

“CONSTITUTIONAL INTERPRETATION”

Caribbean Court of Justice Insights and Approaches

Turks and Caicos Islands

Thursday 21 September 2023

11:00am to 1:00pm

Peter Jamadar JCCJ

LLB, LEC, M.Div., DD

Chairperson, CAJO; Vice-President, CJEI

Constitutional v. Parliamentary Supremacy



The **CCJ**, recognizing the **distinction between constitutional supremacy**, which governs Anglo-Caribbean independent states, **and parliamentary supremacy**, which dictates UK approaches to legal interpretation, has been able to overcome the hurdles that continue to plague the JCPC, and in so doing, **to forge a relevant and socially developmental Caribbean jurisprudence.**

“Unconscionable Decisions of the Privy Council for the Caribbean: Deliberately Obtuse or Just ‘Unfamiliar’?”

by Dr L J Raznovich, CLA News, June 2023

I have argued in various publications during the last few years that **the Judicial Committee of the Privy Council (“JCPC”) has been hindering the progress of human rights in the Caribbean.**

Three decisions of the JCPC during 2022 confirm and reinforce this trend:

- AG of Bermuda v Ferguson [2022] UKPC 5 (“Ferguson”)
- Day et al v The Governor of the Cayman Islands et al [2022] UKPC 6 (“Day”), and
- Chandler v The State No 2 (Trinidad and Tobago) [2022] UKPC 19 (“Chandler”)

The JCPC, by virtue of these decisions, **is failing in its legal role of a constitutional court to expound fundamental rights.**

Applying the JCPC’s ruling in **Chandler**, prima facie, it would lead one to the inevitable conclusion that **regardless of how “inhumane or degrading” those laws are they are nonetheless constitutional and hence enforceable in the eyes of the JCPC.**

A Common Socio-legal History



The eighteen (18) Anglophone independent states and overseas territories that form the Commonwealth Caribbean Community have a **shared common law legal tradition, rooted in a common colonial experience.**

The socio-legal history of Caribbean peoples reflects an **aspirational struggle for Caribbean authenticity, agency, integrity, identity and self-determination.**

CARIBBEAN CONSTITUTIONALISM is the legitimate warrant for and writ of freedom for these societies.

Constitutional Interpretation

At the heart of the struggle for Caribbean authenticity, agency, integrity, identity and self-determination, lies the seminal work of Caribbean attorneys and judicial officers in constitutional interpretation.

It is work that is developmental and evolutionary.



Anglo-Caribbean Socio-legal Contexts

Anglo-Caribbean states have a **common colonial history** that includes **Native American genocide, slavery, and indentureship**, all legitimized in law.

British Slavery (which commenced in 1500s) was abolished in 1834.

British Indentureship (which commenced in 1837) was abolished in 1920.

Laws. During the colonial era, Britain extended the application of its laws to its colonies.

In the 19th and 20th centuries Caribbean colonies implemented legislation in *pari materi* with Britain. Prior to that, the law of England was deemed the law in Caribbean states (by process of reception).

The reception and incorporation of these laws was during an era where there was little recognition of universal human rights or application to colonized peoples.



Anglo-Caribbean Socio-legal Contexts

Post-colonial Caribbean societies have been formed and shaped in the context of several crimes against humanity:

- 1. Genocide**
- 2. Slavery**
- 3. Forced labour**
- 4. Human trafficking**





Anglo-Caribbean Socio-legal Contexts

INDEPENDENCE

The first **Caribbean country** to gain its independence was **Haiti in 1804**, followed by the **Dominican Republic in 1844**, and **Cuba in 1902**.

In **1962** the first **Anglo-Caribbean** colonies became independent – **Trinidad and Tobago and Jamaica**.

In **1966** **Barbados** became independent. Many other Anglo-Caribbean states followed in the 1970s.

In **1983** **St Kitts and Nevis** gained independence, among the last to do so.

**ALL THESE INDEPENDENT CARIBBEAN STATES ADOPTED
WRITTEN CONSTITUTIONS WHICH FEATURED HUMAN
RIGHTS PROVISIONS.**

Anglo- Caribbean Socio-legal Contexts

THE EMERGENCE OF HUMAN RIGHTS

Running parallel to this independence movement in the Caribbean were human rights interventions in the UK.

The Death Penalty

The **Murder (Abolition of the Death Penalty) Bill, 1964 (UK)** was passed and came into effect on 9 November 1964. This Act *temporarily* abolished the death penalty for murder in Britain for a five-year period and substituted it with a sentence of life imprisonment (s 1(1)).

In 1969, in the UK, the death penalty was *permanently* abolished for murder.

However, in the newly independent Anglo-Caribbean states the mandatory death penalty for murder was an existing law that was saved by savings law clauses contained in their independent constitutions.

Indeed, all pre-independence laws were similarly saved.

THIS WOULD CREATE A CONUNDRUM OF UNPARALLELED LEGAL MAGNITUDE!

Anglo-Caribbean Socio-legal Contexts

The British Overseas territories of Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos Islands all also have written constitutions.

Differences

In the fully independent states, their Constitutions are the supreme law.

Any laws or governmental actions that are inconsistent with their Constitutions are void to the extent of their inconsistency. The consequence of this is that all laws and governmental actions must align with the provisions and core values in these Constitutions.

In the Turks and Caicos Islands, the UK Parliament is supreme.

R (on the application of Misick) v Secretary of State for Foreign and Commonwealth Affairs [2020 UKPC 30], illustrates this . In this case a former Premier challenged the changes made to the Constitution by an Order in Council which were made following allegations of corruption and financial mismanagement. The West Indies Act, 1967 gives the Crown in England the power to make laws for the peace, order, and good government of the Turks and Caicos (through Orders in Council). Orders in Council can only be challenged on limited grounds of legality, rationality, and procedural propriety.

Anglo-Caribbean Socio-legal Contexts

Similarities

Though maybe not supreme in the same sense as independent Caribbean states, the Constitutions of Overseas Territories and of the TCI are the governing laws, as:

- (a) Laws made by the local legislature must conform to the Constitution;
- (b) The actions of the local executive must comply with the Constitution;
- (c) The local legislature and executive derive their power from the Constitution; and
- (d) The judiciary has the power to review the laws made by the local legislature and actions of the executive.

Developing Caribbean Constitutional Jurisprudence

The **Caicos pine** (*Pinus caribaea* var. *bahamensis*) also known as **Caribbean pine**, is the only native pine species of the Turks and Caicos Islands (TCI).

It is the national tree of the TCI.

Located on the extensive and **low-lying brush lands of Middle Caicos**, the Caicos Pine Yard Trail is a tranquil and scenic half-mile nature walk and the best place in the country to see the national tree of the Turks and Caicos—the local variety of the threatened Caribbean pine.



