Celebrating Caribbean Jurisprudence: Intersects between Law, Politics, and Society

The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of Justice

Organization of Commonwealth Caribbean Bar Association Lecture Series. C. Dennis Morrison Memorial Lecture

Virtual
26 November 2024

The Organization of Commonwealth Caribbean Bar Associations (OCCBA) is an organisation of the Bar Associations in the Commonwealth Caribbean and neighbouring Commonwealth countries. It is the successor of an organisation known as the West Indies Bar Association which was established in 1957 in Barbados after a conference in Trinidad in 1952. The aims and objects of OCCBA include being concerned with questions of human rights, justice and the rule of law, the independence of the judiciary, the improvement of the administration of justice, legal education, study of jurisprudence, legal literature and law reporting, and the establishment of legal aid. OCCBA aims to contact and encourage the participation of all regional bar and law associations and attorneys, and maintain a close relationship with other regional and international organizations (e.g.CLE., IBA, UIA., IABA), and a close relationship with the OECS bar.

Keynote Address

by

The Honourable Mr Justice Adrian Saunders, President of the Caribbean Court of Justice

On the occasion of

The Organization of Commonwealth Caribbean Bar Association Lecture Series

C. Dennis Morrison Memorial Lecture

26 November 2024

Esteemed Colleagues

First, I wish to congratulate the Organization of Commonwealth Caribbean Bar Association (OCCBA) for naming this lecture series in Dennis Morrison's honour. It is an extraordinary honour to have been invited to deliver the inaugural one under that name.

It is not uncommon to make hyperbolic statements about a deceased person so as to amplify the deserved tribute to them. I assure you that none of the views I express now about Dennis fall into that category. One of the noble things about our profession is that we eulogise our heroes when they are alive and in their presence. Much of what I say now about Dennis is what I shared at his retirement, in his presence and the presence of his dear wife, Janet, and their children.

Dennis was in the first batch to study Law at the University of the West Indies (UWI). That first class comprised truly outstanding luminaries. I think of Francis Alexis, Keith Sobion, Eileen Boxill, Justin Simon, Parnel Campbell, Clare Roberts, Dean Barrow, Derrick McKoy, Henry Browne, Roy Fairclough, Hilford Deterville, Tapley Seaton, Sandra Mason, Andrew Cummings, Endel Thomas and others whose names now elude me and who have made their mark in defining and advancing our Caribbean jurisprudence[1]. Dennis was the finest mind of them all, and unsurprisingly, he topped the class.

I entered Cave Hill when that first batch was in their final year, so we overlapped for one year. It was evident to me that everyone on Campus knew and admired Linguist, as he was fondly called. Over the years, I was very fortunate to have enjoyed an excellent professional and personal relationship with him, especially in the latter years. He appeared before me as counsel once in Anguilla. He was as scintillating as ever. Unfortunately for his clients, I preferred the case of the other side, ably presented by Allan Alexander. Dennis and I taught together at the

[1] See https://barbadostoday.bb/2024/03/29/trailblazers-in-law-faculty-at-uwi-cave-hill-return-home/

Commonwealth Judicial Education Institute's (CJEI) Intensive Study Program for Commonwealth judges in Halifax. When I was appointed President of the Caribbean Court of Justice (CCJ), he was a member of the Regional Judicial and Legal Services Commission (RJLSC). I was truly blessed to call on his skills and experience to assist the Commission and me in discharging our responsibilities. He was my go-to person whenever I needed to discuss a personal ethical dilemma or get a second opinion on a knotty issue.

With his rare combination of academic and professional excellence, his easy way with people, and his modesty, Dennis could have been anything he wanted to be. The world was at his feet. After a successful career in private practice, he ultimately chose public service as a judge. Now, I've never spoken with him or his dear wife about this. But I would not at all be surprised if the major political parties in Jamaica were not extremely keen to enlist him into their ranks. He would have been a prized catch. The electorate would surely have loved him. He would have quickly moved through the ranks of the party and ultimately become PM of Jamaica. Perhaps, if that was his destiny, he would have made an even greater contribution to Jamaica and the region than he otherwise did. Maybe not. The tough compromises politics often requires one to make might have blunted his edge. It's nice to speculate, but we will never know. He chose to remain in our realm, and he became President of the Jamaica Court of Appeal and, after his retirement, President of the Court of Appeal of The Turks and Caicos Islands. He also sat in Belize, The Cayman Islands, and the Eastern Caribbean. Perhaps only Telford Georges, another of my heroes, has sat in as many different Caribbean jurisdictions as Dennis.

