufficient justification to deny the claimant entry into Barbados. It would appear that the court was concerned that neither of these grounds *by themselves* met the proportionality test, given that the Barbadian authorities had failed to establish the alleged untruthfulness of the claimant's statements in accordance with a fair procedure.[59] Against this backdrop, the court found that there was no evidence that the claimant presented on arrival to Barbados a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the Barbadian society. Barbados' denial of entry, in this context, was therefore deemed unlawful.[60]

A 'charge on public funds': in the CCJ's estimation, immigration authorities from a CARICOM member state would be acting legally were they to assess whether CARICOM nationals, desirous of entering their country, have sufficient funds available to cover the duration of their stay, taking into account factors such as the availability of credit cards and whether or not these persons are staying with private persons or at an establishment as paying guests.[61] The CCJ, however, concluded that not having sufficient funds available does not necessarily [nor automatically] mean that these persons would invariably *become* a 'charge on public funds'.[62] Neither would it be reasonable for the CARICOM member state to require that these persons show sufficiency of funds for a period of six months if they are not intending to stay that long in the receiving country. Notwithstanding, this, however, these persons would need to at least show the competent immigration authorities that they possess return ticket(s) on arrival and that they do not intend to stay longer than financially feasible, irrespective of whether they are intending to use their own funds or those of their hosts.[63] Against this backdrop, and in light of the fact that the claimant in the *Shanique Myrie* case had sufficient funds

53 *Shanique Myrie v Barbados*, para. 68 (noting that member states are and continue to be, in principle, free to determine the requirements of public policy in the light of their national needs). See comparable cases at the CJEU, Case C-33/07 Jipa [2008] ECR I-5157, para. 23; Case C-36/02 Omega Spielhallen [2004] ECR I-9609, para. 31; Case C-54/99 Église de scientologie [2000] ECR I-1335, para. 17; and Case C-394/97 Criminal Proceedings against Sami Heinonen [1999] ECR I-3599, para. 43.

54 *Shanique Myrie* (n 1) para. 66. See also, Joined Cases C-482/01 and C-493/01 Orfanopoulos and Oliveri [2004] ECR I-5257 (the court considered that 'particularly restrictive interpretation of the derogations from that freedom is required by virtue of a person's status as a citizen of the Union.'

55 *Shanique Myrie v Barbados*, para. 68.

56 *Shanique Myrie v Barbados*, para. 70.

57 See Georgios Orfanopoulos and thers and *Raffaele Olivieri v Land Baden-Württemberg*, C-482/01 and C-493/01, 29 April 2004 (noting that the concept of public policy presupposes a genuine and sufficiently serious threat which affects one of the fundamental interests of society. The national authorities have to consider in every case whether the personal conduct constitutes a present threat of public policy at the time of the expulsion); see also, *Roland Rutili v Ministre de l'intérieur*, C-36/75, 28 Oct. 1975 (The court ruled that the right of a national of any member state to enter the territory of another member state, to stay there and to move within it, may not be restricted unless the presence or conduct of this national constitutes a genuine and sufficiently serious threat to public policy).

58 See Joined Cases 115 and 116/81 *Rezguia Adoui v Belgian State and City of Liège*; *Dominique Cornuaille v Belgian State* (noting that for the receiving state validly to exclude a visitor on the basis that the visitor poses a realistic threat to engage in conduct prohibited by national law, the receiving state must show that its own nationals who engage in such conduct are routinely prosecuted or otherwise subjected to some legal sanction).

59 *Shanique Myrie v Barbados*, para. 73.

60 Note, however, that member states, in principle, have some discretion when invoking this exception. Notwithstanding this, however, the scope of the concept of 'undesirable persons' is subject to control by the major community organs, particularly the Conference, and ultimately by the Court as the Guardian of the RTC. Refusal on the basis of undesirability must be based on national law and on community law but where the former is inconsistent with community law, the latter must prevail. See executive summary to the *Shanique Myrie* Judgment, CCJ Application no. OA 2 of 2012, para. 13.