Developing Caribbean Constitutional Jurisprudence

Trees can teach us a lot about constitutionalism, if we are willing to look, and have the eyes to see.

A constitution is like the TCI Caribbean pine tree.

We see and use the wood of its text most often, but **need to constantly remember**, and at times recall, its roots.

There can be no Caribbean pine trees without roots. Going deep into the earth, roots anchor, support, give life to, enable growth and development, and sustain trees. Roots grow into trunks, into branches, into leaves, flowers and fruit.

The roots of a written constitution do likewise.

What then are these constitutional roots?

The Basic Structure Doctrine, what I have called the **‘basic deep structure’** of Caribbean constitutions, attempts to answer this question.

And there are other roots.



Developing Caribbean Constitutional Jurisprudence



The Basic Structure Doctrine.

How can we understand this concept?

The analogy of a tree and its roots is a useful analogy, and a good entry point.

The text of the constitution itself is like the tree that we see above ground – trunk, branches, leaves, flowers, fruit and seeds.

The basic deep structure of a constitution is comparable to the roots, lying mostly, though not entirely, below the surface of the earth and not always readily apparent, but in fact the constitutive superstructure out of which what we see and experience as ‘tree’ emerges and is sustained.

Without this basic deep structure, these roots, the constitution as we know it would fall apart.

Developing Caribbean Constitutional Jurisprudence



EXAMPLES

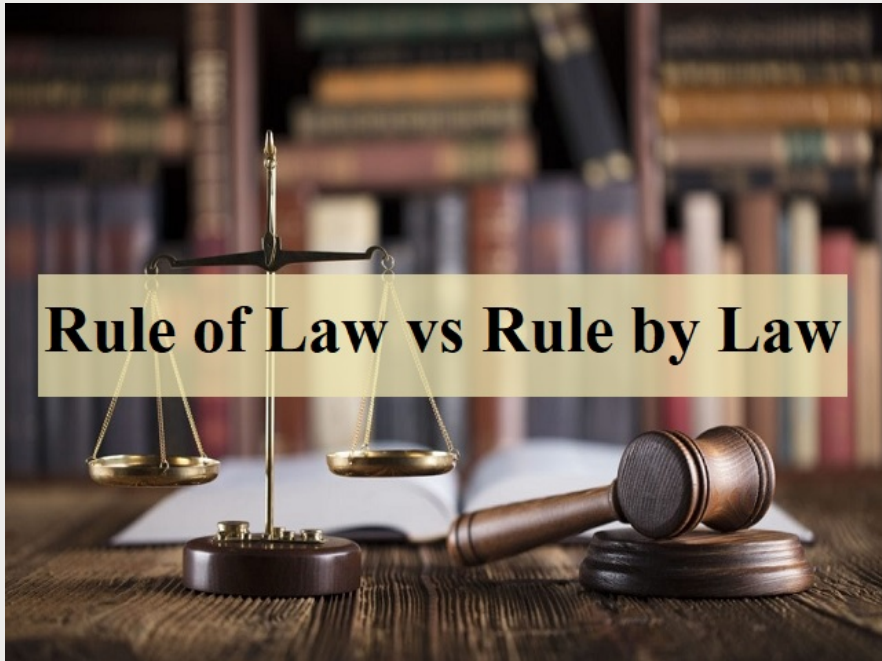
Let us take a few examples to begin to get a feel for this basic deep structure and how it functions.

A long line of case law asserts that **the separation of powers** is **part of the basic structure** of Caribbean constitutionalism. This is no longer disputable. Yet, **nowhere in the actual Constitution is there any mention of a separation of powers**. It cannot be readily seen, yet it exists!

The same applies to the **independence of the judiciary**, and to the **rule of law**. Though in the case of the rule of law there are preambular clauses, some visible indicators, that mention it.

These three, the separation of powers, the independence of the judiciary, and the rule of law, are **integral to the creation and sustainability of sovereign democratic states** as envisaged by and as prescribed in Caribbean Constitutions.

Developing Caribbean Constitutional Jurisprudence



These constitutional features are so fundamental, that without them Caribbean constitutionalism and our liberal democratic systems, that we take for granted, would cease to exist.

If there was no **separation of powers**, the police could maybe, be permitted to sentence criminals.

And if the **independence of the judiciary** did not exist, then ministers of justice could maybe, appoint and remove judicial officers.

And if the **rule of law** was not fundamental, then maybe, **rule by law** could become manifest. Indeed, let us recall that slavery and indentureship were based in law.

Developing Caribbean Constitutional Jurisprudence

How do we make sense of this?

Of the idea that there are certain principles that are so fundamental to Caribbean constitutionalism that even if unwritten, they cannot be changed.

It all makes perfect sense by way of the basic structure doctrine that undergirds, underpins, and 'informs' (from the inside, out) Caribbean constitutionalism.

An in-depth discussion is for another occasion.





A Discussion on the Death of Socrates

- Jacques-Louis David

Developing Caribbean Constitutional Jurisprudence: Some General Comments

1

Begin with Caribbean realities, situational and contextual considerations:

- Historical
- Sociological
- Economic
- Developmental

2

Recognize, realize, reclaim Caribbean sovereignty:

- Socio-historical and legal considerations
- Post-/Anti-colonial approaches

3

Take a holistic rights-centric approach:

- Constitutional supremacy
- Hierarchy of constitutional values
- Democratic development
- Privileging of Human Rights

General Principles of Constitutional Interpretation

Special nature
and character
of
constitutions

Holistic and
evolutionary
approaches

Inclusive and
all-
encompassing
approaches

Chiastic
approaches

General Principles of Constitutional Interpretation

5 basic questions



What is the purpose and function of a constitution?



How should a constitution be interpreted?



What guides evolving understandings of constitutionalism?



How to resolve inter- and intra-textual ambiguities?



What are the available interpretative tools?

General Principles of Constitutional Interpretation

5 Basic Approaches:

1

Have regard to the Basic Deep Structure and Preambles to discern the fundamental ethos and values

2

Regard a constitution as encompassing hierarchical and intersecting norms, values, principles; apply organic inter-textual approaches

3

Distinguish between major and minor features of a Constitution

4

Prioritize basic deep structure principles, the rule of law, and human rights

5

Have regard for the collective wisdom of judicial decisions from a range of jurisdictions



A DEEP DIVE

Special Nature & Character of Constitutions

Caribbean constitutions are *sui generis*

They have their own interpretative principles that arise from their special character, status, and origins as constitutions

Which, because of the supremacy clauses, take paramountcy

The consequence is that the interpretation of Caribbean Constitutions is a legal activity in its own right.

