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The University of the West Indies, St. Augustine Law Journal *(UWISALJ)* is a regional legal journal with an emphasis on issues affecting the legal field, locally, regionally and internationally. The aim of the UWISALJ is to add to the legal research and academic discussions in multiple disciplines.

Editorial Note

This inaugural Volume of the **University of the West Indies, St. Augustine Law Journal** (**UWISALJ**) stands as a sign post in the life of the young Faculty of Law. With the Faculty's foundations built in the rich tradition of indigenous Caribbean legal education, this Journal provides a space for critical legal discourse on matters that affect us as a region. The region has always had great legal minds who have advanced our societies, through law and policy. It is our hope that this Journal can serve as a continuation of that advancement.

The Editorial Committee has supported the birth of the **UWISALJ** and without its unwavering dedication, this Volume would not have been possible. The gravitas and insight of the submissions made this first Volume a powerful demonstration of the voice of the region. Contributors to this Volume include Senior Counsel, senior practitioners, students, members of the Faculties of Law across the UWI campuses and policy makers. The variety of contributions and the rich legal analysis have firmly grounded this first Volume in a place of quality academic literature.

The Faculty remains committed to the development of Caribbean jurisprudence and will ensure that the **UWISALJ** achieves this purpose.

Timothy Affonso (Ph.D.)
Editor-in-Chief
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Absolute Data Absolutely Violates Human Rights

Alexandra Ghany

Abstract: *Data is a prominent feature of daily modern life. Yet in Trinidad and Tobago, processing of personal data goes largely unregulated. Data protection legislation around the world has become increasingly relevant following the European Union enacting the General Data Protection Regulation (GDPR). Regarded as the toughest data protection law in the world and therefore the gold standard, many countries have adopted legislation which encapsulates the seven core principles of the GDPR. Some countries, such as Brazil and Chile, have even gone so far as to amend their Constitutions to include a new fundamental right to data protection. As far as Trinidad and Tobago is concerned, though its Data Protection Act is mostly aligned with the GDPR, it is only partially proclaimed, rendering it wholly ineffective. Though bound by the Act to uphold the fundamental principles of data protection, there are no means to enforce the Act upon companies, or the government, who wish to collect and store the personal data of citizens for nefarious reasons, such as predatory targeted marketing, discrimination or election tampering. This necessarily violates several human rights, including the rights to privacy, liberty, and non-discrimination. Given these concerning circumstances, Trinidad and Tobago desperately needs to adjust the law, as necessary, if it wishes to adapt to the increasingly digitised society into which the world has evolved.*

Keywords: *Data Protection, Human Rights, Constitutional Law*

In recent months, various government, finance and manufacturing institutions have all been victims of cyber-attacks.[1] Parliament's response to this has been to enact a Cyber Crime Bill,[2] but this is more of a reactionary measure than a preventative measure. The purpose of the Cyber Crime Bill is to create punishable offences related to cyber-crimes.[3] While there is a legitimate and obvious need for this, focus should first be placed on the way in which data is stored and processed prior to dealing with breaches by third parties. To do so, the relationship between the data controller and the data subject must be closely examined.

Many companies have some form of a database where they store information, typically demographical, about their customers, such as age, race, nationality, etc. However, traditional database techniques cannot indicate basic things such as trends among customers,[4] and information such as this, and user trends, user preferences, etc. have proven to be very useful to companies. In fact, studies indicate that the use of structured data gives businesses a competitive advantage[5] thus providing a very lucrative incentive for businesses to collect as much data as possible. As such, social media companies have evolved to become an effective tool through which massive amounts of data can be

[1] Denyse Renne, 'Held to Ransom by Cyber Attacks' *Daily Express* (Port of Spain, 1 May 2022) <https://trinidadexpress.com/news/local/held-to-ransom-by-cyber-attacks/article_625204e6-c8f4-11ec-a2c2-735c29515c62.html> accessed 7 May 2022.
[2] ibid.
[3] ibid.
[4] William Ribersky, Derek Xiaoyu Wang and Wenwen Dou, 'Social Media Analytics for Competitive Advantage' (2014) 38 Computers & Graphics 328.
[5] ibid.

accumulated.[6] When a person likes certain content, such preferences are recorded in order to build a data profile of the user. This allows for platforms to be able to identify and push certain types of content towards a user that they are more likely to engage with based on their data profile with a near perfect accuracy. Commonly referred to as 'Social Media Big Data', collectively, this data can be analysed to reveal issues, trends, and other kinds of information.[7] Further to this, information identified as 'metadata', which includes personal information on individuals, their location and online activities, and logs and related about the e-mails and messages they send or receive are also stored and accessible by these platforms. This data is not only useful to businesses, but for governments, NGOs, and political parties as well. Social media analytics can examine factors which influence political participation, helping governments and political parties to develop useful strategies for election periods.[8]

Typically, data subjects do not own their data. This is because when people create an account with social media platforms or any website, they agree to the terms and conditions of the platform, which include consenting to the collection, storage and processing of their data. However, these processes can be regulated to protect individual citizens against ***unjustified*** collection, storage, usage and dissemination of their personal details.[9] One of the leading pieces of legislation pertaining to data protection is the General Data Protection Regulation (GDPR)[10] enacted by the Council of the European Union. It sets out how data can be accessed and limits the ways in which it can be processed, and largely influences most data protection legislation. In Trinidad & Tobago, the Data Protection Act[11] was enacted in 2011. However, it was only partially proclaimed, as only the sections which outline the general principles and establish the office of the Information Commissioner and some of his powers are proclaimed, leaving the protection provided by the Act extremely limited.

The misuse of one's personal data by the government especially can constitute a potential violation of several human rights, both in the domestic and international sphere. On the domestic level, such misuse can affect our constitutional rights to non-discrimination, freedom of thought and expression and privacy.[12] Meanwhile on an international level, as it currently stands, there is no international treaty on data regulation. However, there is a long-recognised right to self-determination in international law, and it is enshrined in both the International Covenant on Civil and Political Rights (ICCPR)[13] as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR).[14] The ICCPR, to which Trinidad & Tobago is a party, articulates the right to self-determination as the right to freely determine one's own political status and to freely pursue his/her economic, social and cultural development. The ICESCR carries a verbatim definition of the right to self-determination. In examining international case law, it appears that this right has further been expanded in various jurisdictions and has evolved as a right to informational self-determination, that is increasingly becoming accepted in these jurisdictions. Developed by German case law in 1983, the right to informational self-determination, is based on the concepts of dignity and self-determination in the

[6] Stefan Stieglitz and others, 'Social Media Analytics – Challenges to Topic Discovery, Data Collection, and Data Preparation' (2018) 39 International Journal of Information Management 156.
[7] ibid.
[8] ibid.
[9] Paul De Hert and Serge Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action' in Serge Gutwirth and others (eds.), *Reinventing Data Protection* (Springer 2009) .
[10] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[11] Chap 22:04.
[12] Constitution of the Republic of Trinidad and Tobago, s 4.
[13] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1.
[14] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 1.

German Constitution.[15] It is articulated as the authority of the individual to decide himself, on the basis of the idea of self-determination, when and within what limits information about his private life should be communicated to others.[16] Italy then also recognized a right to informational self-determination,[17] stating that consent can be considered free only if it appears as a manifestation of the right to informational self-determination, therefore shielded from any pressure, and if it is not conditional upon accepting clauses that bring about any significant imbalance relating to the rights and obligations arising from the contract.[18]

Notwithstanding, each right has limited applicability that may not be expansive enough to encapsulate the nature of a data breach. Moreover, the applicability of these rights varies across jurisdictions whereas data protection rights tend to be similarly applied across the world as most regulations encompass the same core concepts from the GDPR. When it comes to data protection rights especially, the issue is not whether one's personal data *can* be processed, as data subjects typically freely give their consent to this, but rather, one's autonomy over *how* their personal data is processed. For example, a person from Trinidad and Tobago may be perfectly content with providing his/her phone number to Instagram. However, he/she may **not** wish that his/her phone number, along with the types of content he/she likes, be shared with a Trinidadian business so that the business may pay Instagram to feature advertisements of their products on the person's feed.

Thus, it is the foremost objective of this research paper to discern whether a data protection right is worth being created in Trinidad & Tobago. Second, because Trinidad and Tobago's legislation is not adequately enforced to regulate the ways in which a person's data can be used by various entities, it will be suggested that there be further legislation implemented, both between the individual and the State by a constitutional amendment, and between companies and the individual by way of amending and fully proclaiming the Data Protection Act. This will be done through an examination of both international and domestic case precedent and legislation.

The Evolution of Rights

The Right to Privacy

In assessing data protection laws, it is often contended that any such data right is merely an extension of the right to privacy.[19] While the veracity of such a statement remains widely debated and somewhat inconclusive, it is worth exploring the right to privacy and its scope to determine whether it is, in fact, applicable to data protection.

In 1890, theorists, Warren & Brandeis, postulated the revolutionary concept of a right to privacy. They described it as the right of each individual to determine, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.[20] The theorists however, posited that this right already existed in the common law, as nothing in the law, except where on the witness stand, can compel a man to express his thoughts and opinions.[21] This would later be accepted *in Puttaswamy v Union of India*,[22] wherein the court ruled unanimously that privacy is a constitutionally protected right in India despite there being no explicit right to privacy in their Constitution. Yet, in American courts, the right was not recognized until 1965.[23]

[15] Judgment of 15 December 1983, 1 BvR 209/83, BVerfGE 65.
[16] Judgment of 15 December 1983, 1 BvR 209/83, BVerfGE 65.
[17] The Italian Data Protection ruling of 28 May 1997, Bollettino 'Cittadini e Society dell'Informazione', Anno I - May/July 1997 - Il Foro italiano, 3 (1997).
[18] The Italian Data Protection ruling of 28 May 1997, Bollettino 'Cittadini e Society dell'Informazione', Anno I – May/July 1997 - Il Foro italiano, 3 (1997).
[19] Maya Tzanou, 'Data Protection as a Fundamental Right v Next to Privacy? "Reconstructing" a Not So New Right' (2013) 3 International Data Privacy Law 88.
[20] Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.
[21] ibid.
[22] *Justice KS Puttaswamy (Retd.) and Another v Union of India and Others* (2019) 1 SCC 1.
[23] *Griswold v Connecticut* 381 US 479.

In 1976, Trinidad & Tobago enacted the Constitution as we know it today, which enshrined the fundamental rights and freedoms of its citizens. Among these rights was the right to privacy.[24] In fact, most Commonwealth Caribbean Constitutions contain the right to privacy. It is worth noting as well though, that in the Commonwealth Caribbean especially, the Constitution is *sui generis*, in that it is treated as a living instrument whose scope and applicability can evolve to suit the times in which it exists. As such, when theorists such as Hildebrandt contend that privacy is not merely about the exchange of or access to personal information, but also identity-building and identification,[25] this evolution of the right to privacy can be accepted into law even though the right may not have carried such connotations at the time of its creation. Hildebrandt essentially posits that the core of privacy is to be found in the idea of identity, in that particular information can be used to identify individuals, constituting a violation of the right. As such, the right to privacy concerns the freedom from unreasonable constraints that creates the freedom to reconstruct one's identity.[26] It is on such a basis that the courts may expand the right of privacy to include a right to data protection. In so saying, it is worth exploring what the current application of the right to privacy is in Trinbagonian courts.

Keeping in mind that Trinidad & Tobago's Bill of Rights is modeled after the Canadian Bill of Rights,[27] Canadian case law is relevant in interpreting the scope of the right to privacy as it is stated in the Constitution. Thus, it is worth noting that in the Canadian case *R v Dyment*[28] the Court accepts that privacy is at the heart of liberty in a modern state as it is grounded in man's physical and moral autonomy and is essential for the well-being of the individual. In the more recent local case of *Jason Jones v AG,*[29] Justice Rampersad posited that in terms of the right to privacy, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. The leading case on privacy in Trinidad & Tobago, however, is *Felix v AG*[30] wherein the Court recognized the right to privacy as a feature of a democratic society, however further stated that it can at times be curtailed by Parliament where public interest overrides the incentive to uphold such a right.[31] Moreover, the Court echoed the sentiments of the House of Representatives in the Hansard report that if there must be a constitutional invasion, vis a vis a violation of privacy, in order to solve the problem of crime, then such a violation is justifiable. The Court in this case ultimately found s 50(2) of the Police Service Act which allowed photographs of accused or detained persons to be retained even where they are discharged or acquitted to be a violation of the right to privacy. Though, they did not find the retention of the fingerprints of such persons to be a violation on the basis of the margin of appreciation afforded to the State. In so saying, the applicability of the right to privacy in Trinidad & Tobago is often limited due to its substantive nature. Nevertheless, the limited amount of litigation pertaining to privacy within Trinidad & Tobago, let alone the wider Caribbean region, leaves it difficult to discern definitively, the true scope of the right to privacy.

Thus, in order to ascertain the full scope of this right, one can assess how it has been treated by other Commonwealth jurisdictions. Generally, in the Commonwealth, there are several variances in terms of the applicability of the right to privacy. Firstly there are the traditional 'broad' privacy rights, which are expressed to protect individuals from interference with his or her private or family life, and well as the privacy of the home and correspondence.[32] Secondly, there are 'search and entry' provisions which, in their expression, are directed towards protections concerning search of the person and privacy of/search of/entry unto property, and may include an expression of privacy of communications.[33] Thirdly, there are jurisdictions where there is no express provision relating to privacy at all, such as in India.[34]

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[24] Constitution of the Republic of Trinidad and Tobago, s 4(c).
[25] Mireille Hildebrandt, 'Privacy and Identity' in Erik Claes, Antony Duff and Serge Gutwirth (eds), *Privacy and the Criminal Law* (Intersentia 2006).
[26] ibid.
[27] SC 1960, c 44.
[28] [1988] 2 SCR 417.
[29] *Jason Jones v The Attorney General of Trinidad and Tobago* HC No 720 of 2017, CV2017-00720.
[30] *Keston Felix v Attorney General of Trinidad & Tobago* HC No 858 of 2020, CV2020-00858.
[31] ibid para 55.
[32] André Sheckleford, 'Biometric Identification Systems in the Commonwealth and the Right to Privacy' (2019) 9 *International Data Privacy Law* 95.
[33] ibid.
[34] ibid.

Aside from constitutional protection though, as previously mentioned, Trinidad & Tobago is also a party to the International Covenant on Civil and Political Rights,[35] which includes a right to privacy,[36] thereby compelling them to uphold this right as a matter of international obligation. As such, looking at the international interpretation of the right to privacy can be helpful to discern how it is to be applied in contracting State parties, including Trinidad & Tobago. According to the UN Human Rights Committee's (UNHRC) General Comment No. 16,[37] the protection of privacy is relative, but nevertheless, information relating to an individual's private life should only ever be accessed by the State where it is essential in the interests of society as understood under the Covenant.

In other words, the general effect of this Comment is to establish that the right to privacy includes protection against the collection of personal information by the State without one's consent. The UNHRC General Comment also points out that Article 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In reference to the Article, the Committee observes that while an inference with privacy can be provided for by law, the interference must still not be arbitrary in any way. According to the general comment, arbitrary interference can extend to interference provided by law, and this will constitute a breach of Article 17. Moreover, the UNHRC posits that State parties have not given enough consideration to this. This is quite apparent when one observes that there was virtually no discussion in *Felix v Attorney General*[38] on whether the alleged interference was arbitrary, only whether it was permissible by law. This is to say, there appears to be a lacuna in the law when it comes to the domestic and international interpretations of the right to privacy.

As it pertains to data protection, this gap in the law can be therefore exploited by the government to cause citizens to divulge their data even where it may not be necessary so long as it is permissible by law. For example, the recent COVID-19 pandemic has exposed an opportunity for the creation of conditions where personal information such as medical records can be collected by governments. For instance, one Canadian province enacted legislation that compelled health care workers to report individuals who were tested and diagnosed with COVID-19 to the local public health authority.[39] Though in that instance the legislation was legally justifiable and not arbitrary, if another pandemic were to occur, and the right Government of Trinidad and Tobago decided to enact legislation which similarly compelled the disclosure of medical records, based on the domestic case law, it cannot be guaranteed that the arbitrariness of such a disclosure would be questioned. Notwithstanding, there would not be a functional framework of data regulation in the country to guide such disclosure since the Data Protection Act[40] is not fully proclaimed and is barely functional.

Data Protection Rights

In 1973, Germany enacted the world's first data protection law,[41] but it was not until the European Union Council's General Data Protection Regulation[42] (GDPR) was published in 2016 that such stringent data protection regulations around the world became popularized. The GDPR outlines 7 core principles: (i) Lawfulness, fairness and transparency; (ii) Purpose limitation; (iii) Data minimization; (iv) Accuracy; (v) Storage limitation; (vi) Integrity and confidentiality (security); and (vii) Accountability. Somewhat contrastingly though, its predecessor, the Data Protection Directive (DPD)[43] identifies 7 core principles with some semantic

[35] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1.
[36] ibid art 17.
[37] OHCHR 'CCPR General Comment No. 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988) HRI/GEN/1/Rev.9 (Vol. I).
[38] Keston Felix v Attorney General of Trinidad & Tobago HC No 858 of 2020, CV2020-00858.
[39] Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25.
[40] Chap 22:04.
[41] Data Protection Act 1998 (Germany).
[42] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[43] European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

differences. These are (i) Notice; (ii) Purpose; (iii) Consent; (iv) Security; (v) Disclosure; (vi) Access; and (vii) Accountability. One of the key aspects of both pieces of legislation though, is the data minimization requirement, which means that "companies are prohibited from collecting, using and retaining data unless they obtain consent or have another compelling reason to process the data."[44] This is the consent principle in the DPD. The cost of this, however, is that as a result, European countries do not lead in information-driven sectors such as e-commerce, cloud computing, Software as a Service (SaaS) and social networks.[45] This is to say, there is an economic incentive in limiting the protection afforded by data protection legislation.

According to the DPD, personal data includes a person's name, photo, email address, phone, address, or any personal identification number (social security, bank account, etc.), whereas according to the GDPR, IP addresses, mobile device identifiers, geo- location, and biometric data (fingerprints, retina scans, etc.) all constitute personal data.

Currently, 137 of 194 countries have put in place legislation to secure data protection and privacy.[46] Of all 194 countries, 71% have legislation, 9% with draft legislation, and only 15% have no legislation whatsoever.[47] In Trinidad & Tobago, legislation pertaining to data protection was enacted in 2011. The Data Protection Act was heavily influenced by UK law,[48] but remains ineffective as it is only partially proclaimed.

The Separation of Data Rights and Privacy Rights

Internationally, the right to privacy is regarded as a civil and political human right, as it is featured in the International Covenant on Civil and Political Rights.[49] As Trinidad and Tobago is a signatory to this treaty, they are obligated to ensure that this right is upheld. However, in Trinidad & Tobago, the right to privacy is also a constitutional right, as it is enshrined in section 4(c) of the Constitution. On the other hand, the right to data protection may also be viewed as a civil and political human right since it is perceived as having stemmed from the right to privacy.[50] Though, in previous international case law, the two rights appeared to be conjoined. In *Digital Rights Ireland*[51] for example, the CJEU observed the important role protection of personal data plays in upholding the right to respect for private life. However, in the *Schrems case*,[52] the CJEU retrospectively interpreted the EU Data Protection Directive[53] as implementing the right to data protection as guaranteed under Article 8 of the Charter of Fundamental Rights of the European Union.[54]

However, this may be because had the data protection right not been read into the right to privacy, there would have been no avenue of recourse in these instances. In so saying, the connection between the right to privacy and the right to data protection is merely expedient in that it exists only to account for the lacuna in the law. This solution though, lacks longevity in its applicability. This is because the right to privacy can be subjectively interpreted varying on jurisdiction, whereas the right to data protection is objectively interpreted. This right must be interpreted objectively because of the subject matter of its applicability. Inherently, data protection is a global issue as the data controller is typically a company with a global userbase. This is not to infer that governments cannot also be subject to data protection laws, however the potential for data breaches by companies are substantially more significant as they have a commercial interest at stake.

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[44] Lothar Determann, *Determann's Field Guide to Data Privacy Law: International Corporate Compliance* (5th edn, Edward Elgar Publishing 2022) xvii.

[45] ibid.

[46] United Nations Conference on Trade and Development, 'Data Protection and Privacy Legislation Worldwide' (*UNCTAD*, 14 December 2021) <https://unctad.org/page/data-protection-and-privacy-legislation-worldwide> accessed 22 March 2022.

[47] ibid.

[48] HOR Deb (Hansard Reports) 18 February 2009, 10th Sitting, 2nd Session, 9th Republican Parliament, 852 (TT).

[49] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 1.

[50] Maria Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Hart Publishing 2017).

[51] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* [2014] ECR I-238.

[52] *Maximillian Schrems v Data Protection Commissioner* (Case C-362/14) ECLI:EU:C:2015:650.

[53] European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

[54] Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.

Furthermore, as previously stated, the right to privacy on an international level is different from the right to data protection in that it is much more substantive whereas data protection is procedural in nature. In fact, in *Bavarian Lager*,[55] the Court of First Instance postulated that 'not all personal data are by their nature capable of undermining the private life of the person concerned'. They evidenced this by pointing to the fact that in the Data Protection Directive,[56] reference is made to data which are capable by their nature of infringing fundamental freedoms of privacy, and which should not be processed unless the data subject gives his explicit consent. In so saying, data protection is not simply just about informational privacy, but also informational *autonomy*.

The effect of data regulation and the nature of the right to privacy must also be taken into account. Data regulation may drive innovation forward in terms of security practices by both the State and the private sector. Where they may now have a responsibility to ensure the protection of specifically the data in their possession, they would be encouraged to take extra measures to ensure compliance with such a responsibility. Further to this, according to the Charter of Fundamental Rights of the European Union,[57] the right to protection of personal data is regarded as a fundamental right.[58] This right exists in the Charter alongside the right to privacy.[59] In short, the European Union clearly regards the two rights as separate.

Why Data Rights Are Human Rights

In order to justify data protection rights as human rights, it must first be determined what constitutes a human right. Human rights are generally regarded as inherent and inalienable. Many academics fall under the 'essentialist' camp, contending that human rights arise from some essential feature of the human being or morality.[60] For example, theorist David Little postulated that there are universal, and even 'objective,' moral standards that are associated with existing human rights norms, which is to say, human rights can exist independently of our acknowledgement because they are rooted in the undeniable naturalness of morality.[61] Though this can serve to be a pernicious doctrine, since racial discrimination was not perceived as wrong or a violation of human rights for centuries. In fact, enslavement was at one point contended to be morally righteous, as the former colonizers claimed that they were giving the enslaved people salvation.[62] This is to say, moral intuitions may provide a strong sense of how to live and which actions to condemn, but they cannot be the ground for human rights.[63]

As such, some academics of the 20th century and forward tend to adopt a contrasting, non-essentialist view. For example, political philosopher Hannah Arendt, in attempting to understand how totalitarianism could possibly come about, posits that human rights are only enforceable where they are conferred unto individuals by the State and can be enjoyed within the State. However, she goes on to further state that the State alone is not responsible for the creation of human rights, as more often than not, the enforcement of human rights is contrary to the State's interests. To truly be cemented as a human right, a collective will of the people is required. As Arendt postulates:

> we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights. Our political life rests on the assumption that we can produce equality through organization.[64]

Though Arendt's theory is formed against the backdrop of the Holocaust, it holds value to the discussion on data rights being human rights because in essence, she seeks to

[55] *The Bavarian Lager Co. Ltd v Commission of the European Communities* (Case T-194/04) ECLI:EU:T:2007:334.
[56] European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.
[57] Charter of Fundamental Rights of the European Union [2010] OJ C 83/389.
[58] ibid art 8(1).
[59] ibid art 7.
[60] Serena Parekh, 'Resisting "Dull and Torpid" Assent: Returning to the Debate Over the Foundations of Human Rights' (2007) 29 Human Rights Quarterly 754.
[61] David Little, 'The Nature and Basis of Human Rights' in Gene Outka and John P Reeder (eds), *Prospects for a Common Morality* (Princeton UP 1993).
[62] Nigel Pleasants, 'Moral Argument Is Not Enough: The Persistence of Slavery and the Emergence of Abolition' (2010) 38(1) Philosophical Topics 159.
[63] Serena Parekh, 'Resisting "Dull and Torpid" Assent: Returning to the Debate Over the Foundations of Human Rights' (2007) 29 Human Rights Quarterly 754.
[64] Hannah Arendt, the origins of totalitarianism,, supra note 4, at 301.

posit that the enforceability of human rights is reflective of society. She postulates that the Nazis were able to achieve systemic deprivation of human rights through making people stateless, as it is impossible to protect human rights once an individual had lost her place in a political community.[65] Moreover, Arendt contends that human rights are not given by nature or granted by the state but created through human decision and determination.[66] Philosopher Beth Singer, takes a similar view to Arendt, as she rejects the notion that human rights are self-evident and not dependent upon membership in a community.[67] She further argues that the basis of human rights is the nature of community or in the requirements of social interaction.[68] In other words, human rights are based on the social norms necessary to organize behavior, to understand what to expect of others, to have a common purpose, goals and an understanding of these. In so saying, because we now live in an increasingly digital world, where data forms part of daily life for hundreds of millions of people, if not billions, protection of such data must now become a human right. Especially considering that many entities, both the government and private sector included, can now use persons' data to their benefit, data has become a part of modern communities and political systems.

Around the globe as well, many countries are beginning to recognize this fact. For instance, the European Union regards the right to data protection as a fundamental right, enshrining it in Article 8 of the EU Charter of Fundamental Rights.[69] Brazil has also very recently amended its Constitution to include a right to data protection.[70] One Brazilian Senator stated that:

> Personal data belongs rightfully to the individual and the individual alone. It is up for the individual, and only to the individual, to choose to whom these data can be revealed and in what circumstances, except in very well outlined legal settings, as is the case of criminal investigations under due process.[71]

The Impact of Evolved Communication Technology on Data Protection

To reiterate, personal data is very lucrative for businesses especially. Customer data can typically be collected in three ways: by directly asking customers, by indirectly tracking customers, and by appending other sources of customer data to your own.[72] For the purposes of this paper, the indirect methods are most interesting. At first instance, data is collected directly, for example when a DNA sample is sent to a genomics company to figure out one's ancestry. However, this data from the DNA sample may then be sold to pharmaceutical firms.[73] In addition to this, many apps ask users for location permissions so that they may be shown custom advertisements.

Yet, users may be unaware that this location data may be sold to firms to analyze which retail stores they frequent.[74] In both cases, the consumer accepts the services provided by the companies in exchange for the companies monetizing their data.[75] This is the business model of many companies such as Meta (formerly known as Facebook) and Google. Their core products, including

[65] Serena Parekh, 'Resisting "Dull and Torpid" Assent: Returning to the Debate Over the Foundations of Human Rights' (2007) 29 Human Rights Quarterly 754.
[66] Hannah Arendt, The Origins of Totalitarianism, supra note 4, at 301.
[67] Beth J Singer, *Pragmatism, Rights, and Democracy* (Fordham UP 1999) xii.
[68] Beth J Singer, *Pragmatism, Rights, and Democracy* (Fordham UP 1999) xii.
[69] Charter of Fundamental Rights of the European Union (2007) OJ C 303/1.
[70] Constitution of the Federative Republic of Brazil, art 5(LXXIX).
[71] Marcelo Brandão, 'Personal Data Protection Now a Right Under Brazil Constitution' (*Agência Brasil*, 11 February 2022) <https://agenciabrasil.ebc.com.br/en/politica/noticia/2022-02/protection-personal-data-becomes-constitutional-right> accessed 22 March 2022.
[72] Max Freedman, 'How Businesses Are Collecting Data (And What They're Doing With It)'(*Business News Daily*, 3 December 2021) <https://www.businessnewsdaily.com/10625-businesses-collecting-data.html> accessed 20 March 2022.
[73] Megan Molteni, '23andMe's Pharma Deals Have Been the Plan All Along' (*WIRED*, 3 August 2018) <https://www.wired.com/story/23andme-glaxosmithkline-pharma-deal/> accessed 20 March 2022.
[74] Jennifer Valentino-DeVries and others, 'Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret' *The New York Times* (New York, 10 December 2018) <https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html> accessed 20 March 2022.
[75] Louise Matsakis, 'The WIRED Guide to Your Personal Data (and Who Is Using It)' (*WIRED*, 15 February 2019) <https://www.wired.com/story/wired-guide-personal-data-collection> accessed 20 March 2022.

Instagram, WhatsApp, Messenger, Gmail, and Google Maps, are free for persons to use as the data they provide to the companies is almost invaluable. For example, in the UK alone, with 42 million Facebook users, Meta (Facebook's parent company) makes US$37 billion on average every year.[76] Thus, in *Google v CNIL*,[77] the court clarified that the information provided to users must enable them to determine the scope and consequences of the processing operation in advance in order to avoid being caught off guard as to the way that their personal data is to be used.

Under European law, data 'processing' has a broad definition that:

> includes collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure, transmission, dissemination, making available, alignment, combination, restriction, erasure or destruction, manually or by automated means,[78]

of data. Even where companies redact or delete personal data, under European laws, this constitutes processing, and the general prohibitions and data minimization requirements are invoked. According to the GDPR specifically, processing data is where the seven core principles become relevant. First, data must be processed *lawfully, fairly and in a transparent* manner in relation to the data subject.[79] Second, data must be collected for specified, explicit and legitimate purposes, including but not limited to public interest, scientific or historical research, or statistical purposes.[80] This is the purpose limitation requirement. Third, the data must be adequate, relevant, and necessary in relation to the purpose of its collection, this being the data minimization requirement.[81] Fourth, the data must be accurate, with every reasonable step taken to ensure that inaccurate information is rectified.[82] Fifth, the data must be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.[83] Though, personal information can be stored for longer periods so far as it conforms with the purpose limitation requirement.[84] Sixth, data must be processed in conformity with the integrity and confidentiality principle, in a manner that ensures appropriate security of the personal data, including protection against unauthorized or unlawful processing and against accidental loss, destruction or damage.[85] Lastly, the responsibility of compliance with these requirements in processing the data is imposed on the data controller.[86]

As aforementioned, many companies sell the data they collect to third parties. Coined by former Harvard Business School professor Shoshana Zuboff, 'surveillance capitalism' is an economic 'logic of accumulation' that involves extracting personal data in often-unrecognizable ways, creating 'new markets for behavioral prediction, modification, and control' that exploit this data as its primary resource.[87] In short, by users providing a constant stream of photos, likes, and other useful data, companies such as Google and Facebook can use this to map relationships, measure emotional responses, and effectively deliver targeted ads. As a result, underdeveloped and developing countries without proper privacy laws or data protection laws are especially susceptible to the excessive and invasive collection, processing and storage of citizens' data, sometimes even without their knowledge or consent. This is so because since data is so useful in predicting the behaviours of users, it is extremely lucrative for companies to go to countries where the data laws are not as stringent as the GDPR so that they may collect the maximum amount of data possible.

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[76] Jim Martin, 'This Is How Much Money Facebook Earns From Your Data Each Year' (*Tech Advisor*, 28 January 2022) <https://www.techadvisor.com/news/security/how-much-facebook-earns-from-your-data-3812849> accessed 20 March 2022.

[77] Decision N° 430810, ECLI:FR:CECHR:2020:430810.20200619.

[78] Lothar Determann, *Determann's Field Guide to Data Privacy Law: International Corporate Compliance* (5th edn, Edward Elgar Publishing 2022), xxiv.

[79] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 5(1)(a).

[80] ibid art 5(1)(b).

[81] ibid art 5(1)(c).

[82] ibid art 5(1)(d).

[83] ibid art 5(1)(e).

[84] ibid.

[85] ibid art 5(1)(f).

[86] ibid art 5(2).

[87] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile Books 2019).

Why Data Regulation Matters

In 2018, British consulting firm Cambridge Analytica was implicated in a massive data breach as it related to the U.S. 2016 Presidential Election.[88] The firm had improperly obtained the personal data of millions of Facebook users in order to create manipulative and biased marketing techniques to influence the U.S. elections all without the knowledge of the Facebook users. Not long after this scandal broke, it was revealed that the same had occurred with respect to the 2015 Trinidad and Tobago general elections.[89] Cambridge Analytica, using the Facebook data acquired, worked under the United National Congress (UNC) to create the 'Do So' campaign, designed to suppress Afro-Trinidadian voters under the guise of a grassroots protest movement by specifically featuring the campaign on their Facebook feeds.[90] Though the investigation into the matter remained inconclusive and was closed,[91] this would have constituted a violation of section 4(i) of the Constitution, which guarantees the right to freedom of thought and expression, as persons would not have been able to have the freedom to hold opinions and ideas without interference by public authority considering that their views were unconsciously altered as they were continuously subjected to targeted propaganda unbeknownst to them. This may seem like a rash observation, however, according to research, the psychological effect of targeted advertisements is quite strong, and can even change how users feel about themselves, let alone their behaviour.[92] Hence, it is not a far stretch to say that if Cambridge Analytica really was hired by the UNC to create a targeted campaign, then it is entirely possible that such a campaign effectively altered citizens' opinions. Thereby, they would have interfered with the right to freedom of thought and expression. But what is the threshold for such interference to constitute a violation of the right? Though Trinidad and Tobago has limited precedent on this right, one can be guided by the interpretation of the right by regional courts. In the Guyanese case, *McEwan et al v Attorney General of Guyana*,[93] the Court affirms the principle in *National Legal Services Authority v Union of India and Ors*[94] that freedom of expression includes the expression of one's identity through words, dress, action or **behaviour**. It then follows that a person's support for a political party, or rather their abstinence from voting, is a behaviour which is an expression of their identity for the purposes of the right to freedom of expression. Moreover, this purposive approach should be taken in interpreting the right as *Minister of Home Affairs v Fisher*[95] dictates that the austerity of tabulated legalism should be avoided in order to give full measure of the fundamental rights and freedoms conferred by the constitution which is to be treated as a living instrument. In short, the right to freedom of thought and expression must be generally interpreted, especially since this method of interpretation was accepted by Trinbagonian courts in *Suratt v Attorney General*.[96] Thus, when data is not heavily protected, it can result in serious violations of human rights.

As it concerns the GDPR, where data controllers contravene certain provisions of the legislation, including the seven core principles, they can be fined up to 4% of their global annual turnover from the preceding year or €20,000,000, whichever is larger.[97] While 4% or €20 million may seem like a mere slap on the wrist, this is not the case, as just last year, Amazon was fined a whopping €746 million for its violation of the GDPR.[98] While

[88] Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' *The New York Times* (New York, 4 April 2018) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 25 March 2022.

[89] Jada Steuart, 'Netflix's 'The Great Hack' Highlights Cambridge Analytica's Role in Trinidad & Tobago Elections' (*Global Voices Advox*, 6 August 2019) <https://advox.globalvoices.org/2019/08/06/netflixs-the-great-hack-highlights-cambridge-analyticas-role-in-trinidad-tobago-elections/> accessed 25 March 2022.

[90] ibid.

[91] Loop News, 'TTPS Closes Investigation into Cambridge Analytica Allegations' (*Loop News*, 6 May 2020) <https://tt.loopnews.com/content/ttps-closes-investigation-cambridge-analytica-scandal> accessed 25 March 2022.

[92] Christopher A Summers, Robert W Smith and Rebecca Walker Reczek, 'An Audience of One: Behaviorally Targeted Ads as Implied Social Labels' (2016) 43 Journal of Consumer Research 156.

[93] [2018] CCJ 30 (AJ).

[94] [2014] 4 LRC 629.

[95] (1979) 44 WIR 107.

[96] Suratt and Others v Attorney General of Trinidad and Tobago (2007) 71 WIR 391 [45].

[97] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 83(4).

[98] 'Luxembourg DPA Issues €746 Million GDPR Fine to Amazon' (*Data Privacy Manager*, 30 July 2021) <https://dataprivacymanager.net/luxembourg-dpa-issues-e746-million-gdpr-fine-to-amazon/> accessed 23 March 2022.

Amazon contended that they did not disclose the personal data of their users to a third party therefore there was no data breach, this was an almost irrelevant submission. In reality, their violation was encapsulated by their failure to ensure transparency in the processing of their users' data. Whilst one of the core functions of the GDPR is to ensure data security, ensuring that data is processed fairly is another core function of the GDPR. To that end, consent alone is not sufficient to illustrate fairness. Data subjects must be able to understand what they are consenting to. As such, the GDPR imposes an obligation on data controllers to use clear, plain language in explaining how the data is going to be used, why and by whom.[99] Amazon in this case failed to do so, and as such this large fine was imposed on them. Moreover, Amazon is not the only company to incur such a significantly large fine. As a matter of fact, WhatsApp, Facebook, Google, etc. have all incurred fines of €50 million and exceedingly well over thereof.[100]

Domestic Legislation

Coming into force in 2012, the Data Protection Act is the sole legislation in Trinidad and Tobago that deals with data protection. However, as it currently stands, it is only partially proclaimed. Specifically, sections 1 to 6 (Part I), sections 7 to 18, 22, 23, 25(1), 26 and 28 (of Part II),[101] and section 42(a) and (b) (of Part III) are proclaimed.[102] Section 1 is the short title and commences the act, section 2 carries the definitions of the Act, section 3 binds the State, and section 4 outlines the objective of the act. Section 5 defines the instances in which the applicability of the act is limited, and section 6 outlines the general privacy principles, which are very similar to those enshrined in the GDPR. Sections 7 to 18 establish the offices of the Information Commissioner and his functions, the Deputy Information Commissioner, and the staff. This portion of the Act also establishes the removal process, among other more minor things. Though funnily enough section 19, which confers unto officers appointed by the Commissioner to inspect and conduct enquiries on his behalf, as well as sections 20 and 21 which confers upon the commissioner the power to conduct enquiries and investigations of public and private bodies respectively are all not proclaimed. Section 22 of the act deals with how expenses incurred by the expenses and accounts of the office of the Information Commissioner are to be treated and section 23 declares what kind of statements made to the Commissioner are not admissible in court. Yet, section 24, which asserts what is privileged information, is not proclaimed. Additionally, the proclaimed section 25(1) precludes the Information Commissioner from disclosing information obtained in performing their duties, powers and functions under this Act, but section 25(2) which authorizes the Commissioner to disclose such information in certain specified circumstances is not proclaimed. Though, the Commissioner enjoys protection from the courts by virtue of section 26, which is proclaimed. The Commissioner is also directed to publish a list of countries which have comparable safeguards for personal information as provided by this Act by section 28. In observance of the proclaimed provisions and being especially cognizant of the substance of the provisions which remain unproclaimed, one can easily surmise that the Act in its current state does not seek to confer unto the Commissioner any authority with which they can meaningfully ensure adherence to the obligations of the act. Lastly, section 42(a) and (b) govern two instances whereby personal information can be disclosed, being where that information was collected or compiled by the public body or for a use consistent with such a purpose or where it is in accordance with any law which allows any such disclosure.

As it regards penalties, persons committing offences under the Act are liable, at maximum, to a fine of up to TTD $100,000 or to imprisonment for a term of not more than five years. Body corporates are, at maximum, liable to a fine of TTD $500,000. Alternatively, where a corporation contravenes any of the provisions of the Act, the Court may impose a fine of up to 10% of the annual turnover of the enterprise. However, the penalties portion of the Act is not proclaimed, thus technically, these penalties are rendered unenforceable.

From a structural standpoint, the appointment process of the Information Commissioner is a matter of concern. In the earlier drafted version of the legislation, the Information Commissioner, then called the 'data

[99] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 7(2).

[100] '25 Biggest GDPR Fines So Far (2019, 2020, 2021, 2022)' (*Tessian*, 27 January 2022) <https://www.tessian.com/blog/biggest-gdpr-fines-2020/> accessed 22 March 2022.

[101] Legal Notice No 2 of 2012 (TT).

[102] Legal Notice No. 220 of 2021 (TT).

commissioner' was supposed to be appointed by the President in consultation with the Prime Minister and the Leader of the Opposition.[103] However, the Act now only provides that the Commissioner be appointed by the President. Though on paper, this would be a move that appears to exclude politics entirely from the appointment of the Information Commissioner, as the President acts in an independent capacity, some members of parliament did not agree with this. In fact, these fears were expressed in a parliamentary sitting where the Bill was discussed, as one minister posited that if that commissioner is appointed by the President, in effect, he is appointed by the Prime Minister since the President acts on the instructions effectively of the Prime Minster.[104] Considering that the Act binds the State, the Information Commissioner is an inherently political office. The President even appoints the Chief Justice in the advice of the Prime Minister and Opposition Leader.[105] To reiterate as well, alongside this, the act precludes the Information Commissioner from being subject to the courts for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of their duties, powers or functions[106] despite the act having been passed and partially proclaimed in 2011. Thus the power conferred on the Information Commissioner is nearly unchecked, if not entirely so. The act is therefore almost completely useless, as there is no one to oversee and monitor compliance with the act since a Commissioner has not been appointed, notwithstanding the fact that breaches would not be punishable since the penalties portion of the Act is not proclaimed and therefore unenforceable.

In contrast, according to the GDPR, any company which processes data of citizens within the European Union is subject to its provisions.[107] This means that even where the company processing data is not actually established in the EU, so long as its services are offered and used there, companies must confirm with the principles of the GDPR. In so saying, the GDPR has an effect on most major companies globally. In comparison, this is not the case domestically. The Data Protection Act provides that personal information collected in Trinidad & Tobago should only be stored and accessed in Trinidad & Tobago[108] unless the data controller has obtained consent from the data subject[109] or the information is stored in or accessed from a jurisdiction that has comparable safeguards as provided by the Act.[110] The Act is however silent on what constitutes comparable safeguards and instead leaves it to the discretion of the Information Commissioner, who must publish a list of countries which have comparable safeguards for personal information as provided by the Act in the Gazette and at least two other daily newspapers.[111] However, the Act does not specify how often or when this list must be published. Nevertheless, to date, no such list has ever been published yet despite this part of the Act being proclaimed.

Recommendations

Trinidad and Tobago has been regarded as an economic powerhouse in the Caribbean region for quite some time now. However, in order to maintain that status, it must evolve and adapt to new changes in society. Data has now become a large part of modern societies and as such, Trinidad and Tobago must employ proper legislation in order to guide the development of how data is used in our society going forward. In doing so, not only will individual rights be guaranteed, but cross-border data flows and trade, which will enable an environment for e-government and data sharing at the national and regional levels.[112] The COVID-19 pandemic especially, has illuminated the need for better access to e-government services and digital tools for citizens as a means of managing the health crisis by sharing health data, and even by using mobile tools such as contact tracing apps. However, if the government intends to pursue these technological advancements for a better functioning society, citizens' rights must first be adequately safeguarded. As such, Trinidad and Tobago can take note

[103] HOR Deb (Hansard Reports) 18 February 2009, 10th Sitting, 2nd Session, 9th Republican Parliament, 851 (TT).
[104] HOR Deb (Hansard Reports) 18 February 2009, 10th Sitting, 2nd Session, 9th Republican Parliament, 852 (TT).
[105] Constitution of the Republic of Trinidad and Tobago, s 102.
[106] Data Protection Act, 2011, s 26 (TT).
[107] European Parliament and Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art 3(2).
[108] Data Protection Act, 2011, s 36 (TT).
[109] ibid s 36(a).
[110] ibid s 36(b).
[111] ibid s 28.
[112] United Nations Economic Commission for Latin America and the Caribbean, 'Data Protection in the Caribbean' [2020] January-March (1) FOCUS: ECLAC in the Caribbean.

from Brazil, and amend the Constitution to include a right to the protection of personal data, if only to further reinforce legal certainty on the subject matter. Although, an added benefit of creating a constitutional right to data protection is that where the government unlawfully or arbitrarily accesses a citizen's data, the courts are able to exercise jurisdiction over the matter. According to the current Data Protection Act, where a public body is suspected of violating the provisions of the act, rather than submitting a claim to the court, the affected party is instead directed to make a complaint to the Information Commissioner.[113] Instead of the court, the Commissioner possesses the authority to dismiss or investigate any matters relating to infringing the provisions of the act and may make quasi-judicial decisions to remedy the situation.[114] An aggrieved person may only have access to the court where it is a matter of judicial review of the Commissioner's decision.[115] Thus, by creating a constitutional right to data protection, persons are enabled access to the court where the government misuses their data, or accesses it in an unlawful or arbitrary manner.

That being said, the Data Protection Act still holds value as it can regulate the relationship between data subjects and private companies, both local and international. Though, there are amendments that should be made to improve the legislation and its effectiveness. For instance, because there is wide authority and power conferred on the Information Commissioner, a certain level of impartiality must be guaranteed. As such, the President should be compelled to appoint the Commissioner on the advice of both the Prime Minister and the Leader of the Opposition. Alternatively, a private body can perform the role of monitoring compliance, similar to in England. Additionally, rather than allowing the home country of companies which have comparable safeguards to regulate their data processing, international companies should be subject to the laws of Trinidad and Tobago so long as the data subjects reside in its territory. After these amendments are made, the Data Protection Act should then be fully proclaimed, and an Information Commissioner be appointed so that the act may become functional.

One final recommendation for better data protection in not only Trinidad and Tobago, but the wider Caribbean region is the creation of a regional multilateral treaty on data protection regulation. This will serve the purpose of creating harmonized data protection standards in the region with potential for cross-border enforcement. Moreover, it solidifies the region as a unified stronghold for data regulation, dissuading companies from coming to the region and engaging in unlawful data practices. As it currently stands, the data regulation standards are not homogenous across the region. In fact, in one study, several Caribbean countries were examined, using the GDPR as the benchmark.[116] This study found that the legislation of some countries, such as Jamaica and Barbados, were more aligned with the GDPR, thus possessing adequate safeguards, where the legislation of other countries, such as Belize, Antigua and Barbuda and the Bahamas were barely aligned with the GDPR. By collectively aligning our data protection laws in the region, and having those laws be on par with the protection afforded by the EU framework, the Caribbean can gain a competitive advantage in the global market. This is because an aligned framework can help public and private sectors facilitate data flows with EU countries and other trading partners such as the United States.[117] They achieve this by building trust in the general public that their data will be protected even when it is collected by a company outside of one's own country. For instance, if a Trinbagonian is aware that their data when purchasing a product online is protected because the company that they are purchasing from is subject to the region's strict laws surrounding data protection, then they will be more inclined to engage in such international e-commerce. However, the region must be unified in this approach for it to be effective so that the jurisprudence surrounding data protection can be properly developed. For example, the data protection framework established should be regularly reviewed and scrutinised. As such, sharing the challenges of legislative gaps or deficiencies, or barriers to implementation or enforcement, can enrich the work of policymakers from all Caribbean countries.

Conclusion

Though data breaches can constitute a violation of several human rights, including the right to privacy, the right to non-discrimination, freedom of thought and expression, etc., a right to protection of data should nevertheless be created in Trinidad and Tobago because it is a procedural right in nature whereas the other

[113] Data Protection Act, 2011, s 60 (TT).
[114] ibid s 61-65.
[115] ibid s 64.
[116] United Nations Economic Commission for Latin America and the Caribbean, 'Data Protection in the Caribbean' [2020] January-March (1) FOCUS: ECLAC in the Caribbean.
[117] ibid.

aforementioned rights can have varying applicability. In cases where such substantive rights are concerned, the State is often afforded a larger margin of appreciation as seen in *Felix v AG*, but if a procedural right is introduced, the State may find more difficulty in attempting to justifiably curtailing this right. A lesson that Trinidad and Tobago can learn as well from Europe in regards to data protection regulation is the value of a multilateral treaty. One of the reasons the GDPR has been so effective is due to the fact that multiple countries have a standardized set of regulations. As a result, these countries can hold each other accountable in their adherence to the regulations. Additionally, having several countries present a united front on what is accepted practice in processing data further compels international companies to engage in more ethical practices.