I repeat what I said at the sitting held in his honour when he retired as President of the Court of Appeal of Jamaica four years ago. Jamaica has every right to be justly proud of and to revere this most distinguished son of that country. Equally, we in the rest of the Caribbean feel entitled also to claim him as one of ours. His service to the entire region has been immeasurable and profound. He embodied greatness. And greatness among us must appropriately be defined and recognised so that succeeding generations might learn about the heights of which we as a people are capable and to which we must continually aspire.

Next year, we will mark 50 years since the UWI and the Council of Legal Education began unleashing locally assembled lawyers on the Caribbean public. Yes, I've taken a former Trinidadian epithet and turned it on its head as a phrase of endearment. At the time when these Caribbean lawyers were being assembled, the region was in ferment. Some states had not long emerged from the colonial yolk. Some were wending their way towards independence. Internationally, liberation movements in Southern Africa had stepped up their armed fight for

self-determination and an end to apartheid. Caribbean students strongly identified with these developments. We were not just interested in beating the books and passing the exams. I recall marching through the streets of Bridgetown in 1974 in support of African Liberation and also, going down to the Barbados Workers Union Hall to listen, spell-bound, to a riveting lecture by Walter Rodney. Experiences like these helped to shape my outlook on life and the lens through which I see and interpret reality, including the law.

When my former CCJ colleague, Justice Duke Pollard, wrote a book in 2004 titled *Closing the Circle of Independence*, the book's title resonated with me. Last week, I addressed the region's judicial officers on the subject. Today, I want to spend time addressing lawyers on the same matter.

Like Justice Pollard, it is my deeply held belief that the pursuit of the goal of closing that circle of independence is fundamental to the optimal and authentic development of our Caribbean jurisprudence and to the manner in which our Constitutions and our fundamental rights evolve over time. Although it has been over 20 years since Justice Pollard placed that goal, that dream, on the front burner, we are, frustratingly, merely inching our way toward achieving it.

As I indicated in my address to the region's judges, for a group of people to realise a goal, especially a grand one such as closing the circle of our independence, a shared narrative must be embraced; that is to say, we must have a structured and coherent understanding of the sequence and meaning of key historical events that are relevant to the goal and that place it in its proper perspective. A shared narrative contributes to building the unity of purpose required to realise the goal. It keeps us focused and encourages us to overcome the inevitable obstacles we will encounter along the way.

What is the narrative that surrounds this particular goal? The narrative begins, of course, with the pre-Colombian indigenous peoples. They were free to make their livelihood however they pleased. Constrained only by the powerful forces of nature, no alien civilisation limited or thwarted their aspirations. They were, in that sense, independent … until they suffered a holocaust, a genocide. This holocaust was followed by the imposition of colonial rule, the enslavement and transhipment of Africans to the Americas, followed by the importation of cheap indentured labour from Asia. It was a brutal system devised with the sole purpose of enriching Europe, which it handsomely did through the maximum exploitation of human labour and the region's fertile natural resources. The system was justified by the construction of an ideology of racial superiority, the deeply felt scars of which, centuries later, are still very much in evidence.

Throughout it all, the colonised people fought back. At the end of the 18th century, Toussaint's brave Haitians successfully revolted and established an independent state. Haiti was the first country to permanently abolish slavery and the slave trade. How dare they? Their descendants are still paying the price. David Rudder's lament resonates. Haiti, I'm sorry![2] In the Anglophone Caribbean, an end to enslavement was finally achieved, and indentureship ended. In the wake of the atrocities of the 2nd World War, colonised peoples benefited from and helped to shape carefully defined global rules that promoted principles of inalienable human rights, self-determination for the colonised and an abhorrence of crimes against humanity. In the latter half of the 20th century, adult suffrage was won and Caribbean mini-states finally emerged from the clutches of colonial domination.