CARIBBEAN COURT OF JUSTICE

CARIBISCH HOF VAN JUSTITIE

COUR CARIBÉENNE DE JUSTICE

PLEASE USE
OTHER DOOR
GELIEVE ANDERE DEUR
TE GEBRUIKEN
VEUILLEZ BIEN PRENDRE
L'AUTRE PORTE
→ → →

ENTR
INGA
ENT

McEwan and Others v The Attorney General of Guyana [2018] CCJ 30 (AJ) GY

Holistic Approaches

“A Constitution must be read as a whole.

Courts should be astute to **avoid hindrances** that would deter them from interpreting the Constitution **in a manner faithful to its essence and to its underlying spirit.**

If one part of the Constitution appears to run up against an individual human right, then, in interpreting the Constitution as a whole, courts should **place a premium** on affording the citizen his/her **enjoyment of the fundamental rights**, unless there is some overriding public interest.”

McEwan
[2018] CCJ 30 (AJ) GUY, [41]



HOLONS

This notion of holons —

- the idea that the universe is fundamentally made of,
- **whole/parts within whole/parts within whole/parts,**
- all the way up and all the way down,
- all the in and all the way out ...



McEwan

- Four of the appellants, who identify as transgender persons, were **arrested, convicted and punished for cross-dressing in public.**
- They were **charged with loitering and wearing female attire in a public place for “an improper purpose”**, contrary to section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act.
- They argued, that the **section violated their constitutional rights to equality, non-discrimination, and freedom of expression.**
- The **CCJ agreed** with the appellants that their rights had been violated.



McEwan

The CCJ held that:

- **Section 153(1)(xlvii)** of the Summary Jurisdiction (Offences) Act was **not immune from judicial scrutiny just because it was a pre-independence law**,
- The section **violated** the first four appellants' **right to equality**, and
- The section **violated** the first four appellants' **right to freedom of expression** guaranteed to them under Article 146 of the Constitution.
- They also held that the **section offended the rule of law** given its **vagueness**.
- The CCJ therefore ordered that Section 153(1)(xlvii) be **struck from the laws** of Guyana.



McEwan

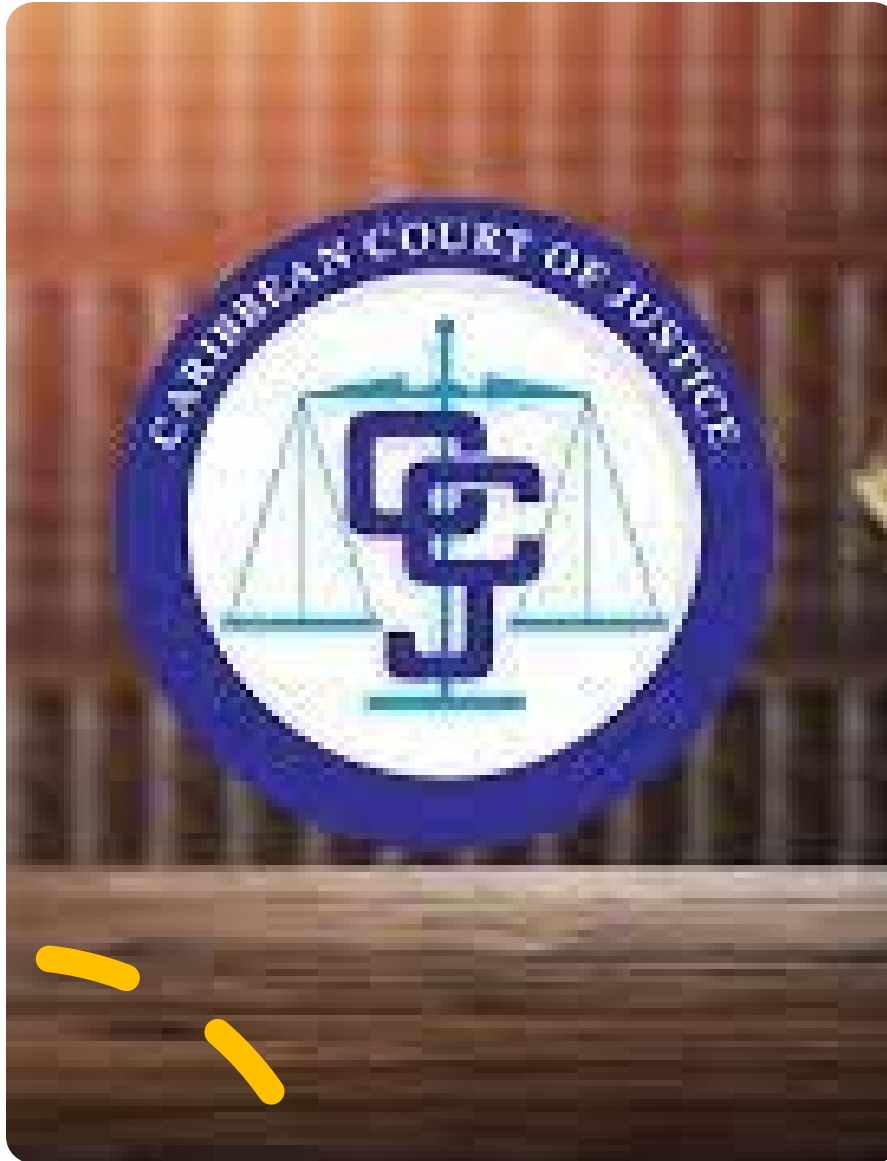
The CCJ stated at [40]:

On 27th June 2018, a day before the hearing of the present appeal, this Court delivered its judgment in the appeals of *Nervais v The Queen* and *Severin v The Queen*.

In those consolidated cases, the Court addressed the **Barbados savings law clause**. At [59] of the judgment we noted that:

“With these general savings clauses, **colonial laws ... are caught in a time warp continuing to exist in their primeval form, immune to the EVOLVING UNDERSTANDINGS AND EFFECTS** of applicable fundamental rights.

This **cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.**”



McEwan

The hallowed concept of constitutional supremacy is severely undermined **by the notion that a court should be precluded from finding a pre-independence law, indeed *any* law, to be inconsistent with a fundamental human right.**



Marin

[2021] CCJ 6 (AJ) BZ

The Honourable:

Mr Justice A Saunders, PCCJ

Mr Justice J Wit, JCCJ

Mr Justice W Anderson, JCCJ

Mme Justice M Rajnauth-Lee, JCCJ

Mr Justice D Barrow, JCCJ

Mr Justice A Burgess, JCCJ

Mr Justice P Jamadar, JCCJ

Counsel:

Anthony G Sylvestre for the Appellant

Deryl-Lynn Vidal SC for the Respondent

International law – Jurisdiction – No originating application – Whether the Court of

Justice and Caribbean Court of Justice have jurisdiction to determine there has been a

violation of fundamental rights where the issue was not engaged in before – Constitution

Marin

“The judges of the CCJ have most recently sought to meld this *sui generis* centre and these core ideological in-forming approaches ...”. [34]

“... they seek to give voice to a **more inclusive and encompassing model** of constitutional interpretation.