On the matter of the relationship between businesses and the average consumer, the use of personal data by businesses is not inherently problematic. As a matter of fact, some persons may actually prefer the services they use to be customised to their likes and demographic. However, where consumers are unaware of what data is being collected, how their data will be used, and where their data is not anonymised, the problem is presented. To reiterate, the issue in this dynamic is not whether data should be collected, processed and stored, but how data controllers go about doing so. The current Data Protection Act meant to dictate such is by no means weak, rather, it is a strong framework that can potentially help to usher in a new era of technological innovation in Trinidad and Tobago. However, because it is not fully proclaimed, it cannot be expected to be of any meaningful use, as it remains essentially inoperative. Although, even where it is proclaimed, the act may still be deficient as it fails to adequately deal with jurisdiction. Once more, a lesson can be learnt from the framework set out by the GDPR, which stipulates that its regulations are subject to any body which collects data from persons within the European Union. Similarly, where an entity wishes to collect data from nationals of Trinidad and Tobago, such entities should be subject to the laws of Trinidad and Tobago. Further, the act is silent as to the protocol for when an entity is from a jurisdiction which does not have comparable safeguards.

In closing, through implementing the aforementioned recommendations, Trinidad & Tobago can successfully acclimatize to a digital society.

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Regional Integration through International Law:

The Original Jurisdiction of the Caribbean Court of Justice

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Abstract: *The Caribbean Court of Justice has been a significant achievement in the Caribbean integration movement. While the Court still has not been widely accepted in its appellate jurisdiction among Member States, it has made its presence felt in the exercise of its Original Jurisdiction. The rich case law which has come out of the Court since its establishment has played a vital role in the integration movement, having touched on issues of regional trade, freedom of movement, national security, access to justice and even minority rights and policy development. It is therefore the aim of this paper to examine the breadth of case law of the Caribbean Court of Justice in its Original jurisdiction to ascertain the contribution of the Court in furthering regional integration.*

Introduction

The Revised Treaty of Chaguaramas[1] (RTC) represented a transformation of the CARICOM Single Market and Economy (CSME) 'into a rule-based system, thus creating and accepting a regional system under the rule of law.'[2] As stated by former President of the Caribbean Court of Justice (the CCJ), the Right Honourable Sir Dennis Byron, the goal of the RTC is to deepen the regional integration movement among Member States to:

> sustained economic development based on international competitiveness, co-ordinated economic and foreign policies, functional co-operation and enhanced trade and economic relations with third States.[3]

It can therefore be seen that there is a significant focus on economic and policy unification in any discourse of the Caribbean regional integration movement. This is the backdrop against which any focus directed by the CCJ on challenges to the integration movement will be discussed.

Another preliminary point of note is that in as much as there will be disputes arising relative to the scope of the RTC, its interpretation becomes a vital element in the integration arsenal. For this reason, it is being asserted at the fore that the guardian of the rule of law under the RTC is the CCJ, the latter of which is mandated to assist in the development of the Caribbean jurisprudence […][4] and

[1] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (opened for signature 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293.

[2] *TCL v The Caribbean Community* [2009] CCJ 2 (OJ) [32].

[3] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (opened for signature 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293, preamble (as cited in Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022).

[4] Sir Dennis Byron, 'Remarks' (Third Caribbean Course on International Labour Standards for Judges, Lawyers and Legal Educators, Port of Spain, Trinidad and Tobago, 9 July 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Third-Caribbean-Course-on-International-Labour-Standards-_-20120709.pdf> accessed 19 May 2022).

[5] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 1 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th

interpret the RTC, thereby providing scope and depth to the instrument. It is consequently possible to assert that there is an intrinsic link between the achievement of the goals of the RTC in the context of regional integration and the quality and strength of the judicial decisions by the CCJ in its Original Jurisdiction. It is this relationship that will be examined in this paper. Focus will first be placed on the concept of Original Jurisdiction of the CCJ under the RTC. Second, the regional integration movement in the Caribbean will be set in the context of its genesis and current status. Third, attention will finally be brought to bear on the challenges faced by the Caribbean regional integration movement and a critical analysis of the role played by the CCJ in addressing or not addressing these issues.

Original Jurisdiction

The Members of the Community comprise fifteen territories namely, Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago.[5] Unlike the CCJ's appellate jurisdiction, which has received limited support by Member States,[6] all Contracting Member States have joined the Original Jurisdiction of the Court without opposition or controversy.[7] As provided for in *TCL v The Caribbean Community*,[8] '[the] Original Jurisdiction of the Court is laid down in Article 211 of the RTC which provides that the Court has compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the treaty […].'[9]

It needs to be noted at the outset that the Original Jurisdiction of the Court falls under Chapter Nine of the RTC, which deals with dispute settlement mechanisms under the RTC. Apart from alternatives to litigation, such as good offices,[10] arbitration,[11] conciliation[12] or mediation,[13] there are also internal mechanisms for dispute settlement. These include the Heads of Government Meetings[14] and Ministerial Councils.[15]

Therefore, the invocation of Article 211 jurisdiction of the Court is not the only recourse to dispute settlement. However, it is a powerful tool of the integration movement. The Court is given the opportunity to interpret the RTC, but at a much more influential level, the Court can explain why its interpretation or application of the treaty would be most appropriate having regard to the spirit and intendment of the RTC in the goal of Caribbean integration. For this reason, the Court, in its Original Jurisdiction, functions tantamount to that of the ultimate 'integrationist'; identifying possible challenges to the movement and providing ways of interpreting the RTC to overcome them.

Another vital feature of the Court in its Original Jurisdiction was articulated by the late A. R. Carnegie. He expressed the view that the Original Jurisdiction of the Caribbean Court of Justice is an international law jurisdiction[16] and governed by rules of international law. The effect of this is that international law would apply in the resolution of any disputes. Therefore, the Court is not concerned purely with the domestic framework of a Member State but the compliance, at the international level, with the RTC. This makes the jurisdiction of the Court under Article 211 much more palatable than the appellate jurisdiction, as the Member States are given a wide policy space, within which they can act. However, it also raises the necessary brief discussion of the operation of international law in the context of the CARICOM.

From the date [of becoming a State Party to the RTC] the rule of *pacta sunt servanda*, enshrined in Article 26 of the Vienna Convention on the Law of Treaties (VCLT) 1969, became operative. This point was clearly identified in the case of *Hummingbird Rice Mills Ltd. v Suriname*

-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022

[6] Barbados, Belize, Dominica, Guyana and St. Lucia have accepted the CCJ's Appellate Jurisdiction.

[7] Mr. Justice Winston Anderson, 'The Benefits to Jamaica and the Caribbean of Full Accession to the Caribbean Court of Justice' (Jamaica High Commission, London, 15 January 2013) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Jamaica-High-Commission-in-London_20130115.pdf> accessed 19 May 2022.

[8] [2009] CCJ 4 (OJ).

[9] ibid.

[10] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (opened for signature 5 July 2001, entered into force 1 January 2006) 2259 UNTS 293, art 191.

[11] ibid art 204.

[12] ibid art 195.

[13] ibid art 192.

[14] ibid art 28(1).

[15] ibid art 29(2).

[16] AR Carnegie, 'International Law and the Original Jurisdiction of the Caribbean Court of Justice: Conflicts of Conflict Resolution Jurisdiction' (2005) 15 Carib LR 136.

(The Caribbean Community).[17] The case sets out that every treaty in force is binding upon the parties to it and must be performed by them in good faith.[18] A similar concept is built into the RTC in Article 9 […] which provides that States must take all appropriate measures to ensure the carrying out of its treaty obligations.[19] The obvious corollary to this is Article 27 of the VCLT which provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule must be squared with Article 46 of the VCLT which allows some deviation by domestic laws of international obligations where that law is of fundamental importance. The end analysis on this point is that States must try to ensure compliance with their treaty obligations in keeping with Article 26. These are the competing interests that the CCJ has to balance when it seeks to exercise its Original Jurisdiction and should be borne in mind when engaging in the following discussion.

Another important point which arose for the CCJ's determination was the issue of standing. This was settled quite succinctly in the case of *Johnson v CARICAD*,[20] in which the CCJ held that only CARICOM and Member States can be sued and additionally, CARICAD nor CARICOM could be held liable for actions of CARICAD. This conforms with the general principle of international law that only international subjects can access the jurisdiction of international courts. Additionally, the Court, in the case of *TCL et al v Trinidad and Tobago*,[21] provides that there is a role in reviewing decisions of the Organs of the Caribbean Community but that it would always accord to the Organs the policy space intended by the framers of the RTC. The Court also retained unto itself the power to assert and exercise its competence and responsibility to ensure that the decisions of the Organs were taken in accordance with both the procedural requirements and substantive considerations required by the legal strictures laid down in or arising under the RTC.[22] While this was not a case that dealt with standing it does demonstrate the Court's view of itself vis-a-vis the RTC and the Organs created by it.

However, the end result of the Court's intervention under Article 211 is the guaranteeing of uniformity in the interpretation and application of Treaty provisions, and it is therefore critical in enabling the legal certainty and predictability which encourage growth, social stability and the rule of law.[23] For this reason, the ability of the CCJ to identify and articulate the challenges of the regional integration movement is critical to its success.

An underlying caveat in the present discourse is the fact that the Court has to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community.[24] As a result, one cannot expect the CCJ to act in an improper manner and speak to matters which fall outside of the proper place of a Judge's commentary. To do so would be to flout the guiding principle of the CCJ which is to uphold the rule of law. This point was directly made by former President of the CCJ, The Right Honourable Mr. Justice Michael de la Bastide, in an address in Port of Spain. At this address, he sought to treat with the development of Caribbean jurisprudence since the Court's establishment. In this address, he stated:

> I apologise for the fact that the role I have adopted is that of a chronicler rather than a commentator, but that is a constraint which judicial propriety imposes on me.[25]

Therefore, in discussing the question posed, it is necessary not to arrive at a damning conclusion on any omissions of the CCJ, as of right, but to highlight potentially missed opportunities of the Court in advancing the integration movement, through the exercise of its treaty-based powers of dispute resolution.

It is in this context that focus will be placed on the decisions of the Court in its exercise of powers under

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[17] [2012] CCJ 1 (OJ) [17].
[18] ibid.
[19] ibid.
[20] (2009) 74 WIR 57.
[21] [2019] CCJ 4 (OJ).
[22] Website: http://www.ccj.org/wp-content/uploads/2021/02/TCL-Cases-Judgment-Summary.pdf (Date accessed 19 May 2022).
[23] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 1 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.
[24] *TCL v The Caribbean Community* [2009] CCJ 4 (OJ).
[25] Michael de la Bastide, 'Five Years of CCJ's Contribution to Caribbean Jurisprudence' (The Fifth Anniversary of the Inauguration of the Caribbean Court of Justice, Port of Spain, Trinidad and Tobago, 16 April 2010) 10 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Mr-Justice-Michael-de-la-Bastide-at-the-Fifth-Anniversary-of-the-CCJ_-20100416.pdf> accessed19 May 2022.

Article 211 as well as statements made by the Court ex proprio motu, in extra-judicial speeches. A careful analysis will also be conducted of the Caribbean regional integration movement, independent of the CCJ, through the actions of CARICOM, as evidenced by its efforts at additional regional integration initiatives and commentaries on such.

The Regional Integration Movement

Sir Sridath Ramphal deftly set out the history of the regional integration movement in the Caribbean in his paper entitled, 'Is the West Indies West Indian?'[26] He traced the movement from the Federation of the West Indies in 1958, to CARIFTA in 1968 and then to CARICOM in 1973.[27] The CCJ was inaugurated in 2005 and the CSME came into being in 2006.[28] Therefore, the goal of regional integration has taken many forms, but it still appears illusive. The problem of political and economic unification is that the concept of integration appears to be nothing more than diplomatic lip-service in the Caribbean due to the 'roll call of unfulfilled pledges and promises and unimplemented decisions.'[29]

For the sake of contextualising the discussion, the term 'integration,' in general usage, signifies the 'coming together of parts into a whole.'[30] In the words of the late Professor Girvan:

> […] the integration process should be used purposively as a means of increasing the capacity for autonomous action on the part of our societies, and ultimately, of the people of the region.[31]

Therefore, there must be a common goal toward which the unified whole is working, having at the foreground of their proverbial minds, the knowledge that to benefit all would be a benefit to one. Thinking in a singular mode versus the collective group is what has caused the regional movement to witness such failure in the past. For this reason, Shelton argues that the relevant notion of integration for the Caribbean space must, as a matter of course, emphasise the development of the capacity of the peoples of the region to shape their political, economic, social and environmental destiny within the context of the existing world order.[32] However, the process by which integration is achieved is the root cause of much uncertainty, ambiguity and even confusion […].[33] Smith[34] argues that this very process of integration can differ in terms of (A) scope; (B) depth; (C) institutionalisation; and (D) centralisation.[35] For the purpose of structure and clarity of this paper, the major legal issues associated with the process of Caribbean integration will be analysed under these four categories identified by Smith. Specific attention will be placed on issues which are inimical to the process but which have not received the attention of the Caribbean Court of Justice.

(A) SCOPE: Outside Influence versus Indigenous Growth

For Smith, the 'scope' of regional integration treats with the range of issues and transactions falling under the

[26] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 3 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

[27] ibid.

[28] CARICOM Secretariat, 'Caribbean Court of Justice is Inaugurated' (*CARICOM*, 6 May 2005) <https://caricom.org/caribbean-court-of-justice-is-inaugurated/> accessed 19 May 2022.

[29] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 4 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

[30] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1164.

[31] Norman Girvan, 'Reflections on Regional Integration and Disintegration' in Judith Wedderburn (ed), *Integration and Participatory Development: Selected Papers and Proceedings on the Second Conference of Caribbean Economists* (Frederich Ebert Stiftung in collaboration with the Association of Caribbean Economists 1990) 5.

[32] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1165.

[33] ibid.

[34] Peter H Smith, 'The Politics of Integration: Concepts and Themes' in Peter H Smith (ed), *The Challenge of Integration: Europe and the Americas* (North-South Center Press, University of Miami1993) 5.

[35] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1165.

integration scheme.[36] This means that the Caribbean integration movement must determine, as a collective whole, what the constituent Member States will decide as having formed part of the integration scheme. It was eloquently put by Sir Sridath Ramphal that the West Indies cannot be West Indian if West Indian affairs, regional matters, are not the unwritten premise of every Government's agenda; not occasionally, but always; not as ad hoc problems, but as the basic environment of policy.[37] This is a point which is obvious to the 'integrationist' but which remains illusory at a regional political level. In fact, in a speech delivered by the President of the Court, focus was brought to bear on this point in the context of the large number of non-native financial institutions in Barbados. This will be referred to as the problem of 'outside influence versus indigenous growth' and was seen in trade-related disputes which will be discussed later in this paper.

In this vein, Sir Dennis Byron, while speaking to the banking sector in Barbados, observed that the dominant enterprises in the Banking and Financial services sectors [in Barbados] are non-indigenous.[38] A similar observation was made by Justice Anderson of the CCJ in an address to the Norman Manley Law School in Jamaica, in which he stated that the quest for indigenous law must, then, recognise that law is, in some respects, a special field of human endeavour.[39]

Sir Dennis attributed this lack of indigenous presence in the financial sector to the fact that the footprint of the indigenous institutions have not tended to spread across national boundaries and embrace the vision of regional integration.[40] Through this assertion, Sir Dennis Byron is stating two important challenges to the integration movement. The first is that there are outside threats to our domestic enterprises and our regional institutions are not stepping outside of their territorial homelands. These two points will always battle for priority in a global market. However, regional political decision-makers must implement incentives to encourage regional growth of business. One suggestion by Evans, of possible incentives, is the full removal of bilateral tariffs.[41] This is important as monetary and financial integration in CARICOM, which speaks to monetary integration; and capital market integration,[42] is crucial to the achievement of the objectives of the RTC. However, the trade-related cases of *TCL v Barbados and Rock Hard Cement*,[43] may demonstrate the nationalistic practices by Member States on compliance with the Common External Tarrif (CET). This shows that the trumping of individual interests over group benefit still factors heavily in the policies of the region and the CCJ serves as the regulator of community equity and in so doing, promotes regional integration.

Furthermore, Sir Dennis also highlights the fact that financial integration will also result in increasing the availability of capital to the entire region which would in turn, foster development at both the national and regional level by increasing investment and improving resource allocation.[44] This is why it is being advanced that the

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[36] Peter H Smith, 'The Politics of Integration: Concepts and Themes' in Peter H Smith (ed), *The Challenge of Integration: Europe and the Americas* (North-South Center Press, University of Miami 1993) 5.

[37] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 3 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

[38] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 1 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[39] Mr Justice Winston Anderson, 'The Caribbean Court of Justice and the Development of Caribbean Jurisprudence: Theoretical and Practical Dimensions' (The Norman Manley Law School Distinguished Lecture, Mona, Jamaica, 7 March March 2013) 7 <https://ccj.org/wp-content/uploads/2021/03/Distinguished-Lecture-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Norman-Manley-Law-School-Distinguished-Lecture_20130307-1.pdf> accessed 19 May 2022.

[40] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[41] David Evans and others, 'Assessing Regional Trade Agreements with Developing Countries: Shallow and Deep Integration, Trade, Productivity, and Economic Performance' (DFID Project Number 04 5881, University of Sussex 2006) 220 < https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e97e9344d6d2f47534bcd740bdc0f7a09cdf3c7b> accessed 19 May 2022.

[42] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1169.

[43] [2019] CCJ 1 (OJ)

[44] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean

'scope' of integration needs to be determined by the Member States of the regional integration movement.

(B) DEPTH

(i) Harmonisation

When Smith speaks of the 'depth' of the integration movement he speaks of the extent of policy harmonisation or co-ordination existent among the members of the movement.[45] The issues of regulatory harmonisation; policy harmonisation; and legal harmonisation have been addressed by the Court, in exercising its Article 211 powers, to a limited extent, but to a much greater extent by the Judges *ex propio motu*.

In the case of *Hummingbird Rice Mills Ltd. v Suriname (The Caribbean Community)*,[46] the CCJ was quick to address the issue of harmonisation in the regional integration movement. In this case, Hummingbird Rice Mills Ltd. commenced proceedings before the Caribbean Court of Justice against Suriname and the Caribbean Community claiming that Suriname had seriously violated Article 82 of the RTC as it had failed to impose the Common External Tariff (CET) of 25% on flour imported from The Netherlands during the period 1st January 2006 to 14th June 2010, causing the company to suffer financial losses totalling US$ 3,003,000.00.[47] The Community was sued on the basis that both the Secretary-General and the Council for Trade and Economic Development (COTED) had failed in their duty to get Suriname to apply the CET from 2006 to 2010.[48]

Taking account of the juxtaposition of the primary obligation in Article 82 and the VCLT's duty to interpret the treaty in its context and in light of its object and purpose, a more plausible interpretation of Article 83(5) is that in continuing the review process COTED has responsibility for *securing the harmonisation of the Common External Tariff* (CET).[49] The Court held that what it called the 'conciliatory approach' adopted by COTED to seeking compliance by Suriname was within the wide margin of discretion which the Court accorded to policy decisions of the organs of the Community.[50] It should also be noted that while the CCJ did hold that Suriname breached the RTC, no damages were awarded because the applicant could not establish adequate evidence to prove its claim.

The importance of this case is not the actual ratio of the case but the obiter. It is noteworthy that the Court specifically stated that COTED had a duty to 'secure harmonisation' of the Common External Tariff (CET). This pivotal role of the Court was also seen quite clearly in the case of *Maurice Tomlinson v The State of Belize and the State of Trinidad and Tobago*[51] where the variation of regional policies relative to minority rights required the Court's intervention.

This issue of harmonisation is not relegated to the issue of trade. Undoubtedly, as it relates to the financial sector, the spirit of the RTC aims at the harmonisation of economic policy through the integration of the financial and regulatory environments in which Member States are to operate.[52] It goes without saying that Member States must play their part in ensuring the harmonisation of rules and regulations which govern the various financial sectors within the Community.[53]

(ii) Sovereignty versus narrowing policy space

Another significant legal issue associated with the scope of the Caribbean regional integration movement is that of the constant battle between the preservation of sovereignty and the narrowing of the policy space.

Association of Banks, St. James, Jamaica, 14-17 November 2012) 4 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[45] Peter H Smith, 'The Politics of Integration: Concepts and Themes' in Peter H Smith (ed), *The Challenge of Integration: Europe and the Americas* (North-South Center Press, University of Miami 1993) 5.

[46] [2012] CCJ 1 (OJ).

[47] ibid.

[48] ibid.

[49] ibid [45].

[50] ibid.

[51] [2016] CCJ I (OJ).

[52] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[53] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 4 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

Professor Girvan[54] sees integration in the region not simply as a staged process but more so as a 'sovereignty-enhancing' process in which the capacity of the people to shape their own economic, social and political development could be effectively strengthened.[55] The Court in *TCL*[56] went so far as to say:

> Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.[57]

The ironic point is that the concern raised by Member States of CARICOM in this context tends to be focussed on a potential loss of sovereign power by full accession to the CCJ with little reflection being given the subtext of irony as former colonies with our highest courts in the historical colonial power. The continued failure of the majority of CARICOM Member-States to accede to the Court's appellate jurisdiction remains a major obstacle to the Court's work.[58]

It was actually regarded by the Right Honourable Telford Georges as a 'compromise on sovereignty' for us to remain wedded 'to a court which is part of the former colonial hierarchy'.[59] This shows that the fear of 'loss of sovereignty' should not be a rationale which prevents accession to the CCJ in its Appellate Jurisdiction, but should be an impetus to break the proverbial shackles of the Judicial Committee of the Privy Council.

It has to be stated that it would be highly inappropriate for the CCJ to comment on parties to a matter before it in its Original Jurisdiction, on the issue of acceding to the Court's appellate jurisdiction. However, the Court has taken several opportunities, extra-judicially, to clarify misconceptions of sovereignty held by Members States. It was put quite eloquently by Justice Winston Anderson of the CCJ when he said:

> […] the single most compelling justification for the Caribbean Court of Justice is the argument from sovereignty: our right to self-definition; our right of authorship of our own Fundamental Laws…[60]

This point was also echoed by the President of the Court in his formulation that, 'it is almost axiomatic that the Caribbean Community should have its own final Court of Appeal in all matters; that the West Indies at the highest level of jurisprudence should be West Indian.'[61] In the words of Sir Sridath, nothing speaks louder of [our] current debilitation than our substantial denial of the CCJ.[62] This evidences that the idea of sovereignty and the perceived threats to sovereignty are belied by misconceptions of the fundamental feature of Statehood.

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[54] Norman Girvan, 'Reflections on Regional Integration and Disintegration' in Judith Wedderburn (ed), *Integration and Participatory Development: Selected Papers and Proceedings on the Second Conference of Caribbean Economists* (Frederich Ebert Stiftung in collaboration with the Association of Caribbean Economists 1990) 5.

[55] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1165.

[56] *TCL v The Caribbean Community* [2009] CCJ 4 (OJ).

[57] *TCL v The Caribbean Community* [2009] CCJ 4 (OJ) [32].

[58] Mr Justice Winston Anderson, 'The Caribbean Court of Justice and the Development of Caribbean Jurisprudence: Theoretical and Practical Dimensions' (The Norman Manley Law School Distinguished Lecture, Mona, Jamaica, 7 March March 2013) 7 <https://ccj.org/wp-content/uploads/2021/03/Distinguished-Lecture-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Norman-Manley-Law-School-Distinguished-Lecture_20130307-1.pdf> accessed 19 May 2022.

[59] Sir Dennis Byron, 'Benefits to Trinidad and Tobago of Joining the Caribbean Court of Justice' (Presentation to the Trinidad Union Club, Port of Spain, Trinidad and Tobago, 27 November 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Trinidad-Union-Club_-20121127.pdf> accessed 19 May 2022.

[60] Mr Justice Winston Anderson, 'CCJ Tribute in Thanksgiving for the Life and Work of Simeon C. R. McIntosh' (The Funeral of the Late Simeon C. R. McIntosh, Grenada, 5 April 2013) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Funeral-of-the-Late-Simeone-C-R-McIntosh_20130405.pdf> Accessed 19 May 2022.

[61] Sir Dennis Byron, 'Benefits to Trinidad and Tobago of Joining the Caribbean Court of Justice' (Presentation to the Trinidad Union Club, Port of Spain, Trinidad and Tobago, 27 November 2012) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Trinidad-Union-Club_-20121127.pdf> accessed 19 May 2022.

[62] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 7 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

Additionally, when the idea of regional integration is internalised and seen as a shared goal, from which all Members benefit, only then will the movement be successful. Furthermore, within the strictures that bind the CCJ from commentary, it is being advanced that the Court has done much to clarify the right of sovereignty and allay fears that accession will in any way impair that right.

This point was made clear in the case of *TCL v The Caribbean Community*.[63] In this case, the Court saw the delicate balancing exercise that needed to be engaged in by the Court in its promotion of regional jurisprudence and the rule of law and the harmonising of policy. The Court held that [it] must seek to strike a balance between the need to preserve policy space and flexibility for adopting development policies on the one hand and the requirement for necessary and effective measures to curb the abuse of discretionary power on the other; between the maintenance of a Community based on good faith and a mutual respect for the differentiated circumstances of Member States (particularly the disadvantages faced by the LDC's) on the one hand and the requirements of predictability, consistency, transparency and fidelity to established rules and procedures on the other.[64]

(C) INSTITUTIONALISATION AND (D) CENTRALISATION

These two points will be dealt with conjunctively. The rationale for this approach is that the idea of 'institutionalisation' addresses the degree to which accommodation and decision-making takes place in organised and predictable ways in Member States.[65] While 'centralisation' speaks to the extent to which there exists a supra-national decision-making apparatus to establish common policy and to resolve disputes. It therefore appears that for centralisation to be efficient, institutionalisation must be meaningful.

'Institutionalisation' encompasses the idea of incorporation and compliance of agreed-upon concepts. In the context of CARICOM, this would be the degree of 'institutionalisation' of the RTC at a domestic level. The CCJ has not made any judicial pronouncements on this point, but specific reference has been made by the President of the Court in his regional addresses. Sir Dennis Byron has opined that there is a gap between the vision and the implementation.[66] One such example of this gap can be seen in the CARICOM Financial Services Agreement (CFSA) which has not been enforced into law and for which there is still the need for further review by the relevant regulatory institutions within Member States.[67] This example demonstrates not the typical institutionalisation problem at a domestic level, but even at a regional level, there exists issues with streamlining decision-making in particular spheres.

The more traditional conception of institutionalisation, as a challenge to integration, is where Member States fail to implement policies which advance the goals of the RTC and by extension the Caribbean regional integration movement. The fact is that Member States, ultimately retain the sovereign right to join a treaty and comply with its obligations in a manner that can reasonably be expected. Therefore, one can strengthen the scope of the regional integration movement, through a harmonisation of policy and a proper understanding of sovereignty. In this way, the head of 'institutionalisation' is really premised on a proper understanding of the 'scope' and 'depth' arguments raised by Smith.

I will now turn to the category of centralisation, which clearly addresses the role, inter alia, of the CCJ, in the context of dispute settlement. The [RTC] provides a number of other modes of dispute settlement, five of which are listed in Article 188.1: 'good offices, mediation, consultations, conciliation, arbitration' as well as adjudication.[68] Recourse to those modes is, however, under Article 188.4 '[w]ithout prejudice to the exclusive and compulsory jurisdiction of the Court in the interpretation and application of this Treaty under Article 211'.[69]

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[63] [2009] CCJ 4 (OJ).

[64] [2009] CCJ 4 (OJ) [40].

[65] Peter H Smith, 'The Politics of Integration: Concepts and Themes' in Peter H Smith (ed), *The Challenge of Integration: Europe and the Americas* (North-South Center Press, University of Miami 1993) 5.

[66] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 4 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[67] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 4 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[68] AR Carnegie, 'International Law and the Original Jurisdiction of the Caribbean Court of Justice: Conflicts of Conflict Resolution Jurisdiction' (2005) 15 Carib LR 136.

[69] ibid.

> The [RTC] is also notable for an extensive supervisory role of COTED in relation to subsidies, dumping and anti-competitive business practices, accompanied by powers of investigation and recommendation which seem to amount to dispute settlement procedures of a binding nature in some degree.[70] Additionally, the role of the Competition Commission under Chapter 8 of the Revised Treaty of Chaguaramas also includes a role of dispute settlement going beyond the purely advisory and amounting to authority to settle disputes in a binding fashion.[71]

These bodies show the alternative dispute resolution paths under the RTC, which operate independently of the CCJ. However, a potential issue arises when one considers that there may be alternative dispute settlement machinery outside of the RTC but which are available to Member States. The question is which system trumps which? This idea of reconciling two areas of law can similarly apply to two different dispute settlement mechanisms of which States may be parties. For example, there is no reason whasotever to suppose that the WTO dispute settlement system is rendered less relevant to the CARICOM environment because the CARICOM environment is a self-contained system with its own dispute settlement regime.[72]

Another issue of reconciliation can be seen in the judicial process with connected claims existing in more than one system. In the arbitration between Ireland and the United Kingdom over the British building of a nuclear power plant which Ireland contends is contrary to Britain's treaty obligations, the arbitral tribunal had suspended proceedings while it waited to hear whether the European Court of Justice considered that the matter was fit for resolution under European law.[73] In so doing, it had cited 'comity' among judicial institutions.[74]

In Carnegie's assessment, a determination by the Court becomes a binding precedent, and that character does not attach to any of the other modes of settlement.[75] So if arbitration proceeds on one interpretation before the court has considered the point in any other proceedings, the arbitration may succeed in applying that interpretation, but if the court subsequently applies a different interpretation, then that different interpretation knocks out the earlier interpretation.[76]

This idea of 'judicial comity' was directly addressed by the CCJ in 2006. In the case of *Boyce et al v Attorney General of Barbados*,[77] the Caribbean Court of Justice deals head-on with the issue of shared jurisdiction and imported public law principles into the operation and exercise of the prerogative of mercy. In this case, two men convicted of murder had petitioned the Inter-American Commission on Human Rights alleging that their rights under the Inter-American Convention on Human Rights were being breached by the State of Barbados. However, while that petition was pending, the Privy Council ruled that they would not commute their death sentence and death warrants were read to the appellants.

The CCJ held that the processes involved in the exercise of the prerogative of mercy were amenable to judicial review, notwithstanding the existence of sweeping ouster clauses.[78] The court also held that the power to commute a death sentence was far too important to allow for the exercise of that power without any possibility of judicial review particularly where there are allegations of breaches of basic rules of procedural fairness.[79] The CCJ therefore utilised the public law concept of legitimate expectation to facilitate judicial deference of the Inter-American Commission's findings of the petition, thereby, in practice, recognising "judicial comity."

Lack of Direct Effect

Direct effect speaks to the binding nature of decision of the CCJ on States Parties to the RTC. In Trinidad and Tobago, the Prime Minister in 2013 announced that, in effect, Trinidad and Tobago desired to meet its treaty commitment in a staggered manner by first channelling its criminal appeals to the CCJ and in the interim 'monitor the developments taking place in both the JCPC and CCJ including the quality of [those courts] decisions in deciding the [country's] future course…'[80] This is a

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[70] ibid.
[71] ibid.
[72] ibid.
[73] ibid.
[74] *MOX Plant Case (Ireland v United Kingdom)* (Order No 3: Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures) PCA Case No 2002-01 (24 June 2003) [28]–[30].
[75] AR Carnegie, 'International Law and the Original Jurisdiction of the Caribbean Court of Justice: Conflicts of Conflict Resolution Jurisdiction' (2005) 15 Carib LR 136.
[76] ibid.
[77] [2006] CCJ 3 (AJ).
[78] Albert Fiadjoe, 'A Pandora's Box in the Commonwealth Caribbean Public Law: The Approach of the Caribbean Court of Justice to the Doctrine of Legitimate Expectation' (2007) 17 Carib LR 10, 22.
[79] ibid.
[80] Sir Dennis Byron, 'Benefits to Trinidad and Tobago of

potential assertion by Trinidad and Tobago that it intends to facilitate this direct effect. The dangerous part of the statement is the 'staggered manner' in which it is being proposed. It appears as though the Court was being given a probationary period before a full decision is made. Such a stance taken by an MDC in the region is creating back-door political pressure on the Court. The fact is that, whether in words or conduct, the CCJ cannot be seen as a pandering sycophant to political pressures and to couch such an important concept in terms of 'monitoring the developments' of the quality of decisions of the Courts is familiar rhetoric of the singular views of Member States. Despite the past language of future intentions, the CCJ still is only the final appellate court for four Member States, which do not include Trinidad and Tobago.

The Court refers to, 'institutional limitations'.[81] This position by Trinidad and Tobago and of all other Member States that have failed to accept the Court's appellate jurisdiction present limitations of an institutional nature, which have the power to undermine the Court and the regional integration movement. While the CCJ treads carefully with this point, the issue is not left in the dark, and has repeatedly been frontally addressed by Judges in extra-judicial fora.

OUTSIDE THE FOUR HEADS

However, there are some issues which do not fit nicely into any of the previous categories, but instead, represent an amalgam of the four heads. These include the independence of the CCJ; the free movement of people within the region; access to justice; financial arrangements for the CCJ and issues of regional trade. They will each be dealt with in turn.

(i) Independence of Judiciary

Separation of powers and the independence of the Judiciary are concepts which are vital to any strong, legitimate legal system. Therefore, it became a source of concern, when the Honourable Edward Seaga, then leader of the Opposition, speaking at the CCJ Debate in Parliament affirmed that a regional court of final appeal would not be viewed with disfavour provided that 'a mechanism could be devised to ensure that judges would be so appointed as to be free of political connections to ensure that their independence would not be in question'.[82] It seems almost fashionable to suspect that politicians exercise control and authority over the Judges and influence their decision-making in given cases.[83] These fears on the part of leaders of governments in the region may be a damning sign of our perception of us. Having governments across the region plagued by allegations of corruption; misbehaviour in public office creates a mistrust of all systems operating within the region.

In a very obviously subtle manoeuvre, a detailed breakdown of the financial trust of the Court has been given repeated attention by the Judges in varying fora. It has been addressed by Sir Byron in 2012 in Trinidad and Tobago[84] and in Jamaica.[85] It also was mentioned in Justice Anderson's Speech in Jamaica in 2013.[86] Justice

Joining the Caribbean Court of Justice' (Presentation to the Trinidad Union Club, Port of Spain, Trinidad and Tobago 27 November 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Trinidad-Union-Club_-20121127.pdf> accessed 19 May 2022.

[81] *Hummingbird Rice Mills Ltd v Suriname (The Caribbean Community)* [2012] CCJ 1 (OJ) [47].

[82] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 10 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[83] Mr Justice Winston Anderson, 'The Benefits to Jamaica and the Caribbean of Full Accession to the Caribbean Court of Justice' (Jamaica High Commission, London, 15 January 2013) 8 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Jamaica-High-Commission-in-London_20130115.pdf> accessed 19 May 2022.

[84] Sir Dennis Byron, 'Benefits to Trinidad and Tobago of Joining the Caribbean Court of Justice' (Presentation to the Trinidad Union Club, Port of Spain, Trinidad and Tobago, 27 November 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Trinidad-Union-Club_-20121127.pdf> accessed 19 May 2022.

[85] Sir Dennis Byron, 'Strategic Integration – CARICOM and the Caribbean' (39th AGM and Conference of the Caribbean Association of Banks, St. James, Jamaica, 14-17 November 2012) 10 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-39th-Annual-General-Meeting-of-the-Caribbean-Association-of-Banks-_-20121114.pdf> accessed 19 May 2022.

[86] Mr Justice Winston Anderson, 'The Benefits to Jamaica

Anderson also goes through the very involved process of selection, appointment and tenure of the judges.[87] In so doing, the CCJ has reaffirmed the strength of the Court and tried to allay fears of influence on the Court by governments.

(ii) Movement of People and Access to Justice

The free movement of people and the CARICOM Skilled Certificate are manifestations of the regional integration movement. However, the process is jeopardised by States not respecting the rights articulated in the RTC. For this reason, the case of *Shanique Myrie v The State of Barbados*[88] was a monumental decision of the Court. The case of Shanique Myrie against the State of Barbados dealt with a claim that Ms. Myrie's rights to free movement within the Community guaranteed under the Revised Treaty were violated by Barbadian officials, when she was subjected to an invasive cavity search and refused entry into Barbados in March of 2010.[89] The Court held that Barbados did violate the right of Ms. Myrie to freedom of movement and ordered Barbados to refund her medical expenses, her airline ticket and reasonable legal expenses. The Court went even further and stated that the right to freedom of movement entitled right-holders written reasons for the refusal and to advise them of their entitlement to access meaningful judicial review. Much apart from the courage of the Court to delineate the boundaries of the freedom of movement in the regional space, the Court also reinforced another very practical challenge to the integration movement; distance and separation of Member States by the Caribbean Sea. The Court has been able to meet this need by the people of the region because it is itinerant. This was seen in the Court travelling to Barbados to take evidence in the matter. Additionally, the issue of access is dealt with by allowing a party to apply for leave to appeal as a poor person.[90] Sir Dennis Byron goes so far as to state that access to justice is crucial in [the] region and […] acceding the Appellate Jurisdiction would enhance access to justice […] and contribute to social stability.[91] As we see the unexpected effects of COVID-19 on systems globally, the CCJ was able to seamlessly adjust its operations to a fully virtual platform because of its significant technological assets.

(iii) Trade Issues

As with most, if not all, regional integration movements, trade forms the heart of the policy arrangements. The grouping, CARICOM, unlike most of the regional arrangements worldwide, has a large sea mass as a dividing line amongst its member States which makes both air and maritime transportation critical for successful trade integration.[92] While the CCJ has been able to overcome this issue by being itinerant, issues of trade are not so easy to solve.

A major reason contributing to the low level of intraregional trade has been the lack of product complementarity.[93] Trade in goods and services is regulated through international legal arrangements aimed at facilitating cross border movement and limiting the power of participating governments to impose domestic restrictions.[94] It is important to highlight […] that the process of intra-Caribbean regional integration, and its relationship to the EPA process is made more complex by the long-standing distinction in the region between the more developed countries of the region (the MDC) and

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and the Caribbean of Full Accession to the Caribbean Court of Justice' (Jamaica High Commission, London, 15 January 2013) 9 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Jamaica-High-Commission-in-London_20130115.pdf> accessed 19 May 2022.

[87] ibid.

[88] [2013] CCJ 1 (OJ).

[89] Mr Justice Winston Anderson, 'The Benefits to Jamaica and the Caribbean of Full Accession to the Caribbean Court of Justice' (Jamaica High Commission, London, 15 January 2013) 3 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-Jamaica-High-Commission-in-London_20130115.pdf> accessed 19 May 2022.

[90] ibid 5.

[91] Sir Dennis Byron, 'Benefits to Trinidad and Tobago of Joining the Caribbean Court of Justice' (Presentation to the Trinidad Union Club, Port of Spain, Trinidad and Tobago 27 November 2012) 2 <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Trinidad-Union-Club_-20121127.pdf> accessed 19 May 2022.

[92] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1164.

[93] Philippe Egoumé-Bossogo and Chandima Mendis, 'Trade and Integration in the Caribbean' (2002) IMF Working Paper WP/02/148, 6.

[94] Gerhard Erasmus, 'What to Do About Sovereignty When Regional Integration is Pursued?' (2011) traclac Trade Brief No. S11TB 01, 3. <https://www.tralac.org> accessed 19 May, 2022.

the less developed countries in the region (the LDC's).[95] The MDC's are: Barbados, Guyana, Jamaica, Suriname and Trinidad and Tobago.[96] The LDC's are the remaining countries which are seen as being particularly vulnerable either due to their size, or due to their levels of economic development.[97] These are Belize, Haiti, Suriname and the seven OECS territories.[98] The issues of product diversity; market monopolies or oligopolies; government subsidies must be resolved at a regional level. The question is, to what extent can the CCJ be useful in addressing these challenges.

It must be noted that CARICOM and its Member States are not newcomers to the idea of trade relations and regional integration movements. Currently, there are negotiations of an Economic Partnership Agreement between the EU and the Caribbean.[99] The CARIFORUM implemented the CARICOM-Dominica Republic Free Trade Agreement.[100] There is an Agreement on Trade and Economic Cooperation between CARICOM and the Government of the Republic of CUBA, which was signed on 5 July, 2000.[101] There are also on-going negotiations for the CARICOM/Canada Trade Agreement and the CARICOM/ Costa Rica Trade Agreement. The involvement of CARICOM in so many bilateral and multilateral trade agreements signals several points. The first is the regional trading bloc of CARICOM must be seen as an important market by the global community. Also, it evidences a unified, if only in theory, regional movement. However, how does one treat with the differing State interests in the CARICOM region? That is to say, to what extent are the LDC given MFN status in our regional integration movement?

Article 1 of the General Agreement on Tariffs and Trade provides that 'any advantage, any favour, any privilege or any immunity that you give to one you have to give to all.' The RTC provides for a similar concept in Article 8, which provides that:

> subject to the provisions of this treaty, each member shall accord to another Member State any more favourable treatment granted to one should be granted to a third Member State.

These formulations capture the Most Favoured Nation Concept. However, in practice it becomes a bit difficult to implement for small State economies. A good example is that of subsidies given to State enterprises which may affect other Member States.

The issue of subsidies is crucial to the movement toward regional integration at an economic level. The importance of this can be seen in the situation between St. Vincent and the Grenadines and Trinidad and Tobago over the subsidies provided by the latter to its national airline, Caribbean Airlines (CAL). Prime Minister Gonsalves contended that the fuel subsidy given to CAL, [by Trinidad and Tobago] contravened the treaty governing the Caribbean Community (CARICOM) to which both countries belong.[102] Gonzalves spoke at length to stress that he did not want to fight but to engage in discussions with Prime Minister Persad-Bissessar of Trinidad and Tobago. This issue shows the exact problems that are intrinsic to the regional integration movement. First, it shows that States seek to balance their own economic goals with the economic growth of other members in the group. This will ultimately give rise to inter-State disputes, at which point the CCJ may be called on to intervene. Second, is the attitude toward dispute settlement. It is natural to have disagreements when a grouping of sovereign States join together for a unified

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[95] David Evans and others, 'Assessing Regional Trade Agreements with Developing Countries: Shallow and Deep Integration, Trade, Productivity, and Economic Performance' (DFID Project Number 04 5881, University of Sussex 2006) 220 < https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e97e9344d6d2f47534bcd740bdc0f7a09cdf3c7b> accessed 19 May 2022.

[96] ibid.

[97] ibid.

[98] Shelton Nicholls and others, 'The State of and Prospects for the Deepening and Widening of Caribbean Integration' (2000) 23 The World Economy 1160, 1164.

[99] David Evans and others, 'Assessing Regional Trade Agreements with Developing Countries: Shallow and Deep Integration, Trade, Productivity, and Economic Performance' (DFID Project Number 04 5881, University of Sussex 2006) 220 < https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e97e9344d6d2f47534bcd740bdc0f7a09cdf3c7b> accessed 19 May 2022.

[100] David Evans and others, 'Assessing Regional Trade Agreements with Developing Countries: Shallow and Deep Integration, Trade, Productivity, and Economic Performance' (DFID Project Number 04 5881, University of Sussex 2006) 206 < https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e97e9344d6d2f47534bcd740bdc0f7a09cdf3c7b> accessed 19 May 2022.

[101] ibid.

[102] 'With Legal Opinion in Hand, Gonsalves Wants Talks Over Fuel Subsidy' *iWitness News* (St Vincent and the Grenadines, 6 February 2013) <https://www.iwnsvg.com/2013/02/06/with-legal-opinion-in-hand-gonsalves-wants-talks-over-fuel-subsidy/> accessed 19 May 2022.

strength. The aim of dialogue over litigation by St. Vincent and the Grenadines shows that there is a growing degree of comity and deference for Member States than would have existed in the absence of the regional grouping.

A similar position was not taken by Jamaican officials by their imposition of import duties on lubricating oil from Trinidad and Tobago.[103] This duty was based on an allegation that the former State-run PETROTRIN represented the oil as originating in Trinidad and Tobago, when it did not. As such, the Jamaican government claimed that rule of origin in the RTC was being circumvented. This reinforces the concern for the Caribbean integrationist that Member States of the RTC are still seeking to advance individual gain at the expense of regional progress and cooperation.

Conclusion

Caribbean regional integration is the goal of every generation in the West Indies at a regional political level. This assertion is based on the fact that the very notion of being West Indian speaks of oneness.[104] Today, CARICOM and all it connotes, is the hallmark of that goal.[105] However, for the first time in the region's history, there is an independent body whose mandate is to promote the rule of law, free from political pressures and back-door deals. This significant role has been placed on the proverbial shoulders of the CCJ. Whether by design or divine error, the CCJ holds the key to true regional integration in CARICOM through its powers derived from the RTC. However, for the CCJ to be successful in accomplishing [its objectives], it would have to provide the people of the region with 'accessibility, fairness, efficiency, transparency and authoritative judicial decisions' while promoting the rule of law in the Caribbean Community.[106] The need for these deliverables of the Court stems more from governmental improprieties than the RTC itself. The fact is that the people of the region need a check and balance on regional governments. Even if this is not the specific role of the Court, it is the need of the people.

The harsh reality, articulated by Sir Sridath Ramphal, of the integration movement in the Caribbean is that we have become '"casual, neglectful, indifferent and undisciplined" in sustaining and advancing Caribbean integration […] and are falling into a state of disunity […]'.[107] The CCJ has the ability to bring the region together through justice delivery in a common regional language.

It has become pellucid that the integration process has numerous challenges. These challenges range from the fear of loss of sovereignty to selfish economic goals of advancement by Member States. The national governments of the region must suffer a perspective differentiation from which they view the integration process more as a benefit to the States of the region than as a threat. In this regard, they must take responsibility for any slowing down of the integration process. This is the context in which the CCJ must operate and it has faced its responsibility with courage and determination in exercising its Article 211 jurisdiction. As noted by Justice de la Bastide, the Court has sought to placate concerns of political interference and lack of judicial independence, while maintaining its role as the citadel of the future of regional jurisprudence.

Therefore, while the CCJ has been able to address many of the challenges of the regional integration movement in the Caribbean in its Original Jurisdiction, it has not been fully given the opportunity to do so at a judicial level, through its appellate jurisdiction. The Court can do only as much as it is given the opportunity to do. There is a correlation between the failure of the regional governments to sign on to the appellate jurisdiction of the Court and the extent of influence the CCJ can have in the regional integration movement. As such, any challenges to the regional movement which have been left in the dark

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[103] Daraine Luton, 'New Ja-T&T Trade War - Duties Imposed on Product After Questions Arise Over Origin' *The Gleaner* (Kingston, 15 May 2013) <http://jamaica-gleaner.com/gleaner/20130515/lead/lead6.html> accessed 19 May 2022.

[104] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 3 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

[105] ibid.

[106] Sir Dennis Byron, 'Enhancing the Administration of Justice' (The Barbados Bar Association Annual Dinner, St Michael, Barbados, 7 December 2021) 4 https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Right-Honourable-Sir-Dennis-Byron-at-the-Barbados-Bar-Association-Annual-Dinner_-20121207.pdf> accessed 19 May 2022.

[107] Sir Sridath Ramphal, 'Is the West Indies West Indian?' (Eleventh Sir Archibald Nedd Memorial Lecture, Grenada, 28 January 2011) 11 <http://www2.sta.uwi.edu/uwiToday/archive/march_2011/Sir%20Archibald%20Nedd%20Lecture%20by%20Sir%20Shridath%20Ramphal.pdf> accessed 19 May 2022.

by the CCJ are entirely due to the region's governments refusing to turn on the light switch.