That is our narrative! And in this narrative, the grant of Independence symbolised a break, a disjuncture, the chance of a new beginning for those Caribbean states able to proceed to self-determination. Independence presented an opportunity for Caribbean people to have control over their own Constitutions and to enjoy the fundamental rights and freedoms laid out in that document, rights which did not necessarily mirror common law liberties that had, bit by bit, been recognised by the coloniser. These Constitutions were supposed to have ushered in a new order, in some ways similar to and reflecting the old order, but in important respects different from the old. So, for example, in this new order, parliament was not the supreme authority. Sovereignty was distributed among three co-equal branches. The judicial branch was entrusted with the important role of reviewing acts of the legislature and the executive to ensure conformity with the Constitution. The courts were made responsible for protecting and guaranteeing the human rights of the citizenry, and they were obliged to provide effective remedies to those who successfully complained about being denied any of those rights.

Justice Pollard's simple point was that this conception of Independence is not fully realised. There is still work to be done to complete it. Some territories have not proceeded to independence, and for some that have, the United Kingdom still retains and/or has been permitted to retain a level of continued influence over critical aspects of our law and justice sector.

The most obvious such lingering imperial influence is overarching. It deeply affects the manner in which our Constitutions and laws are interpreted and how our common law evolves. It is the

[2] David Rudder, https://www.google.com/search?client=firefox-b-d&q=Haiti+I%27m+sorry%2C+David+Rudder+youtube#fpstate=ive&vld=cid:78ba3a5a,vid:0PDuOxwAS3I,st:0

retention of the Privy Council as the final court of appeal even after Caribbean governments have gone through the process of creating a suitable Caribbean alternative.

Simeon McIntosh, the great Caribbean jurist, has argued forcefully, and not unreasonably, that our Independence Constitutions are not actually our own and that this affects their integrity[3]. It is unnecessary here and now to enter that debate. What I stress today is that, notwithstanding McIntosh's argument, upon independence, a new constitutional and legal order was indeed created, albeit superimposed upon, or affixed to and running in tandem with the old colonial order. A fundamental consequence of this duality is that rules and norms must exist to treat appropriately the manner in which the new constitutional order addresses the laws that undergirded the old order.

The instruments that ushered in the Constitutions required that the old existing laws be suitably modified to accommodate the new paradigm of constitutional supremacy, the dispersion of government, judicial review and enforceable fundamental rights. Contradictorily, however, the text of the early Constitutions of Jamaica, Trinidad and Tobago, Barbados, Guyana and The Bahamas indicated that courts should preserve these existing laws from being held to be inconsistent with the human rights laid out in the Constitutions. The issue that, therefore, arises is how do courts resolve that contradiction if and when pre-independence laws of the old order are repugnant to the high ideals that underpin the new order?

As early as 1975, one of our first batch graduates, Francis Alexis, noted and discussed this contradiction. He sensibly concluded that, and here I am paraphrasing him, to apply to the existing laws the modification clause in the instruments that ushered in the Constitutions is to make those existing laws conform with the Constitutions. To apply only the savings clause in the Constitution is to apply the existing laws replete with their repugnancy. His view was that, if anything, the clauses in the constitutive instruments were intended to control the one in the Constitution, but at the very least, both clauses should be read together[4].

There are now two apex courts serving the Anglophone Caribbean: the Judicial Committee of the Privy Council (JCPC) and the Caribbean Court of Justice (CCJ). In one of its early cases[5], the CCJ instructed Courts of Appeal and trial courts whose appeals it hears that they must follow the jurisprudence laid down by the JCPC unless the CCJ has specifically departed from the same. My UWI classmate, Dr Leighton Jackson, has criticised the CCJ for constraining the courts

[3] See Simeon McIntosh, Caribbean Constitutional Reform – Rethinking the West Indian Polity, 2002
[4] When Is "An Existing Law Saved", Francis Alexis, (1976) Public Law 256 at 281
[5] Joseph & Boyce v AG of Barbados [2006] CCJ 3 AJ; (2006) 69 WIR 104

below in this fashion when, in his view, we should have been encouraging them to explore new possibilities[6]. This is not an unreasonable viewpoint, although there are counter-arguments. Be that as it may, the CCJ has over the years mostly embraced the jurisprudence of the Judicial Committee of the Privy Council (JCPC); except, so far, on this issue of the treatment of pre-independence laws (or existing laws as they are referred to in our Constitutions). On that issue, the views of the two courts have sharply diverged. The questions that intrigue me are these. To what extent, if at all, do the roots of that divergence spring from a) a fundamental difference in the narrative of independence embraced by the judges of each of the respective courts and or b) the circumstance that the British judges are physically and emotionally detached from the region?