61 *Shanique Myrie v Barbados*, para. 75.

62 Ibid.

63 *Shanique Myrie v Barbados*, para. 76.

to support herself for the relatively short period she wished to stay, the CCJ did not find that the claimant would have become a charge on Barbados' public funds had she been permitted to enter.

B. Discrimination on the grounds of 'nationality only'

The CCJ has been given exclusive and compulsory jurisdiction to interpret and apply the provisions of the RTC. Article 7 explicitly prohibits discrimination on the grounds of 'nationality only'. Discrimination, in this context, has been interpreted by the CCJ to mean that the treatment meted out had to be worse or less favourable than that accorded to a person whose circumstances were similar to those of the complainant, except for their and the complainant's nationality, with no objective and reasonable justification for the difference in treatment.[64] That the claimant in the instant case was treated differently from others who were on the same flight could not, however, definitively establish that it was less favourable, although the court was clear to explain that discrimination could be inferred from surrounding circumstances, including the presentation of statistical evidence or a proven pattern of discriminatory conduct.[65] If the claimant had been able to prove that the Barbadian authorities associated some or most Jamaican nationals with certain negative attributes or tendencies, and on that basis treated her prejudicially by imputing to her any of those negative attributes or tendencies, this might have be regarded as discrimination on the ground of 'nationality only', in breach of the RTC's Article 7. However, this was not proved by the claimant on the facts of the instant case.

Notwithstanding this, however, it would appear that if the circumstances were different, discrimination could have been proved by presenting statistics to the effect that 'an overwhelming majority of Jamaicans were [not] permitted to freely enter' Barbados.[66] Nevertheless, as some 98 per cent of all Jamaicans travelling to Barbados were permitted entry into that country, the court was sufficiently satisfied that this, at least in the *prima facie* sense, indicated that no discrimination on the ground of 'nationality only' was present in the instant case. It is important to note, however, that the statistics adduced in this case were merely part of the CCJ's assessment; the court did not use these statistics to determine with any degree of certainty whether or not Barbados did discriminate against the claimant. Rather, the court was prepared to consider, in addition to the statistics adduced in evidence, any biases and slurs directed at the claimant, although the latter *by themselves* could not constitute discrimination on the grounds of 'nationality only'.[67]

Procedural requirements: as intimated above, it was an exceptional decision to deny entry to the claimant, and thus, in accordance with the principle of accountability which forms part of CARICOM law, the CCJ required Barbados to provide promptly and in writing the reasons underlying the denial of entry, as well as afford the claimant the opportunity to review such a denial. Although Barbados could have been excused from this requirement on the basis of Article 225(a) RTC (which protects against disclosing to visitors the reasons for denial of entry if the provision of such reasons would impair its national security interests), according to the facts of the instant case, Barbados was under an obligation to provide an effective and accessible appeal or review procedure to the claimant with adequate safeguards to protect her fundamental right to free movement. Against this backdrop, it was therefore not enough for Barbadian officials to have the decision to deny the claimant entry reviewed by a superior immigration official; rather, they had to afford the claimant the opportunity to consult an attorney-at-law or a Jamaican consular official, if available, or in any event to contact a family member.[68] As Barbados had not done this, the CCJ found that it was in breach of important community procedural requirements.

Some brief reflections: in addition to issuing a declaration to the effect that Barbados had breached the claimant's right of entry 'without harassment or the imposition of impediments' by virtue of the claimant's unlawful detention, mistreatment and deportation, the CCJ went even further by awarding damages, though not of an exemplary nature. This award, to the tune of BB $2,240 in pecuniary damages and BB $75,000 in non-pecuniary damages in addition to reasonable costs, was made having taken into account the gravity of the breach in question and, in particular, its severe impact on the claimant's wellbeing.[69] This article submits that this ruling has significant implications with regard to the juridification of the right to free movement in CARICOM. In the first instance, it means that the right has been accorded primacy by the CCJ, with the effect being that CARICOM member states are now under a strict legal (rather than discretionary political) obligation to make provision for and ensure that the right to free movement is guaranteed within their domestic sphere. Second, the ruling also means that, whereas exceptions to this right could have been invoked almost at will in the past, certain stringent criteria now have to be complied with before any restrictions can