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Constitutional Supremacy And Jus Cogens Sanctity: The Potentiality Of Juridical Incompatibility

Rico Yearwood

Abstract: *Constitutional supremacy is a long-standing hallmark of Commonwealth Caribbean constitutionalism. The extent of the interplay and dissonance between Caribbean constitutional law and international law remains an evergreen and divisive phenomenon. In Nervais & Severin v The Queen [2018] CCJ 19 (AJ), Anderson JCCJ enunciated that Commonwealth Caribbean Constitutions are subservient to jus cogens norms. This paper will conduct an appraisal of that judicial proposition. It will demonstrate that a conflict between Commonwealth Caribbean Constitutions and jus cogens is conceptually improbable but not impossible. However, it will invoke judicial and jurisprudential analyses to argue that in the rare instances where a Commonwealth Caribbean Constitution and a jus cogens norm may be incompatible, the former should prevail and continue to reign supreme within the domestic realm. The paper will therefore conclude that Commonwealth Caribbean Constitutions should not be considered subservient to jus cogens norms.*

Keywords: *Commonwealth Caribbean, Constitutions, jus cogens, conflict, constitutional supremacy, international law*

Introduction

In 2018 the Caribbean Court of Justice ("CCJ") adjudicated the celebrated Barbadian case of *Nervais and Severin v The Queen [2018] CCJ 19 (AJ)*. This case represented a monumental turning point in the development of constitutional jurisprudence for Barbados and the other Caribbean countries that retain the CCJ as their final court of appeal. In this case, two condemned men contested the constitutionality of the mandatory death penalty in Barbados. At the material time, the mandatory death penalty was prescribed as a punishment to be imposed for the commission of the offence of murder pursuant to section 2 of the Offences Against the Person Act ("OAPA"). The mandatory death penalty under section 2 of the OAPA was inherited from the Britain during the colonial epoch and retained by Barbados following the attainment of its Independence. It was therefore characterised as a "pre-Independence law", "existing law" or "saved law". Section 26 of the Barbados Constitution had purportedly preserved the constitutional legitimacy of pre-Independence laws, inclusive of the mandatory death penalty, notwithstanding that some of these laws are glaringly inconsistent with fundamental rights and liberties enshrined in the Bill of Rights of the Constitution.

In disposing of the constitutional motion, the CCJ delivered two revolutionary judgments. The first was the judgment of the majority of judges, who declared the mandatory death penalty unconstitutional, despite section 26 of the Constitution, on the basis that it was violative of the separation of powers doctrine, the right to protection of the law, the right to life, the right not to be subjected to cruel and degrading punishment and the right to a fair trial. The majority opined that the mandatory death penalty, along with other pre-Independence laws, had to be applied and construed with such necessary modifications to bring them into conformity with the Constitution. Accordingly, the majority found that the death penalty could only be valid insofar as it was permissive as distinct from mandatory. The second judgment was rendered by Justice Winston Anderson JCCJ, who was in concurrence with the majority inasmuch as they adjudged the mandatory death penalty unconstitutional because it contravened the separation of powers; however, Anderson JCCJ emphatically repudiated the other components of the

majority's rationale and findings. During the delivery of his judgment, Anderson JCCJ categorically postulated that '[n]ational constitutions and laws are subservient to norms of jus cogens and courts everywhere are obliged to uphold and enforce such fundamental international principles.' This judicial fiat merits rigorous dialectic analysis, notably because of the implications that it could have for the hallowed conception of constitutional supremacy if it is accorded any credence.

To this end, this paper will provide coverage of, *inter alia*, a granular interrogation of Anderson JCCJ's proposition, particularly in the context of Commonwealth Caribbean constitutionalism. The paper will delve into the nature, import and standing of Commonwealth Caribbean Constitutions and *jus cogens* norms to highlight the innate juridical similitude between them, which would make it improbable, but not impossible, for a Commonwealth Caribbean Constitution and a *jus cogens* norm to be at odds with each other. The paper will also entail an exploration of the conventional and contemporary interface between international law and Commonwealth Caribbean constitutional law. It will argue that the automatic incorporation of *jus cogens* norms into the common law of Commonwealth Caribbean countries would be no less inimical to the doctrines of dualism and separation of powers than the automatic application of a ratified unincorporated treaty in the domestic legal systems of those countries. The paper will then canvass the judicial postulate of Anderson JCCJ and will conclude that Commonwealth Caribbean Constitutions should not be viewed as being subservient to *jus cogens* norms, and consequently, Anderson JCCJ's proposition is by no means tenable.

Juristic standing of Commonwealth Caribbean Constitutions and Jus Cogens norms

The significance of Commonwealth Caribbean Constitutions and *jus cogens* norms in the domestic and international legal spheres respectively cannot be overstated. In order to fully appreciate the fundamentality of Commonwealth Caribbean Constitutions and *jus cogens* norms, it is necessary to cogitate on their significations and jurisprudential underpinnings. The cogitation will reveal that while these Constitutions and norms operate in disparate domains, they overwhelmingly share similar normative features.

i. Constitutional supremacy in the Commonwealth Caribbean

A Constitution is a *sui generis*[1] politico-legal instrument that is deemed to be representative of the collective will of a people regarding their most treasured societal, democratic and governance ideals and aspirations. The Constitution of a state pre-eminently governs the relationship between that state and the citizens or people therein. Professor Simeon McIntosh felicitously delineated a Constitution by stating that it is the foundational charter of a state and its legal order; it inscribes the sovereignty of the state.[2] He also observed that the Constitution of a polity is the predominant institution for the realisation of fundamental human rights *in* the polity and *by* the polity.[3] It is an organic and living thing that must be ready to respond to the changing needs of the people it governs.[4] Commonwealth Caribbean Constitutions are in written form, and they evince democratic constitutionalism, *viz*., they tacitly enshrine fundamental constitutional principles such as the separation of powers and the rule of law and explicitly embody a set of fundamental human rights, which are judicially enforceable against states.[5]

Commonwealth Caribbean countries conform to the doctrine of constitutional supremacy. As a result, the Constitutions of these countries proclaim that the Constitution is the supreme law of the land, and any law which is inconsistent with the Constitution is, to

[1] *Minister of Home Affairs v Fisher* [1980] A.C. 319, 329.

[2] Simeon C.R. McIntosh, "*Continuity and Discontinuity of Law: A Reply to John Finnis*", 21 Connecticut Law Review 1 1988 – 1989, p. 5.

[3] Simeon C.R. McIntosh, "*Sexual Orientation and the W.I. Constitution*", West Indian Law Journal (2012), 37, p. 72.

[4] *Nankissoon Boodram v Attorney-General* (1996) 47 WIR 459 at 467 – 468.

[5] Simeon C.R. McIntosh (n. 3), p. 52.

the extent of the inconsistency, invalid.[6] Constitutional supremacy therefore dictates that the Constitution predominates in a state's legal system, and it will override other laws that are repugnant to the constitutional text and implicit constitutional imperatives.[7] In other words, the constitutionality of an ordinary law is the principal source of its validity. Constitutional supremacy also entails the subordination of all governmental organs – namely, the legislature, the executive and the judicature – to the Constitution. Indeed, even officials of the legislative, executive and judicial branches of government are subject to and must act in accordance with the Constitution. This means that Commonwealth Caribbean Constitutions simultaneously serve as fountainheads of and circumscriptions on governmental power. It follows therefore that the notion of constitutional supremacy in the Commonwealth Caribbean can transform the normativity of the Constitution into omnipotence.[8]

ii. Sanctity of jus cogens norms on the international plane

Jus cogens is a juristic notion of universal recognition and materiality. The conventional meaning of *jus cogens* can be found in the Vienna Convention on the Law of Treaties (VCLT) 1969. Article 53 of the VCLT provides that a *jus cogens* rule is a peremptory norm of general international law, and it defines a peremptory norm of general international law as:

> '…*a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character*.'

These *jus cogens* rules are derived ultimately from international customary law, but they trump conventional rules and ordinary rules of customary law in inter-state relations.[9] It is for these reasons that *jus cogens* norms have been aptly described as 'fundamental, overriding principles of international law'[10] and 'an elite subset of rules of customary international law'.[11] Even though Article 53 of the VCLT states that a norm must be 'accepted and recognised by the international community of states as a whole' for it to be classified as a norm of *jus cogens*, this is not generally construed or understood as imposing a requirement for the norm to receive the acceptance and recognition of every single member state of the international community. The prevailing jurisprudential opinion seems to be that a norm's qualification for *jus cogens* status does not presuppose universal acceptance – acceptance by an overwhelming majority of states will suffice – and *jus cogens* norms bind non-consenting states and states that have persistently objected to the norms.[12] Therefore, *jus cogens* is non consent-based only insofar as the will of a majority of states binds the dissenting minority.[13] This is what renders *jus cogens*

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[6] See s.1 of the Constitution of Barbados; s.2 of the Republic of Trinidad and Tobago; art.8 of the Constitution of the Co-operative Republic of Guyana; and s.2 of the Constitution of Jamaica; s.2 of the Constitution of Antigua and Barbuda; art.2 of the Constitution of the Commonwealth of the Bahamas; s.2 of the Constitution of Belize; s.117 of the Constitution of the Commonwealth of Dominica; s.106 of the Constitution of Grenada; s.2 of the Constitution of St. Kitts and Nevis; s.120 of the Constitution of St. Lucia; s.101 of the Constitution of St. Vincent and the Grenadines.

[7] Graziella Romeo, "*The Conceptualization of Constitutional Supremacy: Global Discourse and Legal Tradition*", German Law Journal (2020), 21, p. 905.

[8] *Ibid*.

[9] See Articles 53 and 64 of the Vienna Convention on the Law of Treaties (VCLT) 1969; Also see Stephen Vasciannie, "*Reflections on Customary International Law*", in Winston Anderson (ed.), "*Eminent Caribbean International Law Jurists: The Rule of International Law in the Caribbean*" (2019) (The CCJ Academy of Law), pp. 123 –124.

[10] Legal Information Institute. (n.d.) *Jus Cogens*. Retrieve d from www.law.cornell.edu/wex/*jus cogens*.

[11] *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C.Cir. 1988).

[12] *Siderman de Blake and v Argentina*, 22nd May 1992, United States; Court of Appeals (9th Circuit) [9th Cir], para. 42; Petsche, Dr. Markus (2010) "*Jus Cogens as a Vision of the International Legal Order*", *Penn State International Law Review*: Vol. 29: No. 2, Article 2. pp. 267 – 268.

[13] Petsche, Dr. Markus (n. 12) pp. 267 – 268.

norms non-derogable. That is to say, once a justification for not conforming to the norm exists, the norm cannot be regarded as a *jus cogens* norm, and vice versa.[14] Put simply, *jus cogens* norms derive their sanctity from their inviolability.

iii. Commonalities between Commonwealth Caribbean Constitutions and jus cogens norms

Decidedly, there are some affinities between Commonwealth Caribbean Constitutions and *jus cogens* norms. Firstly, both safeguard fundamental human rights of extreme importance by interdicting acts and treatment such as: (a) slavery (b) genocide; (c) torture or other cruel, inhuman, or degrading treatment or punishment; (d) prolonged arbitrary detention; and (e) systematic racial discrimination.[15] Secondly, it is a truism that Commonwealth Caribbean Constitutions (particularly the Bill of Rights sections) and *jus cogens* norms both have moral foundations. In relation to the moral footing of Commonwealth Caribbean Constitutions, Professor McIntosh posited that 'a [C]onstitution is not without some formal connection to moral goodness or legitimacy.'[16] Moreover, in the Belizean case of *Orozco v Attorney General*, Benjamin CJ (as he then was) observed that[17]:

> '*[t]he references to the supremacy of God in the Preamble to the Constitution did not import any specific religious perspective, but rather* ***acknowledged the historical origins of the fundamental rights in natural law and that rights were derived from sources beyond the State and its laws***.' (emphasis added).

Speaking in a similar vein about *jus cogens*, Louis Sohn postulated that *jus cogens* norms derive their peremptory status from their inherent moral authority rather than state consent.[18] Also, Professor Andrea Bianchi explained that[19]:

> '*…to have codified in [the VCLT] a normative category with an open-ended character (jus cogens),* ***the content of which could become intelligible only by reference to some natural law postulates, was tantamount to dignifying the latter's otherwise uncertain foundation by granting it the status of positive law***.' (emphasis added).

These assertions vindicate Florian Hoffman's proposition that '(human rights) law requires a moral foundation it cannot generate itself, whereas foundational (human rights) discourse seeks the facticity which only legal positivation [sic] and institutional enforcement can give it.'[20] Thirdly, as acknowledged previously in section two, Commonwealth Caribbean Constitutions and *jus cogens* norms are both superior within discrete legal spheres. While Commonwealth Caribbean Constitutions reign supreme within the municipal legal order, *jus cogens* norms reign supreme within the international legal order. Their superiority can also lead to the invalidation of other laws and legal norms that are incongruent with them on the

[14] Jason Haynes (2020): "*The confluence of national and international law in response to multinational corporations' commission of modern Slavery: Nevsun Resources Ltd. v. Araya, Journal of Human Trafficking*", p. 2.

[15] The United States Restatement (Third) of Foreign Relations Law § 702 (1987); *see* also the Bill of Rights sections in Commonwealth Caribbean Constitutions.

[16] Simeon McIntosh, "*West Indian constitutional discourse: a poetics of reconstruction*", Caribbean Law Review, Vol. 3, No. 1, June 1993. p. 31.

[17] (2016) 90 WIR 161, para. [84].

[18] Louis B. Sohn, "*The New International Law: Protection of the Rights of Individuals Rather Than States*", 32 AM. U. L. REV. 1 (1982).

[19] Andrea Bianchi, "*Human Rights and the Magic of Jus Cogens*", The European Journal of International Law (2008), Vol. 19 No. 3, pp. 492-493.

[20] See Hoffmann, F. (2012). "*Foundations beyond law*". In C. Gearty & C. Douzinas (Eds.), *The Cambridge Companion to Human Rights Law* (Cambridge Companions to Law, pp. 81-96). Cambridge: Cambridge University Press.

domestic and international planes, respectively.[21] Fourthly, the same way that all member states of the international comity are subject to *jus cogen* norms (including states that register persistent objections to these norms), all persons, bodies and institutions that function under Commonwealth Caribbean Constitutions are subject to these Constitutions. Finally, the monumental provisions in Commonwealth Caribbean Constitutions are entrenched, that is to say, these provisions are moderately to extraordinarily difficult to amend and are not amendable by the ordinary legislative procedure; special mechanisms must be employed to effect amendments to these constitutional provisions.[22] Likewise, *jus cogens* norms are undeniably 'entrenched' since these norms are deeply calcified in the international community[23] and can only be modified by subsequent norms of general international law having the same character.[24]

In view of the manifold correspondences between Commonwealth Caribbean Constitutions and *jus cogens* norms, it is unsurprising that some jurisprudents have opined that *jus cogens* norms play a similar pivotal role in the international legal system to that played by constitutional guarantees in domestic legal systems.[25] Other jurisprudents went as far as to dub *jus cogens* norms 'constitutional principles'[26] and 'international constitutional law'.[27] Ergo, although Commonwealth Caribbean Constitutions and *jus cogens* norms vary to some extent in scope, application and import, *jus cogens* is, in substance, constitutional law writ large. The glaring and appreciable normative congruence between Commonwealth Caribbean Constitutions and *jus cogens* norms would render any potential conflict highly far-fetched. Be that as it may, this does not ineluctably lead to the conclusion that conflict between them is impossible, as will be demonstrated later in section four.

Interface between Municipal and International Law

An exploration of the classical divergence between the doctrines of monism and dualism is crucial to a sound comprehension of the interface between municipal constitutional law and international law in the Commonwealth Caribbean. This aspect of the paper will underscore the actuality that judicial ingenuity and developments have occasioned the impairment of the doctrine of dualism, which is *ostensibly* applicable in the Commonwealth Caribbean. Notably, it will be shown that the so-called confluence of *jus cogens* – *qua* super-customary norms – and a state's common law would make it difficult to concretely espouse the view that a strict and absolute adherence to dualism obtains in the Commonwealth Caribbean.

i. Orthodox dichotomy between monism and dualism

Conventionally, it has been understood that there are two dichotomous doctrines that determine the relationship between international law and municipal law for polities across the globe. These doctrines are monism and dualism. Monists posit that international law and municipal law constitute a single legal order in which the former enjoys primacy over the latter.[28]

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[21] Romeo (n 7); Articles 53 and 64 of the VCLT; Vasciannie (n 9).

[22] *See* the dictum of Lord Diplock in *Hinds v R* (1975) 24 WIR 326, 333 (where he discussed the raison d'être of constitutional entrenchment).

[23] Hossain, K. (2005), "*The Concept of Jus Cogens and the Obligation Under the U.N. Charter*", *Santa Clara Journal of International Law, Vol. 3*, p. 73.

[24] Article 53 of the VCLT.

[25] Hilary Charlesworth and Christine Chinkin, "*The Gender of Jus Cogens*", Human Rights Quarterly, Feb., 1993, Vol. 15, No. 1 (Feb., 1993), p. 65.

[26] Antonio Cassese, "*International Law in a Divided World*" (Oxford: Clarendon Press, 1986).

[27] Mark W. Janis, "*Nature of Jus Cogens*", 3 Connecticut Journal of International Law 359, 363 (1988).

[28] David S. Berry, "*The Use of International Law by Domestic Tribunals in the Caribbean in Death Penalty Cases*", in David S. Berry, Tracy Robinson (eds), *Transitions in Caribbean*

In countries with monist systems, international conventions form part of the domestic law of those countries once the conventions have been ratified by the executive branch of government. In contradistinction, dualists believe that international law and municipal law are two competing legal orders with the municipal legal order taking priority[29], pending the legislative incorporation of international law into a state's domestic juridical system and architecture.[30] In countries with dualist systems, a treaty can only form part of the domestic law if it receives executive ratification *and* the legislature passes legislation for the purpose of domesticating the treaty. This two-pronged approach is necessitated by the functional separation of powers doctrine, which dictates that the executive is endowed with the sole prerogative power to accede to treaties and international obligations, but the legislature is entrusted with the especial responsibility for incorporating and operationalising these treaties and obligations in the domestic legal sphere.

Significantly, dualism is the politico-constitutional orthodoxy that *ostensibly* pervades the Commonwealth Caribbean. Dualism was first adopted by Great Britain, and in the course of the colonial era, Britain extended the application of the dualist doctrine to all of its colonies, including countries in the Caribbean region that were erstwhile British territories. Subsequent to the attainment of Independence, states in the Commonwealth Caribbean remained dualist states.[31] It follows therefore that Commonwealth Caribbean states' slavish adherence to dualism is distinctly the product of British imperial hegemony. Third World Approaches to International Law (TWAIL) scholarship suggests that the international legal system was set up to extend European imperialism and accommodate the former imperial powers[32]; however, it is somewhat ironic that the quintessence of the Eurocentric doctrine of dualism is its normative prophylactic character, which purportedly averts neo-colonialism by safeguarding a Commonwealth Caribbean state's preferred values and the constitutional doctrine of separation of powers.[33]

ii. Contemporary interplay between municipal and international law

For some Commonwealth scholars, dualism is a putative relic that is no longer hallowed because the monist-dualist divide is beginning 'to pale into insignificance', as courts in some common law jurisdictions are increasingly enforcing obligations from unincorporated treaties.[34] Accordingly, these scholars postulate that the dichotomy between municipal and international law is blurred, and the two legal realms are continuously interfacing with each other in a mutually iterative fashion.[35] Professor Melissa Waters befittingly dubbed this phenomenon 'creeping monism'.[36] Incontrovertibly, these postulations hold true, too, for the Commonwealth Caribbean, notably because Commonwealth

Law: Law-making, Constitutionalism and the Convergence of National and International Law, (Caribbean Law Publishing Company, 2013), p. 104.

[29] *Ibid*.

[30] See the dictum of Lord Oliver in *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* [1990] 2 A.C. 418, 500; also see the dictum of Lord Hoffman in *Higgs v Minister of National Security et al*. [2000] 2 A.C. 228, 241.

[31] Dzah G.E.K. (2020), "*Transcending Dualism: Deconstructing Colonial Vestiges in Ghana's Treaty Law and Practice*", in: Addaney M., Nyarko M., Boshoff E. (eds), *Governance, Human Rights, and Political Transformation in Africa*. Palgrave Macmillan, Cham, p. 121.

[32] Robert Young, "*Empire, Colony, Postcolony*" (West Sussex: Wiley-Blackwell, 2015), p. 138.

[33] See Duke E.E. Pollard (2007), "*Unincorporated Treaties and Small States, Commonwealth Law Bulletin*", 33:3, pp. 389-390; see Dzah G.E.K. (n. 27), p. 119; also see Malcolm Shaw, "*International Law*", 5th ed. (Cambridge: Cambridge University Press, 2003), pp. 135–136.

[34] Dzah G.E.K. (n. 31), p. 121.

[35] *Ibid*., p. 118; see also Melissa A. Waters, "*Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*", Columbia Law Review , Apr., 2007, Vol. 107, No. 3 (Apr., 2007), p. 643.

[36] Melissa A. Waters (n. 35), p. 643.

Caribbean countries are quite *au fait* with the judicial employment of hermeneutic and principled devices to contrive the incorporation of international law through the 'back door'. For instance, in *Thomas v Baptiste*[37] and *Neville Lewis v Attorney General of Jamaica*,[38] the Judicial Committee of the Privy Council (JCPC) stated that by ratifying an unincorporated treaty which provided for condemned men to have access to international human rights bodies, the governments of Trinidad & Tobago and Jamaica had made that process part of their domestic criminal justice system, and the constitutional rights to due process and protection of the law had to be construed in a manner which comported with that treaty obligation. Therefore, the JCPC found that a corollary of the rights to due process and protection of the law was the procedural right of condemned persons to have their petitions determined by international human rights bodies before the death sentence is inflicted.

This issue was also dealt with in *Attorney General v Joseph & Boyce*,[39] where the CCJ acknowledged that condemned persons should benefit from the same procedural right, not because the ratified unincorporated treaty formed part of the domestic legal system, but because the condemned men had a legitimate expectation that the government of Barbados would comply with its obligations under that treaty. The CCJ, particularly via the judgment of Justice Pollard (as he then was), also frowned upon the rationale that was adopted by the JCPC in *Thomas v Baptise* and *Neville Lewis* because of the debilitating ramifications that it would engender for the doctrines of dualism and the separation of powers. However, quite recently, the CCJ muddied the waters in *Maya Leaders Alliance et al. v Attorney General of Belize*[40] when it invoked Lord Bingham's eighth sub-rule of the rule of law and brazenly declared that the rule of law requires a state to comply with its commitments in international law, whether the commitments derive from treaty or international custom. This declaration unconditionally paves the way for courts to give full effect to ratified unincorporated treaties and other international legal obligations in the domestic legal spheres of Commonwealth Caribbean states without the need for legislative approbation. Seemingly, therefore, it authorises the deployment of the rule of law in a manner that runs counter to the doctrines of dualism and separation of powers, which the CCJ jealously guarded in *Joseph & Boyce*.

iii. Customary international law, jus cogens and the common law

Generally, the conventional wisdom *vis-à-vis* the relationship between customary international law and the common law of a state is that the former is automatically incorporated into the latter in the absence of legislative agency. This principle was elegantly expounded in *Trendtex Trading Corporation v Central Bank of Nigeria* by Lord Denning who said[41]:

> '*Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago, is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it.*'

[37] (1999) 54 WIR 387.
[38] (2000) 57 WIR 275.
[39] (2006) 69 WIR 104.
[40] [2015] CCJ 15 (AJ).
[41] [1977] Q.B. 529, 554.

This famous dictum of Lord Denning was favourably cited by Pollard J in *Joseph & Boyce*.[42] It was also reinforced by Wit J who observed that[43]:

> '*Certain elements of international law, called customary international law, form part of our law even without us signing anything. We simply accept those rules on the basis that we are not alone in the world; that we are, or assume we are, members of a comity, a family of civilised nations and on the understanding that the rules, emerged within that comity, have to be followed because they represent what civilised nations consider the proper thing to do.*'

There are, however, two caveats to this general principle. The first caveat is that an ordinary norm of customary international law is not binding on a state at the international plane if the state persistently objected to the emergent customary norm. In such a case, if the norm does not bind the state in its international relations, it cannot automatically form part of the common law of that state. The second caveat is that an ordinary norm of customary international law will not be automatically embodied in a state's common law if the norm is frontally inconsonant with an unequivocal statute or the established judicial precedent of that state.

Indeed, if norms of *jus cogens* are accounted as being a superior subset of norms of customary international law, it would necessarily follow that the aforesaid orthodoxy of automatic reception into common law is equally applicable to *jus cogens* norms. Rivetingly, Justice Pollard (as he then was), writing extra-judicially, countenanced the proposition that *jus cogens* norms are automatically received into the common law of Commonwealth Caribbean states. Pollard opined that[44]:

> '*where a norm of customary international law or* ***jus cogens*** *incorporating advanced human rights standards could be established, there would be ample justification for a finding that it has been automatically received in the common law of States of the Commonwealth Caribbean so as to affect the rights of citizens*.' (emphasis added).

The fact that Pollard registered his ardent embrace of the automatic reception of *jus cogens* norms into the common law of Commonwealth Caribbean states is unfathomably irreconcilable with other arguments that were propounded by him. Firstly, as mentioned previously in section two, a norm of *jus cogens* binds a state irrespective of whether that State consented to or persistently opposed the incipient norm of *jus cogens*.[45] The view articulated by Pollard suggests that even if a Commonwealth Caribbean state does not express its consent to be bound by a *jus cogens* norm which has been overwhelmingly accepted and recognised by other states, the norm would still be automatically incorporated into the common law of that Commonwealth Caribbean state. If this is the case, however, could this not contribute to the augmentation of the existing, subtle neo-colonial coercion that major developed states exert over small, developing Commonwealth Caribbean States, as postulated by Pollard?[46]

Secondly, in *Joseph & Boyce* and elsewhere,[47] Pollard strenuously defended the doctrine of dualism and considered it to be a palladium for state sovereignty and the separation of powers principle. However, regardless of whether the executive branch of a Commonwealth Caribbean state opposes or acquiesces to a *jus cogens* norm, would it not attenuate the doctrine of dualism and impinge on state sovereignty and the separation of powers if a court found that the norm automatically formed part

[42] (2006) 69 WIR 104, para. [61] (Pollard J).
[43] *Ibid*., para. [46] (Wit J).
[44] Duke E.E. Pollard (n. 33), pp. 402 – 403.
[45] See (n.12).
[46] Duke E.E. Pollard (n. 33), pp. 415 – 417.
[47] Duke E.E. Pollard (n. 33).

of the common law of the state in the absence of legislative imprimatur? To borrow the words of Professor Stephen Vasciannie, 'should the court not [give] these [Commonwealth Caribbean] states the opportunity to express a view on this kind of question which has long been disputed?'[48] These are all legitimate questions, not least because, as has been validly argued by Gib van Ert, the automatic reception of customary international law (including *jus cogens*) in dualist states 'is a significantly monist element in a system too often depicted as dualist.'[49] Anderson, JCCJ, too, has conceded that this is the adoption of a monist approach as distinct from the strict dualist approach, which is applicable where international treaties are concerned.[50]

It is also noteworthy that some jurists from other Commonwealth nations are at odds with their Caribbean counterparts over this conundrum. For instance, in *Alseran et al. v Ministry of Defence*, Leggatt J incisively opined that[51]:

> '*To classify a norm as a peremptory norm is to make a statement about its status within international law and not about whether it forms part of the domestic law of any state…The recognition that in international law states are bound by certain fundamental norms from which they cannot derogate does not signify that such norms automatically form part of a state's internal law without the need for positive enactment.*'

The author of this paper espouses the views expressed by van Ert and Leggatt J. It is therefore submitted that the automatic integration of *jus cogens* norms into the common law of Commonwealth Caribbean states could emasculate the doctrines of dualism, state sovereignty and the separation of powers, and, in turn, could materially contribute to the 'creeping monism' in the Commonwealth Caribbean. It is also submitted that this would render the absoluteness of dualism in the Commonwealth Caribbean a figment of the imagination.

Prospective incompatibility of Constitutional supremacy and Jus Cogens sanctity

This section is the kernel of the paper; it critically interrogates the judicial fiat made by Anderson JCCJ in *Nervais v R*. The intent of this section is to appreciably demonstrate that by overwhelming weight of reasoned jurisprudential arguments, there is a strong and sufficient basis for the rejection of the assertion that Commonwealth Caribbean Constitutions are subservient to *jus cogens* norms. Consequently, Anderson JCCJ's fiat is by no means unchallengeable.

i. Jurisprudential backing for Anderson JCCJ's proposition

At this juncture, the proposition made by Anderson JCCJ in *Nervais v R* is worthy of a restatement and dissection. Anderson JCCJ unequivocally asserted that '[n]ational constitutions and laws are subservient to norms of jus cogens and courts everywhere are obliged to uphold and enforce such fundamental international principles.'[52] However, this is not the only time that Anderson JCCJ expressed a view endorsing the subordination of Constitutions to norms of *jus cogens*. In the case of *Attorney General of Guyana v Richardson*,[53]

[48] Stephen Vasciannie, "*The Appellate Jurisdiction of the Caribbean Court of Justice*", in Richard Albert, Derek O'Brien, and Se-shauna Wheatle (eds), *The Oxford Handbook of Caribbean Constitutions*, (Oxford University Press, 2020) pp. 519 – 520.

[49] Gib van Ert, "*The Domestic Applicability of International Law in Canada*", in Curtis A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law*, (Oxford: Oxford University Press, 2019), p. 510.

[50] The Hon. Mr. Justice Winston Anderson, JCCJ, "*The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions*", J. Transnational Law & Policy, 2011-2012, Vol. 21, p. 10.

[51] [2019] QB 1251, 1319.

[52] Dissenting Opinion of Justice Anderson, JCCJ in *Nervais v R; Severin v R* - (2018) 92 WIR 178, 227.

[53] [2018] CCJ 17 (AJ).

Anderson JCCJ intimated that if modern universal notions of democratic sovereignty attain the status of *jus cogens*, they could override older notions that are currently constitutionally entrenched.[54]

It must be acknowledged that there are other jurisprudents who are seemingly in concurrence with Anderson JCCJ's postulations. For instance, Karen Parker has argued that since the peremptory nature of *jus cogens* does not permit any derogation, *jus cogens* norms must invalidate *any* instrument, judicial order, executive order or legislative act that contravenes them.[55] If this argument is accepted, it would mean that Commonwealth Caribbean Constitutions could possibly be invalidated by *jus cogens* norms since these Constitutions are fundamentally written instruments. Moreover, Ludwikowski opined that the growing presence of international legal elements in the municipal law of states impacts the position of the Constitution itself.[56] He further added that based on the increasingly monistic doctrine of international law, if states cannot adopt laws that would violate *jus cogens* norms, they cannot claim that their laws are supreme.[57] For him, therefore, there has been the decline of the concept of constitutional supremacy, and the question remains whether the conception of constitutional supremacy is still defendable in a municipal forum.[58]

ii. Potential conflict between Commonwealth Caribbean Constitutions and jus cogens norms

Though the preceding scholarly opinions suggest that *jus cogens* norms predominate over Constitutions, some jurists, including Karen Parker mentioned above, believe that *jus cogens* norms are compatible with the major legal systems in the world,[59] and that constitutional norms and *jus cogens* norms *tend* to acquire the same content and scope.[60] However, the use of the word '*tend*' confirms the view articulated in section two of this paper that it is injudicious to rule out the possibility of conflict between Commonwealth Caribbean Constitutions and *jus cogens* norms. This, then, begs two salient questions – (1) Can there be juridical dissonance between a Commonwealth Caribbean Constitution and a *jus cogens* norm?; and (2) If the first question is answered affirmatively, what would/should be the upshot?

To answer the first question, notwithstanding that most *jus cogens* norms mirror constitutionally shielded rights in the Commonwealth Caribbean, the potentiality of discordance between a Commonwealth Caribbean Constitution and a *jus cogens* norm seemingly exists. Take, for example, Trinidad and Tobago – the only country in the Commonwealth Caribbean that retains the mandatory death penalty. Section 6 of the Trinidad and Tobago Constitution immunises pre-Independence laws from constitutional challenge.[61] Section 4 of Trinidad and Tobago's Offences Against the Person Act is a pre-Independence law, and it provides for the imposition of the mandatory death penalty if a person is adjudged guilty of murder.[62] Ergo, the Trinidad and Tobago Constitution effectively precludes the mandatory death penalty from being declared unconstitutional even though it is palpably inconsistent with constitutional rights, including the prohibition of torture or cruel, unusual or inhuman treatment or punishment.[63] Pertinently, judicial and quasi-judicial bodies have found that the mandatory death penalty violates the interdiction of torture or other cruel,

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[54] *Ibid*. at para. [149].

[55] Karen Parker, "*Jus Cogens: Compelling the Law of Human Rights*", 12 Hastings International & Comparative Law Review 411 (1989), p. 416.

[56] Rett R Ludwikowski, "*Supreme Law or Basic Law - The Decline of the Concept of Constitutional Supremacy*" (2001) 9(2) Cardozo Journal of International and Comparative Law, p. 253.

[57] *Ibid*., p. 268.

[58] *Ibid*., pp. 253 – 268.

[59] Karen Parker (n. 55), p. 414.

[60] Peters, Anne, "*Supremacy Lost: International Law Meets Domestic Constitutional Law*", Vienna Online Journal on International Constitutional Law, vol. 3, no. 3, 2009, p. 197.

[61] s.6 of the Constitution of the Republic of Trinidad and Tobago, 1976.

[62] s.4 of The Offences Against the Person Act, Chap 11:08, Act 10 of 1925, Laws of Trinidad and Tobago.

[63] See s.5(2)(b) of the Constitution of the Republic of Trinidad and Tobago, 1976, which enshrines the prohibition of cruel and unusual punishment or treatment.

unusual or inhuman treatment or punishment,[64] which has attained the status of *jus cogens*.[65] Therefore, while the retention of the mandatory death penalty in Trinidad and Tobago is constitutionally safeguarded, the foregoing opinions indicate that it can be well-foundedly argued that the mandatory death penalty is repugnant to a *jus cogens* norm, *i.e.* the interdiction of torture or other cruel, unusual or inhuman treatment or punishment.

iii. Grappling with the prospective incongruence: A more sobering viewpoint

Using the above-mentioned exemplification, Anderson JCCJ's judicial fiat will now be interrogated. The burning question is: how does one reconcile the notions of constitutional supremacy and *jus cogens* sanctity if there can be potential conflict between them? In other words, if such a conflict had to arise, would it be possible to preserve constitutional supremacy in the Commonwealth Caribbean without depreciating *jus cogens* sanctity, and vice versa? Undeniably, this presents a significant juridical conundrum.

Of course, some jurists would readily contend that the potentiality of conflict between Commonwealth Caribbean Constitutions and *jus cogens* norms does not exist, period. For instance, Sir Gerald Fitzmaurice believes that, strictly speaking, there can never be a conflict between international law and municipal law; the most there can be is a conflict of legal obligations on the part of the state. Therefore, if an action violates international law but is in conformity with municipal law, there is no conflict between the two fields of law. Each decides legality within its own sphere.[66] The author of this paper generally supports this view. However, for the sake of argument, it will be presupposed that there can be conflict between a *jus cogens* norm and a Commonwealth Caribbean Constitution. This presupposition will be made for two reasons. Firstly, the Trinidadian example discussed above reveals that such conflict could be a possibility. Secondly, logically speaking, Anderson JCCJ's assertion regarding the subservience of national Constitutions to *jus cogens* norms necessarily surmises that they may not invariably dovetail and conflict between them could potentially arise. Put another way, if Anderson JCCJ was of the opinion that a Constitution and a *jus cogens* norm could never clash, the subservience of one to another would have been wholly immaterial. Subservience implies, to some extent, that the scope for conflict exists.

Previously in section three, it was demonstrated that the prevailing juristic view is that customary international law (including *jus cogens*) is automatically integrated into the common law of Commonwealth Caribbean states. However, it has been acknowledged that this is a 'broad, monist statement'[67]; therefore, there are cardinal qualifications which must be added to it. The first qualification, which was countenanced by Lord Denning, is that if an existing, *unambiguous* statute or binding judicial precedent is applicable, the court must uphold that municipal law, irrespective of whether it is compatible with the state's international legal obligations.[68] The next qualification, which was

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[64] See *Nervais v R*; see *R v Hughes (Peter)* [2002] UKPC 12; also see Application of the Inter-American Commission on Human Rights before the Inter-American Court of Human Rights in the case of *Lennox Boyce, Jeffrey Joseph, Frederick Benjamin Atkins and Michael Huggins (Boyce et al.)* (2006) (Case 12.480) against Barbados.

[65] See I/A Court H.R., *Case of Caesar v. Trinidad and Tobago*. Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123; see *Prosecutor v. Furundzija* (unreported), 10 December 1998, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/1-T 10, paras. 153-154; see The US Restatement of Foreign Relations Law (n. 15); also see *Siderman de Blake and v Argentina* (n. 12), para. 47.

[66] See David S. Berry (n. 28), pp. 104-105, where he explained the position of Sir Gerald Fitzmaurice. Also see Sir G. Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957-II) 92 Recueil des Cours de l'Académie de Droit International 5.

[67] David S. Berry (n. 28), p. 106.

[68] *Ibid*.; See *Mortensen v Peters* (1906) 8 F(J) 93, 14 SLT 227 (HC Justiciary Scot) 231–32; see the dictum of Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 554; also see Pollard J supporting the case

highlighted by Dr. David Berry, is that when a norm of customary international law is integrated into the common law of a state, its status metamorphosises, and it literally becomes domestic law.[69] If *jus cogens* is a subset of rules of customary international law, it must logically follow that *jus cogens* norms are subject to the same juridical constraints. Therefore, these constraints will now be applied to the example given earlier, which pertains to the potential conflict between the Trinidad and Tobago Constitution and *jus cogens* norms. Again, for the sake of argument, the author of this paper will proceed on the supposition that the body of *jus cogens* rules encompasses the interdiction of torture or other cruel, unusual or inhuman treatment or punishment (hereinafter called "the relevant norm of *jus cogens*").

As alluded to above, for a Constitution to override a norm of *jus cogens*, the Constitution or the relevant provision(s) therein must be unambiguous. Undoubtedly, section 6 (1) of Trinidad and Tobago's Constitution, which retains the mandatory death penalty, is unequivocal. This view received validation from the JCPC through Lord Hoffman in *Matthew v The State* where he opined that[70]:

> '***The language and purpose of s 6(1) are so clear that, whatever may be their lordships' views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it***…
>
> *This is a very important point.* ***It is not suggested that there is any ambiguity about the Constitution itself****. It is accepted that it is simply not susceptible to a construction, however enlightened or forward-looking, which would enable one to say that s 6(1) was merely a transitional provision which somehow and at some point in time had become spent.* ***It stands there protecting the validity of the existing laws until such time as Parliament decides to change them***.' (emphasis added).

It must be noted that the JCPC remains the final appellate court for Trinidad and Tobago, and therefore, the aforementioned dicta remains applicable for that country until the JCPC resolves to overturn it. Accordingly, the constitutional provision in Trinidad & Tobago which legitimises the mandatory death penalty is so lucid and unambiguous that even though it may be at odds with the relevant norm of *jus cogens*, this norm would have to be overridden by the Constitution on this basis.

Also, as previously discussed in section three, a state's municipal law must take precedence and be applied if binding judicial precedent exists, which is discordant with a rule of international custom or *jus cogens*. The relevant binding judicial decisions in this regard are *Matthew v The State* and *Jay Chandler v The State (No. 2)*.[71] In these cases, the majority of the JCPC affirmed the constitutional legitimacy of the mandatory death penalty in Trinidad and Tobago. In *Matthew*, the JCPC unhesitatingly avowed that[72]:

> '*Their lordships consider that…****the mandatory death penalty is a cruel and unusual punishment*** *and therefore inconsistent with ss. 4(a) and 5(2)(b) of the Constitution. Their lordships note that Trinidad and Tobago is…a party to the International Covenant on Civil and Political Rights and a member of the Organisation of American States and that* ***the Human Rights Committee and Inter-American Commission have both decided that the mandatory death penalty is inconsistent with the international law obligations created by adherence to the International Covenant on Civil and Political Rights and membership of the Organisation of***

of *Mortensen v Peters* in *Attorney-General v Joseph and Boyce* (n. 42), 199.

[69] David Berry (n. 67).

[70] (2004) 64 WIR 412, 418.

[71] [2022] UKPC 19.

[72] (2004) 64 WIR 412, 420.

> ***American States**…The principle that domestic law should so far as possible be interpreted consistently with international obligations and the weight of opinion expressed in domestic cases decided in other jurisdictions supports the conclusion that ss. 4 and 5 of the Constitution should be similarly interpreted…*
>
> *The question in this case, however, is whether inconsistency with ss. 4 and 5 has any effect on the validity of the mandatory death penalty*.' (emphasis added).

However, in spite of the aforesaid acknowledgement, the JCPC ultimately found that[73]:

> '*The law decreeing the mandatory death penalty was an existing law at the time when the Constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with ss. 4 and 5. It follows that…it remains valid*.'

Recently, this position was unanimously and resoundingly reinforced by a differently constituted JCPC in *Jay Chandler*, which, after its final analysis, concluded that[74]:

> '*In the Board's view, the 1976 Constitution saves existing laws, including the mandatory death penalty, from constitutional challenge. **The consequence of that is that the state of Trinidad and Tobago has a statutory rule which mandates the imposition of a sentence, which will often be disproportionate and unjust. The sentence is recognised internationally as cruel and unusual punishment.** The state does not dispute that characterisation…*
>
> ***It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. Nonetheless, such a provision is not unconstitutional.** The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws*.' (emphasis added).

Therefore, even if the mandatory death penalty in Trinidad and Tobago offends against the prohibition of cruel and unusual punishment or treatment, which can arguably be regarded as a *jus cogens* norm, the foregoing judicial precedent is so clear, conclusive and firmly established in declaring its constitutionality that, on this basis, too, the relevant norm of *jus cogens* would have to capitulate to the decisions in *Matthew* and *Jay Chandler*.

Finally, if *jus cogens* norms mutate when they form part of the common law of a state and are treated as such, this means that the relevant norm of *jus cogens* would no longer enjoy the superior and overriding status that it enjoys on the international plane upon its mutation and integration into the common law of Trinidad and Tobago. In such a case, the relevant norm of *jus cogens* would automatically become a common law rule and would have to yield to section 6 of the Trinidad and Tobago Constitution, which safeguards the mandatory death penalty, since it is theoretically, practically and juridically impossible for mere common law to invalidate the Constitution or a clear and unambiguous constitutional provision therein. This is because it would certainly result in an absurdity if a common law rule could be regarded as superior to the instrument which proclaims to be, and axiomatically is, the supreme law of the land. It follows therefore that even if it is accepted that *jus cogens* norms automatically form part of the common law of Commonwealth Caribbean states, this does not *ipso facto* mean that the Constitutions of these states will be subservient to such norms in

[73] *Ibid.*, p. 418.

[74] [2022] UKPC 19, paras. [96] – [98].

the event that there is normative dissonance between them.

The automatic ascription of paramountcy to *jus cogens* norms over Commonwealth Caribbean Constitutions would unacceptably result in the erosion of the doctrine of constitutional supremacy. If a Commonwealth Caribbean Constitution is to be divested of its supremacy, this should be done by way of a deliberate legislative resolution, i.e. by the democratic organ of government, which received the mandate from the people of a nation to clothe the Constitution with such supremacy in the first place. If a Commonwealth Caribbean state wishes to render *jus cogens* norms superior to its Constitution or constitutional norms, it is within the legislature's province to effect a constitutional modification that would provide for this explicitly. An example which comes close to achieving this objective can be found in the Swiss Constitution, which provides that total or partial revisions of the Constitution must not violate mandatory provisions of international law, thereby intimating that the Constitution could be viewed as subordinate to norms of *jus cogens*.[75] As discussed previously in section three, *jus cogens* already runs counter to state sovereignty on the international plane. Therefore, it would be a sheer judicial solecism for a national court – in the absence of the needful constitutional amendment – to make an incursion into the legislature's province and pronounce that *jus cogens* norms trump Commonwealth Caribbean Constitutions. Such a judicial pronouncement would only serve to whittle away a state's 'sovereignty' on the municipal plane as well.

This view can be cogently buttressed by the decision in the case of *Buell v Mitchell*,[76] where a United States Court of Appeal (USCA) had to consider whether a rule of *jus cogens* could be the basis for invalidating a domestic statute which permitted the *discretionary* death penalty in Ohio. It is noteworthy that unlike Commonwealth Caribbean Constitutions, the US Constitution expressly proclaims that the supreme law of the land shall comprise the Constitution *and* treaties made under the authority of the US.[77] However, the US Constitution deliberately makes no reference to customary international law or *jus cogens*. It was unsurprising, therefore, when the USCA in *Buell v Mitchell* found that even if it were to conclude that the abolition of the *discretionary* death penalty was a norm of customary international law or *jus cogens*, that would not be a sufficient basis for the Court to invalidate a state's death penalty statute.[78] More importantly, the USCA added that[79]:

> '*We believe that in the context of this case, where customary international law [including jus cogens] is being used as a defense against an otherwise constitutional action,* ***the reaction to any violation of customary international law is a domestic question that must be answered by the executive and legislative branches****. We hold that* ***the determination of whether customary international law [including jus cogens] prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it [is] their constitutional role to determine the extent of this country's international obligations and how best to carry them out***.' (emphasis added).

[75] Arts. 193(4) and 194(2) of the Federal Constitution of 18 April 1999 of the Swiss Confederation; see also Peters, Anne (n. 49), p. 185.

[76] *Buell (Robert A.) v Mitchell (Betty)*, Appellate Decision, App No 99-4271, 274 F.3d 337 (6th Cir. 2001), ILDC 300 (US 2001), 30th January 2001, United States; Court of Appeals (6th Circuit) [6th Cir].

[77] U.S. Constitution. art. VI, cl. 2.

[78] *Buell v Mitchell* (n. 65), pp. 373 – 374.

[79] *Ibid*., pp. 375 – 376.

In view of the foregoing arguments and rationales, the author of this paper respectfully disagrees with Anderson JCCJ, who insubstantially posited, without any caveat, that national [Commonwealth Caribbean] constitutions are subservient to *jus cogens* norms. The author submits that the more pragmatic and legally palatable viewpoint is that Commonwealth Caribbean Constitutions should not and cannot be deemed subservient to *jus cogens* norms on the municipal plane unless and until Commonwealth Caribbean legislatures constitutionally and unequivocally resolve that this is the case.

Conclusion

This paper has painstakingly demonstrated the following: (1) Commonwealth Caribbean Constitutions and *jus cogens* norms generally exist in two discrete legal domains, and they reign supreme over other rules or norms in those respective domains; (2) The automatic reception of *jus cogens* norms into the common law of Commonwealth Caribbean states would constitute a grave impingement on the sovereignty of these states and would wrought further erosion of the doctrine of dualism in the Commonwealth Caribbean; (3) Notwithstanding the considerable affinities between Commonwealth Caribbean Constitutions and *jus cogens* norms, they can potentially clash normatively. If such conflict arises, Commonwealth Caribbean Constitutions should continue to reign supreme within municipal spheres until it is legislatively determined that *jus cogens* norms are to override these Constitutions. This paper accordingly concludes by submitting that Anderson JCCJ's assertion that national Constitutions are subservient to norms of *jus cogens* is untenable.