The treatment of existing laws by the JCPC has an interesting history. From the early years of independence, it appeared that the British judges did not exactly share the idea that independence signalled or should be treated as any new beginning. The view was taken that in the spheres of law, justice and legal interpretation, independence was mostly a seamless continuation of the old regime under a different flag and anthem; that the essence of the new constitutional order could and should be determined by reference to the content of the old. Start with the old to find the meaning of the new. Lord Devlin actually stated in *DPP v Nasralla*[7] that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with constitutionalised human rights was possible[8].

In those early years, the Privy Council sometimes construed the meaning of a constitutionalised fundamental right so that it could accord with the common law, even if the right (borrowed as it was, not from England but from the ECHR or in the case of Trinidad and Tobago from Canada) was on its face framed differently and, when applied, yielded a different result from that which was cognizable by the common law.

That approach is markedly different from one that starts with the overarching ideals that prompted self-determination and which are generally contained in the Preambles to the various Constitutions or an approach that has actual regard to the text of the fundamental rights and then works its way downward and backwards, tailoring or modifying existing laws so as to render them consistent with the new order.

[6] See Transitions in Caribbean Law edited by David Berry and Tracy Robinson, 2013 at 28-29
[7] [1967] 2 AC 238, 247-248; See also Boyce and Joseph v R [2005] 1 AC 400] at [32]
[8] See also Lord Diplock in *De Freitas v Benny* [1976] AC 239, 244

As the British judges came under the influence of Strasbourg jurisprudence, their conservative approach to interpretation of our constitutional rights shifted. The case of *Minister of Home Affairs v Fisher*[9], in which Lord Wilberforce called for a more generous interpretation of our fundamental rights, is usually regarded as emblematic of that paradigm shift.

Ultimately, courts are charged with the obligation to do justice according to law. That is the oath judges take. Since law is the antithesis of arbitrariness, justice must be done within the framework of the law. The rule of law is foundational to the achievement of justice. Not infrequently, however, a gap emerges between the law and justice. How should we eliminate or narrow that gap? Common law judges have, over the years, developed well-recognised techniques.

When interpreting law, judges use devices such as "reading down" and "reading in"; or judges may have resort either to strict and narrow interpretations of the law or to a generous interpretation. These accepted devices are deployed to ensure that law is aligned with a modern understanding of deeply rooted constitutional principles and with fundamental rights.

In the narrative of independence that I embrace, after a former colony has become independent, with a Constitution such as our Caribbean states have, logic dictates that these interpretative devices should be utilised to advance the new order, to privilege human rights, and to promote self-determination of the formerly colonised people. If it is tenable to read in or to read down a legal provision (whether contained in a statute or the Constitution) in order to protect and promote constitutionalised human rights or to advance self-determination, then that is what a court must do. There was indeed a period, say between 1980 and 2004, when the JCPC itself seemed partial to this approach. During that period, the British judges specifically affirmed that derogations from constitutional rights and freedoms 'are ordinarily to be given strict and narrow, rather than broad, constructions[10].'

In the UK, parliament is supreme. The courts have no power to modify or strike down an act of parliament. Despite this, the judges of that country still unfailingly utilise these techniques of "reading in " and "reading down" in order to secure the rights of British citizens and to abide by

[9] Minister of Home Affairs v Fisher [1980] AC 319
[10] See for example: R v Hughes [2002] 2 AC 259 (PC) (St Lucia) at 35

the ECHR. Consider, for example, the House of Lords decision in R v. A (No 2)[11]. It is unnecessary to delve into the details of the case. It was a situation where provisions in the UK's Youth Justice and Criminal Evidence Act 1999, when read literally, infringed Article 6 of the European Convention on Human Rights, which speaks to the right to a fair trial. In order to avoid a finding that the UK statute was incompatible with the Convention, the House of Lords used the technique of reading down to interpret the relevant provisions of the UK Act in a way that could render its objectionable provisions compatible with a defendant's right to a fair trial under Article 6 of the Convention.