64 *Shanique Myrie v Barbados*, para. 84.
65 *Shanique Myrie v Barbados*, para. 84.
66 *Shanique Myrie v Barbados*, para. 91.
67 *Shanique Myrie v Barbados*, para. 88.
68 *Shanique Myrie v Barbados*, para. 83.
69 *Shanique Myrie v Barbados*, para. 97.

be lawfully imposed on this important right. Third, member states now have to fully account for the actions of their respective immigration authorities, and whereas unlawful conduct by these officials could have been easily swept under the carpet in the past,[70] liability at the *community level* will invariably arise where certain substantive as well as procedural requirements are not fully complied with.[71] This ensures both transparency and accountability,[72] and provides a potential avenue for redress for CARICOM nationals where unlawful conduct in respect of the right to free movement touches and concerns them. Fourth, the *Shanique Myrie* case ruling also suggests that CARICOM nationals are now afforded the legal ammunition to become active, rather than passive, subjects in the regional integration process,[73] thereby ensuring the legitimacy of CARICOM as an emerging inter-governmental platform in the developing world.[74] And, finally, as a result of the exacting principles established by the CCJ in the *Shanique Myrie* case, an authoritative precedent capable of guiding the conduct of all 15 CARICOM member states is now provided for, the effect being that any future conduct by member states which does not comport with the proportionality requirement will not only be declared incompatible with the right to free movement, but will render offending member states liable in damages. In general, it is submitted here that the *Shanique Myrie* judgment now means that legal considerations are to be at the heart of future disputes regarding restrictions on this important right, rather than political considerations which might have exemplified the previous state of affairs in this important area of Caribbean community law.

Notwithstanding the foregoing, however, several outstanding issues remain ripe for consideration. The first surrounds the question of the extent to which CARICOM member states, which are primarily small English-speaking countries, are inclined to afford Haitian nationals, whose first language is French and whose population is in excess of 11 million, the right to free movement on similar terms as other CARICOM nationals, given the lack of capacity in the smaller CARICOM islands to accommodate a large influx of Haitian nationals.[75] The second relates to the highly important question of the CCJ's enforcement capabilities in respect of claims arising from infringements to the right to free movement. In this regard, although the CCJ only recently confirmed that 'member states [...] have an obligation under Article 215 RTC to comply promptly with the judgment and orders made by this Court [and that] the court has a responsibility to monitor compliance with its orders',[76] almost nine months after the court delivered the *Shanique Myrie* judgement, the applicant is yet to receive the damages awarded to her as against the state of Barbados.[77] The third relates to the controversial question as to whether persons from third countries who have been granted 'economic citizenship' under the laws of Antigua and Barbuda, Dominica, Grenada, and St Kitts and Nevis should also be accorded the right to free movement on the same terms as community nationals. And finally there remains some uncertainty as to whether the mere existence of immigration laws barring the entry of homosexuals desirous of travelling between the islands is compatible with the right to free movement in CARICOM law. This latter question, in particular, is currently before the CCJ,[78] where a judgment is expected to be rendered in the not-too-distant future.

iv) 'Indirect steering'

The final method of juridification which can be observed in respect of the right to free movement of persons in CARICOM law is that of 'indirect steering'. According to Simitis, this refers to a situation whereby the regional organisation, in this case CARICOM, provides an avenue by which natural persons can themselves autonomously vindicate this important right before the CCJ,[79] without the need for CARICOM's direct intervention. This 'indirect' avenue has come about by virtue of the inclusion of RTC Article 222, which allows CARICOM nationals to petition the CCJ directly in an effort to secure their right to free movement. This process is, however, not an automatic one; several cumulative conditions must first be satisfied. As outlined by the CCJ in *Maurice Tomlinson v Belize and Trinidad and Tobago*,[80] a case in which a Jamaican homosexual man challenged restrictive immigrations laws for allegedly interfering with his right to freedom of movement within CARICOM, the relevant conditions which must be met are that: a) the right to free movement enures to an applicant's benefit; b) that right was prejudiced by the actions of the