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Habeas Corpus: The Great Writ Shines On

Justice Rolston Nelson And Ria Mohammed Davidson

Abstract: *The writ of habeas corpus has been repeatedly described in lofty and romanticised language as a bulwark in the defence of personal liberty. Its origins are often tied to Magna Carta which prohibited imprisonment except by lawful judgment. In the United Kingdom (UK) The ascendency of the writ took place against the backdrop of Magna Carta and religious, political and jurisdictional skirmishes in medieval times. The writ became part of the Caribbean legal order owing to our common law heritage and in certain cases, specific enacting legislation. However legitimate questions can be posed as to the continued utility of the writ in modern times. Such questions are particularly pertinent in the Caribbean context where constitutional law and judicial review reign supreme as the protectors of human rights and the rule of law.*

This article posits that the writ of habeas corpus continues to play a significant role in the Caribbean. Recent judgments in the areas of immigration, mental health, public emergency and extradition demonstrate that the writ is broad and multi-dimensional, capable of remedying an array of unlawful detentions. Thus, the 'Great Writ' continues to shine brightly in upholding the right to personal liberty in the Caribbean. These values are of critical importance in a region whose history is marked by genocide, colonialism, slavery and indentureship.

Keywords*: Habeas Corpus, Immigration, Mental Health, Public Emergency, Extradition*

Introduction

The literal meaning of habeas corpus is have the body. The writ of habeas corpus *ad subjiciendum* requires a person to be brought before a judicial officer to investigate the legality of their detention and if it is found to be unlawful the person is released.[1] The essence of the writ has been thus described:

> *If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of that entitlement to the writ is to require the person who detains you to give an account of the basis on which he says that your detention is legally justified.*[2]

The writ of habeas corpus serves to uphold and protect the right to liberty which is seen as a cherished foundational value of the common law and the constitutional systems forged in the common law tradition.[3] Blackstone described the right to liberty as part of an individual's natural birth-right, the protection of which is the 'first and primary end of human laws.'[4] Dicey later identified the writ of

[1] Thomas Curr, 'The Great Writ of Habeas Corpus, Its Versality on Both Sides of the 'Pond,' and When Right against Remedy Becomes Quixotic' (2020) 9 Global Journal of Comparative Law 220, 221.

[2] *Secretary of State for Foreign and Commonwealth Affairs v Rahmatullah* [2013] 1 AC 614 at [41].

[3] Chuks Okpaluba and Anthony Nwafor, 'The Common Law Remedy of Habeas Corpus Through the Prism of a Twelve-Point Construct' (2021) Vol 14(2) Erasmus Law Review 55.

[4] Blackstone, *Commentary on the Laws of England* (1765 Vol 1) 120.

habeas corpus as one of the laws devised to protect and secure the right to personal liberty.[5]

In the Caribbean, the writ of habeas corpus has been deployed to challenge a range of detentions in the areas of immigration, mental health, public emergencies and extradition; all with varied levels of success. Thus, the writ continues to shine on as an important tool in the defence and preservation of the liberty of the subject.

The History of the 'Great Writ'

The writ of habeas corpus is one of ancient lineage. Both Coke and Blackstone[6] traced its origins to Magna Carta 1215, Chapter 39 which declared that 'No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.'

Although this genesis has since been debated,[7] much like the precise nature of Magna Carta itself,[8] it is beyond dispute that the writ of habeas corpus is a long-established feature of the common law. Originally the writ was purely procedural in nature and was used as 'mesne process'[9] to ensure the efficacious working of the judicial system by securing the attendance of parties. As such 'habeas corpus began as a means of getting people into court, not out of confinement.'[10]

The development of the writ as a stand-alone substantive remedy is connected to religious, political and judicial upheavals in medieval England.[11] The first expansion came as a result of jurisdictional conflicts between common law courts and Chancery courts. Through the writ of habeas corpus *cum causa* the common law courts were able to bring before them and release persons imprisoned by one of their rival courts.[12] This is best illustrated in *Glanville v Courtney*[13] where the plaintiff, who had obtained judgment before the King's Bench, defied the stay of execution issued by the Court of Chancery and was held in contempt and imprisoned by the Lord Chancellor. The King's Bench ordered Granville's release on a writ of habeas corpus, with Coke CJ explaining that '[w]e will not suffer our judgments to be shaken, in other English courts.'

The writ of habeas corpus *ad subjiciendum* developed as a consequence of the religious and political turmoil of the 16th and 17th century, such it came to be regarded as a 'harbinger of justice against the excesses of the Crown itself.'[14] The first milestone was *Search's Case*[15] where William Search was released on a writ of habeas corpus after being imprisoned for violation of letters patent issued by Her Majesty Elizabeth I. Next came the Forced Loan of 1626 which was devised by Charles I as a means to finance his war with Spain. Opposition to this move set the stage for *Darnel's Case*;[16] a decision which proves that legal defeat can serve as a catalyst for legislative victory.

Barristers acting for Sir Thomas Darnel and sixty-nine other knights and gentlemen who were imprisoned for their refusal to pay contributions sought their release via habeas corpus. The return to the writ stated no cause for the commitment but rather that the prisoners were held *per speciale mandatum* Domini Regis (by his Majesty's *special* commandment). Counsel argued that if these imprisonments were held lawful then subjects could be restrained of their liberties perpetually without remedy. The King's Bench

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[5] AV Dicey, *The Law of the Constitution* (10th ed. ECS Wade ed. 1959) 208.

[6] Coke, *The Second Part of the Institutes of the Laws of England* (6th ed. London, W. Rawlins 1681) 54; Blackstone (n 4) 132.

[7] Jenks, 'The Story of Habeas Corpus' (1902) 18 L.Q. Rev. 64; Holdsworth, *A History of English Law* (Meuthen 1926) 112; M Cohen, 'Some Considerations on the Origins of Habeas Corpus' (1938)16 The Canadian Bar Review 92.

[8] Richard H Helmholz, 'The Myth of Magna Carta Revisited' (2016) 94 North Carolina Law Review 1475.

[9] Dallin H Oaks, 'Legal History in the High Court – Habeas Corpus' (1966) 64 Mich L Rev 451, 459.

[10] Alan Clarke, 'Habeas Corpus: The Historical Debate' (1998) 14(2) NYLS Journal of Human Rights 375, 378.

[11] Neil Douglas McFeeley, 'The Historical Development of Haberas Corpus' (1976) 30 SW L.J. 585, 590.

[12] Oaks (n 9) 459 – 460.

[13] 80 Eng. Rep. 1139 (K.B. 1615).

[14] Ishita Sharma, 'Writ of Habeas Corpus vis a vis Mental Health Patients: An Analysis' (2021) 15(2) Indian Journal of Forensic Medicine & Technology 4103.

[15] 74. Eng. Rep. 65 (C.P. 1588).

[16] 3 Howell's State Trials 1 (K.B. 1627).

recognised the prerogative and remanded the prisoners into custody. They were eventually released by the King. The decision in *Darnel* was effectively overturned by the Parliament via the Petition of Right 1628 which affirmed the right to liberty, that no man could be detained without a stated cause and prohibited taxation without the consent of Parliament.[17]

The next notable development was the Habeas Corpus Act 1641 which gave the common law courts power to enquire into detention, even where ordered by the King or the Privy Council. It also allowed the courts to order release if sufficient cause for the detention was not shown. However, the writ continued to be plagued by procedural defects. For example, in *Jenke's Case*[18] a London merchant who was imprisoned on account of his 'seditious and mutinous'[19] public call for restoration of the Parliament was unable to secure his release via habeas corpus because the courts were in recess. Another problem was the detention of suspected republicans in Scotland, the Channel Islands or Tangier, 'as the writ did not run in those parts.'[20]

Legislative action to secure the efficacy of the writ crystalised in the Habeas Corpus Amendment Act 1679, the long title of which was 'An Act for the better securing of the liberty of the subject and for the prevention of imprisonments beyond the Seas.' This Act effected several procedural improvements including which courts could issue the writ, that prisoners could not be shipped overseas beyond the jurisdiction of the courts, that warrants of commitment must be promptly produced and that the writ could be issued even during the court vacation.[21]

It is important to note that this Act did not create any new remedy. Rather it aimed to address the loopholes which beleaguered the already established writ.[22] It has been observed that 'for all its renown, [the Act] was essentially a reform of habeas corpus procedures and jurisdiction.'[23] In other words, '[a]s celebrated as the Act was, no new principles were introduced nor was any right conferred on the subject. Instead, the use of the writ was clarified and some of the abuses and evasions were remedied.'[24]

Further improvements came with the passage of the Habeas Corpus Act 1816. This Act enabled the writ to be issued in non-criminal causes and disobedience to the writ was treated as a contempt of court and punished accordingly.[25] Section 3 of the Act empowered judges to enquire into the facts stated in the return to the writ in determining whether the detention was justified.

Thus habeas corpus eventually came to be regarded as one of the iconic inventions of English Law for the protection of personal liberty. Blackstone described it in lofty rhetoric as 'the great and efficacious writ, in all manner of illegal confinement.'[26] Sir William Holdsworth credited it as being 'the most effectual protector of the liberty of the subject that any legal system has ever devised.'[27] Dicey observed that the Habeas Corpus Acts 'declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.'[28] Lord Halsbury put the matter thus: 'For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject.'[29] The writ has continued to be regarded as one of 'incalculable value…that enables the immediate determination of the applicant's right

[17] Johnathan Gaunt QC, 'Five Knights for Freedom: The Story of the Petition of Right 1628' (Falcon Chambers, May 2015) <https://www.falcon-chambers.com/publications/articles/five-knights-for-freedom-the-story-of-the-petition-of-right-1628> accessed May 15, 2022.

[18] 6 State Trials 1190 (1676).

[19] Ibid 1195.

[20] Johnathan Gaunt QC, 'Charles II and England's Guantanamo Bay' Lecture delivered to the Property Law Association March 25, 2011 < https://www.falcon-chambers.com/publications/articles/charles-ii-and-englands-guantanamo-bay> accessed May 15, 2022.

[21] Clarke (n 10) 388.

[22] Ibid at 389.

[23] Oaks (n 9) 460.

[24] McFeeley (n 11) 589.

[25] *1816 c.*100 56 Geo 3, s 1 and 2.

[26] Blackstone (n 4) 131.

[27] Holdsworth (n 7) 118.

[28] Dicey (n 5) 195.

[29] *Cox v Hakes* [1890] 15 AC 506, 514.

to freedom.' [30] The right to habeas corpus has attained worldwide acclaim such that it is specifically included in the national constitutions of almost sixty-four countries across the globe.[31]

The Caribbean Legal Framework

In the regional context, the writ of habeas corpus has a common law, statutory and constitutional foundation. As British colonies the writ of habeas corpus was part of our common law inheritance and the writ was available through courts which exercised the same jurisdiction as their English counterparts.[32] In other instances, colonial legislatures took specific action to ensure that the reach of Habeas Corpus Acts of the United Kingdom (UK) extended to Caribbean shores. For example, in the Bahamas, the Habeas Corpus Act re-enacted the 1679 UK legislation in its totality.[33]

In Trinidad and Tobago the Habeas Corpus Act enacted in 1841 specifically provided that the 1679 and the later 1816 UK legislation 'shall be in force in Trinidad and Tobago and shall have effect as though they were written laws of the Parliament of Trinidad and Tobago intended for the purpose of securing the liberty of persons in Trinidad and Tobago.'[34] Section 4 of the Act provided that the High Court or any Judge thereof had the power to award the writ of habeas corpus for bringing any prisoner detained in any prison within Trinidad and Tobago before any Court Martial or Court of Justice in Trinidad and Tobago for trial, or to be examined, in the same manner as their English counterparts. The High Court also had 'all the powers, jurisdiction and authority'[35] exercised by the Lord Chancellor or any of the Courts of Justice in England under the common law or any statute or Act of Parliament in respect of the writ of habeas corpus.

That being said, the writ of habeas corpus and concept of liberty which lies at its core, cannot be divorced from the region's shared history of indigenous genocide, colonialism, the trans-Atlantic slave trade and indentureship. In British colonies, including those of the Caribbean, vast swathes of persons did not enjoy personal liberty and would not have qualified to receive freedom's warm embrace. Positive efforts were made to ensure that the writ of habeas corpus was circumscribed to ensure that colonists were not granted statutory rights which could then be asserted against the British government.[36] A notable example is the UK Habeas Corpus Act 1862, section 1 which provided that:

> *No Writ of Habeas Corpus shall issue out of England, by Authority of any Judge or Court of Justice therein, into any Colony or Foreign Dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having Authority to grant and issue the said Writ, and to ensure the due Execution thereof throughout such Colony or Dominion.*

This legislation which was enacted in response to the case of John Anderson, a former slave whose extradition was ordered from Canada to the US on a charge of murdering the person who sought to recapture him.[37] This decision provoked widespread consternation as slave trading and slave owning was by that time illegal in British North America. Whilst awaiting the hearing of his appeal, the Court of the Queen's Bench issued a writ of habeas corpus to have him appear before them in England. In

[30] *Greene v Secretary of State for Home Affairs* [1942] A.C. 284, 302 per Lord Greene. Citied with approval in *Phillips v Commissioner of Prisons and Attorney General of Trinidad and Tobago* [1992] 1 AC 545.

[31] Brian Farrell, 'From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law' (2009) 17 Michigan State University College of Law Journal of International Law 551.

[32] Ibid at 557.

[33] Laws of The Bahamas Ch. 63.

[34] Habeas Corpus Act Chap. 8:01 s 2.

[35] Ibid s 5.

[36] David Clark and Gerard McCoy, *The Most Fundamental Right: Habeas Corpus in the Commonwealth* (OUP 2000) 20.

[37] J.E. Farwell, 'The Anderson Case' Canadian Law Times XXXII (March 1912) 257; Robert C. Reinders, 'The John Anderson Case, 1860–1: A Study in Anglo-Canadian Imperial Relations' (1975) 56(4) Canadian Historical Review 393.

delivering the decision the Lord Chief Justice Cockburn observed that:

> *…even where there are a local judicature and a local legislature, the writ of habeas corpus has been issued in the Queen's dominions, we feel that nothing short of legislative enactment, depriving this court of jurisdiction, would warrant us in omitting to carry it into effect if we are called upon to do so for the protection of the liberty of the subject.*[38]

The effect of this decision was ultimately short lived as Anderson's appeal was expedited and eventually allowed by the Court of Common Pleas in Toronto and the required legislation was passed to ensure that English courts could not issue the writ in relation to British colonies with their own judicial system.

In addition to legislative intervention, colonial authorities took measures to suspend the writ of habeas corpus in order to combat and supress rebellion. Thus, the writ which was glorified by English jurists stood on a decidedly shaky foundation in the colonies of the Empire:

> *This grand narrative served to sustain a claim that England remained, at its core and in its exceptions, faithful to the principle of the rule of law and fundamental liberties dating back since time immemorial. However, if it was a persuasive narrative for those in the metropolis of the British empire, it may have looked less convincing at the peripheries. While legislation infringing liberty was a rarity in fin-de-siècle England, it was much more routine in the wider empire on which the sun never set. The same era that saw coercion measures in Ireland also saw numerous ordinances issued in West Africa for the detention and deportation of specific political prisoners. Such legislation became extremely common throughout the empire, for a standard response of imperial administrators faced with troublesome local political activists was to remove them to another location where they would cause less trouble.*[39]

Therefore although habeas corpus was part of our common law heritage, its value and utility in colonial times would have been necessarily limited. As observed in relation to India 'while habeas certainly sometimes functions in colonial India to "free" people from either governmental or private confinement, to try to inscribe it within some quantum increase in freedom would be difficult.'[40] Though these observations were made in a different historical context, the words ring equally true of the Caribbean.

With the advent of independence, steps were taken to place the writ of habeas corpus on a constitutional footing. In Trinidad and Tobago, section 5(2)(c)(iv) of the Constitution prohibits Parliament from depriving a person who has been arrested or detained of the remedy by way of habeas corpus for determination of the validity of his detention and for his release if the detention is not lawful. The protections contained in section 5 are seen as further and better particulars of the right to due process and the protection of the law.[41] They serve as a fetter on the legislative power of the State. Similar protection is contained in the Constitution of Belize, section 5(2)(d) of which provides that 'Any person who is

[38] *Ex parte Anderson* (1861) 3 Ellis and Ellis 487.

[39] Michael Lobban, 'Habeas Corpus, Imperial Rendition, and the Rule of Law' (2015) 68(1) Current Legal Problems 27.

[40] Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003) 95.

[41] *Thornhill v Attorney General of Trinidad and Tobago* [1979] UKPC 43.

arrested or detained shall be entitled to the remedy by way of habeas corpus for determining the validity of his detention.'

Elsewhere in the region, the protection of the right to personal liberty does not specifically mention the writ of habeas corpus, but the underlying proscription against unlawful detention is maintained. For example, the Constitution of Antigua and Barbuda provides that any person who is arrested or detained pursuant to a court order or on in relation to a criminal offence and who is not released 'shall be brought before the court within forty-eight hours after his detention.'[42]In addition, provision is made for the release of persons charged with a criminal offence upon reasonable conditions including bail.[43] Similar provisions are found in the Constitutions of The Bahamas, Barbados, Dominica, Grenada, Guyana, Jamaica, St. Kitts/Nevis, St. Lucia and St. Vincent and the Grenadines. [44]

In addition, the regional Supreme Courts have an inherent jurisdiction, like their English counterparts, to issue a writ of habeas corpus.[45] The matter is put beyond question in the Supreme Court of Judicature Act of Belize which explicitly provides that:

> *The common law right to the writ of habeas corpus, as confirmed and regulated by the Habeas Corpus Act 1679, and extended by the Habeas Corpus Act 1816, shall be part of the law and procedure of Belize and, subject to any rules of court, shall be granted and issued as nearly as possible in accordance with the practice and procedure for the time being in force in regard to that writ in the High Court of Justice in England.*[46]

Corresponding legislation in Barbados specifically gives the High Court the power to hear and determine an application for a writ of habeas corpus.[47]

Procedural Requirements

A writ of habeas corpus is sought by way of an application made to the High Court. Such applications treated with priority in view of the fundamental importance of the right to liberty.[48] Thus it is said that the remedy of habeas corpus is imperative, peremptory and swiftly obtained without delay.[49] The procedure to be followed in applying for the writ is detailed in the Civil Procedure Rules (CPR) throughout the region.[50]

The CPR requires the person being restrained to make a written application for the writ. This application must be supported by an affidavit from the applicant setting out the circumstances of his/her detention. Provision is made for the application to be made without notice. Once the applicant has provided prima facie evidence that he/she is being unlawfully detained, the writ must be issued by the

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[42] Constitution of Antigua and Barbuda section 5(a) and (b).

[43] Ibid s 6.

[44] The Bahamas: Constitution of the Commonwealth of The Bahamas s 19(3); Barbados: Constitution of Barbados s 13(3); Dominica: Constitution of the Commonwealth of Dominica s 3(3) and (5); Grenada: Constitution of Grenada s 3(3) and (5); Guyana: Constitution of the Co-operative Republic of Guyana Cap 1:01 Article 139(4); Jamaica: Charter of Fundamental Rights and Freedoms s 14(3) and (4); St. Kitts and Nevis: Constitution of Saint Christopher and Nevis s 5(3) and (5); St. Lucia: Constitution of Saint Lucia s 3 and 5; St. Vincent and the Grenadines: Constitution of Saint Vincent and the Grenadines s 3 and 5.

[45] Antigua and Barbuda: Eastern Caribbean Supreme Court Act Cap 143 s 6; Dominica: Eastern Caribbean Supreme Court Act Chap 4:02 s 6; Grenada: West Indies Associated States Supreme Court (Grenada) Act CAP 336 s 6; Guyana: High Court Act Cap. 3:02 s 17; St. Kitts and Nevis: Eastern Caribbean Supreme Court Act CAP 3.11 s 6; St. Lucia: Eastern Caribbean Supreme Court (St Lucia) Act Cap. 2.01; St. Vincent and the Grenadines: Eastern Caribbean Supreme Court (St. Vincent and the Grenadines) Act Chap. 18.

[46] Supreme Court of Judicature Act CAP 91, s 30.

[47] Supreme Court of Judicature Act CAP 117A s 18.

[48] *Rahmatullah* (n 2) at [42].

[49] *R v Secretary of State for Home Affairs ex parte O'Brien* [1923] AC 603, 609.

[50] Antigua and Barbuda, Dominica, Grenada, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines: Eastern Caribbean Supreme Court Civil Procedure Rules Part 57; The Bahamas: Rules of the Supreme Court Order 54; Barbados: Supreme Court (Civil Procedure) Rules Part 57; Belize: Civil Procedure Rules Part 57; Guyana: Civil Procedure Rules Part 57; Jamaica: Supreme Court of Jamaica Civil Procedure Rules Part 57; Trinidad and Tobago Civil Procedure Rules Part 57.

court and there is no discretion to refuse it.[51] Thus it is said that the writ is granted *ex debito justitiae* (as a matter of right).[52]

In the governing procedural scheme, allowances are made for the practical realities of restraint and detention. For instance, the rules allow for the supporting affidavit to be deposed to by a third party. However, a third party must provide an explanation as to why the person restrained is unable to make the affidavit. This explanation must be cogent and comprehensive with supporting material where required. It also bears note that even where the supporting affidavit is made by a third party, the applicant for the writ remains the person who is being restrained and the proceedings are initiated in his/her name. In cases where applicant has a condition which prevents them from applying for the writ, medical evidence must be provided by the person applying. This is because in law a person is presumed to be competent unless the contrary is proved.[53] As such it is insufficient for a third party to seek a writ of habeas corpus on the bald assertion the person restrained is unable to so do,[54] or that they are a relative of the person being restrained. In other words, writ cannot be used to grant possession of an adult to a person who is a relative but has no legal custody of that adult.

The writ is issued in the prescribed form and served personally on respondent who is the person that 'is in actual physical control of the body of the person who is the subject of the writ or that there are reasonable grounds on which it may be concluded that the respondent will be able to assert that control.'[55] It is accompanied by a notice setting out the date, time and place at which the person restrained is to be brought before the court as well as a warning that in default of compliance, proceedings for committal may issue.

The respondent is required to file a return to the writ setting out the cause of the detainer. It is important to note that the respondent bears the burden of proving the legality of the detention.[56] In *R v Secretary of State for the Home Department ex parte Obi* it was explained that 'the fundamental doctrine of English law is that it is for the executive, once challenged, to satisfy a court that it is entitled to deprive of his liberty an individual within the court's jurisdiction.'[57] This principle flows from the primacy attached to the right to personal liberty in democratic societies such that governments must be able to justify the detention of an individual.'[58] This principle applies with even more force in the Caribbean context where the right to personal liberty is guaranteed by a written Constitution which stands supreme.

In seeking to justify the detention, the usual civil standard of proof on a balance of probabilities applies. However, given the liberty implications at the core of the writ, a high degree of probability is required. As explained in *ex parte Khawaja*:

> *The reviewing court will therefore require to be satisfied that the facts which are required for the justification of the restraint put upon liberty do exist. The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate to what is at stake. The nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue.*[59]

At the hearing, the court is required to make such orders as are just, which may include directions as to the manner in which any claim for compensation is to be dealt with by the court. It is well-established

[51] *R v Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74, 111.
[52] *Phillips* (n 30) 558.
[53] Halsbury's Laws (4th Ed, 1980) vol. 30, para. 1029.
[54] *Brown v Robertson* 76 S.C. 151 (1907).
[55] *Rahmatullah* (n 2) at [64]. See also Okpaluba and Nwafor (n 3) 62.
[56] *R v Governor of Brixton Prison ex parte Ahsan* [1969] 2 QB 222.
[57] [1997] 1 WLR 1498, 1502D-E.
[58] Astrill, Farbey and Sharpe, *The Law of Habeas Corpus* (OUP 3rd ed.) 63.
[59] *Khawaja* (n 51)113.

that there is no right of appeal from a successful habeas corpus application in the absence of an enabling statutory provision.[60] The principle arose from the common law heritage of the writ as a summary proceeding which did not involve a formal judgment and therefore could not be questioned by a writ of error.[61] Even with the passage of the Judicature Act 1873 which granted a right of appeal in civil cases, the decision of Lord Halsbury in *Cox v Hakes*[62] made it clear that appeals did not lie from an order of release in a habeas corpus application. In the UK, the right of appeal was granted by the Administration of Justice Act 1960, section 15(1) of which provided that 'an appeal shall lie, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as a refusal of such an order.'

In Trinidad and Tobago, the Habeas Corpus Act was amended in 1996 to include a right of appeal in terms identical terms to the UK provision. The then Attorney General explained the rationale underlying the amendment as follows:

> *...we want to ensure that the procedure is such that there will be fairness in the administration of the law; for example, what happened in the United Kingdom in 1960, that if there is going to be a right of appeal it should be to both sides so that if they agree they would have the opportunity of challenging whatever decision the court gives.*
>
> *...*
>
> *...since the application for habeas corpus can be used in so many ways and the state can be affected in so many ways if orders are made against it, the legislation clearly states that the state is entitled as of right to appeal; and it also states that an applicant is entitled as of right to appeal. ... This is in keeping with the Administration of Justice (Amdt.) Act in 1960 and therefore what this Parliament is trying to do is update its laws and provide laws which appear to all sides that justice is being done between the people and the state.*[63]

The 1996 Amendment Act also effected two further important reforms. First, it provided that an appeal by the State against an order for release shall not affect the right of the person restrained to be released in pursuance of the order being appealed.[64] Second, it stated that a renewed application for habeas corpus could only be made on the basis of fresh evidence.[65]

In the wider Caribbean it is accepted that there is no right of appeal against the grant of a writ of habeas corpus. This position was confirmed by the JCPC in *Attorney General for Saint Christopher and Nevis v Rodionov*[66] which held that since domestic law had precluded an appeal to the Court of Appeal from the order for release, an appeal to the JCPC was also precluded.

Habeas Corpus in Modern Caribbean Jurisprudence

Given the constitutional protections granted to the right to liberty and availability of judicial review throughout the region as a method to challenge maladministration, it might be assumed that the Great Writ now lacks lustre in the Caribbean. However recent cases in the areas of immigration, mental health, public health and even extradition prove the continued utility of habeas corpus. These cases show that the writ remains a distinct and

[60] *The Superintendent of Her Majesty's Foxhill Prison and ano v Viktor Kozeny* [2012] UKPC 10 [20] –[27]
[61] Astrill, Farbey and Sharpe (n 58) 218- 223.
[62] Ibid (n 29).
[63] Hansard Debates of the House of Representatives (March 22, 1996) 360-362.
[64] Habeas Corpus Act (n 34) s 7.
[65] Ibid s 6.
[66] [2004] 1 WLR 2796.

flexible remedy adaptable to changing circumstances.[67]

Immigration

Since 2016 the growing humanitarian crisis in Venezuela has sparked a wave of migration to Trinidad and Tobago. It is estimated that there are almost forty thousand Venezuelan nationals residing in Trinidad and Tobago.[68] Trinidad and Tobago has acceded to the United Nations Convention Relating to the Status of Refugees since 2000 but has not passed the requisite incorporating legislation. Thus, there is no domestic regime specifically providing for refugees or asylum seekers. Furthermore, as of 2019 Venezuelan nationals are required to have a visa to enter Trinidad and Tobago.[69] As a result, Venezuelan migrants who enter Trinidad and Tobago illegally do so at risk of deportation. These deportation orders have sparked a flurry of litigation.

The habeas corpus dimension to this body of jurisprudence was the subject of recent judicial examination by the Court of Appeal of Trinidad and Tobago in *The Chief Immigration Officer v Contrera and Torres*.[70] This decision demonstrates the significant role played by habeas corpus in securing the liberty of the subject even where other proceedings are available or underfoot.

Torres and Contrera were arrested and placed in detention after their illegal entry from Venezuela into Trinidad and Tobago in December 2020. Their applications for habeas corpus arose against the backdrop of constitutional proceedings which had been filed to forestall their deportation. In her constitution claim, Torres was granted an interim injunction preventing the Attorney General from taking any steps to remove her from the jurisdiction. Contrera's husband commenced a constitutional claim on behalf of their infant son who was also being detained and obtained an undertaking from the Attorney General that a deportation order would not be executed during the pendency of the claim. The claim was then amended to include Contrera herself as a party.

Subsequently, Torres and Contrera were served with deportation orders. They applied for habeas corpus, arguing that the deportation orders were unlawful. The trial judge granted both applications and ordered that the Respondents be released from detention. This prompted an appeal by the Chief Immigration Officer which required the Court of Appeal to consider the availability of habeas corpus in the face of extant constitutional proceedings.

On appeal, a central plank of Appellant's arguments was that the writs of habeas corpus were an abuse of the court's process in two respects. First, it was submitted that the Respondents should have challenged the deportation orders via a claim in judicial review rather than seeking a writ of habeas corpus ('the judicial review point'). Secondly, it was argued that habeas corpus should have been sought in the constitutional proceedings in view of section 5(2)(d) of the Constitution ('the constitutional point'). Each of these arguments failed to meet with success.

In treating with the judicial review point, Dean-Armorer JA noted that there are both procedural and substantive features which distinguish the writ of habeas corpus from a judicial review claim. On the question of procedure, the learned judge noted that judicial review is only available with leave of the court whereas a writ of habeas corpus is available as of right. Dean-Armorer JA also referenced the nature of the court's enquiry as a further point of distinction. The learned judge emphasised that given the breadth of habeas corpus proceedings a court is not confined to the narrow question of validity of the order but can also examine the merits of the detention. Thus, on an application for habeas corpus 'the Court may unlock issues beyond the strictures of the legality of the

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[67] *R v Secretary of State for the Home Department, Ex p Muboyayi* [1992] QB 244, 269.

[68] Georgina Chami and Florence Seemungal, 'The Venezuelan Refugee Crisis in Trinidad and Tobago' (Border Criminologies University of Oxford Faculty of Law Blog April 9, 2021) < https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2021/04/venezuelan> accessed May 15, 2022.

[69] Legal Notice 119 of 2019.

[70] Unreported Civil Appeal No. P-40 of 2021 (December 16, 2021).

detention.'[71] The Court noted that a similar range of enquiry does not feature in judicial review proceedings.

On the constitutional point, the learned judge found the submission finding it lacking in merit and against the weight of authority. Dean Armorer JA noted that the Constitution specifically preserved the writ of habeas corpus and provided that an arrested person could not be deprived of this remedy. As such 'the effect of section 5(2)(c)(iv), far from suggesting that the remedy should only be sought in extant constitutional proceedings, confirms that the Respondents cannot be deprived of the remedy, where the validity of their detention is called into question.'[72] The learned judge reasoned that it was therefore incorrect to suggest that the application for habeas corpus should be sought in the context of constitutional proceedings.

In addition, the Court emphasised that the Respondents were not to be deprived of their fundamental right to seek habeas corpus by the existence of an alternative remedy. The learned judge affirmed once a *prima facie* case is established by the applicant, the writ must be issued, relying on the following passage from the decision of the Judicial Committee of the Privy Council (JCPC) in *Lennox Phillips*:

> … the *applicants had made out a clear prima facie case that they were unlawfully imprisoned and therefore entitled to the writ as of right. The court has no discretion to refuse it. A prima facie case having been established that the applicants were unlawfully detained, it was clearly for the respondents to make a return justifying the detention. The applicants are not to be deprived of this fundamental right by the existence of some alternative, but in the circumstances, some wholly unsatisfactory remedy.* [73]

Ultimately, the Court dismissed the appeal in respect of Torres, holding that the deportation order was a breach of the interim injunction granted in her constitutional claim. However, in respect of Contrera, the learned judge reasoned that the Attorney General's undertaking was limited to her infant son only and did not operate to prevent her deportation. As such the order for her deportation was valid.

In *Contrera and Torres*, the Court has confirmed both the significant role played by the writ of habeas corpus and the distinct nature of the writ. The learned judge emphasised that at the core of the writ of habeas corpus was the liberty of the subject which is the most fundamental of all freedoms. She emphasised that courts treat the issuance of the writ as a sacred duty such that:

> *Authorising its issue in appropriate cases is regarded by judges as the first duty, because we have all been brought up to believe, and do believe, that the liberty of the citizen under the law is the most fundamental of all freedoms. Consistently with this, an application for a writ of habeas corpus has virtually absolute priority over all other court business.*[74]

The decision brings to mind earlier observations in *Cartwright v The Superintendent of Her Majesty's Prison* that 'pre-eminently, this is an areas where substance rather than form governs. Semantics must yield to common sense.'[75] The issue of illegal migrants and the availability of the writ of habeas corpus has since engaged the attention of the JCPC in *Martinez and another v The Chief Immigration*

[71] Ibid at [69].
[72] Ibid at [76].
[73] [1992] 1 AC 545, 558.
[74] Ibid (n 70) at [61] citing *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 2 All ER 319, 322(g) per Lord Donaldson.
[75] [2004] UKPC 10 at [16].

Officer.[76] This appeal was heard on March 17, 2022 but no written decision has yet been released.

Mental Health

The writ of habeas corpus has also proved a valuable resource in the area of mental health law. In the Caribbean, the right to liberty of persons with mental illness sits precariously alongside a legal regime which allows for their involuntary and indefinite detention. Regional approaches to mental illness largely favours institutionalisation and segregation due in part to our colonial past where 'measures to remove, sequestrate and care for the insane were a central element in Britain's "civilising mission".'[77] This state of affairs is particularly disconcerting given the efforts of Mrs. Ann Pratt who provided a first-hand account of her stay at the Kingston Lunatic Asylum which provided the impetus for reform of colonial mental asylums.[78]

The spectre of involuntary detention looms large due to regional mental health legislation which allows persons found wandering in public who are suspected to be mentally ill to be involuntary admitted to a psychiatric hospital. For example, the Mental Health Act of Trinidad and Tobago provides that:

> *A person found wandering at large on a highway or in any public place and who by reason of his appearance, conduct or conversation, a mental health officer has reason to believe is mentally ill and in need of care and treatment in a psychiatric hospital or ward may be taken into custody and conveyed to such hospital or ward for admission for observation in accordance with this section.*[79]

The Act allows for a person admitted under section 15 to be detained for an initial period of seventy-two hours upon the application of a mental health officer made to the Psychiatric Hospital Director or duly authorised medical officer. This period of detention can be extended if the Psychiatric Hospital Director or duly authorised medical officer is satisfied that the person is in need of further care or treatment. In such a case the person is deemed to be a medically recommended patient. There is no provision in the legislation which specifies the maximum period of detention. Rather the Act states that a medically recommended patient may be discharged at any time if the Psychiatric Hospital Director or the duly authorised medical officer is satisfied that it is in the interest of the patient to discharge him and the patient is not in need of any further care and treatment in a hospital or psychiatric ward.

Similar legislative provisions for the involuntary detention of 'wandering persons' are found throughout the region. For example, the Jamaican Mental Health Act allows a police constable who finds a person in a public place or found wandering at large in circumstances which indicate that he/she is mentally disordered to detain them without a warrant, convey them to a psychiatric facility for treatment and submit a report within thirty days to the Mental Health Review Board.[80] The legislation is silent as to what happens thereafter. Section 27 of the Act sets out the general functions of the Review Board to include a periodic review at least once in every six months of all patients who have been undergoing treatment in a psychiatric facility within the health region. This suggests that the detention of an involuntary patient can be for a substantially long period. The Bahamian legislation goes even further to provide that an order for sale can be made for any movable property found in the possession of 'a mentally disordered person found wandering' in order to offset the expenses incurred in their detention.[81]

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[76] JCPC 2021/0104.

[77] Leonard Smith, 'Caribbean bedlam: The Development of the Lunatic Asylum System in Britain's West Indian Colonies, 1838 - 1914' (2010) 44(1)The Journal of Caribbean History 1.

[78] Margaret Jones, 'The Most Cruel and Revolting Crimes: The Treatment of the Mentally Ill in Mid-Nineteenth-Century Jamaica' (2008) 42(2) The Journal of Caribbean History 290.

[79] Chap. 28:02 s 15(1).

[80] Section 15.

[81] Mental Health Act, CH. 230, section 39.

The dangers of these provisions were on full display in the case of *Miller v North-West Regional Health Authority*.[82] Ms. Miller was forcibly removed from her desk at her cubicle in her workplace at a Government ministry. Her transgression: having an open umbrella at her desk, using headphones while playing music, appearing untidy and suggesting that her co-workers were against her. As a result, Ms. Miller was involuntarily committed to the St. Ann's Mental Hospital under section 15 of the Mental Health Act. She remained at the hospital for seventeen days. During her detention she was forcibly administered long-acting psychotic drugs, was allowed limited visitors and suffered daily intrusions to her privacy from hospital staff and patients. Her detention provoked public outcry and even a protest outside the Parliament. Ms. Miller was able to secure her release through a habeas corpus application instituted on her behalf by her sister, Doreen against Dr. Ian Hypolite, the medical chief of staff at St. Ann's.[83]

Despite her successful release, Ms. Miller was ultimately saddled with the expenses incurred in the habeas corpus application. In subsequent proceedings for assault, battery and false imprisonment, she was awarded $310,000 in special damages to cover her costs in the habeas corpus proceedings. In making the order, Jones J noted that the habeas corpus judge had provided no indication regarding his exercise of discretion on the question of costs, the expenses claimed were incurred by Ms Miller or on her behalf as a direct result of her detention and the health authority did not dispute the sum.[84] However on appeal the award was set aside.[85] The Court of Appeal, per Mendonça JA, explained that costs was a matter for the discretion of the judge presiding in the habeas corpus proceedings who had ordered that each party bear their own costs. If, Ms. Miller was dissatisfied with the order made in those proceedings, the appropriate remedy was an appeal to the Court of Appeal with leave of the judge or the Court of Appeal. The learned judge reasoned that the habeas corpus costs were not recoverable as special damages in a subsequent claim.

Although the *Cheryl Miller* case shows the important role that can be played by the writ of habeas corpus in combating involuntary detention of persons with suspected mental illness, the decision on costs can prove an impetus to the ultimate utility of the remedy. This is a valid concern given the looming mental health crisis spawned by the COVID-19 pandemic.[86] Care must be taken to ensure that cost does not serve as a barrier to relief, particularly given the challenges in access to justice faced by persons with disabilities.[87]

The indefinite detention of persons with mental illness is also connected to the criminal law, in particular the requirement of fitness to plead and the defence of insanity. As explained in *Benjamin and Ganga v The State* '[i]t is a basic principle of our criminal law that a person should be held liable only where he is of a sufficient capacity to be blameworthy for his actions.'[88]

Fitness to plead is an issue to be determined at trial.[89] It involves an examination of the mental or intellectual capacity of the accused in accordance with *R v Pritchard.*[90] This seminal case has been

[82] Unreported CV2013 – 03971 (June 1, 2015).

[83] Richard Lord, 'Cheryl Miller Goes Home' *Trinidad Guardian* (April 6, 2012) <https://www.guardian.co.tt/article-6.2.419778.e9d3dd100b> accessed May 25, 2022.

[84] *Miller* (n 82) at [85] – [86].

[85] *North-West Regional Authority v Cheryl Miller* Civil Appeal No. P 151 of 2015 (July 28, 2021) at [102].

[86] World Health Organisation, 'COVID-19 pandemic triggers 25% increase in prevalence of anxiety and depression worldwide' (March 22, 2022) <https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide> accessed May 1, 2022.

[87] IMPACT Justice, *A Report on Access to Justice for Persons with Disabilities in CARICOM Countries* (December 2021) < https://caribbeanimpact.org/website/wp-content/uploads/2022/03/March-8-Disabilites-Study-1_1-164-compressed.pdf> accessed May 1, 2022.

[88] Unreported, Cr. App. Nos. 50 and 51 of 2006 (July 28, 2017) at [34].

[89] *Taitt v The State* [2012] UKPC 38 at [17].

[90] (1836) 7 C & P 303, 304; 173 ER 135, 135 per Alderson B.

distilled into six lines of enquiry, namely whether the accused is capable of understanding the charges, deciding whether to plead guilty or not, exercising his right to challenge jurors, instructing solicitors and counsel, following the course of proceedings and giving evidence in his own defence.[91] An accused would be held to be unfit to plead if he/she was found to lack any of these capabilities.'[92]

The defence of insanity is a general defence which is available to all crimes. It is concerned with the accused mental state at the time he is alleged to have committed the crime. The rules governing the defence derive from the common law, in particular the 1843 *M'Naughten* Rules.[93] To establish the defence, the accused must prove that at the time of committing the act he/she was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he/she was doing, or as not to know that what he was doing was wrong. Where the defence is made out a jury can return a special verdict of guilty but insane.

Both common law concepts have been placed on a statutory footing through legislation such as sections 64 – 66 of the Criminal Procedure Act of Trinidad and Tobago. Where there is a finding of unfitness or a special verdict is entered, an order is made for the person to be detained in safe custody, in such place and manner as the Court thinks fit until the President's pleasure is known.[94] The court reports the finding of the jury and the detention of the person to the President, who orders the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he/she may think necessary.[95]

These provisions have provided fertile ground for the lengthy detention of persons adjudged unfit to plead and/or guilty but insane. For example, in *Bissessar v Attorney General of Trinidad and Tobago,*[96] the appellant was detained at the criminally insane unit at the St. Ann's Hospital from 2001 – 2009 after being assessed as unfit to plead to a charge of murder. A mere three weeks after his admission the attending doctor found that there was no evidence of mental illness and he was fit to stand trial. Yet he was only released in 2009 after filing constitutional proceedings challenging his continued detention. In *James v Attorney General of Trinidad and Tobago,*[97] the appellant was charged with murder in 1971 and a special verdict was returned by the jury of guilty but insane in 1975. He was detained at the Carrera Island Prison for over thirty years, during which only four psychiatric evaluations were performed in 1975, 1994, 2003 and 2004. He instituted constitutional proceedings alleging that the failure to conduct periodic reviews of his mental condition and determine his fitness for release was a breach of his rights to liberty and the protection of the law. He was eventually released after receiving a presidential pardon in 2009.

In addition to constitutional claims, the writ of habeas corpus has also been used to challenge the indefinite detention of criminal accused persons with a mental illness. A recent example can be found in the Jamaican case of *R v Williams*.[98] Williams was first incarcerated in 1970 after having been charged with the offence of murdering a young Canadian tourist. He had been diagnosed as being schizophrenic was an out-patient of the Bellevue Hospital. After it was determined that he was unfit to enter a plea, he was ordered to be detained at the Governor General's pleasure at the St. Catherine's District Prison. He received no constant psychiatric care during his detention and no steps were taken by the Director of Public Prosecutions (DPP) to prosecute the murder charge.

Williams' case came to the attention of the court upon the filing of a writ of habeas corpus directed at the Superintendent of the St. Catherine District Prison. That marked the first time in fifty years that he was brought to court. On the return to the writ,

[91] *R v M (John)* [2003] EWCA Crim 3452 at [20].
[92] Law Commission, *Unfitness to Plead Volume 1: Report* (Law Com No 364, 2016) para 3.5.
[93] *M'Naghten* [1843] UKHL J16.
[94] Criminal Procedure Act, Chap 12:02 s 67. See also *The State v Burris* Unreported Cr. 7106 of 2010 (May 14, 2012) at [17].
[95] Criminal Procedure Act s 68.
[96] Unreported Civil Appeal No. P 136 of 2010 (January 31, 2017).
[97] Unreported Civ. App. No. 194 of 2011 (October 9, 2018).
[98] [2020] JMSC 8.

Jackson-Hasley J ordered that a psychiatric evaluation report and social enquiry report be prepared and that he be assessed by a psychiatrist of his choice. The medical evidence revealed that he was not fit to plead so the DPP discontinued the proceedings against him. The learned judge, utilising the principles of problem-solving justice, provided guidance on the way forward to ensure that his smooth transition back into society including that he take his prescribed medication, maintain good health via regular visits to the community health centre, refrain from substance abuse, foster a close relationship with his family and take advantage of all available social services available such as the community mental health clinic and the probation department.

The decision in *Williams* illustrates the broad, flexible and adaptable nature of the habeas corpus writ in upholding the right of liberty. The indefinite detention of persons adjudged to be mentally ill is usually addressed via constitutional law but it is clear that habeas corpus provides an equally viable means of redress.

Public Emergency

War, rebellion and public emergencies are often used as to justify the suspension of the writ of habeas corpus. One of the earliest examples is the UK Habeas Corpus Suspension Acts 1688 passed after the Catholic James II was deposed and replaced by his Protestant daughter Mary and nephew William.[99] It was feared that persons suspected of conspiring against the new King could use habeas corpus to secure their release. Thus, the legislation authorised the detention of persons suspected of high treason without bail or trial by a warrant issued by members of the Privy Council on terms that would have violated the 1679 UK legislation.[100]

In Caribbean history, a notable suspension of the writ occurred during the 1865 Morant Bay uprising in Jamaica. Governor Edward Eyre curtailed the availability of habeas corpus by declaring martial law. In the brutal crackdown which followed scores of Jamaicans were imprisoned and executed.[101] Efforts to hold Governor Eyre liable for false imprisonment and trespass to the person came to naught.[102] In *Phillip v Eyre*[103] the court established the rule of double actionality which required that in order to sue in England for a wrong committed abroad, the wrong must be actionable if committed in England and the act must not have been justifiable by the law of the place where it was done. As a result, Eyre could not be held liable given the Act of Indemnity which had been passed by the Jamaican colonial legislation whereby Eyre and all persons who acted under his authority were indemnified in respect of all acts done in order to suppress the rebellion. In delivering its judgment the Court also emphasised the duty of all individuals, and by extension the Governor, to suppress rebellion as a good subject of the Crown.

In modern times, the suspension of the writ of habeas corpus has again come to the fore in relation to persons detained by the United States (US) as 'enemy combatants' based on national security concerns in the post 9-11 era. Article I, section 9 clause 2 of the US Constitution contains a guarantee that '[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.' The United States Supreme Court has since confirmed that non-citizen detainees at Guantanamo Bay are entitled to file habeas corpus petitions in Federal Courts.[104] In response Congress passed the Military Commissions Act 2006 which aimed to strip federal courts of jurisdiction to hear habeas corpus petitions brought by enemy combatants. This legislation was struck down as unconstitutional by

[99] Clarence C. Crawford, 'The Suspension of the Habeas Corpus Act and the Revolution of 1689' (1915) 30 English History Review 613.

[100] John Harrison, 'The Original Meaning of the Habeas Corpus Suspension Clause, the Right of Natural Liberty, and Executive Discretion' (2021) 29 William & Mary Bill of Rights Journal 649.

[101] Gad Heuman, *The Killing Time: The Morant Bay Rebellion Jamaica* (University of Tennessee Press 1994).

[102] Peter Daniel, 'The Governor Eyre Controversy' (1969) 50 New Blackfriars 574.

[103] (1870) LR 6 QB 1.