An example of reading in is to be found in *Ghaidan v. Godin-Mendoza*[12] where the House of Lords read words into the 1977 Rent Act so as to be able to construe that Act in a way that extended tenancy rights to same-sex partners. Here again, the purpose of reading in was to ensure compliance with overarching human rights values, in this case, Article 14 (anti-discrimination) and Article 8 (right to respect for home and family life), respectively, of the ECHR.

A similar approach should be taken by Caribbean courts to pre-independence or existing laws. How does the citizenry make sense of legal interpretation that suggests that our Independence and or Republican Constitutions intend that our courts are empowered to modify or render void post-independence statutes that infringe fundamental rights but, on the other hand, existing laws must be construed so as to defeat enjoyment of the same fundamental rights?

In the noughties, the judges of the JCPC had to grapple with this precise issue. How to interpret constitutional savings clauses which purport on their face to exalt colonial or existing laws over the enjoyment of constitutionalised individual rights. There was a deep and even division among their Lordships on the matter. One group, led by Lord Bingham, the President of the Court, vigorously supported the view that existing laws can and should be construed so as to advance human rights. The other group, led by Lord Hoffman, the next senior judge, robustly held fast to the view that doing this was not permitted by the Constitution. In the Trinidad and Tobago case of Roodal[13], a 3 - 2 JCPC majority determined that courts were indeed entitled to modify an existing colonial law – in that case, one that prescribed the mandatory death penalty for murder - so as to have the law comply with that country's constitutional bill of rights. The Privy

[11] **[2002] 1 AC 45**
[12] [2002] EWCA Civ 1533; [2004] UKHL 30
[13] Roodal v Trinidad and Tobago [2003] UKPC 78

Council then decided to settle the vexed question by assembling a 9-member Bench in 2004 in the cases of *Watson*[14], *Matthew*[15] *and Boyce*[16].

Lord Millet, a dissentient in Roodal, has written in his memoir "*As In Memory Long*[17]*,"* an alarming story about the circumstances involving the decision to ask former Jamaica Chief Justice Edward Zacca to comprise the ninth member of that panel. Those interested should read that memoir. At any rate, a bitterly divided Privy Council voted 5 - 4 (with Sir Edward joining the Hoffman group) to reverse Roodal and to leave firmly in place a penalty that everyone accepted constituted cruel and inhumane punishment. Writing for the bare majority Lord Hoffman claimed that if and when colonial laws were found to be inconsistent with the rights and freedoms that were declared in the Constitution, it was for Parliament to provide the remedy.

The reality is that democratic governance in the Caribbean is not solely guided by the will of the legislature. Caribbean Constitutions are not premised on parliamentary supremacy. In some Constitutions, Parliament, even when it acts unanimously, is incapable of passing certain legislation without the support of the people in a popular referendum. In all our Constitutions, responsibility for protecting the rights of the citizenry is specifically entrusted to the judiciary. Neither parliamentary inertia (for which there may be myriad explanations) nor parliamentary indifference to the deleterious consequences of an existing law provides, in my view, a justification for constitutional interpretation that precludes courts from affording effective remedies to persons affected by laws that trample on constitutionalised human rights.

In a trilogy of cases - Nervais, McEwan and Bisram - the CCJ has disagreed with the JCPC majority's 5-4 decision that general savings law clauses shut out the modification of existing laws that are or have become inconsistent with a modern understanding of human rights. Caribbean narrative and indignation are evident in the CCJ's framing of its stance on the matter. At [58] of the CCJ's judgment in Nervais, the CCJ majority stated that -

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

[14] [2004] 3 WLR 841 | Privy Council
[15] Matthew v The State of Trinidad and Tobago [2004] UKPC 33; [2005] 1 AC 43
[16] Boyce & Anor v R (Barbados) [2004] UKPC 32 (07 July 2004)
[17] See Peter Millet, As in Memory Long, pp 188-189

from declaring the truth of that inconsistency just because the [provision] formed part of the inherited laws from the colonial regime must be condemned.