A model **intended to prioritize substance over form**, without disregarding the intimate and integral interconnectedness between legal form and legal essence.

A model that recognizes and **places at the centre of the hermeneutical exercise the *sui generis* nature of constitutional interpretation.**” [35]

Marin

- Solomon Marin Jr (“Marin”) was tried by a jury and convicted of the crimes of kidnaping and robbery. He was sentenced to two concurrent ten-year terms.
- Marin appealed the conviction and sentences imposed. There was a **nine-year delay between his conviction in the Supreme Court and the hearing and determination of his appeal**. Marin subsequently withdrew his appeal against sentence but maintained his appeal against conviction.





Marin

- On appeal Marin argued that the **post-conviction delay breached his fundamental right to a fair hearing within a reasonable time and asked for his conviction to be quashed**. The State admitted the delay breached Marin's fundamental right to a fair hearing within a reasonable time but argued that the conviction did not need to be quashed as it was otherwise sound.
- The Court of Appeal proceeded *arguendo* on the basis that Marin's right to a fair hearing within a reasonable time was breached but refused to quash his conviction, finding that it was otherwise sound. **The Court of Appeal did not grant Marin a remedy for the breach of his fundamental right.**

CCJ upholds appeal from Belizean man

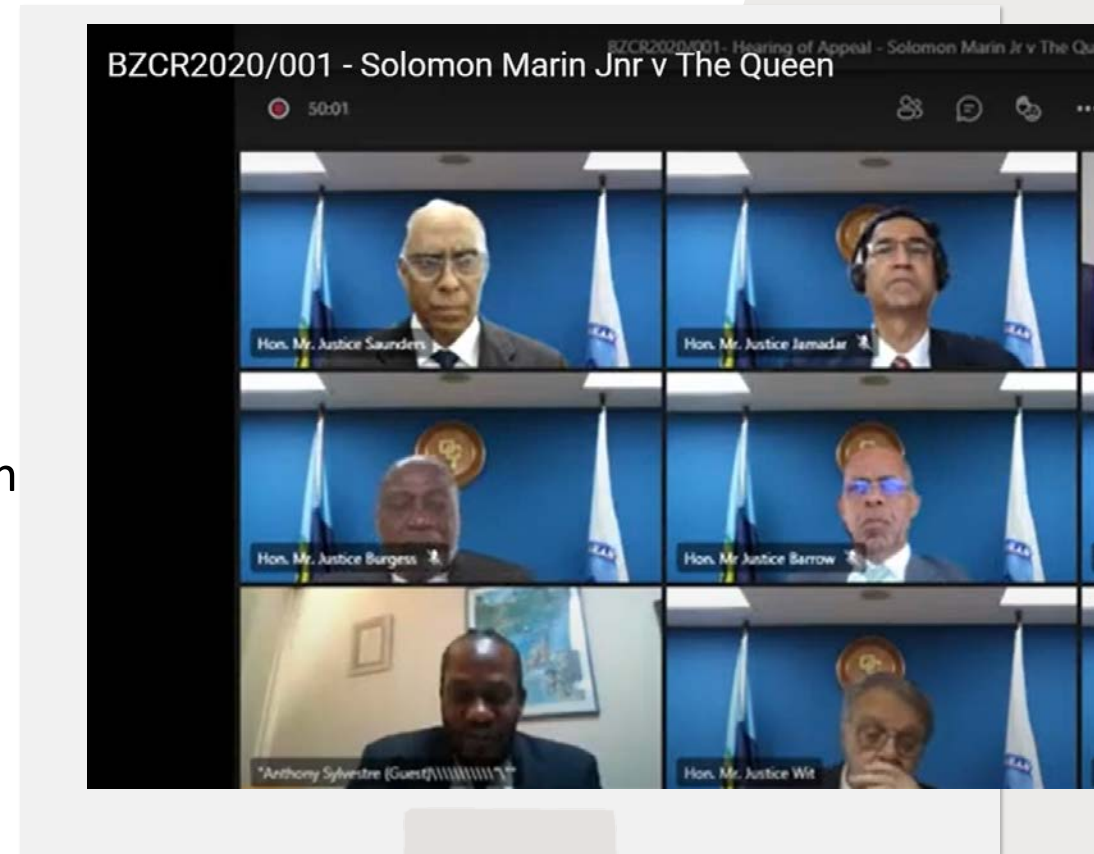
Marin

- The **CCJ** found that the Court of Appeal can, in certain circumstances, grant relief and a remedy for a breach of an individual's fundamental rights where the breach arises during a case before it, even if not directly related to the issues that may or do arise from the substantive criminal trial.
- In such instances there is no necessity for an aggrieved individual to seek such relief by way of a separate originating application in the Supreme Court.
- Marin was **granted relief for the breach of his constitutional right to a fair hearing within a reasonable time**. The Court granted both a **declaration and an order suspending any further execution** of the sentences imposed.



Marin - Evolving understandings and effects

- Caribbean **constitutional interpretation remains an unfolding, forever unfinished process** of reflection, discovery, assimilation, refinement, and application.[27]
- In 2005 this Court emerged in the region as an indigenous apex appellate court with an explicit mandate to play ‘a determinative role in the further development of Caribbean jurisprudence through the judicial process...’.
- In this mandate, the **Court’s role is intended to be transformative of both law and society**, conceived as mutually constitutive.[28]

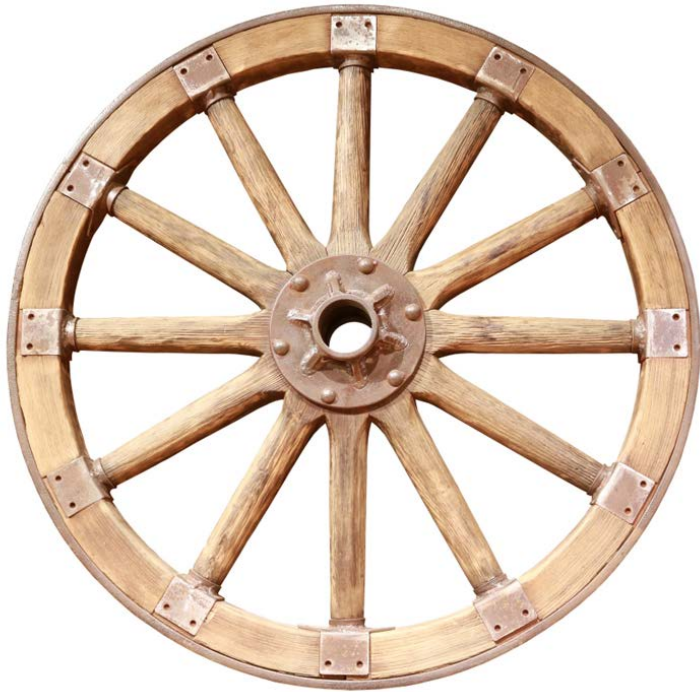


Interrogating Change from the Centre CCJs Human Rights Jurisprudence



INCLUSIVE, ENCOMPASSING, CHIASTIC APPROACHES

Marin



- What has begun to emerge is a **sort of chiastic analytical pattern** (emerging out of a resonant chiastic epicentre) to the approaches to Caribbean constitutional interpretation. [29]
- [It is] a **more inclusive and encompassing method** It is a pattern in which there is an **evolutionary flow towards greater symmetry and a balancing of parts,**
- of what is a **movement towards a more unified interpretative whole.** [29]