[104] *Rasul v Bush* 542 US 466 (2004).

the US Supreme Court.[105] However the problem of enemy combatants continues to bedevil scholars given the issues of 'territorial jurisdiction, effective control, separation of powers and the status of individuals …[which] implicates domestic statutory law, case law, constitutional law, as well as international humanitarian law.'[106]

The Caribbean has experience with emergency legislation being used as a tool in the fight against crime. The phenomenon is most prolific in Jamaica were from 2010 to present day repeated declarations of a state of emergency in certain geographic areas have been declared to combat rising crime. The question which arises is whether persons detained during these periods of emergency could challenge their detention via a writ of habeas corpus. The answer was provided in the case of *Douglas and ors v Minister of National Security, Commissioner of Police and Attorney General of Jamaica.*[107]

In *Douglas,* a writ of habeas corpus was successfully used to challenge the legality of detention orders made under the Emergency Powers Act. The writs were sought by five claimants who had been detained for periods ranging from 361 days on the lowest end to 491 days on the highest end. In seeking to justify the detentions, the respondents relied on the proclamation issued by the Governor General under section 20(2) of the Constitution that a state of emergency existed in the parishes of St. James, Hanover, Westmoreland and St. Andrews ('the proclamation point'). Reliance was also placed on the Emergency Powers Act and the regulations made hereunder which enabled a police office to arrest and detain without warrant any person whose behaviour is prejudicial to public safety, for the Minister of National Security to issue an order detaining such persons and for the Emergency Powers Review Tribunal to review cases of detention ('the emergency powers point'). In the alternative, the respondents argued that the court could not pronounce on the constitutionality of the respective states of emergency through a writ of habeas corpus as this is a matter more properly suited for the Constitutional Court ('the jurisdiction point'). Each of these submissions was rejected by Morrison J.

On the proclamation point, Morrison J emphasised that in issuing the proclamation under section 20(2) 'the Governor-General is not creating a State of Public Emergency but declaring the existence of one.'[108] Thus it remained within the court's jurisdiction to determine whether there was in fact a state of public emergency such ordinary course of law was diverted, the life of the nation threatened and there is an exceptional crisis or danger such that the normal measures or restrictions for the maintenance of public safety, health and order are inadequate.[109] Morrison J noted that it was the duty of the respondents to satisfy the court that there was in fact a public emergency in Jamaica. This they had failed to do by relying solely on the proclamation of the Governor General which did not provide any indication of any situation or information that could provide the background to the public emergency.[110]

The emergency powers point also failed to meet with success. The learned judge held that the Emergency Powers Act itself was unconstitutional. The court stressed that with the passage of the 2011 Charter for Fundamental Rights and Freedoms:

> *…a new paradigm was introduced … [which] ensures that emergency measures are only permitted when they are reasonably justifiable to deal with a situation that exists during the state of public emergency and only to the extent that the measure or actions is (sic) rationally linked and proportional to deal with the said situation.*'[111]

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[105] *Boumediene v Bush* 128 S. Ct. 2229 (2008).

[106] Brian Farrell, 'Habeas Corpus in Times of Emergency: A Historical and Comparative View' (2010) 1(9) Pace University School of Law International Law Review 74, 75.

[107] [2020] JMSC Civ. 267.

[108] Ibid at [97].

[109] Ibid at [136] - [138].

[110] Ibid at [86].

[111] Ibid at [116].

Morrison J emphasised that the respondents failed to lead evidence that the proclamation and the measures taken under it, including the claimants' detention, were reasonably justifiable for dealing with the emergency and were proportionate to the situation.[112] It was further held that the regulations made under the Act which gave unfettered discretion to a Minister to order the detention of persons suspected of criminal offences violated 'the basic structure of the Constitution regarding the separation of powers, the rule of law and the protection of fundamental rights.'[113] The Regulations were also too 'laxly worded'[114] and were therefore void for vagueness.

In dismissing the jurisdiction point, the Court emphasised that a single judge could hear an application for writ of habeas corpus as part of the court's inherent jurisdiction and pursuant to section 20(1) of the Constitution. The learned judge stressed that the writ of habeas corpus is an important safeguard of the liberty of the subject and 'it is the right of a citizen to obtain a writ as a protection against illegal restriction or imprisonment.'[115] Furthermore the court always has a discretion to grant the writ even in the face of an alternative remedy.[116]

The decision in *Douglas* provides useful guidance on the interplay between habeas corpus, emergency powers and constitutional rights. This issue remains relevant against the backdrop of the emergency measures taken to combat the spread of COVID- 19. Legitimate questions have been raised on the utility of the writ in times of pandemic. It is thought that '[i]n public health emergencies, such as pandemics, the writ of habeas corpus may serve as a limited means for relief … Courts denying the relief tend to conclude that the isolation or quarantine of individuals during a public health emergency serves the public good.'[117] This is therefore an area that requires eternal vigilance to ensure that human rights and liberty are not blithely sacrificed on the altar of public emergencies.

Extradition

Another area of law where the writ of habeas corpus features prominently is extradition. Unlike the immigration, mental health and public emergency cases, in extradition cases courts do not appear as willing to make an order for release on an application for habeas corpus.

Extradition continues to occupy a prominent place in the Caribbean due to continued concerns about money laundering,[118] drug trafficking[119] and more recently, lottery scamming.[120] It is founded on the principles of reciprocity, comity and respect for differences in other jurisdictions.[121] In the Caribbean, extradition is facilitated through bi-lateral or multi-lateral treaties which then take domestic effect by way of national legislation. The tension which undergirds this area of law has been explained in the following way:

> *This complex area of law involves a dynamic interplay between criminal law, constitutional law, international law, domestic law, executive power and the judicial process. In*

[112] Ibid at [144].
[113] Ibid at [70].
[114] Ibid at [127].
[115] Ibid at [56].
[116] Ibid at [55].
[117] Christopher Ogolla, 'Non-Criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy' (2011) 14 DePaul J Health Care L 135, 136.
[118] United States Drug Enforcement Agency, 'Dominican Republic Citizen Extradited to the United States on Money Laundering Charges' (May 20, 2022) < https://www.dea.gov/press-releases/2022/05/20/dominican-republic-citizen-extradited-united-states-money-laundering> accessed May 25, 2022.
[119] Henry Shuldiner, 'Haiti Resurfaces as Transit Hub for US-Bound Cocaine' *InSight Crime* (April 18, 2022) <https://insightcrime.org/news/extradition-drug-smuggler-underscores-haitis-historical-cocaine-transit-hub-status/> accessed May 25, 2022.
[120] Christopher Thomas, 'More US Extradition Warrants For Alleged Lottery Scammers Coming' *The Gleaner* (April 7, 2022) <https://jamaica-gleaner.com/article/news/20220407/more-us-extradition-warrants-alleged-lottery-scammers-coming> accessed May 12, 2022.
[121] *Kindler v Canada (Minister of Justice)* [1993] 4 LRC 85.

> *this delicate balance there will always be an underlying tension between the security interests and the international obligations of the State on the one hand and the fundamental rights and freedoms of citizens on the other.*[122]

The availability of the writ of habeas corpus in the context of extradition proceedings was recently explored in the decision of the JCPC in *Knowles and ors v The Superintendent of Her Majesty's Fox Hill Prison.*[123] Here the appellants' extradition was sought from The Bahamas to the United States in connection with conspiracy to commit drug trafficking offences. This set off a series of litigation spanning the period 2003 – 2021. On November 12, 2003, after committal proceedings before a magistrate, the appellants were sent to the Fox Hill Prison to await extradition. On November 25, 2003 they applied for habeas corpus and judicial review. On May 2004 they successfully applied for bail from the High Court; a decision which was appealed all the way to the JCPC which upheld the grant of bail.[124] Between 2003 – 2015 the habeas corpus application was listed before three different judges and the substantive hearing commenced in 2016. The application for the writ was refused and the appeal to the Court of Appeal proved unsuccessful.

Before the JCPC the appellants argued that the delay in the hearing of the habeas corpus application deprived them of the right to a fair hearing with a reasonable time as guaranteed by section 20(8) of the Constitution of The Bahamas. This argument was rejected by the Board. In its decision Lord Hamblen noted that the Court of Appeal had found that the delay was not attributable to the Supreme Court Registry but rather to due to the appellants failure to pursue the matter timeously. The Board found no reason to go behind that finding. It also did not consider it necessary to definitively rule on whether section 20(8) could apply to the determination of the habeas corpus applications. Lord Hamblen explained that '[t]he Board does not consider that the appellants could not complain about not obtaining a hearing in "a reasonable time" in circumstances where they did not seek a hearing and were content for the matter to be delayed.'[125]

The ruling in *Knowles* accords with the previous decision of the JCPC in *Fuller v Attorney General of Belize*.[126] Here the appellant applied for a writ of habeas corpus after being ordered to be extradited to the United States on a charge of first-degree murder allegedly committed in 1998. He obtained bail pending the hearing of his application. The High Court refused the writ in 2002 and the appellant launched an appeal to the Court of Appeal shortly thereafter. His appeal was heard 6 years later and dismissed in 2009. On appeal to the JCPC, the appellant argued the delay in his case would render his extradition an abuse of process and his detention unlawful and as such he was entitled to habeas corpus. He pointed to the thirteen-year delay between the alleged commission of the offence and the request for extradition and the twelve-year delay between the start and conclusion of the extradition proceedings in the courts of Belize.

In Fuller the JCPC upheld the appellant's contention that the Supreme Court had jurisdiction to consider the issue of abuse of process in the context of extradition proceedings. However, the Board held that based on the facts before it the appellant had not established that there was an abuse of process. Lord Phillips explained that in treating with delay there must be evidence of prejudice to the extent that a fair trial could not be held. Further the question of whether the appellant could receive a fair trial in the US could be raised in the US courts. In addition, the appellant took no steps to progress his appeal. Lord Phillips explained that the appellant 'was only too happy that the hearing of his appeal should be delayed. In these circumstances the Board does not consider it arguable that justice demands that the

[122] *Ferguson and Galbaransingh v Attorney General of Trinidad and Tobago,* unreported Civil Appeal 2010-185 (December 17, 2010) at [28].
[123] [2021] UKPC 19.
[124] *Knowles v Superintendent of Her Majesty's Prison Fox Hill* [2005] 1 WLR 2546.
[125] Ibid (n 123) at [49].
[126] [2011] UKPC 23.

extradition proceedings should be abandoned because of the delay that has occurred.'[127]

These extradition cases represent a divergence from the general trend where courts jealously guard the liberty of the subject. One possible explanation for the outcome in the foregoing cases is that the appellants had been granted bail and were not in detention. However, in *Fuller* Lord Phillips affirmed that on an application for habeas corpus an applicant on bail is to be treated as if he were in custody.[128] Another possible reason for the court's approach is the principle that extradition law proceeds upon the assumption that the requesting state is acting in good faith and the person whose extradition is sought will receive a fair trial.[129] A third reason could be that extradition proceedings occur within a specific statutory context which already allows a court to order the person discharged from custody where it would be unjust or unfair to extradite him/her.[130] Whatever the reason it appears that seeking release on an application for habeas corpus in the context of extradition is an arduous task.

Conclusion

The writ of habeas corpus is the product of a rich and storied history. Forged in the fires of Magna Carta, refined by the judicial skirmishes and political machinations of medieval times and transplanted into the legal regime of the Caribbean, the Great Writ has retained all its glory up to present day. In regional jurisprudence the writ of habeas corpus is a standard-bearer in defence of personal liberty in the face of detentions stemming from illegal migration, mental illness, public emergency or rising crime. Habeas corpus jurisdiction is one that is 'broad, flexible and adaptable'[131] with varied dimensions and capable of being deployed in divers situations. Thus, the Great Writ, despite its vintage, continues to shine on in the pages of Caribbean jurisprudence.

[127] Ibid at [79].

[128] Ibid at [54] citing with approval *R v Secretary of State for the Home Department ex parte Launder (No 2)* [1998] QB 994, 1000-1001.

[129] Ibid at [75].

[130] See for example The Bahamas: Extradition Act s 11(3)(b); Trinidad and Tobago: Extradition Act s 13(3)(b).

[131] Okpalbur and Nwafor (n 3) 60.

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Charting The Path Towards Sustainability: A Critique of Guyana's Recent Investment Treaty Practice

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Abstract: *In 2015, ExxonMobil announced the discovery of more than 90 metres of high-quality, oil-bearing sandstone reservoirs about 200 km off the coastline of Guyana. Subsequent discoveries by ExxonMobil and Hess have estimated the production of 8 billion barrels of oil, an announcement which has been triumphantly welcomed by both foreign investors and the Guyanese government. While the presence of these oil reserves has the potential to significantly improve Guyana's economic standing, Guyana's government is acutely aware that oil and gas are a finite resource and that, in this context, its thrust to attract and retain foreign investors in the energy sector must necessarily be informed by its sustainable development goals. In this regard, in a marked demonstration of its commitment to its sustainable development agenda, Guyana's latest Bilateral Investment Treaty (BIT) with Brazil, signed in 2018, seeks to strike an appropriate balance between encouraging and protecting foreign investors and the state's sustainable development interests. Although this BIT does not, of course, provide a panacea for all of Guyana's developmental challenges, this article argues that, in contradistinction to earlier BITs, the 2018 BIT's approach to sustainable development provides a useful starting point which could and should inform the negotiation of future BITs to which Guyana and, indeed, other Caribbean countries are party.*

Introduction

Guyana is geographically a South American nation, but has traditionally identified, for historical, linguistic and cultural reasons, as a Commonwealth Caribbean nation.[1] Despite its historical economic disenfranchisement,[2] Guyana boasts not only gold and other precious metals,[3] but also large expanses of oil and natural gas, which were only recently discovered.[4] The potential associated with Guyana's newly found oil reserves is enormous, so much so that an increasing number of foreign investors from primarily Capital-Exporting countries are now seriously contemplating investing in Guyana.[5]

Guyana has, to date, signed nine (9) Bilateral Investment Treaties (BITs),[6] albeit only six of these BITs are currently in force. Unsurprisingly, these five BITs were concluded with primarily Capital-Exporting countries, namely the United Kingdom, Germany, Switzerland, South Korea and China. Sadly, the majority of these BITs are older Model BITs which were negotiated between 20 – 25 years ago. By their very nature, these BITs are

[1] David Berry, *Caribbean Integration Law* (Oxford University Press, 2014)

[2] John Gafar, 'Growth, inequality and poverty in selected Caribbean and Latin American countries, with emphasis on Guyana' (1998) 30(3) Journal of Latin American Studies 591.

[3] Michael DaCosta, 'Colonial origins, institutions and economic performance in the Caribbean: Guyana and Barbados' (IMF Working Papers, 2007) 1-37

[4] Luis Fernando Panelli, 'Is Guyana a new oil El Dorado?' (2019) 12(5) The Journal of World Energy Law & Business 365

[5] 'Stabroek partners find more oil at Uaru offshore Guyana' (https://www.offshore-mag.com, 27 April 2021) https://www.offshore-mag.com/drilling-completion/article/14202227/exxonmobil-hess-cnooc-find-more-oil-at-uaru-offshore-guyana

[6] 'International Investments Navigator' (UNCTAD, 2021) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/89/guyana> accessed 11 June 2023

asymmetrical, in that they are principally aimed at protecting the interests of foreign investors. The State's interest in achieving sustainable development is therefore secondary.

This article engages in a critique of Guyana's 1989 BIT with the United Kingdom vis-a-viz its most recent 2018 BIT with Brazil. It argues that, having regard to the provisions of the 2018 BIT, Guyana, at this critical juncture in its economic development, appears to be headed in the direction of striking a more effective balance between the rights of investors, on the one hand, and the sustainable development interests of the State, on the other. Although, admittedly, this BIT might have been negotiated in the manner in which it was at the insistence of Brazil, which has signaled its intention to recalibrate its position vis-a-viz investors,[7] this article argues that Guyana must be commended for taking a bold step in the right direction since many of the provisions of the 2018 BIT are congruent with UNCTAD's 2015 Investment Policy Framework for Sustainable Development.

UNCTAD's 2015 instrument outlines ten areas of inclusive growth and sustainable development, namely:

1. *Policy coherence* - investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
2. *Public governance and institutions* - investment policies should be developed involving all stakeholders and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient, and transparent procedures for investors.
3. *Dynamic policymaking* - investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
4. *Balanced rights and obligations* - investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
5. *Right to regulate* - each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
6. *Openness to investment* - in line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
7. *Investment protection and treatment* - investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
8. *Investment promotion and facilitation* - policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.
9. *Corporate governance and responsibility* - investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
10. *International cooperation* - the international community should cooperate to address shared investment for development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

This article argues that, having regard to the congruence between the 2018 BIT and UNCTAD's

[7] Nicolás M. Perrone and Gustavo Rojas de Cerqueira Césa, 'Brazil's bilateral investment treaties: More than a new investment treaty model?' (Working Paper, No. 159, Columbia Centre for Sustainable Development, October 26, 2015)

Investment Policy for Sustainable Development, it may be argued that Guyana's move in the direction of a sustainable development approach to its international investment treaty relations is a refreshingly new and welcome one, as it effectively rebalances the interests of the state in its relationship with investors.

UK – Guyana BIT (1989) vs. Guyana – Brazil BIT (2018)

Guyana gained independence from the United Kingdom on 26 May 1966.[8] Since that time, it has been on a constant path toward progressive development, despite numerous impediments of a social, economic and political nature. Having amended its constitution to effectively create a socialist republic,[9] Guyana has been among only a handful of Caribbean countries that have prioritised the interests of the state and its citizens in its relationships with external stakeholders, including foreign investors.

The earliest contemporary manifestation of Guyana's interest in generating foreign direct investment was that of the Bilateral Investment Treaty (BIT) between that country and the United Kingdom, which was signed in 1989. This BIT seeks to afford investors from certain enforceable rights in a manner consistent with a neoliberal approach to trade and investment. This 'older generation' BIT, which was signed long before Guyana discovered oil, quite unlike Guyana's 2018 BIT with Brazil, does not countenance an approach to investment protection which prioritizes sustainable development, as illustrated below.

A. The Preamble

Guyana's 1989 BIT with the United Kingdom, from the very outset, sets the tone for an asymmetrical relationship between the host state and foreign investors, by specifically indicating, in the preamble, that the BIT seeks to 'create favourable conditions for investment by nationals and companies of one State in the territory of the other State.' There is no mention of the State's interest in generating sustainable investment in the preamble of this BIT. By contrast, over 30 years later, Guyana, in its BIT with Brazil, ensured that the preamble of said instrument reads, *inter alia*,

> Recognizing the essential role of investment in promoting sustainable development;
>
> Considering that the establishment of a strategic partnership between the Parties in the area of investment will bring wide-ranging and mutual benefits;
>
> Recognizing the importance of fostering a transparent and friendly environment for investments by investors of the Parties;
>
> Reaffirming their regulatory autonomy and policy space.

The explicit reference to 'sustainable development', 'mutual benefits', and the protection of 'regulatory autonomy and policy space' are particularly welcome as it sets the tone for how tribunals will interpret the subsequently enumerated substantive provisions of the BIT. Indeed, as the tribunal in *Lemir v Ukraine*[10] indicated, having regard to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), it is permissible for tribunals to resort to the object and purpose of the BIT in question when interpreting substantive rights and obligations in circumstances where the literal meaning of the provision produces absurd or uncertain results.

B. Sustainable 'Investments' and 'Investors'

Substantive provisions of the Guyana – Brazil BIT further demonstrate Guyana and Brazil's desire to recalibrate the system of investor-state relations such that the host state's sustainable development interests are properly accounted for. For example, whereas under the UK – Guyana BIT there are no

[8] Odeen Ishmael, *The Guyana Story: From Earliest Times to Independence* (Xlibris Corporation, 2013)

[9] Jason Haynes, 'The Constitutional Law of Guyana: Challenges and Prospects' in Richard Albert, Derek O'Brien and Se-Shauna Wheatle (eds), Oxford Handbook on Caribbean Constitutions (Oxford University Press, 2020) Chapter 6

[10] ICSID Case No. ARB/06/18

limitations with respect to the types of subject matter that may be protected as 'investments' since the relevant provision speaks to the protection of 'every kind of asset',[11] the Guyana – Brazil BIT is more prescriptive. More specifically, the latter makes it clear that claims to money that arise solely from commercial contracts for the sale of goods or services by an investor in the territory of a Party to a national or an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction are excluded from protection, as well as claims deriving from any expenses or other financial obligations incurred by the investor prior to the establishment of the investment are not protected.[12] This latter provision is especially useful in light of the fact that, in the recent past, such as in *F-WO Oil v Trinidad and Tobago*[13] and *Mihaly v Sri Lanka*,[14] investors have insisted that upfront costs expended prior to their formal admission into the host state should be protected as valid investments, thereby placing the host state in the precarious position of possibly having to honour obligations that they did not intend to formally assume. The definition of 'investment', however, falls short of a truly robust requirement for investors to make sustainable investments, as it does not expressly mandate investors to contribute in a wholesome manner to the sustainable development of the host state's economy.

Separately, with respect to the types of persons or entities which may obtain protection under Guyana's recently concluded BIT with Brazil, it is apposite to note that the range of prospective investors has been limited in a significant way, at least in contrast to its 1989 BIT with the UK. More specifically, for a company to qualify as an 'investor' under the UK – Guyana BIT, it need only be incorporated or constituted under the laws of the host state, there being no requirement for the entity to conduct substantial business activities in the jurisdiction in question. This allows for shell companies, which have no meaningful connection to the host state and which do not contribute to the sustainable development of the host state, to benefit from the rights afforded by the BIT in question. The reality of this unfortunate state of affairs arose for consideration in *Saluka v Czech Republic*,[15] *Tokios Tokeles v Ukraine*[16] and *Gambrinus Corporation v Venezuela.*[17]

Gambrinus was a case involving a company incorporated under Barbadian law but carrying out no substantial business activity in that Caribbean nation. More specifically, four companies concluded a Fertilizer Development Agreement, setting forth the framework for the creation of a joint venture for the construction and operation of a fertilizer production facility called "Fertinitro" in Venezuela. One of the companies, Polar, owned 10% of the interest in this facility. Polar, as part of its restructuring exercise, concluded a share purchase agreement with Gambrinus through which, in exchange for the payment of USD 80,000,100.00, Polar sought to transfer its 10% equity interest in Fertinitro. At this time, Venezuela began restructuring its food and agriculture industry aimed at achieving food security by way of increasing its agriculture productivity. Against this backdrop, Venezuela sought, in 2010, to ensure adequate fertilizer supply by enacting a Decree which provided for the expropriation of companies involved in the fertilizer industry. This resulted in the forced acquisition of Fertinitro, albeit that Gambrinus did not receive compensation from Venezuela in this connection. Accordingly, Gambrinus filed its Request for Arbitration against Venezuela before ICSID on the basis of the BIT between the Government of Barbados and the Government of the Republic of Venezuela.

Venezuela objected to the tribunal's jurisdiction on the basis that Gambrinus did not, in its view, qualify as an 'investor' under the BIT nor a national of another contracting State because it was an empty off-shore entity with no operations in Barbados. Venezuela considered that Gambrinus was owned, controlled and run by Polar, a Venezuelan company, in Venezuela, and that, having regard to Gambrinus'

[11] Article 1(a) Guyana – UK BIT (1989)
[12] Article 1.3(iv) – (v) Guyana – Brazil BIT (2018)
[13] ICSID Case No. ARB/01/14
[14] ICSID Case No. ARB/00/2
[15] Partial Award, ICGJ 368 (PCA 2006), 17th March 2006
[16] ICSID Case No. ARB/02/18
[17] ICSID Case No. ARB/11/31

economic reality, it should not be considered a foreign investor under the BIT.

The tribunal, relying on *Tokios, Aucoven, Rompetrol,* and *Saluka*, emphatically found in favour of Grambinus on this jurisdictional question. It noted that the jurisdiction of ICSID depends on the consent of the Contracting Parties, who enjoy broad discretion to choose the disputes that they will submit to ICSID. The tribunal, applying the natural and ordinary meaning of the provisions of the relevant BIT in question, found that mere incorporation in Barbados was sufficient to establish the nationality of the company:

> In the exercise of its functions, the Tribunal is guided by the terms in which the Contracting Parties to the BIT have agreed to establish its jurisdiction. According to the Tribunal's interpretation, the BIT only requires that Claimant be constituted under the laws of one of the Contracting Parties. As a company incorporated or constituted in Barbados, one of the BIT's Contracting Parties, Gambrinus satisfies the jurisdiction *ratione personae*.[18]

While the *Gabrinus* decision is consistent with the leading cases of *Tokios, Aucoven, Rompetrol*, and *Saluka*, its contribution to Caribbean countries' quest to attract and retain investors who are interested in the host state's sustainable development is far from positive. That an arbitral tribunal would countenance an approach which effectively allows a company that did not tangibly contribute to the sustainable development of the host state nor maintain any economic linkage to the host state to benefit from the protections conferred by the BIT in question raises important questions regarding the asymmetrical nature of the international investment regime,[19] and the seemingly subservient place of host states in the context of this regime. The effect of the ruling is to somewhat legitimize the practice of investors treaty shopping; that is, setting up shell companies in foreign jurisdictions only to benefit from investor protection standards contained in BITs between their home state and the contracting party in question. It may very well be that the time has therefore come for the old generation Caribbean BITs to be reconceptualized such that they adopt the siège social approach to corporate nationality. Under this approach, the paper nationality (i.e. where the company has been incorporated) is not the imperative consideration, but the investor's effective nationality which contemplates its engagement in actual business activity in the host state - its principal place of establishment.

Indeed, under Guyana's 2018 concluded BIT with Brazil, in order to qualify as an investor and therefore benefit from the provisions of the BIT in question, the entity in question must have been carrying out 'substantial business activities in the territories of the Parties.'[20] This provision is implicitly a denial of benefits clause which has the effect of limiting in a significant way the types of entities which may gain protection under the BIT. Clearly, shell companies which carry out limited business activity in the host state will not obtain protection under this BIT.

C. Fair and Equitable Treatment

Whereas Guyana's 1989 BIT with the UK promulgates the fair and equitable treatment standard without limitation, the Guyana – Brazil BIT adopts a more restricted approach that is intended to exempt the host state from tedious obligations such as the protection of investors' legitimate expectations, an obligation which has been argued to be in constant tension with host states' right to regulate for sustainable development purposes.[21] Rather than giving free reign to arbitrators to define the constituent elements of the FET standard as they see fit,[22] the Guyana – Brazil BIT lists a limited range of

[18] Ibid [144]

[19] Rachel Anderson, 'Toward Global Corporate Citizenship: Reframing Foreign Direct Investment Law' (2009) 18 Michigan State University College Law Journal of International Law 1.

[20] Article 3(1)(a) Guyana – Brazil BIT (2018)

[21] M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press 2015)

[22] Jason Haynes, 'The Evolving Nature of the Fair and Equitable Treatment (FET) Standard: Challenging Its Increasing Pervasiveness in Light of Developing Countries'

prohibited host state action such as denial of access to justice, breach of due process, targeted discrimination and breach of the requirement to act transparently. The provision, however, goes on to make it clear that:

> For greater certainty, the standards of fair and equitable treatment and full protection and security shall not be used or raised by either Party to this Agreement as a ground for any dispute settlement procedure in relation to the application or the interpretation of this Agreement.[23]

The practical effect of this provision is that investors' legitimate expectations, which have been a source of much anxiety for developing countries, are not expressly protected; as such, investors' claim that they have been disentitled from obtaining certain generalized benefits arising from the state's legal system that are not specific representations to the investor in question are precluded from grounding a claim. Similarly, the provision has the effect of excluding the possibility of tribunals broadly construing the BIT to include an obligation of stability, which would have had an effect similar to a stabilization clause;[24] that is, precluding the host state from taking measures to advance its sustainable development goals by freezing its regulatory framework to the time of the investor's entry into the jurisdiction.

D. National Treatment and Most Favoured Nation Treatment

Whereas Guyana's 1989 BIT with the United Kingdom provides very few qualifications to the national treatment standard, Guyana's recent BIT with Brazil expressly provides that when tribunals are deciding the question of whether this standard has been breached by state conduct, account must be taken of whether the relevant treatment meted out by the host state distinguishes between investors or investments on the basis of legitimate public interest objectives.[25] Furthermore, according to the 2018 BIT, the national treatment standard may not be interpreted by tribunals as affording compensation to aggrieved investors for any inherent competitive disadvantages which result from the foreign character of the investor or investments.[26]

Similarly, whereas Guyana's BIT with the UK only carves out limited exceptions to the application of the Most-Favoured Nation Treatment Standard (MFN), namely with respect of the host state's participation in regional integration regimes and treaties on double taxation, Guyana's 2018 BIT with Brazil goes even further by specifically indicating that the MFN clause does not apply to 'provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of any commercial agreement'.[27] This provision is an important one because it prevents investors under this BIT from invoking the MFN clause to import more favourable dispute settlement provisions which have been carefully negotiated by the host state with third parties, as seen in *Maffezini v Spain*,[28] a practice which may properly be described as forum shopping and arguably an abuse of the system of investor-state dispute settlement.[29]

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[23] UNCTAD Investment Policy Hub, 'Cooperation and Investment Facilitation Agreement Between the Federative Republic of Brazil and Cooperative Republic of Guyana (2018)' International Investment Agreement Navigator [Online] Available from:<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5763/download> Accessed 15th February 2021

[24] Lorenzo Cotula, 'Reconciling Regulatory Stability and Evolution Of Environmental Standards In Investment Contracts: Towards A Rethink Of Stabilization Clauses (2008) 1(2) Journal of World Energy Law & Business 158.

[25] Article 5(4) Guyana – Brazil BIT (2018)

[26] Ibid Article 5(5)

[27] Ibid Article 6(3)(1)

[28] ICSID Case No. ARB/97/7

[29] Hervé Ascensio, 'Abuse of process in international investment arbitration' (2014) 13(4) Chinese Journal of International Law 763; Ruth Teitelbaum, 'Who's Afraid of Maffezini-Recent Developments in the Interpretation of Most Favored Nation Clauses' (2005) Journal of International Arbitration 225. Martins Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26(2) ICSID Review 14; Jorun Baumgartner, *Treaty Shopping in International Investment*

E. Expropriation

Whereas Guyana's BIT with the United Kingdom is broad is in its coverage of both direct and indirect expropriation,[30] its recent BIT with Brazil expressly precludes a claim for indirect expropriation. It provides:

> For avoidance of doubt, this Article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights and does not cover indirect expropriation.[31]

It is submitted that this is an important innovation in the context of Guyana's quest to advance its sustainable development goals because it prevents against tribunals adopting warped interpretations of state action which may have caused damage to the investor's investment, but which does not result in the actual transfer of the investor's title of the asset in question. In addition, it obviates the confusion that has been introduced over the years as to the applicable standard of review in respect of indirect expropriation clauses, as some tribunals have taken the approach that substantial deprivation is sufficient,[32] while other tribunals take the approach that loss of control[33] is requisite. With the high threshold introduced by the 2018 for establishing expropriation, the state has effectively been given a wide margin of appreciation to advance its sustainable development agenda.

Although Guyana's recent BIT with Brazil does indeed provide for direct expropriation, expressly referencing the traditional constituent elements associated therewith (public purpose, due process, non-discrimination and compensation), its formula for the determination of compensation is especially consistent with its sustainable development objective of being subject to crippling investor-state compensation. Indeed, whereas the 1989 BIT between the UK and Guyana provides that the fair market value should be awarded to investors in the case of an expropriation without much guidance as to how this determination should be made, Guyana's 2018 BIT makes it clear that tribunals must make this determination having regard to 'market criteria, according to the legislation of the host state'.[34] Such an approach appears to, on the one hand, countenance the Hull formula, while, on the other hand, also countenancing the Calvo formula, the practical effect of which might very well be that the amount of damages awarded in direct expropriation cases may not be as developmentally crippling as awards rendered in previous cases, including *Occidental v Ecuador*[35] where approximately US$1.76 billion (plus interest) in damages were awarded against a developing country.

F. Essential Security Exceptions

Another important innovation in the context of Guyana's 2018 BIT with Brazil, which is noticeably absent from its earlier BIT with the United Kingdom, is the express inclusion of a national security exception, which may be invoked where the host state has taken action which harms the investment in question in circumstances where such action is aimed at preserving its national security or public order and which is necessary for achieving that purpose.[36] Such a provision is particularly necessary in BITs concluded by developing economies, like Guyana which has only recently discovered significant oil reserves, because it applies a lower threshold than the customary international law defence of necessity which, according to *CMS v Argentina*,[37] requires evidence that the measure adopted by the host state to achieve public interest objectives is the only way

Law (Oxford University Press, 2016). Alejandro Rodriguez, 'The Most-Favored-Nation Clause in International Investment: Agreements A Tool for Treaty Shopping?' (2008) 25(1) Journal of International Arbitration 1

[30] Article 5 Guyana – UK BIT (1989)

[31] Article 7(6) Guyana – Brazil BIT (2018)

[32] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06

[33] El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15.

[34] Article 7(4) Guyana – Brazil BIT (2018)

[35] ICSID Case No. ARB/06/11, Award, 5 October 2012

[36] Article 13 Guyana – Brazil BIT (2018)

[37] ICSID Case No. ARB/01/8

(as opposed to one of the reasonable ways, even if other ways are available) of achieving the public interest objectives in question. In other words, under the 2018 Guyana – Brazil BIT, it is much easier for the host state to defend a claim brought by an investor which alleges that bona fide, proportionate and non-discriminatory measures taken by it to advance its sustainable development goals have damaged the investor's assets.

G. Sustainable Development Provisions

Perhaps the most significant innovation in the context of Guyana's 2018 BIT with Brazil is its express and firm attention to sustainable development and corporate social responsibility, matters which were not even contemplated in its 1989 BIT with the United Kingdom. Article 15 of the Guyana – Brazil BIT reads as follows:

1. 1nvestors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.
2. The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:
   a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;
   b) Respect the internationally recognized human rights of those involved in the enterprises' activities;
   c) Encourage local capacity building through dose cooperation with the local community;
   d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers;
   e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;
   f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance.

Meanwhile, Article 17 of the Guyana – Brazil BIT, unlike the 1989 BIT between the UK and Guyana, makes express provision for matters relating to the protection of the environment, labour affairs and health:

1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labour, environmental and health legislation of that Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.
2. The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labour and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its territory, to the extent that such amendment or repeal involves decreasing their labour, environmental or health standards. If a Party considers that another Party has offered such an encouragement, the Parties will address the issue through consultations.

Provisions of this nature are a welcome development but are not entirely new to Guyana. In fact, Guyana's Investment Act, which came into effect in 2004, provided that:

Section 29. Investors shall conduct their operations in accordance with the laws of Guyana and in particular, take all measures necessary and appropriate to ensure that the facilities, factories, products and activities of their investment enterprises protect –

(a) the natural environment as mandated by the Environmental Protection Act; and

(b) the health and safety of workers and the general public under the applicable laws of Guyana.

Section 30. In accordance with the Guyana National Bureau of Standards Act, investors shall comply with the standards of the Guyana National Bureau of Standards regarding the importation of products and investment equipment and in their outputs.

Section 31. In accordance with the Trade Union Recognition Act 1997, investors shall grant union recognition at any site of operations if the majority of their employees indicate the desire for union representation. Investment enterprises shall contribute to the social insurance and welfare programme for their workers in accordance with the National Insurance Act.

Section 32. Investors shall comply with the international accounting principles and standards acceptable in Guyana.

Section 33. Investors shall pay all relevant taxes, except as exempted under any law.

Meanwhile, section 6 of the 2006 Act further provides that 'investors shall not invest in or operate investment enterprises which are prejudicial to national security, or detrimental to the natural environment, or public health, or which contravene the laws of Guyana.'

It is submitted that Guyana's 2006 Investment Act, which is usefully augmented by its 2018 BIT with Brazil, creates enabling conditions that advance its sustainable development goals. The provisions contained in these instruments not only protects its citizens, its environment and regulatory space, but are also consistent with UNCTAD's newly released IIA Reform Accelerator.[38] It is also fully consisted with the 2015 Investment Policy Framework for Sustainable Development,[39] which places considerable emphasis on the promotion of investment in sectors related to the sustainable development, provided that such investment activities are consistent with the state's environmental, human rights and regulatory objectives.

The challenge, however, is that the obligations contained in the 2018 Guyana – Brazil BIT that relate to sustainable development practices, such as corporate social responsibility, are couched in purely hortatory language, such that they may not likely be enforced by tribunals in respect of future disputes involving Guyana. This argument is not at all farfetched as the recent Caribbean case of *Grenada Private Power Limited and WRB Enterprises, Inc. v Grenada*[40] illustrates. Here, the Government of Grenada was, in 1992, advised by the World Bank and others to privatize electricity in that country. The then party in power, the National Democratic Congress (NDC), embraced the recommendation. The main party then in opposition, the New National Party (NNP), opposed it. Two years later, the NDC government sold a controlling interest in the local electricity company (GRENLEC) to Grenada Private Power Ltd. (GPP), a Grenadian company in which WRB Enterprises Inc. (WRB), a closely held private company based in Tampa, Florida, United States of America, indirectly held 75% of the shares. The privatization package included a Share Purchase Agreement that was made conditional upon the Government of Grenada enacting a favourable regulatory structure in the 1994 Energy Supply Act (ESA) and the 1994 Public Utilities Commission Act (PUCA). The SPA specifically provided that upon the occurrence of any one of fifteen 'Repurchase Events', the Claimants would have the right to 'put' their shares to the Government of Grenada, and the Government of Grenada would be obliged to repurchase them at a price calculated in accordance with the Second Schedule of the 1994 ESA.

Twenty-two years later, the incoming NNP Government decided to restructure the electricity

[38] - 'IIA Reform Accelerator' (United Nations Conference on Trade and Development, 2020) https://investmentpolicy.unctad.org/news/hub/1662/20201112-unctad-s-iia-reform-accelerator---a-new-tool-to-facilitate-investment-treaty-reform retrieved 9 February 2021

[39] - 'Investment Policy Framework for Sustainable Development' (United Nations Conference on Trade and Development, 2015) https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf retrieved 9 February 2021

[40] ICSID Case No. ARB/17/13

sector through sweeping changes to its regulation, production and distribution. More pointedly, the Senate of Grenada passed the Electricity Supply Act and Public Utilities Regulatory Commission Act (respectively, the '2016 ESA' and the '2016 PURCA'). These pieces of legislation were part of a restructuring of the electricity sector promised by the NNP Government, consistent with its long-standing view that privatization of GRENLEC had been a mistake and its implementation bungled. The 2016 Acts shortened and narrowed GRENLEC's exclusive license on the generation of electricity and cut short any future license, cancelled its monopoly on permitting or refusing self-generators, abolished the statutory rate-setting mechanism, and replaced it with a more discretionary procedure before the PURC as well as eliminated GRENLEC's import duty and tax concessions. GRENLEC no longer had authorization to harness potential wind and water power without making payment to the Government, and the guarantee of compensation for revocation of the license contained in Sections 28, 29, and the Second Schedule to the 1994 ESA was removed. Consequent upon the passage of these Acts, the Claimants wrote to the Government stating that the 2016 Acts gave rise to a number of 'Repurchase Events' and demanded the purchase price according to the Second Schedule, which the Claimants calculated at USD $65,428,963 payable within 30 days. Following unsuccessful attempts to negotiate a solution, the government of Grenada declared its rejection of any obligation to repurchase the shares and refused to pay the amount claimed. This set in motion ICSID arbitration proceedings.

At the hearing, the Respondent argued that its repurchase obligation was void and unenforceable under Grenadian law; that the SPA repurchase obligation constituted a penalty under Grenadian law, which rendered it unenforceable, and in any event, the repurchase provisions were void as unconstitutional because their effect was to fetter the authority of the government to regulate the electricity sector in the public interest. The Respondent also argued that the Claimants committed willful malfeasance in their management of GRENLEC which (under the express terms of the SPA) disentitled them from insisting on the government's repurchase of the shares. Moreover, the Respondent argued that the Claimants were poor corporate citizens in that they sought at all times to maximize their return on investment with little regard for meeting GRENLEC's capital investment needs or the wellbeing of the island economy, including, in particular, the Claimants' persistent failure to develop Grenada's ample renewable energy resources.

The Claimants responded that the repurchase obligation was neither a penalty nor unconstitutional. They argued that it was a straight-forward commercial investment whose terms were fairly negotiated and which they were entitled to enforce. Their view was that 'a deal is a deal.'[41]

Interestingly, the Tribunal felt that it had no authority to judge whether or not in the period 1994 to 2016 the Claimants were not a good corporate citizen of Grenada.[42] It noted that its task was simply to determine whether the complex contractual arrangements between the Parties were complied with and, if not, what remedy should be awarded. Ultimately, the tribunal ruled in favour of the Claimants, finding that the agreement was valid in that its terms were not contrary to the Constitution of Grenada. In addition, the tribunal felt that the Respondent had not established either the procedural condition precedent or the substantive factual prerequisites to deny the Claimants compensation on the basis of willful malfeasance. Having established a 'repurchase' event which required the Respondent to pay compensation at the level agreed to in the Second Schedule, the tribunal felt constrained to award the Claimants Second Schedule compensation.

On the question of sustainable development, one of the arguments raised by Grenada, but which was rejected by the tribunal, was that the formula in the Second Schedule of the 1994 ESA contained 'a bizarre formula inherited from the colonial past' whose application produced compensation 'extravagantly disproportionate to the actual fair

[41] Ibid [7]

[42] Ibid [8]

market value of the shares',[43] and that, in any event, the Claimants' monopoly, which allowed it to dish out dividends to its shareholders, was an anomalous 'colonial-era' monopoly.[44] On the latter point, the tribunal considered that the special dividend paid by the Claimants simply reflected the role of the Claimants' investment in GRENLEC. In other words, while the government of Grenada saw the Claimants as a key player in the sustainable development of the island and believed that the Claimants should share that vision by, for example, making significant investment in renewable energy, the Claimants saw their investment as a profit-making enterprise which was 'rightly managed to maximize shareholder value.'[45] In light of the fact that there was no provision under Grenadian law which was violated by the payment of the special dividend, the tribunal felt that the Claimants were under no legal obligation to share the Grenadian government's view of the best interest of Grenada.[46]

In so far as the agreement as a whole was concerned, the tribunal rejected the Respondent's general challenge to the 1994 package of laws and agreements made by the prior (and rival) NDC government. More specifically, the tribunal refused to countenance the argument that the Claimants performed their obligations badly; that they reaped unconscionable benefits while hindering progress and in particular obstructed the development of 'utility scale' renewable energy; and that it would be oppressive and unfair to reward the Claimants for their mismanagement with a grossly excessive award of compensation calculated under the Second Schedule. In this connection, although the tribunal recognized that the terms of the agreement did not 'look as attractive to the present NNP Government as they did to the 1994 NDC Government',[47] it nonetheless felt that this was no basis for concluding that the government was the victim of a lopsided or unfair negotiation.

Another interesting argument advanced by the Respondent was that the 2016 restructuring laws were in the national interest because the Claimants were squandering Grenada's renewable energy potential. It pointed out that Grenada is blessed with much sun for solar energy, much wind for industrial turbines and much potential for the generation of geo-thermal energy, and that the Claimants' investment in renewable energy was a pittance. It referred, in particular, to a report from the Inter-American Development Bank which observed that development of energy resources in Grenada was hampered by the regime created by the 1994 ESA since that regime enabled a monopolistic, fossil fuel-biased development of the electricity sector, severely impeding the development of renewable energy technologies. The tribunal, however, felt unimpressed by this argument, holding that Grenada was unable to identify any statutory or contractual obligation on the part of the Claimants to develop renewable energy.[48]

Ultimately, the tribunal accepted that the Claimants 'may have fallen short of what might be expected of a good corporate citizen',[49] but nonetheless then went on to blame the 1994 NDC Government for creating a regulatory framework which was toothless and for failing to set performance standards for renewable energy which, with the benefit of hindsight, would have promoted Grenada's development.

The *Grenada Private Power* case underlines why binding provisions on sustainable development needed to have been made mandatory in the context of Guyana's 2018 BIT with Brazil.

H. Dispute Settlement

Another of the important innovations introduced by Guyana's BIT with Brazil is the method and procedure for resolving disputes. Whereas the UK's 1989 BIT with Guyana internationalizes dispute settlement by making a standing offer to investors to initiate proceedings before international arbitral tribunals if the state is alleged to have breached one of the investor protection standards,[50] Guyana's 2018

[43] Ibid [113]
[44] Ibid [47]
[45] Ibid [96]
[46] Ibid
[47] Ibid [119]
[48] Ibid [140]
[49] ibid
[50] Article 8 Guyana – UK BIT (1989)

BIT with Brazil adopts a more restrictive, phased approach to dispute settlement.

Given the concerns of developing countries with respect to the prospect of being subject to crippling compensation in circumstances where they adopt *bona fide* measures to advance their sustainable development goals, but which harm foreign investors, considerable thought was given by the negotiators of Guyana's 2018 BIT to dispute prevention. Under Article 24 of the Guyana – Brazil BIT, for example, if a Party considers that a specific measure adopted by the other Party constitutes a breach of this Agreement, it may initiate a dispute prevention procedure before the Joint Committee.[51] This Joint Committee is composed of government representatives of both Parties designated by their respective Governments, which has the power to not only supervise the implementation and execution of the BIT, but to resolve issues or disputes concerning investments in an amicable manner.[52] To initiate the procedure, the interested Party is required to submit a written request to the other Party, identifying the specific measure in question, and presenting the relevant allegations of fact and law. The Joint Committee is then obliged to convene a meeting within sixty (60) days from the date of the request. To ensure efficiency, the Joint Committee has sixty (60) days from the date of the first meeting, extendable by mutual agreement, to evaluate the submission presented and to prepare a report. The Committee's 'report' is similar to an arbitral award in that it identifies the submitting Party; gives a description of the measure in question and the alleged breach of the Agreement; and presents the findings of the Joint Committee.

In the event that the dispute is not resolved upon the completion of the time frames outlined above, or there is non-participation of a Party in the meetings of the Joint Committee, the dispute may then be submitted to arbitration.[53] In this connection, the parties may choose to submit the dispute to an *ad hoc* Arbitral Tribunal or a permanent arbitration.[54] The decision of the Arbitral Tribunal must be rendered within six (6) months following the appointment of the Chairperson and the decision of the Arbitral Tribunal is final and binding on the Parties, who must comply with it without delay.

It is submitted that compared to older BITs, such as the 1989 UK – Guyana BIT, Guyana's approach under its 2018 BIT with Brazil goes a long way to incentivize investors to utilize the Joint Committee as a first step to resolving their disputes, and only at last resort are they then able to petition an arbitral tribunal. Among other things, this provides a useful opportunity for the investor-state relationship to be rekindled given that the proceedings before the Joint Committee are not expected to be as adversarial as arbitration proceedings, and saves costs and time associated with the resolution of the dispute in question. It also provides an opportunity for Guyana to explain the rationale behind the measures it takes to advance its sustainable development goals. This may result in a de-escalation of tensions and allows for the investor and the state to discuss amicable solutions that advance their mutual interests, without having to resort to potentially reputationally damaging and relationship ending international arbitration proceedings.

Conclusion

Having regard to the foregoing discussion, it appears that Guyana, through its 2018 BIT with Brazil, has signaled its intention to advance its sustainable development goals more efficaciously. Indeed, many of the provisions contained in the Guyana – Brazil BIT, in contradistinction to its 1989 BIT with the UK, are congruent with UNCTAD's 2015 Investment Policy Framework for Sustainable Development. While this is, indeed, a positive development for which Guyana is to be commended, it must be appreciated that the road to eradicating

[51] ibid Article 24

[52] ibid Article 18

[53] Ibid Article 25

[54] Note that Arbitral tribunals appointed under the Guyana – Brazil BIT are expressly precluded from making a binding determination on Article 13 (security exceptions); Article 14 (investors' compliance with domestic legislation); Article 15 (corporate social responsibility); Paragraph l of Article 16 (investment measures and combating corruption and illegality); and paragraph 2 of Article 17 (provisions on investment and environment, labour affairs and health).

international investment law's asymmetry and perceived illegitimacy has only just begun, as the other 8 Guyanese BITs are still asymmetrical in nature. More than this, the true test of the effectiveness of the 2018 BIT lies in its practical enforcement, namely its ability to equip the state with the margin of appreciation it needs to advance its sustainable development agenda, while encouraging investors to act consistently with labour, human rights and environmental standards and principles of corporate social responsibility.