70 Derek O'Brien, 'Fundamental rights and the community law of CARICOM' (Oxford Human Rights Hub, 2013) (citing Ralph Gonsalves, Prime Minister of St Vincent, who has noted that his office regularly receives 'heart-rending stories of Vincentian nationals who have been subjected to unfair, unlawful, unconscionable, and discriminatory treatment by some immigration authorities within member states of CARICOM').

71 *Shanique Myrie* (n 1) para. 55.

72 The principle of accountability is now an indispensable part of Caribbean community law, which must be respected by all state parties in the exercise of powers. See *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 4 (0J), (2009) 75 WIR 194 [39]–[41]; *Hummingbird Rice Mills v The Caribbean Community* [2012] CCJ 1 (OJ), (2012) 79 WIR 448 [31]–[32].

73 Derek O'Brien, *The Constitutional Systems of the Commonwealth Caribbean: A Contextual Analysis* (Oxford: Hart, 2014), 252.

74 David Berry, *Caribbean Integration Law* (Oxford: Oxford University Press, 2014), 258.

75 Kevin Baldeosingh, 'Gonsalves: Haitians can stay legally in T&T for 6 months', *Trinidad Express*, 18 June 2014.

76 *Rudisa Beverages & Juices v Guyana* [2014] CCJ 1 (OJ) para. 28.

77 'Still no money for Shanique Myrie', *Jamaica Observer*, 22 June 2014.

78 *Maurice Tomlinson v Belize and Trinidad and Tobago* [2014] CCJ 2 (OJ).

79 Spiros Simitis, *The Juridification of Labor Relations*, 122.

80 *Maurice Tomlinson v Belize and Trinidad and Tobago* [2014] CCJ 2 (OJ).

receiving state; c) his country of origin declined to espouse the claim on his behalf; and (d) it is in the interest of justice to allow a direct petition in respect of the alleged infringement. Once these conditions have been satisfied, the next and perhaps more arduous step is for that person to provide evidence that the breach committed in respect of the right to free movement was a serious one, and that the loss sustained was causally connected to this breach. It is submitted here that, based on the *Shanique Myrie* decision discussed in the foregoing section, as well as the *Maurice Tomlinson* decision in relation to which the CCJ granted leave to the applicant, it would appear that CARICOM has created an 'indirect steering' mechanism – that is, direct applications to the CCJ by private persons – as a fourth method of securing the juridification of the right to freedom of movement in CARICOM law. It is arguable that this is a welcomed development, which no doubt augurs well for the development of the region's fledgling human rights jurisprudence.

Conclusion

This article has attempted to provide a diachronic analysis of the extent to which the right to freedom of movement of persons in Caribbean community law has juridified since the formal establishment of CARICOM in 1973. By applying Simitis' analytical paradigm of 'juridification', it has shown that the right to free movement in CARICOM law has undergone slow but progressive development since 1973, having passed through a 'reactive' phase, followed by an 'activist' one. Although this process of juridification remains 'an open process which is far from completed',[81] the foregoing sections of this article suggest that, to date, CARICOM has utilised at least four methods – legislation, administrative decisions, judicial decisions and 'indirect steering' – to secure the juridification of the right to free movement in CARICOM law. Although each method poses its own challenges, including continued resistance from member states, progress is being made, particularly in the area of judicial juridification, evidenced not least by the seminal *Shanique Myrie* case decision discussed hitherto. What shape and form this evolving process of juridification will take in the coming years, particularly in light of the 'indirect steering' mechanism becoming crystallised in CARICOM law, remains uncertain. It seems likely, however, that the content of the right to free movement can only expand with the passage of time.

81 Spiros Simitis, *The Juridification of Labor Relations*, 152.