Marin



- **What is the centre point** of this Court's approach to Caribbean constitutional interpretation?
- It is that **Caribbean constitutions are *sui generis***. And as such, have their own interpretative principles that arise from their special character, status, and origins as constitutions. And which, because of the supremacy clauses, take paramountcy. [30]
- Having once accepted this centre point, it becomes **the primary lens** through which one must **view, read, interpret, and apply** constitutional provisions, values, and principles.
- However, something more needs to be said about **this *sui generis* centre point**. Ultimately **it facilitates**, in the sphere of constitutionalism, **the search for meaning**. [31]



Marin

A search (for meaning) that **for the process of interpretation:**

a) **begins with ‘a recognition of the character and origin of the instrument’,**

b) **is grounded in a regional and local *sitz im leben*** (the contexts in which constitutions as text are created and located, including indigenous legal customs, traditions, conventions, culture, and history),

c) **reaches simultaneously backwards-and-forwards temporally into local and incorporated international intentions and aspirations, and**

d) **is also in-formed by unique ideological interpretative approaches.**

[31]

Marin

Some of these unique ideological and in-forming approaches, that have their true origins in a constitution's *sui generis* character, **include** interpretations that:

- a) are guided by the principle of giving full recognition and effect to fundamental rights and freedoms;
- b) are open minded;
- c) are generous, broad, and purposive;
- d) treat a constitution as a living instrument capable of responding to evolving societal attitudes and norms;
- e) are present and future facing;
- f) are democratically justifiable; and
- g) are consciously independently developmental.



Marin

The judges of the CCJ have most recently sought to meld this *sui generis* centre and these core ideological in-forming approaches ... [34]

... they seek to give voice to **a more inclusive and encompassing model** of constitutional interpretation.

A model **intended to prioritize substance over form**, without disregarding the intimate and integral interconnectedness between legal form and legal essence.

A model that recognizes and **places at the centre of the hermeneutical exercise the *sui generis* nature of constitutional interpretation.** [35]

Marin



Radiating outwards, from this 'sui generis' centre (a constitution's special character, status, and origins), as it were in concentric mutually reciprocating interpretative circles, are also the **following practical (and more traditional) aids** to this singular search for meaning:

- a) closest to the centre in terms of immediacy, **the specific language of the text** that is the object of the task of interpretation,
- b) encircling that, the textual context, often discovered by use of inter- and intra- textual aids, as well as relevant canons of construction, but not exclusively so, as **the broader surrounding circumstances** may be relied upon,
- c) then informing the text, **discoverable intent**,

Marin



- d) then **constitutional common law**,
- e) then **core and basic deep structure influences**,
- f) then **relevant international values, principles, and conventions**, including with particularity those consented and subscribed to by the local jurisdiction,
- g) Then **local, regional, and comparative international precedents** and relevant judicial interpretations and applications, bearing in mind the policy of *stare decisis* and the hierarchies of precedential persuasiveness, and then
- h) the **corpus of relevant academic and research literature**, both legal and otherwise.

Marin

Indeed, this approach aligns with Professor Simeon McIntosh's concept of **'integrity, as an adjudicative principle.'**

It is an approach that recommends seeing and interpreting the constitution as a coherent text.

As (Professor Simeon) McIntosh explains:

'It expresses an interpretative ideal that the Constitution be interpreted in a way that makes it as just as it can possibly be

Therefore, as an adjudicative principle, integrity requires that the **various provisions of the Constitution be read as expressing a coherent scheme of justice and.' fairness**



Rabbinical Discussion

- Jacob Toorenvliet



**STRECH
BREAK**



CONSEQUENCES

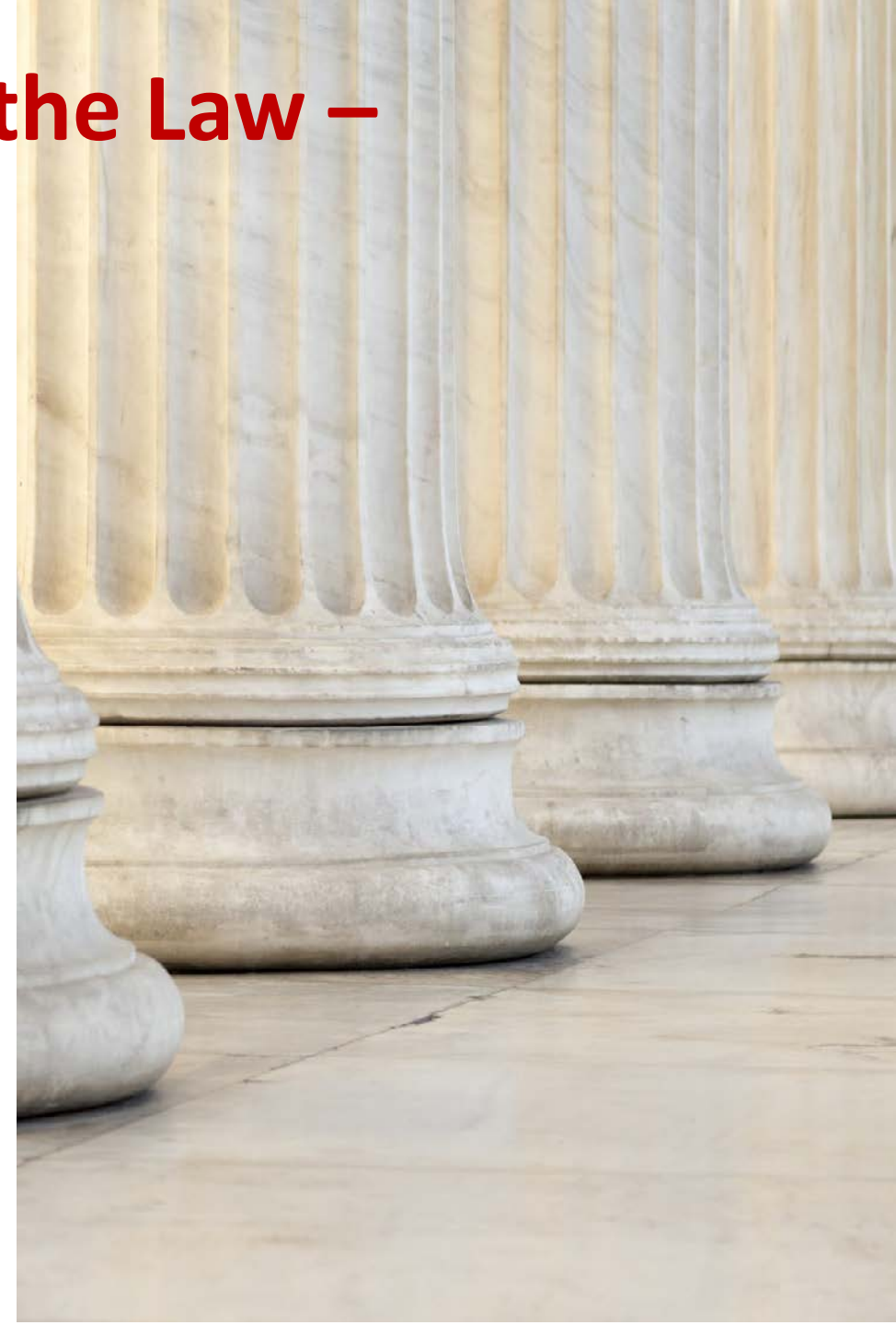
The Rule of Law and Protection of the Law – Overarching Constitutional Norms