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Recent Approaches To The Interpretation Of The Savings Clause In The Commonwealth Caribbean

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Introduction

The savings clause found in the independence constitutions of most Caribbean Commonwealth countries has been a source of consternation for many concerned with the development of constitutional law in the Caribbean. This clause which immunised pre-independence laws from invalidation after former colonies gained sovereignty, can undermine a state's ability to grant citizens the full protection of the rights and freedoms guaranteed by its constitution. Over time, two distinct approaches to constitutional interpretation vis-à-vis the savings clause have emerged regionally. Some courts have chosen to apply a broad and purposive interpretation to Caribbean constitutions as a whole while reading savings clauses narrowly. On the other hand, this approach has been disparaged by Courts which adopt a literal approach when construing these constitutions. Interestingly, in recent times, the two final appellate courts that govern this region fall on either side of the divide. The Caribbean Court of Justice (CCJ) has adopted a "modify first" approach in its application of the savings clause while the Judicial Committee of the Privy Council (JCPC) does not see the necessity of such a technique given the unambiguous nature of savings clauses. These contrasting approaches will be examined through the lens of two cases emanating from these courts in 2022: *Bisram v Director of Public Prosecutions*[1] and *Chandler v The State.*[2]

Purpose of the Savings Clause

As West Indian colonies transitioned into independent nations, savings clauses were included in the constitution of these bourgeoning nations to maintain law and order. These clauses either preserved the standing of all laws that subsisted under the colonial regime immediately before the commencement of the constitution or protected specific penalties contained in colonial laws, from attack. Most savings clauses were drafted without any time limitations. Belize is one notable exception as its constitution contained a savings clause with a five-year life span. Whether these savings clauses were drafted in general or specific terms and with or without limitations they were intended to provide 'legal certainty [and] secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy.'[3]

Bisram v Director of Public Prosecutions

Bisram v Director of Public Prosecutions,[4] embodies the CCJ's approach to the constitutional conundrum arising out of the inclusion of savings clauses in regional constitutions. Marcus Bisram, the Appellant was charged with murder but at the conclusion of his Preliminary Inquiry (PI), the magistrate found that a prima facie case had not been made out and discharged him. Relying on s 72 of Guyana's *Criminal Law (Procedure) Act* ("the CLPA"), the Director of Public Prosecutions ("the DPP"), by two separate letters, directed the

[1] [2022] CCJ 7 AJ (GY).
[2] [2022] UKPC 19
[3] *Watson v the Queen* [2004] UKPC 34 para 46
[4] Delivered on 15th day of March 2022

magistrate to reopen the PI and to commit Bisram for trial, respectively. The magistrate complied with both directives.

Section 72 of the CLPA as amended in 1972 grants the DPP the power to direct a magistrate to reopen an inquiry and to commit the accused for trial if he is of the opinion that the accused should have been committed for trial. The Appellant challenged the constitutionality of s 72 on the basis that it was incompatible with the Constitution of Guyana.[5] The Respondent argued that she acted in keeping with s 72 of the CLPA.

The CCJ found that s 72 and article 122A, which imbeds the principle of judicial independence into the constitution, could not harmoniously co-exist. As a result of the supremacy of the constitution over all laws, the power of the DPP to give such a direction to a magistrate must be declared void to the extent of its inconsistency with article 122A. Moreover, the Court found that article 152, the savings clause, did not preserve s 72 as it only has effect in relation to inconsistencies with fundamental rights outlined between articles 138 and 149 (inclusive) of the constitution and article 122A is outside that range. As such, s 72 was declared to be inconsistent with article 144 of the constitution which guaranteed the right to protection under the law. The Court further modified s 72 to excise those provisions permitting the DPP to direct a magistrate in the aforesaid manner.[6]

Though the panel found that s 72 was not saved by article 152, it spent some time re-affirming the 'modification first' approach to savings clauses which was initially utilised by the CCJ in *Nervais v R* [2018] CCJ 19 (AJ) and followed in *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ). This approach is hinged on the modification clause found in the act or order establishing the constitution. These clauses mandate that existing laws should be interpreted with the modifications, adaptations, qualifications and exceptions that bring them into conformity with the act or order establishing the constitution.[7] Existing laws, that infringe fundamental rights are therefore first suitably modified before the savings clause is applied. In the case of Bisram, s 72, the existing law, must be suitably modified by s 7(1) of the Constitution of the Co-operative Republic of Guyana Act 1980 ("the 1980 Act") so that it aligns with the fundamental rights laid down in the Constitution of Guyana.

The Panel in *Bisram* acknowledged that there were many criticisms of the modification first approach including the notions that, save for its Schedule, the provisions of the Constitution Act (or parent Order) are spent or of little effect after the Constitution comes into force; that a provision in a parent instrument cannot prevail over a Constitution scheduled to it because the Constitution is the supreme law; that (in the case of the Independence Constitutions) the modification clause is set out in 'mere subordinate legislation', i.e. an Order in Council, of the former colonial power; that the Court cannot make law as that is the province of the legislature; and that the savings clause, because it forms part of the Constitution, should be read literally, without regard to the modification provisions (which do not form part of the Constitution) and notwithstanding its crippling effect sometimes on the enjoyment of fundamental rights.

However, eschewing all these arguments, Saunders P relied on the unique characteristic of a constitution, opining at paragraph 62:

> A Constitution embodies the most fundamental aspirations of a nation and its people. It is crafted to endure through all manner of, sometimes unforeseeable, circumstances. Interpretation of such a document absolutely requires an examination of, not just its text, but also its structure, its history and antecedents, and the moral values and governing principles underlying and/or proclaimed by it.

Further to the exceptional character of a constitution, the parent enactment should also be viewed differently from other pieces of legislation. It

[5] The Appellant also argued that the action the DPP did not comply precisely with s72.

[6] The CCJ also declared that s 72 of the Criminal Law (Procedure) Act violated the principle of separation of powers.

[7] Examples of these modification clauses can be found in s 7(1) of the Constitution of the Co-operative Republic of Guyana Act 1980 and s 5(1) of the Constitution of the Republic of Trinidad and Tobago Act 1976.

should not be read as subordinate to the Constitution but together with the Constitution 'as a single organic law emanating from an appropriate law giver'.[8] Saunders P reasoned that a united view of the legislations would achieve the purpose and goals of the Constitution. In this case therefore, the modification clause in s 7(1) the 1980 Act must be read together with the savings clause.

Chandler v The State

In *Chandler v the State* a judgement delivered two months after *Bisram*,[9] the Privy Council respectfully declined to follow the decision of the CCJ in *Nervais*, *Mc Ewan* and *Bisram*. The Appellant, Jay Chandler, mounted a constitutional challenge to the mandatory death penalty for murder on the basis that it was contrary to the constitution which Trinidad and Tobago adopted in 1976 ("the 1976 Constitution"). After his conviction for murder on 17 August 2011, the Appellant was sentenced to death by hanging, in accordance with s 4 of the *Offences Against the Person Act 1925* ("the OAPA"). The Appellant's main argument was that s 4 of the OAPA was inconsistent with (i) the right to life and the right not to be deprived of life except by due process of law, (ii) the right not to be subjected to inhuman or degrading punishment or other treatment, and (iii) the right to a fair and public hearing of a criminal charge by an independent and impartial tribunal. He argued that due to its unconstitutionality, s 4 of the OAPA must be read as providing a discretionary death sentence.[10] Counsel for the Respondent agreed that the mandatory death penalty was a cruel and unusual punishment and therefore inconsistent with s 4(a) of the 1976 Constitution. However, it was constitutionally valid having been saved as existing law.

The Board found that the inclusion of a savings clause[11] in the 1976 Constitution protected the mandatory death penalty from constitutional challenge. In coming to its decision, the Board opted to maintain the literal approach to the interpretation of the constitution applied in *Matthew v the State* [2004] UKPC 33 and *Boyce v The Queen* [2004] UKPC 32. The Board reiterated that the judge's role is to interpret the words of a constitution and not substitute other words as they saw fit. Where clauses are 'concrete and specific' they do not 'invite judicial participation in giving them practical content'.[12] The evolution of societal attitudes had no bearing on unambiguous clauses, such as the savings clause, in a constitution. The Board recapitulated the position adopted by the in *Matthew* and *Boyce* that

> The living instrument doctrine enables broadly worded statements of fundamental rights to be adapted to reflect changing attitudes and changes in society; but not all provisions in a Constitution are of that nature. The meaning and purpose of a savings clause which preserves existing law does not change over time.[13]

Further, the "modification first" approach utilised by the CCJ was rejected. The Board opined that this approach did not give priority to the constitution, as the supreme law of the land, over the act that established it.[14] Anything intending to modify or qualify a provision in a constitution would have been included in the constitution. Lord Hodge opined at paragraph 32 that reliance could only be placed on the authority in s 5 of the Constitution of the Republic of Trinidad and Tobago Act 1976 ("the 1976 Act") to modify a law to make it conform to the 1976 Constitution where the law in question was not in conformity with the 1976 Constitution. The 1976 Act does not give the courts power to alter a law whose validity is preserved by the constitution.

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[8] *Bisram* (n 1) para 62

[9] Delivered on 16th May 2022.

[10] The Appellant also argued that that the mandatory death penalty for murder contravened s 1 of the 1976 Constitution because it breached the principle of separation of powers (*Chandler v The State* [2022] UKPC 19 para 52).

[11] Section 5 of the 1976 Constitution states '(1) Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order-in-Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act.'

[12] *Boyce v The Queen* [2004] UKPC 32 para 29 which was paraphrased in *Chandler* at para 22.

[13] *Chandler* (n 2) para 32

[14] *Chandler* (n 2) para 72

'Giving priority to a modification clause in the 1976 Act over the savings clause in the 1976 Constitution would in large measure destroy the effect of the savings clause which is part of the supreme law of the state'.[15]

The Panel was also of the view that the "modify first" approach could not have been the correct approach since 1962.[16] The savings clause was introduced to ensure a measure of legal certainty as former colonies transitioned into independent nations. If these clauses were to be modified first, the interpretation and application of existing laws would have been uncertain. Courts may have been inundated with the many legal challenges that could have arisen as existing laws go beyond "the mandatory death penalty" which was currently being challenged. In fact, since 1962, the people and government of Trinidad and Tobago, had built a nation with the notion that existing laws had not been modified after independence. To declare that modification first principle took effect at independence would be to introduce uncertainty into the law.

The panel also repeated the position of the minority in *Roodal v. The State (Trinidad and Tobago)*[17] in relation to the possible irrational ramification of attempting to modify an existing law first. If the law could not be modified it would then be saved thereby resulting, perversely, in only the laws most incompatible or least susceptible to modification would be saved.

Commentary

Interpretation of the Anglo-Caribbean constitution has been 'an unfolding, forever unfinished process of reflection, discovery, assimilation, refinement, and application'.[18] Early judicial pronouncement favoured a presumption that the fundamental rights and freedoms which were included in these constitutions were already secured by the denizens of newly independent nations through existing law. Existing laws were 'not to be subjected to scrutiny in order to see whether or not they conform[ed] to the precise terms of the protective provisions' of the constitution.[19] Fundamental human rights were only included in the constitution to ensure that no future enactment could derogate from the rights which were already recognized.[20]

However, as societal norms evolved, courts were called upon to examine the constitutionality of past laws in light of novel situations or re-evaluate previous decisions. Savings clauses were no longer viewed as protecting citizens from new laws that could encroach on fundamental rights but as a mechanism utilised by some jurists to save colonial laws from being declared unconstitutional. Instead of smoothing the transition from colony to sovereign nation, savings clauses were arguably freezing morals and values in perpetuity.

Courts in the Caribbean appear to be resisting this time warp by embracing the capacity of Caribbean constitutions to create and protect new rights by moving towards a less restrictive approach to constitutional interpretation.[21] The use of the modification first approach in *Bisram* is yet another step towards a more generous purposive approach to constitutional interpretation. It further cements the recognition that not all existing laws were compatible with fundamental human rights. As existing laws ranging from the mandatory death sentence[22] to the validity of health regulations in a pandemic[23] are challenged, it is pellucid that existing laws can and should be scrutinised for compliance with fundamental human rights. As our norms and values evolve, our understanding of the right to liberty, due process of the law and privacy, to name a few, deepens and broadens. To stifle our expanded appreciation because of the strictures that existed over fifty years ago would be irrational especially as former colonial powers have themselves repealed

[15] *Chandler* (n 2) para 32
[16] ibid para 72
[17] [2003] UKPC 78 para 92
[18] *Marin v the Queen* [2021] CCJ 6 (AJ) BZ para 27
[19] *DPP v Nasrell*a [1967] 2 AC 238, 248
[20] ibid 248
[21] Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems, (1st edn*, Cavendish 1999) 80
[22] *Watson* (n 3)
[23] CV 2020-02223 *Satyanand Maharaj v The Attorney General of Trinidad and Tobago*

many of these "saved" laws. In the words of Byron P at paragraph 58 in *Nervais*

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

A similar approach to modification was postulated by the Privy Council almost two decades ago. In *Roodal v The State*, it was suggested that constitutional modification could be undertaken in two stages. The first stage would be to determine if the existing law could be brought into conformity with the constitution by the utilising the modification clause to read down, read in or sever the offending law. The savings clause would only come into operation if an existing law could not be repaired by the modification clause.[24] This decision, however, was overturned in *Matthew* and *Boyce.*

In *Chandler*, the Privy Council showed itself even more wedded to the sanctity of the savings clause. In *Matthew* the decision was arrived at by a bare majority which was strong evidence that both sides of the argument were tenable.[25] Almost twenty years later, the Board was unanimous in its decision to uphold the findings of the majority in Matthew. Lord Hodge, in paragraphs 56 – 66, extolled the virtue of the principle of legal certainty stating in part that the Board 'would need to be satisfied that the decision [in Matthew] was wrong and that it lacked a satisfactory foundation. It is not enough that the Board as presently constituted might take a different view if considering the matter for the first time.'

All in all, the Privy Council has doubled down on its position that when an existing law is unquestionably unconstitutional it is the duty of the parliament, as the democratic organ of government, to reform and update the law.[26] It will not usurp this position by use of the "modification first" or any approach that restricts the savings clause.

The CCJ, too has acknowledged that parliament would be best placed to enact constitutionally compliant provisions to address the mischief presented by the savings clause. However, it also shows itself willing to take up the legislative mantle where it believes it is constitutionally mandated to do so. In *Bisram*, the court viewed itself as having the power under the 1980 Act to close gaps when necessary or expedient, to modify appropriately impugned provision(s) in the existing law.[27]

Conclusion

Despite the advancement of human rights jurisprudence internationally, the savings clause continues to wield significant power over citizens who are subject to the Privy Council's jurisdiction. By taking a literal approach to the savings clause and rejecting the modification first approach adopted by the CCJ, the Privy Council continues to immunise existing laws from a finding that they violate the fundamental rights found in the constitution. The CCJ has drawn a different line between judicial creativity and impermissible judicial legislation. Given the disparate yet strongly held approaches to interpretation in this regard, the cases of *Bisram* and *Chandler* are unlikely to be the last where the relationship between the savings clause and existing law is reviewed. It is hoped that future decisions on the interpretation of the savings clause and the constitution will better incorporate both a respect for the language of the constitution and for the traditions and usages that have given it meaning and the principle of giving full recognition and effect to the fundamental rights and freedoms which is enshrined in the constitution.

[24] *Roodal* (n 17) para 26
[25] *Chandler* (n 2) para 63
[26] ibid para 96 -98
[27] *Bisram* (n 1) para 81 and 85

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A Green Court Leads To Red Faces: The Salutary Story of The Environmental Court of Trinidad &Tobago

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Abstract: *Proposals for the establishment of a specialist environmental court in Trinidad & Tobago evolved from 1976 onwards, culminating in the establishment of the Environmental Commission by the Environmental Management Act 1995. A constitutional issue arising from the creation of the Commission as a superior court of record stymied the establishment of the Commission, leading to the repeal and replacement of the 1995 Act by the Environmental Management Act 2000. This paper traces the key questions raised and decisions made in the legislative process by reference to background documents and the debates in Parliament on both pieces of legislation. It shows that, notwithstanding the establishment of the Commission, with the exception of the Talisman case in 2002, all major litigation arising with respect to the administration of the Environmental Management Act 2000 over the past two decades has been pursued by way of civil proceedings under the Judicial Review Act 2000, in the ordinary superior courts. It analyses in particular two decided cases in which the constitutionality of appointments to the bench of the Commission by the executive and the limits of the Commission's jurisdiction in were tested. It shows that the Commission has been virtually moribund for years and concludes that, without changes, it is unlikely to become the forum of choice for litigants.*

Introduction

Special tribunals with jurisdiction over environmental matters, some of which are called environmental courts, have been established in several common law and civil law countries, including Australia, the United States of America, New Zealand and South Africa, as well as in Europe. The establishment of an environmental court for England and Wales was the subject of a research project carried out by the Department of Land Economy of Cambridge University in 1999, the Final Report on which includes a comparative study of some of these initiatives.[1]

That study identified ten general criteria that define the general conception of an environmental court; namely: a specialist or exclusive jurisdiction; the power to determine merit appeals; vertical and horizontal integration, such that its jurisdiction goes beyond any one environmental subject area and includes different types of suits, including public law, civil actions, enforcement and criminal prosecution; the hallmarks of a court or tribunal, such as independence from government and the power to make binding decisions; dispute resolution powers; a body whose members are environmental specialist, including non-lawyers as judges or advisors; broad rights of access; informality of procedure; lower costs; and a capacity for innovation. These criteria provide a useful yardstick for the evaluation of the structure and functioning of an environmental court in any jurisdiction.

In this paper, the creation of an environmental court in Trinidad and Tobago (T&T) and environmental cases subsequently decided by the courts in T&T are examined. As will be shown, constitutional questions about the independence of the court from government and the role to be played by non-legal members of the court frustrated efforts to set up the court for over five years after the law

[1] Prof. Malcolm Grant, *Environmental Court Project: Final Report* (Department of the Environment, Transport and the Regions 1999). See also: George Ping and Catherine Ping, *Environmental Courts and Tribunals: A Guide for Policy Makers* (UNEP 2016).

establishing it was first enacted. Moreover, the narrow jurisdiction conferred on the environmental court has limited the number of matters coming before the court, with the result that most environmental cases are still being decided by other courts, casting doubt on the justification for its creation.

Background to the Creation of an Environmental Court

The *Environmental Management Act, 1995* (the EM Act 1995)[2] made provision for the creation of a new superior court of record, called the Environmental Commission (the Commission).[3] Although the enactment of the EM Act 1995 followed the 1992 United Nations Conference on Environment and Development (UNCED) and was ultimately donor-driven,[4] it was the preceded by a long process inclusive of the production of several reports and earlier drafts of legislation and public consultations, the original catalyst for which was T&T's participation in the United Nations Conference on the Human Environment held in Stockholm in 1972.[5]

Provision for the creation of a special tribunal to hear environmental matters first appeared in the *Draft Environmental Protection Act 1976*, prepared under the auspices of the Pollution Control Council, one of two inter-Ministerial committees appointed in the aftermath Stockholm.[6] This draft Act provided for an Environmental Appeal Tribunal to hear appeals by persons aggrieved by decisions of the Environmental Protection Officer, an office to be established by the Act and vested with responsibility for its administration. The draft Act provided for the tribunal to consist of three members appointed by the Minister; a Chairman and Vice Chairman, being members of the legal profession appointed after consultation with the Attorney General, and one lay person with "considerable experience in the area of environmental protection."[7]

The 1976 draft never became a Bill, but was reviewed by the Standing Committee on the Environment who, in their 1987 report recommending the establishment of a National Environmental Office with a coordinative role, proposed the establishment of a twelve-member inter-sectoral National Environmental Advisory Board. The proposed functions of the Board included hearing appeals against actions taken by the National Environmental Office or the line agencies with responsibly for the enforcement of environmental laws.[8] This Board was intended to perform the dual functions of an advisory and appellate body performed in practice by the Advisory Town Planning Panel established by the *Town and Country Planning Act*,[9] to which *de facto* appeals to the Minister against decisions of the Town & Country Planning Division were referred.[10]

In 1989 an *Environmental Protection Bill* was laid in Parliament.[11] This made provision for the first time for the establishment of a new superior court of record, to be called the Environmental Protection Court, to hear appeals from persons aggrieved by decisions of the National Environmental Authority to be established by the Bill. The court was to be composed of three members to be appointed by the President of T&T; a President, being a person

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[2] Act 3 of 1995

[3] ibid Part VIII s 81 – 90

[4] Enactment of the EM Act was a condition for the release of the second tranch of the Inter-American Development Bank's (IDB) Investment Sector Reform Loan (BIERL) to T&T signed in August 1993; establishment of the EMA was a condition for the release of the third tranch of the loan.

[5] See: Dr. Carol James, *Guidelines for Environmental Administration in T&T*, Report of the Standing Committee on the Environment, (Ministry of Food Production, Marine Exploitation, Forestry & the Environment 1987); Christine Toppin-Allahar, *Institutional Strengthening & Legal Infrastructure*, IADB Basic Environmental Studies for T&T, (Ministry of the Environment & National Service 1992); Dr. S. G. Sultan-Khan, *Policy Brief for the Establishment of the Environmental Management Agency*, (Ministry of Planning & Development 1993)

[6] The entire text of the draft Act appears in an appendix to the James Report; (n 5).

[7] Part V 'Appeal and Appeal Tribunal' s.29

[8] James Report (n 5) 16

[9] Section 4, Chap 35:01, Act 29 of 1960, Revised Laws of Trinidad and Tobago

[10] This was an administrative arrangement made because the appellate provisions of the T&CP Act, which depend upon a delegation of powers to local authorities that was never effected, were inoperative.

[11] Bill No. 39 of 1989

qualified for appointment as a High Court Judge to be appointed after consultation with the Chief Justice, and two lay persons "who have contributed significantly in the field of environmental protection." Decisions of the court were to be made by the President, after consideration of the advice of the lay members, which was not binding on the President.[12] This Bill was withdrawn following the decision of the Government to establish a Ministry responsible for the environment,[13] rather than a statutory authority.

Following a change of Government, the Ministry was disestablished and a *Draft Environmental Management Bill*, prepared by a World Bank consultant,[14] was published for public comment in September 1994. This draft Bill provided for the establishment of a new statutory corporation, the Environmental Management Authority (EMA); an Environmental Trust Fund for funding the operations of the EMA; and an environmental court called the Environmental Commission, with jurisdiction to hear appeals against decisions of the EMA, direct private party actions for enforcement of the Act and any other matters over which jurisdiction was conferred on it by any other written law. The provisions of the Bill with respect to the composition and appointment of the Commission were essentially the same as those contained in the law when enacted.

Written submissions were solicited and over seventy public comments were received from NGOs, business, labour, individuals and interest groups, as well as from a number of international agencies, including the World Bank, the Inter-American Development Bank, UNEP, UNDP, and WHO/PAHO.[15] Persons who submitted substantial comments in writing were invited to make oral submissions to a panel chaired by the World Bank consultant on the establishment of the EMA, which included the World Bank legislative drafting consultant, the Chief Parliamentary Council and officers of the Ministry of Planning and Development, the Ministry then responsible for the environment.[16]

The author prepared written comments on behalf of two organisations, a general comment on the Bill as a whole[17] and a detailed comment on the provisions of the Bill relating to Environmental Impact Assessments.[18] In the former, reservations about the establishment of an environmental court were expressed in the following terms:

> "The most important question … is whether there is a need to provide for a special tribunal of this type simply to hear environmental matters. It is certainly difficult to justify this when the country has been unable to find the resources to establish specialist courts to adjudicate in other areas in which there is a plethora of litigation. … Moreover, the provision that appointments are to be made by the executive branch, namely by the President, who would act on the advice of the Minister, is also a source of concern, although he would be constrained to appoint experienced attorneys to the post of Chairman and Deputy Chairman of the Commission. This is in contrast to the provisions of the 1989 draft, which provided that the President would act on the advice of the Chief Justice, the Chairman of the Judicial and Legal Service Commission, and would appoint someone qualified to be a High Court judge to preside over the tribunal. These difficulties would be removed if the tribunal to be established under the bill

[12] Hence, the composition and powers of this court did not raise the Constitutional problem afflicting the Commission as established in 1995.

[13] The Ministry of Environment and National Service (MENS).

[14] Dale E. Stephenson of the American-based international law firm of Squire, Sanders & Dempsey.

[15] *Hansard*, House Deb 3 February 1995, Vol 49, 897-8 (Sen. Dr. L. Saith)

[16] The impact of this process on the preparation of the draft legislation is illustrated by the fact that the discussion draft of the Bill had 54 Clauses, while the Parliamentary Bill had 95 Clauses.

[17] Prepared on behalf of the Chaguaramas Development Authority (CDA), a statutory authority of which the author was then a Board member.

[18] Prepared on behalf of Rapid Environmental Assessments Limited (REAL), a private company of which the author was then a Director.

> was a statutory appeals tribunal, which is consonant with the main functions of the Commission under the Bill."[19]

The legislation was presented to Parliament for enactment on 20th December 1994, being introduced in the Senate.[20] During debate in the Senate, questions were raised as to the Constitutionality of the Bill, on the grounds that it was legislation that infringed the fundamental right to property and could not be enacted by a simple majority.[21] In response to these concerns, the Attorney General contended that the legislation was purely regulatory in nature and that it is trite law that regulatory legislation does not infringe the right to property, citing the decision of the Privy Council in *Belfast Corporation v O.D. Cars Ltd*[22] in support of his answer.[23] A broader constitutional concern was also voiced that the Bill was "completely alien …to our traditions," particularly with respect to the provisions for making subordinate legislation; [24] however, the offending provisions were amended in the Senate.[25]

No constitutional objection was raised with respect to the provisions relating to the appointment of the members of the Commission, although one Senator opined that these provisions of the Bill would "open the door to immense corruption",[26] but the provisions for the establishment of the Commission attracted comment during the debates in both Houses of Parliament.

Opposition in the Senate to the establishment of a special environmental court centred on the fact that it was the stated intention of Government to get away from reliance on the judicial process.[27] Three Senators took the view that setting up a parallel court system was no answer to the problems afflicting the administration of justice, which was described as being in "chaos" and "a shambles".[28] Nonetheless, the leading spokesman for the legal fraternity took the position that the establishment of a specialist court was unobjectionable, although he pointed to many deficiencies in the provisions of the Bill relating to the court.[29] These points were also addressed by amendments made to the Bill in the Senate.[30] There was less comment on the relevant provisions of the Bill during the debate in the House of Representatives, although one member of the House predicted that the Commission would most likely go the way of other special courts created by earlier legislation, which had not come into being despite the elapse of many years.[31]

Delay in Setting Up the Court

The Act was passed in February 1995 and in came into force on 7th March 1995. The EMA and Environmental Fund were established immediately, however, the establishment of the Commission was delayed for five years. One of the factors accounting for the delay in establishment of the Commission was doubt about the constitutionality of the provisions of the EM Act 1995 relating to the appointment of the members of the court raised by the Law Commission even before the Act was passed.[32] The fact that, in this context, the EM Act 1995 had been brought to

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[19] CDA *"Comments on the Environmental Management Bill, 1994"*, § 43 - 44

[20] The Upper House of T&T's bi-cameral Parliament. Section 40 of the Constitution provides that the Senate shall consist of 31 appointed persons, 16 nominated by the Government; 6 nominated by the Opposition; and 9 Independent Senators, "appointed by the President in his discretion from outstanding persons from economic or social or community organisations or other fields of endeavour."

[21] *Hansard*, Senate Deb 10 January 1995, vol 42, 1059 (Sen. M. Mansoor); Senate Deb 17 January 1995, vol 41, 1080 (Sen. K. Persaud-Bissessar)

[22] [1960] All ER 65

[23] *Hansard*, Senate Deb 17 January 1995, vol. 42, 1107 (Hon. K. Sobion)

[24] Ibid, 1093-4 (Sen. M. Daly SC).

[25] *Hansard*, Senate Deb 24 January, 1995,vol. 42, 1236-1238

[26] *Hansard*, Senate Deb 10 January 1995, vol 42, 1071 (Sen. S. Capildeo)

[27] ibid, 1050 (Sen. C. Robinson-Regis)

[28] ibid, 1070 (Sen. S. Capildeo); Senate Deb 17 January 1995, vol 42, 1087 (Sen. K. Persad-Bissessar); 1094 (Sen. M. Daly SC)

[29] ibid, 1095 (Sen. M. Daly SC)

[30] ibid, Senate Deb 24 January 1995, vol 42, 1265-1270

[31] *Hansard*, House Deb 10 February 1995, vol 49, 990 (Hon. P. Nicholson)

[32] Letter of 8 February 1995 from Justice Guya Persaud, Chairman of the Law Commission, to Dr. Shafeek Sultan-Khan, Advisor to the Minister of Planning & Development, referring to a previous letter of 10 January 1995, read into the record of Parliament by the Attorney General, Hon. R. L. Maharaj, during debate on the *Environmental Management*

Parliament for enactment by a simple majority was later described as a "confidence trick" played on Parliament by the then Government.[33] As the Government's majority in Parliament did not give it the numbers to secure a special majority in both Houses, however, it is evident that Government had little option but to take this course to satisfy the conditions of its loan from the Inter-American Development Bank.

The Law Commission's opinion was founded on the provisions of Chapter 7 of the *Constitution of the Republic of Trinidad and Tobago* (the Constitution)[34] relating to the appointment of members of the judiciary and the decision of the Privy Council in the Jamaican Gun Court case of *Hinds v the Queen*.[35] Under the Constitution members of the judiciary[36] are to be appointed by the President[37] acting on the advice of the Judicial and Legal Services Commission (JLSC).[38] This is a body established by the Constitution that is chaired by the Chief Justice, to which appointments are made by the President after consultation with the Prime Minister and Leader of the Opposition.[39] All the provisions of the Constitution relating to the appointment of members of the judiciary are entrenched and cannot be altered other than by a Bill supported by the votes of two-thirds of the members of both Houses of Parliament.[40]

In *Hinds v The Queen* the Privy Council had to consider the constitutionality of an Act passed by a simple majority, which purported to confer powers analogous to those of the Supreme Court on a tribunal comprised of three magistrates, whose appointments, unlike those of judges of the Supreme Court, were not protected against legislation passed by a simple majority and depended upon the goodwill of the party in power. The Privy Council held that, while there is nothing to prohibit Parliament from establishing a court under a new name, Parliament is not entitled to vest in a court comprised of members of the lower judiciary a jurisdiction that forms part of the existing jurisdiction of the Supreme Court, as this would be an infringement of the separation of powers enshrined in the Jamaican Constitution and all others of the "Westminster model."[41]

The EM Act 1995 provided for the Chairman and five other members of the Commission, including a Deputy Chairman, to be appointed and removed (on grounds of inability, misbehaviour or conflict of interests) by the President.[42] Under the Constitution, in the exercise of this function the President must act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.[43] With the exception of the Chairman and Deputy Chairman, who must be attorneys at law of at least ten years standing, the members of the court are lay-persons qualified for appointment by virtue of their knowledge of or experience in environmental issues, engineering, the natural sciences or the social sciences. The jurisdiction and powers of the court may be exercised by a panel of three,[44] the Chairman or the Deputy Chairman and two other members, presided over by the Chairman or Deputy

(Amendment) Bill 1999. *Hansard,* Senate Deb 1 December 1999, vol 18, 12

[33] *Hansard,* Senate Deb 16 November 1999, vol 17, 549 (Sen. M. Daly SC)

[34] Schedule to the *Constitution of the Republic of Trinidad and Tobago Act*, Act 4 of 1976, Chap.1:01 [Revised Laws 2016]

[35] [1977] AC 195 (PC); [1975] 24 WIR 326 (PC)

[36] Other than the Chief Justice, who is to be appointed by the President, after consultation with the Prime Minister and Leader of the Opposition, pursuant to s 102 of the Constitution (n 34).

[37] The President is the ceremonial Head of State of the Republic. Chapter 3 of the Constitution deals with this office.

[38] (n 34) s 104

[39] ibid s 110

[40] ibid s 54(2)(a)

[41] The Privy Council's subsequent ruling in *Charles Matthews v The State (Trinidad and Tobago)* [2004] UKPC 33; [2005] 1 AC 433; that the separation of powers is not an overriding supra-constitutional principle which can be invoked to challenge the legal validity of the provisions of the Constitution *per se*, does not affect this decision.

[42] (n 2) s 82

[43] (n 34) s 81(1).

[44] Except, as provided by section 84(2), that any matter may be decided, with the consent of the parties, by the Chairman or Deputy Chairman sitting alone; or any contested matter concerning practice or procedure may be determined by the Chairman, Deputy Chairman or any member who is a lawyer appointed by the Chairman, sitting alone; or any uncontested matter of practice or procedure may be decided by any member assigned by the Chairman, sitting alone.

Chairman.[45] Matters before the Commission are to be decided by the majority; but on questions of law the opinion of the presiding member prevails.[46]

Prior to enactment of the EM Act 1995 there were two comparable superior courts of record in existence in T&T, the Tax Appeal Board, established by the *Tax Appeal Board Act*,[47] and the Industrial Court, established by the *Industrial Relations Act*.[48] These courts are comparable to the Commission in that, whilst they are presided over by lawyers qualified for appointment to the judiciary, they are comprised in part of lay-persons. Both of the *Tax Appeal Board Act* and the *Industrial Relations Act* are immune to constitutional challenge on grounds that they infringe the fundamental rights and freedoms guaranteed by the Constitution, the former because it was a law in force at the time when the Constitution was adopted,[49] and the latter because it was enacted by a special majority,[50] but contrary to views expressed elsewhere,[51] this does not shelter them from challenge on other constitutional grounds. They differ from the EM Act 1995 in that the provisions for the appointment and removal of members of the Tax Appeal Board and the Industrial Court do not infringe the separation of powers and thus fall afoul of the principles in *Hinds v. the Queen*.

In 1997, after a change in Government and in the Board of the EMA, it was recognised that the main impediment to the implementation of the EM Act 1995 was the non-existence of the Commission, without which subordinate legislation could not be enforced.[52] Although it was not responsible for setting up the Commission, the EMA retained a consultant[53] to make recommendations for the establishment of the Commission. In his report,[54] the consultant made recommendations with respect to the mode of appointment of the Commissioners, necessary support staff, physical accommodation, office equipment and supplies, computer hardware and software requirements, and estimates of the projected initial capital costs and recurrent costs of establishing the Commission. As a result, estimates for the establishment of the Commission were included in 1998 Budget. In December 1997, however, the EMA's legal adviser drew the constitutional issue to the attention of the Board and the Minister.[55]

Shortly thereafter, the leading spokesman on environmental matters in Parliament began to ask questions about the delay in establishing the Commission. In February 1998, in response to the first such question,[56] the Minister of Planning and Development stated that the Government was working speedily towards the establishment of the Commission and expected to do this in 1998.[57] In November 1999, in response to a Motion on the Adjournment of the Senate on the delay in establishment of the Commission, in which the implications of the failure to establish the Commission were fully ventilated,[58] the Minister of the Environment indicated that Government was about to make the necessary amendments to the EM Act 1995 in order to establish the Commission and had in fact introduced legislation in the House of Representatives for this purpose.[59]

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[45] (n 2) s 84(1)
[46] ibid s 84(13)
[47] Act 29 of 1966; Chap 4:50 [Revised Laws 2016]
[48] Act 23 of 1972; Chap 88:01 [Revised Laws 2016]
[49] Under s 6 of the Constitution, (n 34)
[50] ibid
[51] *Hansard*, Senate Deb 16 November 1999, vol 17, 543 (Sen. C. Cuffee-Dowlat)
[52] In a Juhel Browne article entitled, "Lonely Legal Waters for Oil Spill Victims", published in the *Sunday Guardian* on November 12, 2000, the EMA explained that persons seeking damages for an oil spill at Sea Lots would have to pursue individual civil claims against the polluter, as in the absence of the Commission the draft Water Pollution Rules had not been laid in Parliament; however, the EMA expected that this deficiency would be remedied soon.
[53] Justice of Appeal J. Davis (Retired).
[54] Environmental Management Authority, *Final Report of the Consultant Appointed to Make Recommendations for the Establishment of the Environmental Commission* (Undated)
[55] Florabelle Grenade-Nurse, Manager Legal and Enforcement Services, *'Note to the EMA Board on Legal Issues Concerning the Establishment of the Environmental Commission'*, (23 December 1997)
[56] *Hansard*, Senate Deb 17 February 1998, vol 17, 65 (Sen. Prof. J.S. Kenny)
[57] ibid 66 (Hon. T. Sudama)
[58] *Hansard*, Senate Deb 2 November 1999, vol 10, 442-5 (Sen. Prof. J.S. Kenny)
[59] ibid 446 (Hon. Dr. R. Mohammed)

Repeal & Re-enactment of the EM Act

The legislation to which the Minister referred was a short Bill entitled the *Environmental Management (Amendment) (No.2) Bill 1999*, which was introduced in the House of Representatives on 20th October 1999. As stated in the Explanatory Note to the Bill and by the Minister in piloting the Bill in the House,[60] the principal purpose of this Bill was to amend the provisions of the EM Act 1995 to confer on the members of the Commission the independence and security of tenure of High Court judges. To this end, the Bill provided for the Commission to comprise a Chairman and Deputy Chairman, being Attorneys-at-Law of at least ten years standing "experienced in environmental issues", to be appointed by the President acting on the advice of the JLSC.[61] It also provided for the appointment by the President[62] of six lay assessors, qualified for appointment by virtue of their knowledge of or experience in environmental issues, engineering, the natural sciences or the social sciences, to be "attached to the Commission." The function of these lay assessors was to advise the Commission on matters of fact, but they would have no vote in decisions of the Commission.[63]

The Bill also contained a clause amending the provision of the EM Act 1995 dealing with the appointment of the Managing Director of the EMA.[64] It was this provision that attracted most comment in the debate on the Bill in the House,[65] and the Bill was passed in the House on 5th November 1999, with only minor amendments.[66] In the Senate, however, the proposed changes to the composition of the Commission, in particular the demotion of the lay members to the position of non-voting advisors on matters of fact, attracted vigorous opposition from the Opposition and several Independent Senators.[67] These objections provoked an Independent Senator to suggest that the problem could be resolved by the enactment of the amending legislation by a special majority, given that Government was simply seeking to cure a defect in legislation originally enacted by the Opposition.[68] This intervention ultimately led to the Attorney General extracting from the leader of the Opposition in the Senate an undertaking to support the legislation, if the Government brought the EM Act 1995 back to Parliament in its original form for re-enactment by a special majority.[69]

A fortnight later the Attorney General returned to the Senate with a Bill to repeal and re-enact the EM Act 1995 by a special majority. Several Senators then indicated that it was their expectation that the relevant provisions would have been amended to provide for the appointment of the Chairman and Deputy Chairman of the Commission to be made by the President on the advice of the JLSC.[70] The Leader of the Opposition in the Senate stated that the Opposition was prepared to support this change to the 1995 Act, if it would get the Commission going.[71] The Attorney General, however, insisted that the Act be re-enacted in its original form, as previously agreed, and ultimately the Bill was passed unanimously. A month later, it was laid in the House and after brief debate it was also passed unanimously.[72] As a result, with effect from 8th March 2000 when the re-enactment came into force,

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[60] *Hansard*, House Deb 29 October 1999, vol 1, 504 (Hon. Dr. R. Mohammed)

[61] *Environmental Management (Amendment) (No2) Bill 1999)*], cl 6

[62] Acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, per s 81(1) of the Constitution, (n 34).

[63] (n 61), cl 7

[64] ibid cl 3

[65] *Hansard*, House Deb 29 October 1999, vol 1, 517 (Hon. C. Robinson-Regis), House Deb 5 November 1999, Vol 1, 551-3 (Hon. M. Joseph); 555-6 (Hon. R. Mohammed)

[66] ibid, House Deb 5 November 1999, vol 1, 575

[67] ibid Senate Deb 16 November 1999, vol 17, 514-5 (Sen. Nafessa Mohammed); 521-2 & 528 (Sen. Prof. J.S. Kenny); 528-9 (Sen. Prof. J. Spence); 531-3 (Sen. Prof. K. Ramchand); 550 (Sen. M. Daly SC); 554 (Sen. D. Mahabir-Wyatt); Senate Deb 30 November 1999, vol. 1, 818 (Sen. Dr. E. St. Cyr)

[68] ibid Senate Deb 16 November 1999, vol 1, 549-553 (Sen. M. Daly SC)

[69] Ibid Senate Deb 1 December 1999, vol 18, 11-17

[70] ibid Senate Deb 14 December 1999, vol 1, 374 & 378 (Sen. Prof. J.S. Kenny); 378 (Sen. Dr. E. St. Cyr); 380 (Sen. M. Daly SC)

[71] ibid, 376 (Sen. Nafessa Mohammed)

[72] ibid, House Deb 14 January 2000 & 21 January 2000, vol 1, 487-495

the legislation was renamed the *Environmental Management Act, 2000* (EM Act 2000).[73]

Consequently, the only differences between the EM Act 1995 and the EM Act 2000 are the insertion into the preamble of the Act of a recital that "it is intended by this Act to alter the Constitution" and amongst the provisions of the Act of a new subsection declaring that, "This Act shall be construed as altering sections 104 to 107, 136 and 137 of the Constitution";[74] and the addition at the end of the Act of two sections, repealing the EM Act 1995 and retrospectively validating everything done under it,[75] and two recitals certifying that the Act was passed by a two thirds majority in both Houses of Parliament. However, doubt has been cast on the validity of this means for circumventing the provisions of the Constitution. Commenting on the passage in Barbados of legislation inconsistent with the fundamental right to property by a majority required for a constitutional amendment, for the express purpose of ensuring the constitutionality of the Act, DeMerieux states that:

> "[R]esort has been had to the dubious device of a supposed constitutional amendment ... No doubt it is being sought to declared the Act constitutional rather than to amend the Constitution, and the new version of the amended section is unstated. The difficulty of all this is shown up in the practical consideration that, in the absence of litigation on the Act itself, one cannot tell the extent and scope of the supposed constitutional amendment."[76]

Another difficulty which the adoption of this expedient presents concerns the procedure required for making amendments to the EM Act 2000 in future. In the original debate in the Senate in 1995, one of the Senators speaking in support of the Bill acknowledged that it was "not perfect" and would "need considerable amendment as the years go by."[77] This observation proved perceptive and it is now generally recognised that many provisions of the legislation require amendment. The question that arises in this context is whether a special majority is now required to make any amendment to the legislation, as it is highly unlikely that the circumstances in which a special majority was obtained to re-enact the legislation will reoccur. The better view is that a special majority would only be required to amend the provisions of the EM Act 2000 that alter the Constitution, however, these have not been explicitly identified in the legislation. A further question therefore arises as to whether the other provisions of the Act can be severed from the sections that amend the Constitution or whether the amending provisions infect the entire Act.

Moreover, although this is not germane to the problem presented by the provisions of the legislation establishing the Commission, it is arguable that the mode of re-enactment adopted with respect to the EM Act in 2000 does not dispose of all objections concerning the constitutionality of the Act. This is because the Constitution of Trinidad and Tobago is *sui generis* in guaranteeing "the right of the individual to … the enjoyment of property and the right not to be deprived thereof without due process of law."[78] This has been held to be a "broad and majestic constitutional term … not limited to rights of property in the strict legal sense,"[79] casting doubt on the applicability of jurisprudence concerning the constitutionality of regulatory laws from countries where the prohibition is on the uncompensated "taking" of property,[80] which would include the decision of the Privy Council in *Belfast Corporation v O.D. Cars Ltd*.[81] Given that

[73] Act 3 of 2000, Chap.35:05 (Revised Laws 2016)

[74] ibid s 1(2); the Sections cited deal with the Appointment of Judges, Oaths to be taken by Judges, Judges' Tenure of Office and Removal from Office.

[75] ibid s 97 & s 98

[76] Margaret DeMerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions*, (Faculty of Law Library, University of the West Indies 1992) 94

[77] *Hansard*, Senate Deb 10 January 1995, vol 42, 1040 (Sen. D. Mahabir-Wyatt)

[78] (n 34) s 4(a)

[79] *Krakash Singh v A.G. of Trinidad and Tobago,* (High Court Action No. 2443 of 1982) (Deyalsingh J)

[80] See: Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation*, (Island Press 1999)

[81] (n 22)

Parliament in its wisdom thought it necessary to re-enact the *Town and Country Planning Act* [82]and retrospectively validate everything done under it in 1980,[83] in the manner and by the three-fifths majority in both Houses required to validate infringements of the fundamental rights and freedoms guaranteed by the Constitution,[84] it is arguable that the EM Act required enactment in the same way and that the manner of its re-enactment in 2000 does not entirely cure its unconstitutionality.[85]

Establishment of the Court and Hiatus in Operations

A further delay of some eight months transpired before the members of the Commission were appointed, provoking further comment in Parliament concerning the impact of the failure to establish the Commission on the efficacy of the EMA, during the Budget Debate in September 2000.[86] The Commission was finally set up on 30 October, 2000, however, the first case was not filed in the Commission until 25 September, 2002 and the first sitting of the Commission on the matter, for directions, took place on 1 October 2002, some 23 months after the Commission was established. In the interim, substantial capital costs were incurred to refurbish rented premises to accommodate the special needs of the Commission; and the administrative costs of running the Commission, including the cost of salaries and perquisites of office for two Judicial and four lay-Commissioners, a Registrar and a staff of clerical and secretarial personnel, were accumulating, although the Commission was idle.

The reason that the Commission had no caseload for nearly to two years after it was set up is that there was a hiatus between the coming into force of subordinate legislation made under the EM Act 2000 and the emergence of cases arising from the enforcement of that legislation. In this context, the main factor that accounts for the under-utilisation of the Commission can be seen to be the limited jurisdiction that the EM Act 2000 confers on the Commission, which is neither horizontally nor vertically integrated. In his 1995 opinion on the EM Bill,[87] the Chairman of the Law Commission observed that, although "the legislation seems to drift towards the creation of a superior court of record, the body created has the characteristics of an inferior tribunal." One of the alternatives he recommended for resolving the constitutional problem posed by the Bill was that the Commission should be established as an inferior tribunal, which is a creation of statute with prescribed powers, as it would be exercising "severely circumscribed judicial functions."

Under the EM Act 2000,[88] the Commission has jurisdiction over five types of matters. First, applications by the EMA for the enforcement of final Administrative Orders issued and Consent Agreements entered into under the Act and for the determination of "administrative civil assessments" of the amount of damages and compensation payable for the violation of Administrative Orders made by the EMA. Second, applications for the deferment of decisions by the EMA to undertake emergency response activities or to designate environmentally

[82] (n 9). Although this Act was enacted in 1960, before T&T attained independence, it did not come into force until 1969.

[83] By the *Scheduled Ordinances (Re-enactment, Commencement and Validation) Act*, Act 31 of 1980

[84] Under section 13 of the Constitution, (n 34)

[85] The decision of Dean-Armorer J in *Trinidad and Tobago Civil Rights Association v Patrick Manning*, (n 134), suggests otherwise; however, the weight of the decision on this point is doubtful. In her statement of the issues in the matter, the Trial Judge conflates the point that the EM Act 2000 breaches the fundamental rights and freedom enshrined in the Constitution with the question of whether there had been a breach of the constitutional principle of the separation of powers with respect to the appointment of the Commissioners. Her brief ruling that, "It seems to me that this right [to a fair hearing in accordance with the principles of fundamental justice enshrined at s 5(2)(e) of the Constitution] must be informed by the Constitution, the common law and the constitutionally passed Acts of Parliament," falls under the heading 'Separation of Powers' and leaves much to be desired by way of the statement of reasons.

[86] *Hansard*, Senate Deb 12 September 2000, vol 21, 204-5 (Sen. Prof. J.S. Kenny)

[87] (n 32)

[88] (n 73) s 81(5)

sensitive areas or species. Third, appeals generally against decisions or actions of the EMA that are specifically authorised by the Act and particularly appeals against decisions to refuse certificates of environmental clearance or grant such certificates subject to conditions, to designate environmentally sensitive areas or species, and to disclose information or materials claimed to be trade secrets or confidential business information. Fourth, direct private party actions instituted under the provision[89] that gives individuals or groups expressing a general interest in the environment or a specific concern with respect to a claimed violation of the Act the right to institute a civil action to enforce certain environmental requirements, as defined in the Act.[90] Fifth, any other matters that may be prescribed or arise under the EM Act 2000 or any other written law, where jurisdiction is specifically vested in the Commission.

In his 1997 report,[91] Justice Davis analysed the nature of the jurisdiction to be exercised by the Commission. He noted that, while the Act does not give the Commission a criminal jurisdiction, it creates several criminal offences, two indictable offences of reckless endangerment[92] and three summary offences relating to ethical prohibitions and failing to disclose conflict of interests.[93] Additionally, the Act confers upon the Minister the power to make Regulations prescribing additional summary offences. He pointed out that all indictable offences are triable in the Assizes (the criminal side of the High Courts), after a Preliminary Inquiry has been carried out in the Magistrate's Court,[94] and all summary offences are prosecuted in the Magistrate's Courts under the *Summary Offences Act*.[95] He also noted that the Act provides that the EMA may, in addition to or in lieu of any other recourse provided by the Act, seek restraining orders or other injunctive or equitable relief and various orders to prevent violations of the Act,[96] and opined that the EMA would have to pursue these remedies in the High Court. He connected these provisions to another provision of the Act which authorises the EMA to institute or otherwise to be a party to any legal proceedings before the Commission or any other court.[97]

These observations, which illustrate that the Commission does not have exclusive jurisdiction even with respect to proceedings to be taken to enforce compliance with the EM Act 2000, underline the fact that the establishment of the Commission did not address the major problems of environmental law enforcement in T&T. Prior to the enactment of the EM Act 1995, there were already over forty laws in force in T&T that contained provision for aspects of environmental protection and management.[98] The majority of these laws are of the traditional command and control type and the major factors hampering their enforcement were known to be the general failure to make subordinate legislation for their implementation; the lack of adequate resources for their enforcement; the fact that they generally had to be enforced by means of summary proceedings in the Magistrate's courts, where there was a huge backlog of cases including prosecutions for what were considered more serious offences; and the fact that breaches of these environmental laws were punishable by archaic fines the real value of which had been which had been eroded by the effluxion of time and currency devaluation.[99]

Additionally, where the existing legislation provides for alternative means of redress, these mechanisms were generally inoperative as the result of the failure of Government to implement the

[89] ibid s 69
[90] ibid s 62
[91] (n 54)
[92] (n 73) ss 70(1) & (2)
[93] ibid s 94(1) & (2) & s 95(4)
[94] Under the *Indictable Offences (Preliminary Enquiry) Act*, Act No.12 of 1917, Chap.12:01 [Revised Laws 2014]
[95] Act No.31 of 1921, Chap. 11:02 [Revised Laws 2009]
[96] (n 73) s 68
[97] ibid s 92; however, in practice the Commission has interpreted s 68 as giving it the jurisdiction to make such orders and has granted the EMA interlocutory injunctions in at least two decided cases, *Environmental Management Authority v Michael Trestrail*, EAA 002 of 2011, and *Environmental Management Authority v George Aboud & Sons Limited and Las Cuevas Properties Limited*, EAA 001 of 2019. This construction of the relevant provisions has not been tested on appeal.
[98] James Report (n 5)
[99] Toppin-Allahar Report (n 5)

relevant provisions of existing laws. The most egregious example of this was the abject failure of Government to set up the Oil & Water Board, the statutory tribunal provided for by the *Oil and Water Board Ordinance*[100] for over thirty years. This tribunal was vested with exclusive jurisdiction to hear applications for compensation from persons suffering loss and damage as a result of oil pollution events. As a result, in a 1991 case the High Court held that it had no jurisdiction to hear an action filed by persons aggrieved by the pollution of their land as a result of petroleum operations by a State-owned company.[101] This situation was specifically mentioned in Parliament during debate on the EM Act 1995,[102] as the Oil and Water Board had not yet been established when this legislation was introduced.

In fact, the only forum in which there was a record of successful environmental litigation was the superior courts of record on the civil side, both in the areas of private and public law. The jurisprudence of T&T includes several civil cases involving common law remedies to environmental problems, including two relatively important precedents, from Trinidad[103] and Tobago[104] respectively, concerning injunctive relief for nuisances. There had also been some Judicial Review actions in town and country planning matters with an environmental dimension, including a novel case decided by the Privy Council.[105] More recently, environmental issues have been the subject of Constitutional cases, notably a 1993 case[106] that attracted comment in Parliament during the debates in both Houses on the EM Act 1995.[107] Such cases do not arise frequently; however, when they have, the ordinary civil courts proved quite competent to adjudicate on them. This certainly begs the question as to whether it was either necessary or appropriate for the environmental court in T&T to be established as a superior court of record; which only a review of the environmental cases coming before the courts after the establishment of the Commission can answer.

Environmental Litigation Following Establishment of the Court

In 2002 the first two cases to be brought against the EMA were decided by the courts. Both related to the grant or refusal of a Certificate of Environmental Clearance (CEC), the form of environmental permit required under the EM Act 2000,[108] with respect to activities designated in the *Certificate of Environmental Clearance (Designated Activities) Order 2001*,[109] with effect from 7th July, 2001 when the *Certificate of Environmental Clearance Rules 2001* (the CEC Rules)[110] came into force. These cases are of special interest because taken together they underscored the doubts cast, before and after the establishment of the Commission, on the necessity for the creation of a special court for environmental cases in T&T.

The first case, *Fishermen & Friends of the Sea v Environmental Management Authority & BP T&T LLC (FFOS v EMA & BPTT)*,[111] an *ex parte* application for leave to apply for Judicial Review of

[100] Chap. 26 No. 6, Laws of T&T [1950 Revision]

[101] *Dookhie & Mungroo v T&T Oil Company (TRINTOC),* (reported in the *Trinidad Guardian* newspaper, 22 March 1991)

[102] *Hansard*, House Deb 10 February 1995, vol 49, 1066 (Hon. S. Panday)

[103] *Stollmeyer & Others v Trinidad Lake Petroleum Co Ltd* [1918] AC 485; *Stollmeyer v Petroleum Development Co Ltd* [1918] AC 498

[104] *Grayson v Quinn* [1963] 6 WIR 109-121

[105] *Lopinot Limestone Ltd v Attorney General* [1984] 34 WIR 299 (CA); [1987] 36 WIR 389 (PC). See: Christine Toppin-Allahar, 'Lopinot Limestone Limited v Attorney General of T&T: A Retrospective Analysis' [1999] 32(1) Journal of the Association of Professional Engineers of Trinidad & Tobago, 65

[106] *Jabar & Jabar v. the Minister of Agriculture & the Attorney General of Trinidad and Tobago* (High Court Action No 630 of 1993; 28 July 1993) (Lucky J)

[107] *Hansard*, Senate Deb 10 January 1995, vol 42, p 1011 (Sen. M. Daly SC); House Deb 3 February 1995, vol 49, p 929-930, 936 (Hon. C. Imbert); House Deb 10 February 1995, vol 49, p 1006-1009 (Hon. K. Rowley)

[108] (n 73) s 35

[109] SI No.103 of 2001

[110] SI No.104 of 2001. The Designated Activities Order and CEC Rules are available on the EMA's website: www.ema.co.tt

[111] High Court Action No. 1715 of 2002

the grant of a CEC, was also the first case brought under the *Judicial Review Act* (the JR Act) enacted in 2000,[112] to be determined by the High Court. The application was filed by FFOS, an environmental non-governmental organisation (NGO), on 21 May 2002, almost six months after 29 November 2001 when the EMA granted to BPTT a CEC for a US$6.5 billion dollar project to upgrade an existing offshore drilling platform, install two new platforms and two infield submarine pipelines, and a new 48 inch trunk offshore-onshore pipeline connecting to an existing 36 inch cross-country pipeline. The application for leave was opposed by the EMA and BPTT, on the grounds that it had not been filed within the maximum three-month period allowed by the Act and that there was no good reason for extending that period.[113]

In his judgment in the High Court,[114] the Trial Judge found that the reasons advanced by FFOS for the undue delay in filing the case were not well-founded. Moreover, having regard to the fact that BPTT, relying on the CEC, had proceeded apace with the project at considerable expense, and without any notice from FFOS of its intention to mount a legal challenge to the CEC, there would be substantial prejudice to BPTT if the time allowed was extended. He reasoned that it is important to good administration that the decisions of the EMA, particularly one on which third parties are relying, be treated with decisiveness and finality. Additionally, he concluded that there was little merit in FFOS's case and ruled that the balance must come down against the grant of leave to apply for Judicial Review. This decision was upheld on appeal by the majority of the Court of Appeal[115] and by the Privy Council unanimously.[116]

The fact that this case was filed in the Supreme Court, rather than in the Commission (which at that time had been established for more than a year and a half but had not yet heard a single case), caused some consternation. By its own admission, FFOS resorted to Judicial Review proceedings only after concluding that the EM Act 2000 did not offer it any means of redress. In the initial hearing, Counsel indicated that the EMA proposed to take a preliminary point that the High Court was not the appropriate forum for consideration of the issues raised in the matter. In the final analysis, however, the EMA abandoned this point. If the EMA had pursued it, the Commission might have been spared the embarrassment of sitting idle while the first case to have been litigated with respect to the EM Act 2000 was being heard.[117] Moreover, given the subsequent course of environmental litigation in T&T, this omission may ultimately prove fatal to the Commission.

Hence, it came as a surprise that, in a brief observation at the end of his judgment in the Court of Appeal,[118] Nelson J.A. emphasized that he was not persuaded that FFOS did not have an alternative remedy by way of direct private party action before the Commission pursuant to section 69 of the EM Act 2000, but since the point had not been ventilated below or dealt with in the judgment at first instance, he expressed no concluded view on this point.

Section 69 of the EM Act 2000 confers on any private party the right to institute a civil action in the Commission against any other private party for a claimed violation of any of the environmental requirements specified in section 62, with certain

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[112] Act 60 of 2000; Chap 7:08 [Revised Laws 2016]

[113] The JR Act s.11 provides that an application for Judicial Review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application is to be made. The court may refuse to grant leave if it considers that there has been undue delay and the grant of the relief sought will cause substantial hardship to or prejudice the rights of any person, or would be detrimental to good administration.

[114] Judgment of Bereaux J, delivered 30 August 2002

[115] Court of Appeal No 106 of 2002; 4 August 2003; (Nelson J.A., Jones C.J. (Ag) concurring; Lucky J.A. dissenting)

[116] [2005] UKPC 32; [2005] 66 WIR 358

[117] The JR Act s 9 provides that the Supreme Court shall not grant leave for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances.

[118] (n 115), para 106

exceptions.[119] The issues raised by FFOS to show that their application for Judicial Review was justifiable in the public interest related solely to the transmission of additional natural gas through an existing cross-country pipeline; however, the transmission of additional natural gas through this pipeline was not part of BPTT's application to the EMA and hence was not covered by the CEC being impugned. If, as FFOS contended, this use of the existing pipeline constituted a significant modification to the existing activity and should have been subject to the CEC process, it is certainly arguable that it was open to FFOS to institute a direct private party action under the EM Act 2000 for a claimed violation of an environmental requirement, namely the requirement to apply for and obtain a CEC.

Moreover, FFOS may have been ill advised that it had no other recourse under the EM Act 2000. There is an obscurely worded provision in the Act that confers a right of appeal to the Commission on persons who submitted comments during the period allowed for public comment on an application that requires the preparation of an EIA.[120] As this right to appeal on the grounds that the EMA has not complied with the public participation requirements is conferred on persons who have submitted comments, it can only mean that an appeal lies against the subsequent failure of the EMA to give due consideration to those comments and to set out its responses to them and the basis for the final decision in the administrative record, as required by law.[121] Hence, unless their concerns about the EIA process, deficiencies in the TOR and reservations about the adequacy of the EIA reports were contrived after they submitted their comments, FFOS could possibly have filed an appeal to the Commission in accordance with section 30(1) of the EM Act 2000.[122]

While *FFOS v EMA & BPTT* was making its way through the hierarchy of ordinary courts, the second case brought against the EMA in 2002, *Talisman (Trinidad) Petroleum Ltd v Environmental Management Authority* (the *Talisman* case),[123] was filed in the Commission under sections 40 and 81(5)*(f)* of the EM Act 2000.[124] This case was a statutory appeal against the refusal by the EMA of Talisman's application for a CEC to carry out a 3D seismic survey, pursuant to a licence that the company had been granted under the *Petroleum Act* [125] to carry out petroleum exploration and production operations in a 438.43 km^2 area.[126] Talisman identified 374 km^2 of the licensed area as the survey area, of which 32 km^2 fell within the boundaries of the Nariva Swamp,[127] the wetland designated by

[119] The only applicable environmental requirement appears to be the one specified in s 62(*f*), to apply for and obtain a CEC. The only other subsection that could possibly have been relevant is s 62(*l*), the general requirement to comply with all other procedures, standards, programmes and requirements in such a manner as may be prescribed by rule or regulation, but this is one of the exceptions mentioned in s 69(1).

[120] (n.73) s 30(1)

[121] ibid s 29

[122] This point, mentioned by the author in Notes on the Pre-action Protocol, was raised by Senior Counsel for Alutrint in her submissions in the later case of *People United Respecting the Environment (PURE) & Rights Actions Group (RAG) v Environmental Management Authority, Alutrint Limited & The Attorney General*, CV2007-02263. It her Judgment delivered 16 June 2009, Dean-Armorer J accepted the existence of an alternative remedy [under s 30 & s 81(5) of the EM Act 2000], but ruled that it was unconscionable to refuse relief at the trial stage of the JR proceedings, *"when the Court has gone through the exercise of the review and found the decision reviewable",* notwithstanding the provisions of s.9 of the JR Act.

[123] No. EA3 of 2002; Notice of Appeal filed 25 September 2002

[124] Which confer on applicants the right to appeal against any refusal of a CEC and on the Commission the right to hear and determine such appeals.

[125] Act 49 of 1969; Chap 62:01, [Revised Laws 2016]

[126] This license had been issued in response to a successful bid made by Talisman before the CEC regime came into force; however, at the material time a CEC was required for the conduct of all works related to the exploration for crude oil and natural gas under the *Certificate of Environmental Clearance (Designated Activities) Order 2001*, (n 108), para 24.

[127] As defined in the Schedule to the *Forests (Prohibited Areas) Order*, (GN 125/1953), (Amendment 78/1993), made under the *Forests Act*, Act 42 of 1915; Chap.66:01 [Revised Laws 2016]. Parts of the survey area also fell with the Bush Bush Wildlife Sanctuary, established in 1968 under the *Conservation of Wildlife Act*, Act 16 of 1958; Chap.67:01 [Revised Laws 2016] and designated a Prohibited Area under the *Forests Act* in 1989; and the Nariva Wildbelt Forest

T&T as a Wetland of International Importance upon accession to the Ramsar Convention in 1993.[128]

Within 14 working days after acknowledging receipt of Talisman's application, the EMA indicated that it would be unable to grant a CEC, although the formal notice of refusal was not issued for another three weeks.[129] No request was made for an EIA to be carried out with respect to the proposed activity. Talisman appealed against this decision on several grounds, including illegality of the reasons for refusal of the CEC given by the EMA and legal defects in the process by which the EMA had arrived at its decision on the application. The basic thrust of the EMA's response was that it could not, as a matter of law, grant a CEC for a 3D seismic survey in the Nariva Swamp. In the judgment of the Commission,[130] the questions before the court were summarised as two-fold. First, whether the EMA's reliance on the Ramsar Convention, the *Forests Act*, the *Conservation of Wildlife Act* and the National Wetlands Policy was right in law as a basis to support its refusal to grant a CEC to Talisman. Second, whether, having regard to the information before it when it refused to issue a CEC, the EMA breached Talisman's right to a fair hearing and/or the procedure prescribed by the CEC Rules.

The Commission came to the conclusion that the first question must be answered in the negative and the second question must be answered in the affirmative. This decision is undoubtedly correct.[131] Although the *Talisman* case was the first matter decided by the Commission, the argument was confined to points of law and the judgment of the court was given by the Chairman of the Commission,[132] with the concurrence of the two lay members of the tribunal. Hence, the issues in the case could certainly have been decided by the ordinary courts, as was demonstrated by earlier environmental litigation relating to the same geographical area,[133] further underlining the question as to the need for a specialist environmental court in T&T.

Reserve, established in 1936 under the *State Lands Act*, Act 32 of 1919, Chap 57:01 [Revised Laws 2016], the former being wholly and the latter partly within the Nariva Swamp. In December 2006, four years after the Talisman case, the Nariva Swamp was also designated as an Environmentally Sensitive Area (ESA) under the EM Act 2000, by *The Environmentally Sensitive Areas (Nariva Swamp Managed Resource Protected Area) Notice 2006*, (LN 334 of 2006).

[128] *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (adopted at Ramsar, Iran (1971). Under Article 2.1, each contracting party must designate one or more suitable wetlands within their territory as Wetlands of International Importance.

[129] The application was refused on three grounds: (1) The clearance of vegetation, noise and disturbance associated with the proposed survey could potentially have a negative environmental impact and change the ecological character of the Nariva Swamp, hence it might lead to a contravention of Trinidad & Tobago's obligations under the Ramsar Convention and the precautionary principle is applicable; (2) The EMA intended to designate the Nariva Swamp as an Environmentally Sensitive Area (ESA) under the *Environmentally Sensitive Areas Rules* (LN No 37 of 2001); (3) The proposed activity would contravene existing policy, namely the National Wetlands Policy, and the protection conferred on the Nariva Swamp by existing laws, namely the *Conservation of Wildlife Act* and the *Forests Act*, (n 127).

[130] Delivered 18 December 2002.

[131] One of the most striking aspects of the Talisman case is that, because its decision was founded on the misconceived view that there was a legal prohibition on granting a CEC for petroleum exploration operations in the Nariva Swamp, the EMA refused a CEC without requiring an EIA; however, on appeal Talisman did not raise the point that the EMA ought not to have refused the application unless an EIA had been carried out, showing that the 3D seismic survey would potentially cause serious or irreversible damage to the Nariva Swamp. In what is arguably the most important if the briefest part of the judgment, the Commission interpreted the CEC Rules and the related provisions of the EM Act, with particular reference to the sufficiency of the information that should be before the EMA at various stages in the decision-making process. Although these pronouncements can be regarded as *orbiter dictum*, it is arguable that the Commission was wrong to suggest that, where there is evidence of possible adverse environmental impacts but there is insufficient evidence that these impacts can be mitigated, the applicant should be afforded an opportunity to persuade the EMA behind closed doors to grant a CEC, without having carried out an EIA. Any such practice could potentially undermine the scheme of the legislation and the transparency of the CEC process.

[132] Justice of Appeal Z. Hosein (Retired).

[133] *Jabar & Jabar v. the Minister of Agriculture & the Attorney General of Trinidad and Tobago*, (n106)

Constitutionality of the Court Tested

There was a change in Government in December 2001. On 16 October 2003, the then Chairman wrote to the Minister responsible for the Environment on behalf of the members of the Commission to advise the Government of the imminent expiry of their term in office, indicating that they were eligible for reappointment and willing to serve for another term.[134] The appointments of the original Commissioners expired at midnight on 29 October 2003, without any appointments having been made. Consequently, to the consternation of environmentalists,[135] for an appreciable period of time the Court was effectively disabled.

On 1st January 2004 new appointments were made, resulting in changes in the court's composition. The original Chairman, who had delivered the Commission's judgment in *Talisman* case, was not reappointed. The Deputy Chairman, a former Magistrate and Judge of the Industrial Court, was elevated to the position of Chairman and a former legal officer in the public service, specialising in petroleum law, was appointed as Deputy Chairman. Only three of the former lay members of the Commission were re-appointed for a second term. Both the new Chairman, who had first been appointed to the Commission by the previous Government now in opposition, and the Deputy Chairman, had close personal ties to the political party in power.[136]

On 10 February 2004, the T&T Civil Rights Association (TTCRA), a non-profit organization incorporated in March 2003, wrote a well-publicised letter to the Registrar of the Commission, copied to the Prime Minister, in which it expressed its dissatisfaction with the "handpicking" of Judges by the political arm of the State, attacked the failure of the Cabinet to appoint an independent committee to select new Commissioners and the failure of the Government to re-appoint the former Chairman, and called on the newly-appointed Commissioners to decline to perform judicial functions.[137] Receipt of the letter was acknowledged by the Commission, but otherwise the TTCRA received no response.[138]

On 20th February 2004, the TTCRA filed an application for Judicial Review against the Prime Minister, on behalf of thirty residents of the village of Tortuga, in the High Court.[139] In it they claimed that the villagers were desirous of filing a matter against the EMA in the Commission, but feared that the Commission as reconstituted would not be able to give them a fair and impartial hearing; further, as potential litigants, they were aggrieved by the Government's decision not to re-appoint the former Chairman contrary to his legitimate expectations, which was alleged to be an act done in bad faith and a breach of natural justice meted out to him. They further claimed that, notwithstanding the re-enactment of the EM Act 2000 by a special majority, Government's failure to appoint an independent Commission was unconstitutional, as it deprived them of their Constitutionally-protected rights to a fair hearing and due process of law,[140] and conflicted with a basic feature of the Constitution, namely the separation of powers, rendering the Commissioners appointments unlawful, null and void.[141]

The matter was heard in November 2004. The facts were not in issue. In her judgment,[142] delivered in June 2005, the Trial Judge held that, while the role of

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[134] *The Trinidad and Tobago Civil Rights Association v Patrick Manning*, (High Court Action No 447 of 2004) (Dean-Armorer J, 1 June 2005), p 7 para 14

[135] Gizelle Morris, 'Environmental Watchdog Abandoned by Govt' *Sunday Guardian* (Trinidad & Tobago, 2 November 2003) 5

[136] The Chairman is the daughter of a former People's National Movement (PNM) Mayor of Port-of-Spain, the capital city of T&T, and the Deputy Chairman is the wife of a former Deputy Political Leader of the PNM, who had served as a Cabinet Minister in a previous PNM administration. See paragraph 4B of the Amended Statement of Claim filed on 11 March 2004 in High Court Action No.447 of 2004, (n 133).

[137] "Appointment of Judges Unconstitutional", *Newsday*, Monday, 16th February 2004 p A4

[138] (n 134) Amended Statement of Claim, para 37

[139] (n 134)

[140] (n 34), s 5(2)(e) & s 4(b)

[141] It is of interest to note that Ramesh Lawrence Maharaj S.C., the former Attorney General who piloted the EM Act 2000 through Parliament when the legislation was re-enacted by a special majority, was Counsel for the Applicants in the matter. Christopher Hamel-Smith S.C., to whom the author is indebted for providing a copy of the judgment, acted for the Respondent.

[142] (n 134), pp 57-60

Cabinet in selecting the Chairman of the Commission clearly compromises the public perception of the Commission's independence, the doctrine of separation of powers, though implicit in the structure of the Constitution, is not "an over-riding supra-Constitutional principle".[143] Hence, given the re-enactment of the EM Act 2000 by a special majority, those of its provisions which conflict with the provisions of the Constitution concerning the appointment and security of tenure of Judges are beyond challenge. Although the right to a fair hearing enshrined in the Constitution was not altered by the re-enactment of the EM Act 2000, the substance of this right must be informed by the Constitution, the common law and by constitutionally enacted Acts of Parliament, so this argument must also fail.[144]

Limited Jurisdiction Confirmed

In 2010 the Court of Appeal of Trinidad & Tobago was offered the opportunity to rule on the extent of the jurisdiction of the Commission in two appeals by way of Case Stated[145] from interlocutory decisions of the Commission which, although not formally consolidated, raised very similar issues and were heard together and disposed of in a single judgment.

The facts in the first case, *Fishermen and Friends of the Sea v Environmental Management Authority*,[146] are that in May 2003 the EMA had issued a Notice of Violation (NOV)[147] against the Atlantic LNG Company of Trinidad & Tobago (Atlantic LNG), following receipt of a formal complaint made by FFOS[148] that Atlantic LNG, having commenced construction works for an LNG plant without a CEC, were in breach of an environmental requirement.[149] In August 2004 the EMA stayed the NOV at the request of Atlantic LNG.[150] In June 2007, after discovering that the EMA was not actively enforcing the NOV, FFOS filed an appeal against the EMA in the Commission pursuant to sections 81(5)(a) and 81(5)(i) of the EM Act 2000.[151]

In the second case, *Southwest Tobago Fishermen's Association v the Environmental Management Authority*,[152] the facts are that in June 2008 the EMA granted a CEC subject to certain terms and conditions, including a requirement that mitigation measures be undertaken, to Petroleum Geophysical A.S. (PG) to carry out a 2-D Seismic Survey off the east, west and north coasts of Tobago for the purposes of oil and natural gas exploration. The following month the South West Tobago Fishermen's Association (SWTFA), an NGO said to represent a substantial number of fisher-folk in Tobago, wrote to the EMA alleging that PG was not complying with the CEC conditions and complaining that the EMA was not performing its statutory duty of monitoring compliance with the CEC pursuant to s.37 of the EM Act 2000. In December 2008 SWTFA filed an appeal against the EMA in the Commission pursuant to sections 81(5)(a), 81(5)(f) and 81(5)(i).[153]

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[143] Decision of the Privy Council in *Charles Matthews v. Attorney General*, [2004] UKPC 33, followed.

[144] As mentioned previously (see n 85), the Court's reasoning on this point is not persuasive; however, since there is a right of appeal to the Court of Appeal from decisions of the Commission on questions of law under s.87 of the EM Act 2000, it is arguable that the Commission satisfies the test for compliance with the guarantee of fair hearing by an independent and impartial tribunal in accordance with to Art.6(1) of the European Convention applied by the ECHR in the case of *Bryan v UK* (1995) 21 EHRR 342, namely that the tribunal is subject to subsequent control by a judicial body which itself provides that guarantee.

[145] Under the EM Act 2000 (n 73) s 87.

[146] Civil Appeal No199 of 2008

[147] Under the EM Act 2000 (n 73) s 63(1).

[148] ibid under s 69(1)(a).

[149] ibid under s 62(f).

[150] The reason for this EMA decision is not mentioned in the judgments in this case; however, the judgment of Stollmeyer J. delivered 22nd October 2004 in a separate Judicial Review case, *Fishermen and Friends of the Sea v. The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago* (High Court Action Cv. 2148 of 2003), reveals that the EMA issued a CEC Ref. No. CEC0114/2002 to Atlantic LNG on 6th June 2003.

[151] (n 73)

[152] Civil Appeal No.210 of 2009

[153] The provisions of the EM Act 2000 on which FFOS and SWTFA sought to found their appeals read as follows:

In a weak and self-serving judgment in the first case,[154] the Commission held that it had jurisdiction pursuant to section 81(5)(a) to hear appeals from any decision of the EMA which the EM Act 2000 has specifically authorised.[155] The Commission arrived at this conclusion based on what they construed to be the literal meaning of subsection 81(5)(a), having regard to the proximity of the phrase "as specifically authorised by the Act" to the words "decisions of actions of the Authority". Having arrived at this conclusion, the Commission then held that FFOS had standing to appeal against the EMA's decision to stay the NOV because, having been precluded from bringing a private party action against Atlantic LNG by virtue of the issuance of the NOV by the EMA, FFOS had a legitimate expectation that the EMA would enforce the NOV, so Parliament must have intended it to have some recourse against the EMA's decision.[156] Additionally, in an audacious *orbiter dictum*, the Commission stated that, since it has the power in determining appeals to have regard to all the grounds that are applicable to proceedings under the JR Act,[157] "Having regard to section 9 of the JR Act the court is of the opinion that matters filed at the High Court seeking judicial review of a decision or action of the EMA should as a matter of law and of course be transferred to the Commission by the presiding Judge."[158]

In an equally superficial judgment in the second case,[159] the Commission adopted its own reasoning in the first case with respect to s.81(5)(a). They opined that the SWTFA had standing to appeal under this provision because a third party who may be affect by the activity to which a CEC relates would not have any grounds for judicial review but must have some legal recourse to force the EMA to do its statutory duty under s.37.[160] Even more remarkably, notwithstanding that s.40 of the EM Act 2000 (a provision which was not referred to in the judgment) expressly confers the right to appeal against the refusal or conditional grant of a CEC upon the applicant for a CEC only, the Commission held that SWTFA also had standing to appeal against such a decision pursuant to s.81(5)(f). Further, the Commission ruled that s.81(5)(i) provided yet another avenue for SWTFA to bring "an action" before the Commission. Their reasoning in this regard was that the word "or" which appears twice in s.81(5)(i) has a disjunctive function giving the Commission jurisdiction over three separate matters, "firstly, such other matters as may be prescribed by the Act ..., secondly matters that arise under the Act, and thirdly matters under any other written law where jurisdiction of the Commission is specifically provided."

These two interlocutory decisions were patently wrong for several reasons. Leaving aside the

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81. (5) The Commission shall have jurisdiction to hear and determine –

(a) appeals from decisions or actions of the Authority as specifically authorised under this Act;

(f) appeals from a decision by the Authority under section 36 to refuse to issue a certificate of environmental clearance or to grant such a certificate with conditions;

(i) such other matters as may be prescribed by or arise under this Act or any other written law, where jurisdiction in the Commission is specifically provided.

[154] *Fishermen and Friends of the Sea v Environmental Management Authority*, (EAP 005 of 2007). (judgment delivered 7 July 2008)

[155] Consequently, the Commission declined to rule on the submissions concerning their jurisdiction under s.81(5)(i), to which they returned in the second case.

[156] The decided cases on Judicial Review of the power of the Director of Public Prosecution (DPP) to take over and discontinue criminal proceedings initiated by a private person may be relevant here. See: Eddy Ventose, *Commonwealth Caribbean Administrative Law*, (1st ed, Routledge 2012) 81-83.

[157] (n 112). The grounds mentioned are set out in s.5(3).

[158] The JR Act s.9 provides that, *"The Court shall not grant leave to an applicant for judicial review of a decision where any other written law provides an alternative procedure to question, review or appeal that decision, save in exceptional circumstances*."

[159] *South West Tobago Fishermen's Association v Environmental Management Authority*. (EAP 004 of 2008), (Judgment, 30 July 2009)

[160] It seems self-evident that it would have been open to the SWTFA, either as a person with a sufficient interest in the matter within the meaning of s.6 of the JR Act or alternatively a person suing in the public interest under s.7, to seek an order of mandamus in JR proceedings in the High Court to compel the EMA to perform this statutory duty, on the grounds specified in s.5(3)(l) of the JR Act.

Commission's grammatical legerdemain, to begin with the Coram asked itself the wrong question. It is trite law that there is no inherent right of appeal against administrative decisions, actions or omissions, and every such right must be conferred by statute and is governed by the express provisions of the statute.[161] Section 81(5) of the EM Act 2000 confers on the Commission the jurisdiction to hear and determine *inter alia* appeals; it does not create any rights of appeal. The first question that the Commission should have asked itself therefore is, "Does the Act create a right to appeal against the particular decision/action being challenged and, if so, upon whom is the right of appeal conferred?"

All the grounds on which FFOS sought to appeal in the first case[162] related to the NOV served by the EMA on Atlantic LNG. There is no provision in the EM Act 2000 conferring on any person, including the person on whom a NOV has been served, a right of appeal against a NOV. On the contrary, a right of appeal only arises under s.65(2)(a) after an Administrative Order has been served to enforce the NOV and that right is conferred solely on the person on whom the Order was served. The grounds on which the SWTFA sought to appeal in the second case[163] related to the exercise by the EMA of its powers and the performance of its duties under s.35, s.36 and s.37 of the EM Act 2000. As mentioned previously, a right to appeal against decisions made by the EMA in the exercise of its powers under s.36 is clearly conferred by s.40 solely on applicants for CECs and jurisdiction to hear and determine such appeals is specifically conferred on the Commission by s.81(5)(f), In addition, as mentioned previously, a right of appeal with respect to s.35(5) is conferred in a round-about way by s.30(1) on any "interested person", namely a person who has submitted a written comment on the Environmental Impact Assessment during the public comment period.[164] No provision is made for recourse to the Commission in connection with the performance by the EMA of its statutory duties under s.37.[165]

Having considered these provisions it becomes apparent that s.81(5)(a) of the EM Act 2000 is a "catch all" provision the purpose of which is to vest the Commission with the jurisdiction to hear appeals provided for by the Act that are not specifically mentioned in the following paragraphs of that subsection, including but not limited to appeals under s.65(2)(a) and s.30(1).[166] Applying the principle "*expressio unius est exclusio alterius*" it is also clear that, since s.40 confers the right to appeal against decisions made by the EMA under s.36 solely on the applicant for a CEC, s.81(5)(f) cannot be construed as conferring the right to make such appeals on any other person. Logic also suggests that the purpose of s.81(5)(i) is to allow for the expansion of the limited jurisdiction of the Commission, by means both of Rules and Regulations made under the EM Act 2000 and other primary legislation. Indeed, if the modifying phrase "where jurisdiction in the Commission is specifically provided" after the comma in s.81(5)(i) had been placed at the beginning of that paragraph rather than at the end, this would be abundantly clear.

In its brief and lucid judgment in both cases,[167] the Court of Appeal gently reprimanded the Commission for over-reaching its limited jurisdiction. Based on a more rigorous grammatical analysis of that provision, the Court concluded that under s.81(5)(a) the jurisdiction of the Commission is to hear appeals specifically authorized by the Act. In addition, the Court pointed out that the interpretation placed on that provision by the Commission would lead to the

[161] H.W.R. Wade, *Administrative Law*, (5th ed Clarendon Press Oxford 1982), citing *AG v Sillem* [1864] 10 HLC 704*; R v Special Commissioners of Income Tax* [1888] 21 QBD 313

[162] Set out in paragraph 8 of the Commission's judgment, (n 155).

[163] Although the grounds are not listed in the Commission's judgment, (n 160), they can be deduced from the submissions of Counsel for the SWTFA referred to in paragraphs 11 and 15 of the judgment.

[164] See n122

[165] But, as mentioned previously (see n 161), the EMA's performance of its statutory duties under s.37 is susceptible to judicial supervision by the High Court under the JR Act.

[166] There is at least one other right of appeal the hearing and determination of which by the Commission depends upon s.81(5)(a), namely the right of permit or licence holders to appeal against the revocation, suspension, variation or cancellation of permits and licences, pursuant to s.48(8) of the EM Act 2000.

[167] Judgment delivered 28 June 2010, Jamadar JA; Archie CJ and Mendonca JA concurring

illogical, counter-productive and senseless result of enabling members of the public to appeal against any number of purely administrative decisions or actions that the Act authorises the EMA to take,[168] and most absurdly it would preclude appeals against unauthorized decisions of the EMA.[169] Further, this interpretation is consistent with the status of the Commission as a court of limited jurisdiction[170] and, as decisions of the EMA are subject to Judicial Review in the usual manner, this does not deprive any person of their constitutional rights to access to justice and the protection of the law, the appropriate course of action being determined by s.9 of the JR Act.

In light of the interpretation given to s.81(5)(a), it is unsurprising that the Court ruled, with specific reference to the second case, that the right of appeal under s.81(5)(f) is limited to the person seeking a CEC, as provided for by s.40. As regards s.81(5)(i), the Court noted that this subsection does not provide access to the Commission by way of appeal at all. The jurisdiction that is conferred on the Commission by this section is limited to such "other matters" as may be prescribed by or arise under the EM Act 2000 or any other written law, but only where jurisdiction in the Commission to hear and determine such matters is specifically provided for in that legislation.

This litigation highlights the problems posed by the establishment of the Commission as a superior court of limited jurisdiction and the entrenchment of the provisions concerning the Commission in the EM Act 2000. The two erroneous decisions of the Commission that were overruled by the judgment of the Court of Appeal can best be understood as a desperate attempt by the Commission to give itself an increased case load and greater relevance, in the context of a very imbalanced cost/benefit scenario. Since a special Parliamentary majority is required to repeal or amend some or all of the provisions of Part VIII of the EM Act 2000, these decisions underline the need for further provision to be made under the EM Act or other relevant legislation to expand the jurisdiction of the Commission if it was not to remain a "white elephant" or, like other statutory bodies in the Caribbean,[171] to be allowed to fade into oblivion by means of the simple expedient of governmental omission to make the necessary appointments to keep it in existence.[172]

Conclusion

During the three-year term in office of the original Commissioners, only four statutory appeals were filed in the Commission, a couple of cases involving noise pollution and one concerning the conditions subject to which a CEC was granted by the EMA, which were evidently settled out of court, and the *Talisman* case.[173] During this period the Commissioners, of whom the Chairman and Deputy Chairman are employed full-time, were therefore engaged almost exclusively in extra-judicial activities, the major event being the organisation in 2003 of an international symposium on environmental law.[174] There was no discernible increase in the number of matters filed in the

[168] The examples given by the Court are s.9 (delegation of functions or powers); s.11 (appointment of personnel); s.20 (general powers linked to performance of functions); s.21 (appointment of Inspectors) and the decisions of the Board pursuant to s.6.

[169] The court went on to note that, in any event, in this case the Appellant/Respondent had been unable to identify in its grounds of appeal any decision or action of the EMA specifically authorised by the EM Act 2000 against which it was appealing.

[170] Reference was made by the Court to *dicta* by Baroness Hale in the judgment of the Privy Council in *Suratt & Others v Attorney General of Trinidad & Tobago*, [2007] UKPC 55.

[171] Examples include the Oil and Water Board in Trinidad & Tobago provided for by the *Oil and Water Board Ordinance*, [1950 Revision] Ch.26 No.6; the Conservation Commission in St. Kitts & Nevis provided for by the *National Conservation and Environmental Protection Act*, No. 5 of 1987; and the Land Conservation Board in St. Lucia provided for by the *Land Conservation and Improvement Act*, No.10 of 1992.

[172] See: Editorial, '*Environmental Commission Collapse?' Trinidad Guardian*, (Trinidad and Tobago, 18 March 2013); <http://www.guardian.co.tt/editorial/2013-03-18/environmental-commission-collapse > accessed 18 March 2013

[173] Anne Hilton, 'Inside the Environmental Commission' *Newsday* (Trinidad & Tobago, 21 November 2004) 20

[174]Environmental Commission's Symposium on Sustainable Development: A Legal Perspective (Hilton Hotel, Port of Spain, Trinidad & Tobago, 7th May 2003)

Commission during its second three-year term,[175] which expired on 31st December 2006, and the court again heard only one case, related to the denial by the EMA of a CEC applicant's claim for information to be treated as a trade secret or confidential business information.[176] Hence, the Commissioners continued to be involved mainly in extra-judicial activities, the highlight of which was the Launch of the Commission's Informational Material in 2005.[177]

During its third three-year term, with further changes to its composition, and, notwithstanding its best efforts to publicise its services, the Commission remained grossly under-utilised,[178] while litigants continued to file major environmental cases in the High Court.[179] A curious and utterly misconceived attempt was even made to obtain damages in a High Court Action for private nuisance pursuant to section 66(d) of the EM Act 2000, which provides for the making of Administrative Civil Assessments by the EMA or the Commission of damages for failure of a person to comply with applicable environmental requirements,[180] but the Master in Chambers rightfully held that the High Court had no jurisdiction to determine the matter.[181]

Accurate information with respect to the number and types of matters filed in the Commission after its first decade in operation are unavailable as annual reports have not been published on its website since 2007; however, it is reported that between 2000 and 2018, the Commission adjudicated on only 98 matters, of which only a small percentage made it to trial, none whatsoever going to trial between 2013 and 2016, after which the government failed to appoint any commissioners during the triennium 2016 to 2018.[182] Meanwhile, additional environmental cases were being determined by the regular courts of law. In addition to further litigation concerning the CEC/EIA process,[183] the Supreme Court and Privy Council have also adjudicated on judicial reviews of the compliance of the statutory rules governing charges for water pollution, the

[175] The statistics given in the Annual Report of the Environmental Commission (2005) for the total number of matters filed during the period 2000-2005 are as follows: Appeals 9; Administrative Orders 8; Consent Agreements 11; Applications 6; Direct Private Party Actions 0.

[176] *T&T National Petroleum Co Ltd v EMA*, (EAP 002 of 2006), (judgment dated 30 November 2006)

[177] Launch of the Environmental Commission's Informational Material, (Crowne Plaza Hotel, Port of Spain, Trinidad & Tobago, February 2005). The Informational Material comprises five pamphlets, being 'Guides to the Environmental Commission'; 'Applications for Deferment of Decisions made by the EMA'; 'Appeals against Decisions of the EMA'; 'Instituting Civil Actions (Direct Private Party Actions) Against Other Persons for Violations of Environmental Requirements'; and 'Mediation at the Environmental Commission'.

[178] The statistics given in the Annual Report of the Environmental Commission (2007) show no appreciable increase in the number of cases filed. Although two Direct Private Party Actions appear to have been filed in 2006, for the first time, only one appeal matter, *Michelle Dove v Environmental Management Authority*, (EAP No 003 of 2007), went to trial. The interlocutory judgment in this case was given 27 June 2007 by the Chairman and Deputy Chairman, the two legal Commissioners, sitting together.

[179] *Fishermen & Friends of the Sea v EMA & Atlantic LNG*, (High Court of Action No. 2148 of 2003, 22 October 2004) (Stollmeyer J); *The Trinidad and Tobago Civil Rights Association v Patrick Manning*, see (n 133); *Chatham Villagers v AG & Minister of Public Utilities & Environment*, CV2006-04141; *People United Respecting the Environment (PURE) & Rights Action Group (RAG) v EMA, Alutrint Ltd & The Attorney General*, CV2007-02263, (16 June 2009) (Dean-Armorer J). Two other Judicial Review cases, *Chatham/Cap de Ville Environmental Protection Company & Trinidad & Tobago Civil Rights Association (TTCRA) v EMA, Alutrint Ltd* and *The Attorney General and Smelta Caravan v EMA, Alutrint Ltd & Attorney General*, were stayed pending the hearing and determination of CV2007-02263.

[180] Under s 66 of the EM Act 2000, an Administrative Civil Assessment may be imposed only with respect to violations of Administrative Orders made under s 65 of the EM Act 2000 or environmental requirements specified in s 62 of the EM Act 2000, and not with respect to civil actions for public or private nuisance at common law.

[181] *Karan Ramlal v Simon Macoon & Indira Ramsanahie*, (High Court Action No 2812 of 2004, undated) (Master Doyle)

[182] "T&T's environment still not a priority" *Sunday Guardian* (Trinidad & Tobago). Accessible at: https://edition.pagesuite.com/popovers/dynamic_article_popover.aspx?artguid=eabfa40e-bcd2-456b-806d-64d033968d57&appid=3352

[183] *Concerned Residents of Cunupia v Environmental Management Authority & RPN Enterprises Limited*, (Civil Appeal P.195 of 2015) (Rajkumar JA & Pemberton JA, Bereaux JA concurring, 17th November 2017); *Fishermen and Friends of the Sea v Environmental Management Authority & Ministry of Works & Transport* [2018] UKPC 24

Water Pollution Fees (Amendment) Rules 2006,[184] with the 'Polluter Pays Principle' referred to in the preamble to the EM Act 2000,[185] the enforcement of the *Noise Pollution Control Rules 2001*[186] with respect to a one off Carnival season event,[187] and even a civil claim for damages for malicious prosecution by the EMA.[188]

Shortly after the establishment of the Commission in 2001 two commentators pointed to the need for amendment of the relevant provisions of the EM Act 2000, if the Commission was to fulfil the role required of an environmental court in T&T; to no avail.[189] Meanwhile, the existence and maintenance of an idle court, at appreciable cost to the taxpayer, became a continuing public embarrassment. Nearly two decades later, the pre-eminent authority on environmental law in the region, whilst lauding the pioneering role of T&T in Caribbean environmental law and the theoretical advantages of having an environmental court, reiterated these concerns about the legal deficiencies constraining the functioning of the Commission.[190] It still remains to be seen whether, even if steps are taken to increase the vertical and horizontal jurisdiction of the Commission as suggested by Justice Anderson, litigants will be prepared to bring matters before a court tainted by the role of politicians in the selection of judges, once the option of litigating in another convenient and competent forum exists.

[184] LN No.13 of 2006

[185] *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment* [2017] UKPC 37; See: Chris Hilton, 'The Polluter Pays Principle in the Privy Council: *Fisherman and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent)* (Trinidad and Tobago)' JEL (2018) 30, 507

[186] LN No.60 of 2001

[187] *Wild Goose Limited v Environmental Management Authority & Senior Superintendant of Police Garth Nelson*, CV2019-02219 (Mohammed J., 25th June 2021)

[188] *Neale v Environmental Management Authority*, CV2014-03449 (Rahim J. 25 January 2016)

[189] Christine Toppin-Allahar, 'Overview of Environmental Law in T&T and the Role of the Environmental Commission', (Environmental Commission's Symposium on Sustainable Development: A Legal Perspective, Hilton Hotel, Port of Spain, Trinidad & Tobago, 7th May 2003) (n 176); Dr. Winston Anderson, 'Remarks Delivered on the Occasion of the Launch of the Environmental Commission's Informational Material', (Newspaper Supplement published by the Environmental Commission in Celebration of World Environment Day, June 5 2005)

[190] Justice Winston Anderson, 'Feature Address' Launch of the Environmental Commission's Environmental Education and Stakeholder Outreach Series, Port of Spain, 25th June 2019

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Some Thoughts on Corporate Social Responsibility

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Abstract: *There has been mounting discourse about the importance of corporate social responsibility over the last few decades. Indeed, this concept which has increasingly made its way into the policy frameworks of companies, as a result of this heightened discussion. Conscious of the real-world impact that their actions can have on society, some companies have departed from the longstanding notion of maximizing profits at the expense of all else, to acknowledging societal interests in their decision-making. In this way, they balance different concerns, not only staying faithful to the interests of shareholders, but also having regard for broader interests groups, such as the society. As such, this article endevours to examine the approaches to corporate governance which have historically excluded society as a consideration, those which are more inclusive, and aims to assess the law's posture regarding the issue of corporate social responsibility.*

Keywords: *Corporate social responsibility, profit maximization, fiduciary duty, contractualism, stockholder theory communitaire theory, social contract theory*

Introduction

The concept of corporate social responsibility has gained prominence over the last few decades, and there is a bourgeoning consensus as to its importance.[1] Corporate social responsibility is premised on the idea that corporations have a responsibility to society that transcends the making of maximum profit.[2] From a historical standpoint, corporations adopted a posture that paid scant regard to, if any at all, the effects that their actions had on the community, focusing solely on the maximization of profits.[3] The idea of maximization of profits made its way into the literature of economics as an assumption, undergirded by the intention to describe the conduct of companies. However, within a legal-economic model that is oversimplified, it has become a normative objective, underpinning the idea that the goal that supersedes all else in corporate governance, should be the generation of wealth for shareholders.[4] However, as time has passed, persons have become more cognisant of the deleterious societal effects that could ensue from the actions of corporations in pursuing profit maximization.[5] Ceding to vociferous public protestation and the force of law, some corporations have shifted from solely focusing on the maximization of profits, to engaging in activities that are largely geared towards adding value to society.[6] This move towards corporate social responsibility therefore represents a challenge to the orthodoxy of

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[1] Fabio Balboni, Wayne Charles- Soverall, Brigette Levy, "New Perspectives on Corporate Social Responsibility" (2017) Journal of Public Sector Policy Analysis 2
[2] Forest Reinhardt et al, *Corporate Social Responsibility through an Economic lens* (2008) Oxford University Press 219
[3]Abagail McWilliams and Donald Siegal, "Profit Maximisation Corporate Social Responsibility" (2011) The Academy Management Review 504
[4] Abagail McWilliams & Donald Siegel, " Corporate social responsibility and financial performance: Correlation or misspecification?" (2002) Strategic Management Journal 603
[5] ibid 7
[6] Richard Nunan, "The Libertarian Conception of Corporate Property: A Critique of Milton Friedman's Views on the Social Responsibility of Business" (1988) Journal of Business Ethics 891

profit maximization at the expense of society.[7] In this regard, this article will explore the contours of corporate social responsibility. Part 1 A will explore the traditional approach to corporate governance, which excludes corporate social responsibility as a consideration. Part 1 B will assess the compatibility between corporate social responsibility and directors' fiduciary duties. Part 2 will examine if there is a moral nexus between corporations and them assuming responsibility towards society. Part 3 looks at the role of the law in effecting corporate social responsibility. To buttress the arguments made and facilitate analysis, theories of corporate governance, specifically, contractualist theory, stakeholder theory, communitaire theory, social contract theory, will be deployed.