The Rule of Law and the Protection of the Law are now clearly established as constitutional norms that can be independently enforced.

In this respect they can both be classed in the same category as Separation of Powers and Judicial Independence, as part of the Basic Deep Structure of Caribbean constitutionalism.

They are overarching norms that are fundamental to Caribbean constitutionalism.

AG of Barbados v Joseph and Boyce [2006] CCJ 3 (AJ) BDS; Lucas v The Chief Education Officer [2015] CCJ 6 (AJ) BZ; Maya Leaders Alliance v. AG of Belize [2015] CCJ 15 (AJ) BZ; Nervais v The Queen and Severin v The Queen [2018] CCJ 19 (AJ); and McEwan v AG of Guyana [2018] CCJ 30 (AJ) GUY



The Rule of Law and Protection of the Law – Overarching Constitutional Norms

The rule of law and the right to protection of the law may also, in appropriate cases, require the **relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.**

Lucas v The Chief Education Officer [2015] CCJ 6 (AJ) BZ; Maya Leaders Alliance v. AG of Belize, [2015] CCJ 15 (AJ) BZ.





The Rule of Law and Protection of the Law – Overarching Constitutional Norms

In effect, the decision in *Nervais and Severin* is monumental in Caribbean jurisprudence, because it establishes that **even the literal text of a constitution is not inviolable and is at once subject to certain ‘basic underlying principles’.**

What becomes normative, and authoritative, is ultimately not the letter of the text, but **the basic ‘deep’ structure** (certain non-derogable features, principles, and values) **that underpins, informs, and constitutes the text as a constitution.**

State Contracts – Good Faith



The **State** is indeed under the Constitution obliged **to treat with contracting parties in accordance with the rule of law**, not understood as a mechanical but as a rich and normative principle, and, flowing therefrom, the **principle of good governance**.

As indicated, the Constitution is a qualitative and normative instrument primarily containing directions and instructions for the State and its agents.

Good governance is down to earth fairness and reasonableness in the public domain. **And in contract law, the duty of the Government implies treating with contracting parties fairly, honestly, openly, in short - in good faith.**

State Contracts – Good Faith

As a general principle, **the executive and all state and public agencies and authorities are subject to the standards of accountability and good governance** that the constitutional imperative of the rule of law demands, **in all of their dealings with private enterprise third parties**, including in the making, changing, and breaking of commercial contracts.





State Contracts

If laws passed by the legislature can be struck down as unconstitutional and outwit constitutional legitimacy, conceivably **so can State actions** which are always assumed to be premised on legality and lawfulness; that is to say, on constitutional propriety.

Belize International Services Ltd. v AG of Belize [2020] CCJ 9 (AJ) BZ [354]

General Statutory Interpretation

This appeal raises several matters of pure statutory interpretation that have generated anxious argument, and that are amenable to multiple rational lines of reasoning. [132]

It seems that a court faced with choices as to multiple interpretations of statutory provisions needs to have an orienting filter that guides the options that are best suited for the circumstances. One such filter which demands priority, in Caribbean states such as Guyana, is the deep basic structure and core constitutional values and principles to be found in Guyanese constitutionalism. [135]



General Statutory Interpretation

Fundamental to this endeavour, is to critically interrogate assumed and inherited legal methodologies taken as givens, and to seek to discover new ways of seeing, interpreting, applying law in the project of interpretative ‘law-making’, consistent with the will and aspirations of the Constitution and peoples of Guyana.

This is in fact the role of a judge in the legislative project, to interpret legislation.

And in doing so to bridge the gap between the law as written and current, new, and emerging social realities. It is not judicial overreach, but rather judicial duty, constitutionally warranted.

Indeed, this Court has been consistently taking this approach. [139]



General Statutory Interpretation

In sum, the approach that we advocate avoids having to draw rigid categorical lines in an attempt to resolve an either-or conundrum,

and in its hermeneutic of constitutionally grounded open inclusivity,

sees, interprets, and applies the both-and Parliamentary intent that aligns more readily with Guyanese constitutionalism. [168]



General Statutory Interpretation

This Court has pointed out that constitutional democracies function under the rule of law and in the context of constitutional supremacy.

Accordingly, where the issue of statutory interpretation is at play, the Court should interpret legislation not only to achieve the objectives of the legislation, and the intention of Parliament but to achieve alignment with

(1) fundamental human rights and core constitutional values and principles contained in Commonwealth Caribbean Constitutions, and

(2) international treaty obligations and commitments of these States. [67]



General Statutory Interpretation

The Barbados case of *Commissioner of Police v Alleyne* is important to this discussion.

In *Alleyne*, Jamadar J noted that in constitutional democracies all statutory interpretation must include a consideration of whether the law as stated can be interpreted in a manner that is consistent with the Constitution, as to the extent that there is an inconsistency, the law is void.

Statutory interpretation in state where there is constitutional supremacy, such as in Barbados, necessarily requires that all legislation be filtered through constitutional lenses. [71]



General Statutory Interpretation

Jamadar J therefore observed that two principles of statutory interpretation emerge for states which exist in the context of constitutional supremacy.