Part 1 A: Corporate Social Responsibility, Stockholder Theory and Legal Contractualism as a Theoretical Framework: The Traditional Approach to Corporate Governance

Prominent economists, such as Milton Freidman, have proffered the view that the sole responsibility of directors is to make as much profit as possible for the shareholders.[8] In his famous New York Times article, he advanced the argument that:

"There is one and only one social responsibility of business –to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[9]

If directors stray from this idea, Freidman posits, they will not know what interests to serve.[10] Freidman's sentiments are reflective of the stockholder theory, which maintains that, businesses are merely arrangements by which one group of people, the stockholders put forward capital to another group, the directors, to be utilised to realise specific ends and for which the person who hold stock, are recipients of an ownership interest in the venture."[11] Grounding this viewpoint in a legal framework, the legal contractualist theory is potently instructive. This holds that "the company as a legal entity, its directors, and its members are bound together by a contract which is embodied in the company's articles of association."[12] Indeed, British courts have staunchly adhered to this legal contractualist view, as this theoretical framework greatly underpins English corporate law,[13] thereby naturally extending to the Caribbean. The legal contractualist view was espoused in the English case of Automatic Self-Cleansing Filter Syndicate Co v Cunningham,[727] where the court observed that, "the articles of association are a contract that exists between the members of the body corporate, and the shareholders have, through their express contract, commonly provided that their affairs be managed by certain directors to be appointed by the shareholders in the manner described by other articles."

If one were to accept this framework, it can be argued that, in light of this "contract" formed, the directors would be obliged to give effect to the intentions of the shareholders, and naturally, the shareholders would intend for the directors', in their management of the company, to implement policies that will give rise to the maximisation of profits.[14] Such a parsimonious or narrow approach to conceiving the company, however, warrants interrogation. It is posited that a shortcoming from which this legal contractualist theory grievously suffers, is that this binary contractual relationship of shareholders and directors, renders it limited,[15] and

[7] Bill Wedderbburn, "The Social Responsibility of Companies" (1985) Melbourne University Law Review 4

[8] ibid 8

[9] Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" (1970) New York Times Magazine 122

[10] Milton Freidman, *Capitalism and Freedom* (1962) The University of Chicago Press 133

[11] John Hasnas, "The Normative Theories of Business Ethics: A Guide for the Perplexed" (1998) Business Ethics Quarterly 36

[12] Janet Dine, *Theories of Corporate Governance* (2000) Cambridge University Press 1

[13] Janet Dine, *Company Law* (1st edn, Sweet and Maxwell 2001)

[14] Jill Fisch, "Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy" (2006) Journal of Corporation Law 637

[15] ibid 20

this thereby forecloses other stakeholders, such as the society, from consideration in management. Indeed, given that, according to this theory, the directors solely owe their duties to the shareholders,[16] this is the only interest group for which they know to serve.[17] Thus, as Sagerman and Rubin astutely point out, the outcome that logically follows from the binary contractual paradigm, is the restriction of social responsibility of the company,[18] because any departure from the service of the shareholder as the prime constituent would amount to an interference with the notion of the company.[19]

Part 1 B: Corporate Social Responsibility and its Compatibility with Directors' Fiduciary Duty

Intimately linked to this discussion of corporate social responsibility, is directors' fiduciary duty, and whether they are compatible. In examining this, it is apposite that the legislative framework be set out- the Barbados Companies Act being used as a frame of reference. Section 95 (1) of the Barbados Companies Act[20] provides: "Every director and officer of a company in exercising his powers and discharging his duties must (a) act honestly and in good faith with a view to the best interests of the company." As was noted in the locus classicus, Howard Smith v Ampol,[21] it is for the directors in their judgment to decide what is in the best interests of the company, not what the court considers to be in the best interest of the company, once not acting for an improper or collateral purpose. This, therefore, reveals that there exists an element of subjectivity in making this determination, and that the court affords them some deference or margin of appreciation in so doing.[22]

Moreover, this fiduciary duty is owed to the company alone, as provided for in Section 95 (3)[23] of this Act. This would therefore suggest that, contrary to the fervently held notion by shareholders,[24] that the directors owe fiduciary duties to them alone, section 95 (3)[25] unequivocally refutes this errant notion. This is further reflected in the case of Great Eastern Rly v Turner,[26] where the court made clear that the directors were agents of the company. Further, Section 95 (2)[27] provides: in determining the best interests of the company, regard must be given to the interests of shareholders and employees in general.

At first blush, one might conclude that since Section 95 (2) of the Barbados Companies Act states the directors "must" pay regard to the interests of the shareholders…in determining the best interests of the company, they are confined to making decisions that are accordant with immediate profit-maximisation, as the contractualist view prescribes. However, this "ends-oriented and individualistic"[28] focus of the contractualist school of thought is untenable, as it fails to consider that circumstances may demand that the directors take actions which are incongruent with immediately reaping maximum profit. Thus, it is submitted that, if one were to look at directors' fiduciary duties expansively, it can be argued that, given this judicial deference accorded to directors, as heretofore indicated, they can, in regarding the interests of the shareholders, implement policies that bear the society in mind, which may appear, in the short term, to run counter to profit maximisation, but offer more profit for the shareholders in the long-term. Indeed, as was stressed in Smith Ltd v Ampol Petroleum:[29] "directors, within their management powers, can make decisions against the wishes of the majority of shareholders" once they are in the best interests of

[16] Ibid 14
[17] ibid 12
[18] David Sagerman and Paul Rubin, *Law, Economy and Society* (1st edn, Abingdon Press 1984)
[19] ibid 15
[20] Barbados Companies Act 2002, s.95 (1)
[21] [1974] UKPC 3
[22] Darren Skinner, "Interlocking Directorates" (1994) Journal of Transnational Policy 1
[23] Barbados Companies Act 2002, s. 95 (3)
[24] ibid 16
[25] ibid 24
[26] 1872) LR 8 Ch
[27] Barbados Companies Act 2002, s.95 (2)
[28] Stephen Bottomley, "From Contractualism to Constitutionalism" [1997] Sydney Law Review 227
[29] ibid 24

the company. In this way, they stay faithful to their fiduciary duty and the community's interests are met.

The foregoing discussion, further, raises a conspicuous flaw in Freidman's argument that, if the directors depart from profit maximisation, they would not know what interests to serve.[30] While indeed, there is merit in Freidman's argument that the contractual relationship demands that the directors' serve the shareholders' interests by reaping profit, it is submitted that this argument fallaciously assumes that, in seeking to make profit, both society's and shareholders' interests cannot be simultaneously served. Given that, as noted above, societal consideration may inure to the shareholders' benefit, it strains credulity to assert that, any departure from the goal of profit maximisation would amount to an abdication of the board's responsibility. To the contrary, it is posited, given that the directors are, as reflected in Section 58 (1) of the Barbados Companies Act,[31] charged with the remit of managing the affairs of the company, it would be inconsistent with good corporate management, and indeed, in this instance, amount to "an abdication of the Board's responsibility," to pursue a short-term goal of reaping considerable profits which is detrimental to the society and ultimately detrimental to the company's success.

Part 2: Corporate Social Responsibility: A Question of Morality?

The argument has been proffered that morality is fundamental to corporate social responsibility, and is thereby a consideration in the running of the company.[32] This, however, is by no means dispositive, as others have raised staunch objections to the notion that morality bears, or should bear, any connection to the operation of the company.[33]

To determine whether morality is at the core of corporate social responsibility, it is proper to look at the different perspectives as to what the corporation is and its purpose. It is trite that a corporation is a persona ficta-"an artificial person…existing only in contemplation of law," having rights and responsibilities distinct from its members.[34] Professor Joel Bakan notes that corporations come into being by virtue of law and are imbued with purpose by law. The law, he contends, provides for what their directors and managers can do, what they are forbidden from doing and what they are obliged to do.[35] Guided by this reasoning, it is posited that, since the company is a concession made by the State,[36] it is by virtue of this concession that the State can circumscribe corporate activities, and thereby fashion its regulatory power on its "creation" as it deems fit.[37] In this way, it can be argued that the State sets forth, by way of law, its moral view regarding corporations' responsibility towards society, and the company, by complying with the regulatory command, gives effect to the State's moral view.

This stands in marked contrast to operating within a contractual framework, which dismisses the idea of a concession being made by the state to bring into existence the company.[38] Thus, this contractualist framework does not entertain the idea of corporate social responsibility or the morality that arguably inheres it. Indeed, this view was held by Freidman, who proffered that, a corporation comes into being, not by a concession by the state, but by an agreement willingly formed by individuals, who make the decision to best pool their resources into an entity with the view of wealth and profit generation.[39] He further argues that the role of government is solely to

[30] ibid 12

[31] Barbados Companies Act 2002, s.58 (1)

[32] Reza Kaboli, Bahman Banimahd, Ataollah Mohammadi Molgharani, "Relationship between Moral Foundations and Perception of Corporate social Responsibility" (2021) Vol. 3, No. 3, International Journal of Ethics & Society 45

[33] ibid 11

[34] Salomon v Salomon [1897] AC 22

[35] Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (1st edn, Free Press 2004)

[36] ibid 16

[37] Stefan Padfield, "Rehabilitating Concession Theory" (2014) Vol. 66, No. 2, OKLA. Law Review 327

[38] ibid 16

[39] Karl Mertens, "Milton Freidman and Social Responsibility: An Ethical Defense of the Stockholder Theory" (2013) University of Oslo 1

give effect to and enforce contracts between the parties involved. Because the resources are held by the private parties who formed the corporate body, then the act of resource-pooling does not convert those assets into public ones merely because there is participation by many persons.[40]

This is buttressed by Mertens, who, in a similar vein, expressed that, the corporation is not a "moral entity" that exists separately beyond the contractual purposes that gave rise to it. Thus, it does not have any obligations towards society. A corporation is bound to abide by the law and that is the extent of it."[41] Therefore, because businesses are devoid of any sense of morality, they should, as Levitt tersely suggested, unflinchingly "stick to business."[42]

Reflecting on these sentiments, it is submitted that, while it is true that individuals come together, and willingly form corporations to sustain their shared economic interests, if one were to look at this in in a strict sense, society, by contrast to "these individuals," never expressed its intention to be party to the contract that brings forth the existence of a corporation. That notwithstanding, the corporations' impact on society is nonetheless felt. Given this societal impact, it is plausible to hold that some relaxation of contractualism is warranted, and there be some considerations of morality in how the company's actions affect society.

More pointedly, embedded in this question of whether there should be consideration of morality in the operation of the company, is what one deems as the purpose of the corporation. Therefore, those who are sympathetic to the contractualist school of thought countenance a very narrow view of the purpose of the company-that being to serve the shareholders.[43] By contrast, one could posit that the corporation's purpose is to serve society.[44] In navigating this enquiry, the communitaire theory aids greatly. This theory asserts that, "The standard of a corporation's usefulness is not whether it gives rise to individual wealth, but whether it aids society in gaining a greater sense of the meaning of community by honouring individual dignity and fostering overall welfare."[45] Certainly, one can contend that, given that the community is directly affected by the decisions of corporations, and it plays an indispensable role in the corporations' success and longevity,[46] this creates a moral responsibility in corporations to play an active role in ensuring its well-being as it carries out its affairs. In giving effect to that moral duty, Abdelli et al argue that the directors must use their inner judgment, not solely seeking to make profit, but also, they must take into consideration broader environmental and social concerns.[47]

Guided by the forgoing analysis, it can be argued, therefore, that as seen in social contract theory, there exists an unwritten contract between society and the company, where companies operate at the consent of the society.[48] This societal consent therefore delimits the possibilities of corporate functioning,[49] essentially giving legitimacy to the corporation's ability to operate.[50] Indeed, in keeping with this conception of the corporation, philosophers such as Donaldson have advanced the view that corporations have an obligation towards a broad base of individuals and the environment in which those individuals reside.[51] As such, in contrast to the formalistic contractual conception of the company, at the company's inception, it enters into an agreement with society, and the society, as a result, endows

[40] ibid 31
[41] ibid 31
[42] Theodore Levitt, "The Dangers of Social Responsibility" (1958) Vol. 36, No. 5, The Harvard Law Review 41
[43] ibid 16
[44] Venelin Terziev, "The Role of Business in Society" (2012) SSRN Electronic Journal of Advances in Social Sciences 68
[45] ibid 16
[46] Kh Tomba Singh, Sanjoy Singh, "Ethics in Corporate Social Responsibility" (2019) IOSR Journal of Business and Management 16
[47] Zouheyr Gheraia, Sawssan Saadaoui, Abdelli Hanane, "Business Ethics and Corporate Social Responsibility: Bridging the Concepts" (2019) Vol 7, Issue 4, Open Journal of Business and Management 1
[48] ibid 37
[49] Husein Inusah and Peter Sena Gawu, "The Social Contract Theory and Corporation Moral Obligation" (2021) Electronic Journal for Philosophy 4
[50] ibid 41
[51] Thomas Donaldson, "Values in Tension: Ethics Away from Home" (1996) Harvard Business Review 48

certain obligations on the corporation in return for its permission to engage in business. These obligations are therefore morally binding on the corporation. In other words, this social contract, places a moral constraint on the corporation in return for society according it permission to operate.[52] It is posited that if this if these moral obligations are breached, society can withdraw its consent.[53] As professor Cary observed, if corporations allow "the modern concepts of morality to fade under the cold light of economic analysis,"[54] and thereby abdicate their responsibility to society, this can irretrievably shatter the trust reposed in the social contract, and the society's revocation of the contract will subsequently ensue.[55] Naturally, therefore, "this revocation" of permission afforded to the company will be detrimental to the financial well-being of the company.

Departing from this view of morality as a driving force in corporate social responsibility, it can be conversely argued that morality may not always be at play in corporate social responsibility. Given that society is indeed fundamental to the survival of the company, the company may, not by any moral conviction, but rather, by self-interest, feel compelled to incorporate into their decision-making, considerations of how their actions will affect the society. Therefore, corporate social responsibility may be considered as a means to an end, in effect.

Part 3: The Role of the Law in Corporate Social Responsibility

Because the unbridled quest for profit can be incompatible with the society's welfare,[56] the law acts as a potent tool in compelling corporate social responsibility. Adopting a historically lax posture in ascribing responsibility to corporations for harm done in their exclusive pursuit of profit maximisation,[57] it is posited that the law today, in many instances, emphatically affirms the moral view that, it is right and just for the society to be considered in corporate actions, and further, declares that responsibility will be imposed for any harm done to society. The Jamaica Companies Act[58] provides an illustration of this. Interestingly, unlike other Caribbean Companies Acts, which solely provide for directors considering shareholders and employees in general in determining the best interests of the company, the Jamaica Legislature has departed from this standard, and decided to expressly include the community as a constituent in making this determination. Section 174 (4) of the Jamaica Companies Act[59] provides: "In determining what are the best interests of the company, a director or officer may have regard to the interests of the company's shareholders and employees and the community in which the company operates."

It is submitted that this inclusion of the community as a stakeholder in the company is an acknowledgement of its importance, and this represents a disruption of the historical exclusion of the community in managerial decision-making. It should be underscored, however, that while the Jamaican Legislature's inclusion of the community does indeed mark an embrace of the concept of corporate social responsibility, the section 174 (4)[60] states that the directors' "may" have regard to the interests of the community. This therefore indicates that that it is within the director's discretion to regard the community, and this resultantly opens the possibility for the directors to disregard it as a stakeholder. Accordingly, this therefore compels the question of whether this latitude granted to the

[52] ibid 41
[53] ibid 38
[54] Louis Loss, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) Vol. 13, No. 1, The Modern Law Review 34
[55] Thomas Donaldson, Thomas Dunfee, "Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory" (1994) Vol. 19, No. 2, The Academy of Management Review 252
[56] Thomas Donaldson, *Corporations and Morality* (1st edn, Prentice-Hall 1982)
[57] Judith schrempf-Stirling, Guido Palazzo and Robert A. Phillips, "Historic Corporate Social Responsibility" (2016) The Academy of Management Review 700
[58] Jamaica Companies Act 2002
[59] Jamaica Companies Act 2016, s 174 (4)
[60] ibid 61

directors regarding the community is the most fitting legislative prescription, given the company's actions will indubitably affect this interest group. As such, as a matter of reform, the Jamaican Legislature can amend "may" to "must" or "shall", to legally oblige the directors to incorporate the community as a consideration in their decisions. Other jurisdictions can also invite such reform to their company's Acts as well so as to elicit their support of corporate social responsibility.

Diverting our attention to the common law, there has been a recent trend where negligence has been used to hold parent companies liable for the actions of their subsidiaries.[61] This has been evidenced in cases where the subsidiary causes harm to the community/third parties writ-large. In the case of Vedanta v. Lungowe,[62] the plaintiffs contended that Vedanta plc was in breach of its duty of care to the community when the toxic emissions emanating from the Nchanga Copper Mine at its subsidiary harmed the health and farming practices of that community. The court emphasised that, "whether the parent assumes a duty of care toward third parties "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary." In applying this standard to the facts at bar, the court was of the view that the parent company had assumed responsibility by not only its establishment of group-wide environmental control and sustainability standards, but also, its implementation of those standards through carrying out training, oversight and enforcement. As such, the court was convinced that these actions taken by Vedanta amounted to a sufficient level of intervention in the way the operations were conducted at the subsidiary, and Vedanta was consequently deemed to have assumed responsibility.

It is submitted that this case signals that parent companies, on a showing of a high degree of control in the affairs of their subsidiaries, have a responsibility to the community when those subsidiaries occasion harm to that constituent. This case, moreover, makes clear that the tort of negligence is a viable avenue for aggrieved communities to pursue for injury they deem subsidiaries to have visited upon them. This thereby creates more possibility for success for the community, since this cause of action demands a lower threshold be attained than the typical- piercing of the corporate veil. Notwithstanding the foregoing, however, it should be emphasised that this is a very fact-sensitive area of law, therefore, success through the use of negligence as the cause of action, will be contingent on whether the case can be made out on those particular set of facts. As Sales LJ observed in AAA v Unilever Plc:[63]

"There is no special doctrine in the law of tort of legal responsibility on the part of a parent company in relation to the activities of its subsidiary, vis-à-vis persons affected by those activities. Parent and subsidiary are separate legal persons, each with responsibility for their own separate activities. A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case. The legal principles are the same as would apply in relation to the question whether any third party …was subject to a duty of care in tort owed to a claimant dealing with the subsidiary."

Shareholders taking action in Corporate Social Responsibility?

There has been a shift in attitude by some investors who are more "community-conscious".[64] This runs in contrast to the quintessentially passive posture assumed by shareholders, where they allow the

[61] Dalia Palombo, *The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals* (2019) Cambridge University Press

[62] [2019] UKSC 20

[63] 2018 EWCA Civ 1532

[64] Robert Eccles et al, "Reaping Returns on Environmental, Social and Governance Investments" (2019) Harvard Business Review 106

directors to manage-encapsulated in the concept of separation of ownership and control.[65] As O'Rourke notes, shareholders are going beyond the decision to merely invest, but rather, to take a more active role in the operation of the company.[66] This approach taken by shareholders can be analysed through the lens of the corporate constitutionalism feature-deliberative decision-making.[67] This feature places emphasis on ensuring that the processes through which decisions are made in each of the constitutional organs (the board and the general meeting), are "open and genuine."[68] Essentially, this demands that decisions should be the result of processes that centre discussion and deliberation.[69] In the context of corporate social responsibility, this therefore suggests that deliberative decision-making would furnish shareholders with the ability to put forth their view as to what they believe is the best course of action to earn profit, without impinging on the interests of the community, and also express their objections when the directors stray from acknowledging societal concerns in their decision-making. This also gives the directors the opportunity to communicate their thoughts to the shareholders relating to corporate social responsibility, and this "open and genuine" allows for the formulation of a decision-making system that best meets the needs of the community and satisfies the interests of the shareholders and other corporate constituents.

Shareholders growing concern about corporate social responsibility, and their activism that ensues therefrom can also be examined through the corporate constitutionalism feature-dual decision-making. This feature maintains that, the annual general meeting and the board of directors are two distinct decision-making organs with separate decision-making functions.[70] It proffers that in the annual general meeting, fundamental management matters that transcend the ambit of everyday management, such as the appointment of the Board, are effectuated.[71] This is in contrast to the Board, which holds general managerial power which can be delegated to senior directors and thus, decisions through this delegated power, constitute part of the daily events of the company.[72] As such, if the shareholders are dissatisfied that directors are not placing enough emphasis on the community in their decision-making, they can oust them from office and install directors who will give effect to their vision of the company that is considerate of the community's interests. As was noted in the case, Gramophone & Typewriter Ltd v Stanley,[73] given their control of the company, the shareholders can use "their voting powers to turn out the directors and enforce their views as to policies of the company.

Conclusion

Historically, corporate social responsibility was seen as a perversion of the concept of the company, and was therefore met with unstinting reprobation. Today, however, this concept has increasingly becoming embedded in the policy frameworks of corporations. As a response to the outcry of society, corporations today, in some instances, feel morally compelled to consider the community in their decision-making, lest they run the risk of public damnation. However, where not moved by a sense of morality, the law has intervened to protect the interests of the community against 'the pathological pursuit'[74] for wealth by corporations. Even shareholders, who have historically been indifferent to the notion of corporate social responsibility have increasingly been active in striking a balance between their interests and those of the company. All of this thereby dissolves the frivolous notion that both society's interests and those of the shareholders

[65] Eugene F. Fama, Michael C. Jensen, "Separation of Ownership and Control" (1983) The Journal of Law and Economics 301

[66] Anastasia O'Rourke, A New politics of Engagement: Shareholder Activism for Corporate Social Responsibility (2002) The Greening Industry Network 1

[67] ibid 30

[68] ibid 30

[69] ibid 30

[70] ibid 30

[71] ibid 30

[72] ibid 30

[73] (1908) 2 KB 856

[74] ibid 36

cannot equally enjoy protection as corporations run their affairs.

Appendix:

The theory of legal contractualism is very closely linked to the idea of shareholder primacy, which places emphasis on the interests of the shareholder to the exclusion of other stakeholders.[75] Therefore profit- maximization is centred by the directors in the running of the company. As commented above in a cursory way, British courts have greatly adhered to this notion of legal contractualism, which was reiterative of the notion of shareholder primacy, and this notion seeped into British corporate law. This can be tied to the rise of individualism in England and the West in general, which gave birth to notions such as freedom to contract.[76] Naturally, during this rise of individualism, State intervention in the affairs of the company, aimed at protecting societal interests, was viewed as an improper interference with notion of "the freedom to contract,"[77] and courts were swift to hold such intervention as legally impermissible, and thereby gave effect to the notion of shareholder primacy.

[75] ibid 16
[76] ibid 14
[77] ibid 14

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Case Brief

International obligations, community law, national measures, business interests: Rock Hard Distribution Limited and Others v Trinidad and Tobago and CARICOM and Others (2021)

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Keywords: *Council for Trade and Economic Development - Common External Tariff - Suspension of - Revised Protocol - Other Hydraulic Cement - Caribbean Community Law - WTO Law*

Introduction

Disputes associated with the regional cement industry have generated the most litigation in the original jurisdiction of the Caribbean Court of Justice ('CCJ'). Of the thirty-six original jurisdiction judgments delivered by the Court as of May 2022, twenty concern the regulation of the cement industry at the national and regional level. This judgement, delivered on 2 March 2022, marks the conclusion of part three of a series of proceedings involving the distributors and importers of Rock Hard Cement, the Caribbean Community ('CARICOM') Secretariat, a number of Member States and the region's largest cement manufacturer, Trinidad Cement Limited ('TCL'). These disputes date back to 2018, with the CCJ having previously issued decisions concerning the tariff classification of Rock Hard Cement ('the classification decision'), the claimants' right to consult with Member States prior to the suspension of the CET on their cement imports ('the consultation decision'), and in the instant case the procedural and substantive obligations applicable to the Council for Trade and Development ('COTED') when granting suspensions of the common external tariff ('CET'). These disputes fomented at the convergence of the Community's single market and economy and its objectives, Member States' national economic policy autonomy, the business interests of regional and manufacturers and importers, and the legal obligations that underpin the interactions between these frequently antipodal forces. For CARICOM Member States, this judgement will likely be received as a satisfactory conclusion to the latest round of agitations in the regional cement industry. From the perspective of the respondents, the judgement affirms the powers of the Community and the legitimacy of prioritising protection for regional industries, while recognising that the sovereignty, autonomy and discretion of Member States and Community Organs are equally as sacrosanct as the accountability, transparency and procedural propriety expected of them.

Background and facts

In December 2020, COTED granted authorisation to Trinidad and Tobago to suspend the applicable CET of 5% and apply a tariff of 50% to imports of other hydraulic cement for the year 2021. Alongside this measure, Trinidad and Tobago also imposed a quota on imports of other hydraulic cement. This was the second successive increase in the tariff, with

Trinidad and Tobago having previously been authorised by COTED to suspend the CET and apply a tariff of 35% for the year 2020.

The claimants' businesses were engaged in the importation and distribution of other hydraulic cement in Trinidad and Tobago and other CARICOM markets. They claimed the measures implemented by Trinidad and Tobago, with COTED's authorisation, were prejudicial to their commercial interests and rights under Community law. Consequently, they commenced proceedings in the original jurisdiction of the CCJ challenging the legality of COTED's decision on procedural and substantive grounds.

The cardinal issues in the case concerned (i) alleged breaches of the claimants' procedural right to consultations prior to the tariff increase, (ii) whether COTED's decision was flawed in its substance and premised incomplete evidence, and (iii) whether COTED's decision was incompatible with Trinidad and Tobago's international obligations under the multilateral agreements of the World Trade Organisation ('WTO'), specifically, Trinidad and Tobago's bound tariff commitments.

The respondents, Trinidad and Tobago and CARICOM, supported by the interventions of Belize and local cement producer TCL (the claimants' competitor) argued that COTED's decision was procedurally and substantively sound, and that the CCJ lacked jurisdiction to adjudicate questions concerning alleged violations of WTO obligations; these being exclusively within the province of the WTO's Dispute Settlement Body.

The Court's findings

Ultimately, the claimants' originating application was unsuccessful. The Court's main conclusions can be grouped under three themes, the right to consultation, propriety of COTED's decision, and the relationship between WTO and Community law. On consultations, the Court reiterated its stance on the indispensability of an efficient system of consultations at the national and regional levels, which are a vital input to COTED's decision making process.[1] However, to the extent that the consultations antecedent to COTED's impugned decision could be said to be deficient, this was attributable to the claimants' refusal to participate in the process.[2]

As regards COTED's decision, the Court found it to be reasonable and proportionate having regard to the contents of Trinidad and Tobago's application to suspend the CET.[3] Moreover, it was consistent with, and reflected an appropriate balancing of, the objectives of CARICOM as expressed in the Revised Treaty of Chaguaramas ('RTC'),[4] to wit, according predominant weight to the aim of creating a protected market for producers and manufacturers in CARICOM.[5]

Finally, as regards WTO law, the Court noted that it was competent to adjudicate whether COTED's decision violated CARICOM law, and to determine to what extent WTO law was binding on CARICOM and COTED, decisively finding that 'in relation to the setting of the tariff rates, WTO law is not part of Community law and that COTED is not bound by it'.[6] That jurisdiction did not however extend to pronouncements anent Trinidad and Tobago's WTO tariff bindings, or the consistency of the measure

[1] *Rock Hard Distribution Limited* [2022] CCJ 2 (OJ) [44]
[2] ibid [45]
[3] *Rock Hard Distribution Limited* (n 1) [50], [52]
[4] Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy [2004] UNTS 2259/293
[5] *Rock Hard Distribution Limited* (n 1) [55] - [56]
[6] ibid [21]

implemented by Trinidad and Tobago in relation thereto.[7]

Reasoning: The right to consultation in practice

In the consultation decision,[8] the CCJ found that Article 26 of the RTC created a procedural right to consultations for CARICOM nationals, who were thus entitled to have their views meaningfully considered by Member States prior to adjustments of the CET which could impact their interests. The Court explained that Article 26 was 'a key element in the ability of Community Organs to make the right decisions when called upon to do so',[9] the purpose of which was to ensure transparent and effective decision making that was 'so far as reasonable, adequately informed by input from affected stakeholders.'[10]

In the instant case, the Court reiterated that suspensions of the CET to accommodate higher tariffs required 'serious and well-informed consideration'[11] with 'proper and timely consultations at the national level of the Member State requesting the suspension,' noting however that the outcome of those consultations 'may or may not lead to filing, maintaining, or amending an application for a suspension.'[12] However, the Court noted that Trinidad and Tobago, through its competent authority, had in fact seriously attempted to engage in consultations with the claimants, who, despite attempts to accommodate them, did not take the opportunity to engage with the authority.[13] Although the Court recognised that the competent authority could have been more fulsome and transparent in its communication with the claimants during the consultative process, it concluded that there was no justification for the claimants' refusal to participate in the process[14] and thus rejected the argument that the claimants' right to consult had been violated.

The Court's reasoning suggests that the content of the right to consultation in Article 26 of the RTC as it pertains to stakeholders may be more closely associated to the availability of a clearly defined consultative process, than the substance and outcome of the exchanges between the parties.

Was COTED's decision flawed in substance?

The claimants mounted a multi-pronged challenge against the rationale of COTED's decision to approve the suspension of the CET and authorise Trinidad and Tobago to apply a higher tariff. The grounds of complaint included that there was insufficient evidence to support the decision,[15] that the authorised derogation from the CET was disproportionate,[16] that the decision was given for an improper purpose,[17] and notably, that it prejudiced the Community objective of expanding trade and economic relations with third States.[18]

The Court considered that there was satisfactory evidence before COTED and deferred the wide margin of discretion afforded to it, before concluding that there were no grounds for interfering with the decision.[19] As regards the question of proportionality, the Court noted that having regard to the trend of increasing imports, notwithstanding the previous tariff hike in 2020, it was not unreasonable to allow a further temporary increase in the tariff, and therefore the decision was not disproportionate to the facts presented to COTED.[20] The Court also dismissed the claimants' improper purpose argument, and observed that it was a serious allegation, which the claimants had failed to

[7] ibid [21]

[8] *Rock Cement Limited v The State of Barbados and CARICOM* [2020] CCJ 2 (OJ)

[9] ibid [41]

[10] *Rock Cement Limited* (n 8) [41]

[11] *Rock Hard Distribution Limited* (n 1) [35]

[12] ibid [35]

[13] ibid [44]-[45]

[14] ibid [45]

[15] *Rock Hard Distribution Limited* (n 1) [40]

[16] ibid [51]

[17] ibid [57]

[18] ibid [53]

[19] ibid [41]

[20] ibid [52]

substantiate with objective, relevant and consistent evidence.[21]

Finally, with reference to the alleged conflict with community objectives, the Court noted that while the RTC did articulate an objective of expanding trade with third States, another 'pertinent objective of the Community is to create a protected market for producers and manufacturers in CARICOM'[22] and that 'in principle, more weight should be given to the protection of regional producers and exporters of Community goods than to importers of goods from third States.'[23] On that basis the Court concluded that COTED had properly weighed the competing factors and that its decision was sound.

The Court's treatment of these issues did not expand the bounds of Community law nor the standard of review. However, the affirmation of the RTC's prioritisation of intra-regional trade growth and endorsement of the weightiness accorded to these factors by COTED is noteworthy.

The relationship between WTO and Community law

The starting point of the Court's analysis of this issue was that before the incompatibility of a Community Law measure with a provision of international law could be determined, it must first be established that the provision was binding on the Community.[24] In that regard, the Court observed that CARICOM was not a member of the WTO, and was therefore not bound by its agreements explicitly nor as a matter of customary international law.[25] Further, CARICOM played no role in the setting of WTO bound rates on behalf of its Member States, and had not assumed responsibility for the WTO obligations relating to setting tariffs and trade policy of its Member States.[26] Additionally, the Court found that the RTC did not circumscribe COTED's decision making power to authorise the suspension of the CET by reference to the WTO agreements,[27] and thus concluded that 'WTO obligations such as those dealing with bound rates, therefore, do not limit the powers of COTED in terms of Caribbean Community law.'[28] Accordingly, COTED was 'not formally or legally bound by the WTO law in respect of the altering or suspending of the CET.'[29]

This line of reasoning meant it was unnecessary for the Court to engage further with the WTO law issues,[30] and pre-empted the questions of jurisdiction that such engagement would have raised.

Concluding Observations

This case is emblematic of the political and economic tensions between CARICOM Member States' trade and fiscal policy interventions, ostensibly aimed at securing economic benefits and advancing the wellbeing of their nationals, and the interests of businesses driven by market forces, maximisation of profit and efficiency, and a desire to capitalise on the possibilities created by liberal globalised trade. To the extent that a policy is discernible from the decisions issued thus far, the CCJ has consistently affirmed CARICOM Member States' rights to regulate their domestic and community affairs in concert with their community partners, and to shape community law as they see fit. The CCJ's recent judgments have authored a measure of protection for corporate nationals using the existing, non-operative, and aspirational elements of the community framework.[31] This signals an appetite to clarify the demarcations of the policy space and flexibility solemnised in the consultation decision, in which

[21] ibid [57]
[22] ibid [55]
[23] *Rock Hard Distribution Limited* (n 1) [56]
[24] ibid [59]
[25] ibid [60]
[26] ibid [61]
[27] ibid [62]
[28] ibid [62]
[29] ibid [59]
[30] *Rock Hard Distribution Limited* (n 1) [63]
[31] *Rock Hard Cement Limited* (n 8) [58]

Member States' entitlement to take such measures in implementing their national economic and development strategies as they may consider appropriate took preeminence.[32]

Notwithstanding its successful and delicate balancing act, the Court's ruling on the non-binding character of WTO law on the decisions of Community organs means it is likely that the claimants and similarly circumstanced corporate CARICOM nationals, will come away with the feeling that they lack an avenue for recourse when allegedly WTO inconsistent measures are implemented using the machinery of the Community, adverse their commercial interests. It is doubtful that this judgement is the closing act in these matters, CET suspensions are time limited.

[32] ibid [73]

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Rewarding Resilience: Building on the past as we look to the future

This speech was delivered by the Honourable Mr. Justice of Appeal Ronnie Boodoosingh at the annual Student Prize Giving Ceremony of the Faculty of Law, UWI, St. Augustine Campus on Friday 21 October 2022.

Salutations

I thank the Chair for the very kind introduction and your Dean for his gracious invitation for me to share some thoughts on this important occasion of your Prize Day or Evening of Excellence.

Today, you the prize winners, are no doubt proud of your achievements and I am sure your parents, relatives and well-wishers are as well. You and they are justifiably so and you should receive these accolades with all humility and at the same time recall that it is hard work and sacrifice that got you to today and it is that same hard work and sacrifice that will decide whether you will continue to achieve in the years ahead. I whole heartedly congratulate you. I congratulate your families and supporters whose sacrifice has contributed to this achievement and I congratulate your teachers who have guided you so that you could have achieved the awards you have today.

Today's function makes me recall a day a long time ago when at UWI, Cave Hill, I had gotten one prize for public international law. There was no fancy function or evening of excellence as you have today, but I do recall the happiness I felt when I received the letter of congratulations and even more so, when I received the cheque for what I considered to be a lot of money for doing what I was supposed to be doing in any event, studying and writing an exam.

Rewards for hard work are important and I am pleased that the University has progressed over the years to investing the time and effort to produce a function like this.

The theme of today's function is Rewarding Resilience: Building on the past as we look to the future. I think it is a very appropriate theme and I commend your Dean for having the foresight to choose it. Far too often nowadays we forget the past and we are quick to erase, ignore or reduce its relevance to where we are today. We forget the lessons that the past teaches us as we chart the future.

The three-year degree at this faculty started about 12 years ago. But the faculty of law started in October 1970 to undergraduates with 24 students at Mona, 19 at St Augustine 35 at Cave Hill and 13 at the University of Guyana (Taken from UWI, Cave Hill Faculty of Law website on 16/10/22). Its first graduates were in 1973. For many years only the Year 1 programme was offered here at St. Augustine and there were many pioneers who gave yeoman service to the Faculty and students over the years. You would know the persons of recent vintage, but some of the persons who helped build the faculty and seal its reputation included Chuks Okpaluba and Martin Daly, Endell Thomas and Greg Christie, Douglas Mendes and John Jeremie, Fred Gilkes, and your very own Principal Prof Antoine who was the first Dean of the three-year programme. There are others as well but I mention just a few. It is well and good that ever so often we should call their names and recall their contribution to the education of students over the years. I trust that there is somewhere in your building where their names and photos are etched for the present students to see. If it is not, Dean, that's a suggestion.

In my time, the two lecturers were Endell Thomas, of the foundational constitutional law case, Thomas v The AG case and Gregory Christie, a gentleman from our sister CARICOM country Jamaica. These men taught me valuable lessons, which at 18 years old at the time, I didn't realise I was learning.

I remember, fresh from secondary school where I was used to fairly positive comments from my teachers on my essays, one of the early essays I wrote

at the faculty was on parliamentary sovereignty and supremacy of the Constitution. I received the corrected version back from Endell Thomas with lots of red ink question marks, exclamation marks and the Latin word, quare, in several places, which I later learnt meant loosely, in what way, how, why etc?

I had liberally quoted from a leading British constitutionalist, Dicey. Mr Thomas wrote at the end, "not interested in what Dicey has to say, what do you have to say". After some days feeling wounded, I decided to ask Mr Thomas about his comments. He said, look, you quoted the sources, you researched it well, but I am interested in hearing what do YOU have to say, What is you view, what do you think about the issue. Because your view is as important as what they have to say. I remember leaving that day thinking, my view? Why is my view important? Why would he want that? I am an 18-year-old who a few weeks before had never heard of supremacy of the Constitution or parliamentary sovereignty. It was a long time later, many years, (I am a little daft perhaps) that I really understood the lesson he was teaching me, that it was important for me to think for myself and work things out and don't just be keen to accept what others have said, to be discerning.

The second story I would tell is of Greg Christie. He had a deep voice and the ladies in the class would line up in the front rows, no doubt so they could hear every word of his very erudite lectures. He made criminal law come alive, gave many real-life examples, and made the course extremely accessible and interesting. But, it is not that for which I remember him. One day he shared a personal story relating to the illness of a close family member and you could tell how emotional he got about it. All of us felt for him and his family. And the lesson that taught me is that no matter how good we are in what we do, how dedicated we are, how hard we work, how well we may do financially from this profession, and how much we achieve, the thing that ultimately matters most are the relationships we have with family and friends.

The point is that good and dedicated teachers, which this faculty has had in abundance, make an impact on us, even if, like me, we are too daft, in the moment, to understand the lessons being taught. Hopefully some years from now, you too will have your eureka moment from things said in your classes and may be able to tell the story to a prize giving function a generation from now.

At Cave Hill, we had very distinguished teachers as well. There was the great Professor of international law, Prof PK Menon. We had Dr Fiadjoe (he wasn't Professor then) making public law come alive; Norma Forde with her purple hair and colourful outfits teaching torts reminding us we could be different, the fearsome Dorcas White on equity, Mr Owusu (later Professor) trying to untangle real property for us: for many of us it didn't work despite his best efforts; Jeff Cumberbatch, now CA judge in Barbados, on contract law, Rahim Bacchus, among others. The younger tutors in those days included Prof Antoine recently back from her Phd and Dr Winston Anderson who pushed me to learn public international law and probably accounted for me getting the one prize I mentioned, as well.

I make this roll call because it is important for us to remember those on whose foundation our present position now rests. A lesson of gratitude is one you will do well to learn and to be appreciative of the work of your tutors. In time to come others will help you along the way. In my case, I was the first lawyer in my family. I had no connections in law. I didn't even know a lawyer. But I have to say, strangers helped me. I first did in-service with Hendrickson Seunath, a lawyer from San Fernando and would hang out at his office during the August holidays from UWI and law school. My first job was as junior lawyer to Reginald Armour at JD Sellier. Mr Aldric Benjamin "hired" me to work at the DPP's office. I had met Justice Annestine Sealey when she tutored us at Hugh Wooding Law School. She later "hired" me as a tutor and lecturer when she became Principal of the law school. None of these people were family. They were not family friends. They did not know me. They just took a chance with me. There will be people who will take a chance with you as well and it will be important for you to remember them as you progress in your career.

The Next Aspect of The Theme Is Resilience

You have done well to navigate the cataclysmic changes wrought by Covid-19. You had to adapt to

learning online. You had to spend a lot of screen time; adapt to new ways of assessments; new ways of learning. Anxiety has been on the rise. Economic times are difficult. By soldiering on you have shown yourself to be capable of resilience and for this you should be commended.

But it must not end there. You are only at the beginning. Resilience is also about staying the course, when things get tough.

What of your responsibility as students? Law for you must not just be about learning legal principles, being able to write exams well and winning prizes as you have done. Part of your responsibility is to prepare yourselves for the next stage of legal education and your time in practice after that. I must tell you that law is a social profession. It is a people profession, where you must interact with persons of all stations in life. I have had the opportunity of seeing lawyers in court. I have learnt that good grades at CAPE and UWI do not necessarily mean that students have acquired all the important basic skills. Continue to work at improving your language use and writing. Words are the tools of the lawyer as a trowel is a tool of the mason and a knife a tool of the chef. Develop the ability to have a conversation. These are essential skills for the legal professional. Have a view on the war in Ukraine or global warming or the supply-chain issues causing shortages and prices to soar.

Part of your responsibility is to be self-aware of what skills you need to improve on and to educate yourself about what is happening around so that you can properly help others. Remember you are the future judges, CEOs of companies, advocates of human rights and politicians.

A lawyer has also to be brave and able to stand up for others and stand up, albeit respectfully, to authority. If you have come from a sheltered home or environment, you need to learn about how the average citizen lives, the struggles they have. In a matter of 2 or 3 short years, these people will be your clients who you have to help with maintenance for their children, or an unfair dismissal, or filing a claim relating to discrimination. You will have to hear their stories without judgment and advise them about the most personal of circumstances.

If you come from a struggling background, you have to gain confidence to stand shoulder to shoulder with people who may have a lot more than you, to be able to fit in to a different world as well. Part of the transition of university is growing up, becoming exposed.

As this is only the beginning of your time in the law, some of you, given the developments in science and technology, may be lawyers for 75 or a hundred years. Imagine the changes you will see in that time! I can tell you I still learn every day. Two years ago, when I was joined the Court of Appeal I had to learn a different style of judgment writing from being a High Court judge. I had to learn how to collaborate with 2 or more judges in giving a single judgment. Recently, I sat on my first judge alone criminal appeal. For my whole career I have been used to judge's summing up to juries. We now had to evaluate the judge's reasons for deciding on issues of guilt. We have to think about what should be the approach of an appeal court to this. I need not tell you how much I have had to learn in the past 30 months on use of Zoom, Teams, TWEN and whatever else there is out there as court has been conducted online and documents are filed, accessed and read electronically.

You too will have to learn as you go. It does not stop when you leave UWI or Law School. You will have to learn how to live with Artificial Intelligence in the legal system as much as you have to learn how to interact with people. So, prepare for a lifetime of learning.

I would also like to talk to you about **your path to the future**. Lawyers are not always regarded highly among members of the public. Some of it stems from they not knowing what we do, our constraints and limits, but some of it also comes from **unprincipled and dishonest conduct** by lawyers which gives the profession a bad name. I will tell you that it will take longer to get to where you want to go by taking the high road, the path of ethical conduct, respect, courtesy, hard work, reasonable fees and the like, but it is a path that is still very much available to those who follow it. I want to urge you to resist the temptation of the short cut. Don't take advantage of your clients. Do honest work for honest pay. In your early days especially, law is not a 8 to 4 profession,

especially when an hour or two of that may be spent on the YouTube or the Instagram.

The theme for today also looks to the future of the faculty. What does preparing for the future entail for the faculty? In two years' time we have been able to deliver a teaching programme online even with the glitches and imperfections related to bad connectivity and insufficient planning. We may have to find ways now to blend education with a mix of in-person and online course delivery. It is not one or the other. We have to find ways to deliver practical education better in an online setting. We have to consider what is a good number of lawyers to graduate each year. We have to find ways to keep the quality of education intact as we have raised the quantity of lawyers being produced. Your faculty has to be broad based with a good mix of persons with an academic background and tutors who have practical experience.

The framers of legal education in the region designed an integrated and complementary programme. The Agreement Establishing the Council of Legal Education spoke of "a University course of academic training in a Faculty of Law;" and "a period of further institutional training directed towards the study of legal subjects, having a practical content and emphasis, and the acquisition of the skills and techniques required for the practice of law".

If we have an integrated programme we need to continue to have and develop meaningful collaboration between UWI and Hugh Wooding Law School. Can new ways be found to foster collaboration on what is learnt where and how?

What about the alumni? Every successful academic institution requires the support of the alumni. Now you have 12 years of graduates and 50 years of doing the Year 1 programme. There should be a programme to get the alumni back here to give of more of their time and money to support Faculty programmes. This is integral to the future.

What about your facilities? I know space may be a premium on Campus but if I may be allowed to advocate for the students, are there spaces for the students to gather, to socialize, to meet tutors, to have debates and moots, to have something to eat and to share a beverage? As much as we may be moving to more online teaching, having proper physical spaces to gather are also important because we do better when we have human contact.

As you look to the future, we may have to add new courses to those currently on offer. These are some challenges I throw out to the faculty as you look to the future.

Before I close, I would be remiss if I don't say a word about your acting Dean, Dr Affonso. Timothy was my student years ago when most of you would have been in preschool. I have seen him as a bright student in my moot team; his graduation into practice; his educational achievements and his teaching career. In this profession you need mentors. If you want an example of what it takes to be an outstanding professional, you need not look much further than him. I know I have embarrassed him by saying this, but it is the license you have when you are a former teacher and can celebrate the successes of your students. After all today's event is a celebration of achievement brought about by hard work.

So once again I congratulate you. I wish you every success in your continuing journey of learning. Hopefully we will meet again soon at the law school or when you appear in court. For now, enjoy your time at University. I learnt a lot in my time at UWI and Law School, but I also thoroughly enjoyed my experiences. I urge you to do both.

I wish everyone a happy Divali and I thank you very much for the kindness of your attention.