Methodologically,

- a) respect for fundamental rights and basic deep structure principles, and**
- b) formal international treaty commitments, are both lenses through which all statutes must be viewed, interpreted, and applied so as to adhere to and be consistent with, so far as is appropriate, those core values, principles, and commitments.**

Jamadar J affirmed that these two rules of statutory interpretation must be considered and applied because in a constitutional democracy where the Constitution and not Parliament is supreme, it is a constitutional imperative, integral to the task of statutory interpretation.

The Constitution therefore is at the centre of statutory interpretation and not at the periphery. [73]



General Statutory Interpretation

We share the views of Jamadar J as to the role played by the Constitutions of the various Commonwealth Caribbean jurisdictions in the exercise of statutory interpretation carried out by the courts, mindful that the Constitution is the supreme law in constitutional democracies.

In particular we note that regard must be had to the fundamental rights provisions. [74]



General Statutory Interpretation: Supremacy and the Modification of Existing Laws

‘[M]odification first ennobles [the Constitution] by respecting and advancing [its] cherished ethos.

It **avoids the artificial conundrum** that a law that plainly infringes fundamental rights must be held to be constitutional and valid, if, paradoxically, one focuses only on a fundamental rights challenge to it, but the same law may be held unconstitutional and invalid if one focuses on its tension with deep structural constitutional concepts...

Or that the savings clause, to take yet another example, preserves the validity of an existing law that seriously contravenes fundamental rights, but if parliament makes a valiant good faith effort at mitigating the harshness of that law, the same then becomes liable to be invalidated by the courts as being unconstitutional.’ [63]



General Statutory Interpretation: Supremacy and the Modification of Existing Laws

In Barbados, the **‘modification first’** principle applies to all pre-independence laws.

The principle mandates **construing these laws so as to bring them into conformity with relevant constitutional provisions and principles/values**.¹⁵⁹

It evidences statutorily the supremacy principle in s 1 of the Constitution which is more generally stated and applicable.

The duty to modify is however **demonstrative of the deeper constitutional principle of conformity**, which in its truest sense is a **principle of statutory interpretation** and application.

Thus, in Barbados the domestic violence legislation must be interpreted and applied so as to further the appellant’s rights to liberty, security of the person, and the protection of the law, and to do so with equality (and non-discrimination). [167]



General Statutory Interpretation: Supremacy and the Modification of Existing Laws

Courts in Barbados therefore have a continuing responsibility to ensure that statutes adhere to and are consistent with, so far as is appropriate, the core values, principles, and commitments contained in both the Constitution and in ratified treaties.

These philosophical/policy and jurisprudential perspectives are voices of the law that must never be brushed aside, but rather honoured in their application. [169]

What I will say however, is that in constitutional democratic states such as Barbados, these approaches to statutory interpretation are not peripheral, but are rather central and paramount. [170]



Supremacy and the Modification of Existing Laws: TCI

In *Roach v Attorney General*, from the British Virgin Islands, Matthew J (Ag) opined that the provisions of their Constitution were supreme, as **the Constitution had a modification clause requiring 'existing laws' to be modified or amended to bring them in line with the Constitution.** (Roach v The Attorney General VG 2002 HC 2 (V Lex) 31 January 2002 (HC BVI))



Section 5(1) of the Turks and Caicos Constitution Order, 2011 is a similar provision.

These Constitutions may thus be the highest law on the territory but do not supersede laws created by the UK to govern that territory.

Supremacy and the Modification of Existing Laws: TCI

Modification of Existing Laws

The Turks and Caicos Islands Constitution Order 2011

5.—(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.





Discussion: The AI Art Debate

- Steve Dennis

Specific Approaches to Constitutional Interpretation

Privileging of Human Rights

Consistency with international obligations

Substantive protection of the law & rule of law

**Use Preambles
Basic Deep Structure**

Privileging of human rights

Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. [41]

Saunders PCCJ in McEwan [2018] CCJ 30 (AJ) GUY

If one part of the Constitution appears to run up against an individual human right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. [37]

Jamadar JCCJ in Marin [2021] CCJ 6 (AJ) BZ



Privileging of human rights



The Attorney General Barbados v Joseph and Boyce.*

The CCJ held that a constitutional ouster clause did not prevent the courts from inquiring into the decision of the local Mercy Committee in light of allegations that these powers had not been exercised in accordance with the rules of procedural fairness.

*[2006] CCJ 3 (AJ) BB

Privileging of human rights



This privileging of human rights has found unique expression in the CCJs Caribbean jurisprudence, especially in a trilogy of cases. In *Nervais v R*; *Severin v R* , *Mc Ewan v AG*, and *Bisram v DPP*, the CCJ would uphold the primacy of human rights in the context of establishing a hierarchy of constitutional principles, rendering savings law clauses subject to their values.

- [2018] CCJ 19 (AJ) BB
- [2018] CCJ 30 (AJ) GY
- [2022] CCJ 7 (AJ) GY

Privileging of human rights

In Nervais, the CCJ stated at [58]:

The general saving 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.



Privileging of human rights

In McEwan, the CCJ put it this way at [39]:

By shielding pre-Independence laws (referred to as “existing laws”, because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism.

The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be precluded from finding a pre-independence law, indeed any law, to be inconsistent with a fundamental human right.

Simply put, the savings clause is at odds with the court’s constitutionally given power of judicial review.



CCJ: Consistency with International Obligations

In the case of *The Attorney General Barbados v Joseph and Boyce*.*

The CCJ held that courts must interpret the constitution in a manner that is consistent with international obligations.

In this case the issues were whether the mercy committee was subject to judicial review, and whether it was required to await the conclusion of international human rights petition processes and to consider the reports of those bodies before making its recommendation.

*[2006] CCJ 3 (AJ) BB



CCJ: Consistency with International Obligations

Legitimate Expectation

In the case of *The Attorney General Barbados v Joseph and Boyce*.*

The CCJ unanimously held that **according to the doctrine of legitimate expectation, the respondents had the right to have their petitions heard before international bodies.**

The ratification of the American Convention on Human Rights though unincorporated into domestic law together with the positive statements by the Executive and Parliament illustrating an intention to comply with the Convention; and the practice of the Barbados government of allowing convicted persons the opportunities to petition international bodies before execution, created this legitimate expectation.



*[2006] CCJ 3 (AJ) BB

CCJ: Protection of the Law, a substantive right



In *The Maya Leaders Alliance v The Attorney General of Belize*, the CCJ affirmed the customary land rights of the Maya peoples in respect of land in Belize and emphasized that the constitutional right of protection of the law ought not be viewed only through the lens of access to courts or quasi-judicial bodies.

The court held that **there is a justiciable principle of the protection of the law, and the rule of law.**

The CCJ found that the Government of Belize had **breached** Maya community members' **right to protection of the law by failing to ensure that the existing land law system recognised and protected Maya land rights.**

[2015] CCJ 15 (AJ)

CCJ: Protection of the Law, a substantive right

In *The Maya Leaders Alliance v The Attorney General of Belize*, the CCJ explained the right as follows:

The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law.

The right to protection of the law **prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights** to life, liberty or property.

It encompasses the **right of every citizen of access to the courts and other judicial bodies** established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights.

However, the **concept goes beyond such questions of access and includes the right of the citizen to be afforded, “adequate safeguards against** irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.”

The right to protection of the law may, in appropriate cases, **require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights.**

CCJ: Use of Preambles

Caribbean constitutions make explicit references to certain core values in their preambles ('preambular values'), including the rule of law and democracy.

In *The Attorney General Barbados v Joseph and Boyce* ([2006] CCJ 3 (AJ) BB), Wit JCCJ described **constitutional preambles as “filling the constitution with meaning” and infusing “life into the clay of the more formal provisions”**. [18]-[19]

In several cases the CCJ has confirmed that **the rule of law is an implied principle in Caribbean constitutionalism**:

- *The Attorney General Barbados v Joseph and Boyce* [2006] CCJ 3 (AJ) BB
- *The Maya Leaders Alliance v The Attorney General of Belize* [2015] CCJ 15 (AJ) BZ
- *McEwan v The Attorney General of Guyana* [2018] CCJ 30 (AJ) GUY

While **preambles** may not be separately enforceable *per se* they **function at a minimum as an aid to interpretation** of the constitutional text, and certainly so in cases of uncertainty and ambiguity.



JCPC: Privileging of Human Rights

In **Chandler v State of TT**, a judgment of the JCPC delivered in May 2022,* the **JCPC would confront the CCJ jurisprudence** on the savings law clause and acknowledge “that there are tenable arguments on both sides.” **

Yet, and in the face of tenable arguments, **it would choose reliance on the doctrine of stare decisis**, “standing by what has been decided,” because this was “a fundamental principle of the common law,” and not depart from its prior approaches.



* [2022] UKPC 19; ** [33] - [50], and [74]; [57]; [97] - [98].

JCPC: Privileging of Human Rights

Chandler v State of TT

In the end, the **JCPC acknowledges the unconstitutionality of several pre-independence colonial era laws** but declares that it is for Caribbean parliaments to effect reform – not the courts.****

A remarkable position, given the principle of constitutional supremacy and the power, indeed, the duty, of constitutional judicial review that is vested in the courts!



* [2022] UKPC 19; ** [33] - [50], and [74]; *** [57]; **** [97] - [98].

JCPC: Privileging of Human Rights

The **JCPC's approach is to give precedence to the savings law** clause despite leading to a result that is admittedly inconsistent with the Constitution.

The **CCJ adopted a different approach**, reflective on the general approach of affording a premium to human rights.

The JCPC has in some instances adopted a literal approach especially in the cases dealing with human rights and the savings law clause.

The **result of this is that it saves archaic outdated colonial laws and shields them from constitutional challenge**, ignoring the modification clauses and in full acknowledgment of its repugnancy as it relates to the bill of rights and international obligations.

JCPC: Reliance on International Obligations



Due Process

The JCPC in *Pratt v The Attorney General* [1994] 2 AC 1, *Thomas v Baptiste* [2000] 2 AC 1, *Lewis v The Attorney General* [2001] 2 AC 50, significantly relied on **international obligations**, namely the **right to petition these international organizations as part of a due process right under the Constitution**.

That is, access to this international process that did not form part of local laws (they were part of an unincorporated treaty's process), were nevertheless part of the right to due process under the constitution.

JCPC: Protection of the Law/Rule of Law

In **Chandler**, the **JCPC would also part ways with the CCJ** on its approach to the interpretation and **use of the constitutional doctrines of the rule of law and the protection of the law, and of the preamble:**

The Board is **not persuaded that it is possible to erect the rule of law into a justiciable unwritten principle which can be separated and untethered from the specific provisions** of the 1976 Constitution. The Board has already expressed its opinion on the separation of powers (paras 75-91 above). Just as the principle of the separation of powers arises by implication from the provisions of the 1976 Constitution, those provisions also are the source of the principle of the rule of law.

The **principle of the rule of law must be considered in the context of the 1976 Constitution as a whole and the Constitution interpreted as a coherent whole.** The aspects of the rule of law upon which Mr Fitzgerald relies are articulated in sections 4 and 5 of the 1976 Constitution. **Those provisions are, as the Board has explained, disapplied by section 6 of the Constitution.**

It would **undermine the coherence of the Constitution if that which section 6 has disapplied were nevertheless to be applied though the invocation of the principle of the rule of law.** [94]

JCPC: Protection of the Law/Rule of Law

In **Chandler**, the **JCPC would also part ways with the CCJ** on its approach to the interpretation and use of the constitutional doctrines of the rule of law and the protection of the law, and of the preamble (continued):

The Board concludes that the acceptance of a justiciable principle of the rule of law that is untethered from the 1976 Constitution would contradict the fundamental provision (section 2) that the Constitution is the supreme law of Trinidad and Tobago and would militate against legal certainty. [95]

[2022] UKPC 19, at [92]-[96]



Discussion Potato Eaters

- Vincent Van Gogh



“Unconscionable Decisions of the Privy Council for the Caribbean: Deliberately Obtuse or Just ‘Unfamiliar’?”

by Dr L J Raznovich, CLA News, June 2023

These cases involve constitutional construction of codified written constitutions, i.e. where the constitution, rather than the parliament, is supreme.

In that context, the JCPC’s attempts to justify its decisions, by deference to majoritarian democratic ruling, remain highly unpersuasive by effect of its failure to follow (or to give reasoned explanation for why it departed from) its own long-established principles of constitutional interpretation, such as the “living tree”, generous and purposive interpretation of bills of rights, strict and narrow interpretation of derogations from human rights, the presumption that constitutional provisions are intended to conform with international obligations where there is ambiguity, carefully focusing on the language rather than the intention of the drafter, etc.

Lord Bingham explained in *Bowe v R* [2006] UKPC 10 that constitutional adjudication of primary legislation under a written constitution is unfamiliar and even resisted by some in the JCPC, perhaps due to their conflation of two very different systems of governance.

Constitutional v. Parliamentary Supremacy



The **CCJ**, recognizing the **distinction between constitutional supremacy**, which governs Anglo-Caribbean independent states, **and parliamentary supremacy**, which dictates UK approaches to legal interpretation, has been able to overcome the hurdles that continue to plague the JCPC, and in so doing, to **forge a relevant and socially developmental Caribbean jurisprudence**.



THANK YOU

**MAY YOUR JOURNEY INTO
CONSTITUTIONAL
INTERPRETTION**

**LEAD YOU IN DIRECTIONS
OF CONSTRUCTIVE
EVOLUTIONARY
DEVELOPMENT**

**SUITABLE FOR YOUR OWN
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