Faced with the Nervais and McEwan CCJ judgments, the JCPC had an opportunity to re-consider its 2004 decision giving due regard to the views of the CCJ, an apex court comprised of Caribbean judges who actually reside in the region. Another nine-member JCPC Bench was convened in the Trinidadian case of Chandler[18]. The issue in Chandler, as was the case in Watson, in Boyce and in Matthew, was whether to modify the law prescribing automatic death sentences that everyone agreed were cruel and inhumane. No Caribbean judge sat on Chandler, and it would have made no difference this time if one had. The nine British judges were unanimous. They conceded that although the CCJ's approach in Nervais was not unreasonable, Trinidad and Tobago's general savings clause should continue to be interpreted in a manner that would result in restricting the enjoyment of fundamental rights.

So, according to the Privy Council, where two ways of resolving a legal issue are tenable, one having the ostensible effect of doing away with mandatory application of a cruel and inhumane punishment and the other leaving that system in place, their Lordships were satisfied to adopt the latter. In their view, the reasoning that supported the denial of human rights was sounder. They buttressed their views by resorting to the principle of stare decisis. It was very important to them to adhere to their earlier 5–4 precedent, given the tremendous store they place on that principle. In support of their adherence to the principle of stare decisis, they cited the US Supreme Court in Planned *Parenthood v. Casey*[19], whose judgment, we know, upheld *Roe v Wade*[20] in relation to the right to privacy and a woman's ability to access abortion services. The decision in Chandler paying homage to stare decisis was given in May 2022. The following month, in Dobbs v. Jackson Women's Health Organization[21], the US Supreme Court spectacularly reneged on both *Roe v Wade* and on Casey. So much for transatlantic reverence of precedent!

The JCPC's Chandler decision on Trinidad's general savings clause was again endorsed in *AG v Maharaj*[22]. These decisions (Matthew, Chandler, Maharaj) confirm a disappointing retreat from a stream of progressive Privy Council jurisprudence that flourished between 1980 and 2004 and did much to advance Caribbean human rights. The retreat was presaged in the powerful

[18] [2022] UKPC 19
[19] 505 US 833 (1992)
[20] 410 U.S. 113 (1973)
[21] 597 U.S. 215 (2022)
[22] [2023] UKPC 36

2004 joint dissent of Lords Bingham, Nicholls, Steyn, and Walker entered in *Matthew*[23]. It is useful to repeat what was said there by the dissentients because the sentiments they expressed are prescient, even more, relevant today than they were when they were expressed twenty years ago. The dissentients commenced their attack on the reasoning of the Matthew majority led by Lord Hoffman in the following way:

In recent years [i.e. prior to 2004], the Privy Council has generally shown itself to be an enlightened and forward-looking tribunal. It has, of course, recognised that the provisions of any constitution must be interpreted with care and respect, paying close attention to the terms of the constitution in question. But it has also brought to its task of constitutional adjudication a broader vision, recognising that a legalistic and over-literal approach to interpretation may be quite inappropriate when seeking to give effect to the rights, values and standards expressed in a constitution as these evolve over time. It is such an approach which Lord Wilberforce stigmatised, in the phrase of Professor de Smith, which he made famous, as "the austerity of tabulated legalism" ... It is such an approach also which, in our opinion, vitiates the reasoning of the decision of the majority in this appeal. We consider the decision of the majority to be unsound in law and productive of grave injustice to a small but important class of people in Trinidad and Tobago. It is in our opinion clear that the interpretation of the 1976 Constitution of Trinidad and Tobago, which commends itself to the majority, does not ensure the protection of fundamental human rights and freedoms, degrades the dignity of the human person and does not respect the rule of law. With much regret, but without doubt, we dissent from the majority decision.

The respective appellants in the 2004 cases of Watson, Matthew, Boyce and also in Chandler were all convicted criminals seeking to avoid automatic death penalties for murders for which they had been convicted. It would have been unfortunate enough if the precedent set by those cases "concern[ed] only the constitutionality of the mandatory death penalty for murder[24]". Immunising all pre-independence laws from human rights challenges, however, goes well beyond affecting only convicted murderers. In Maharaj, the immunity was applied in a case that addressed the constitutionality of the crime of sedition and, in the Guyanese case of *McEwan*[25], the savings clause was unsuccessfully invoked before the CCJ, but if the attempt had succeeded,

[23] [2005] 1 AC 433]
[24] [2005] 1 AC 433] at [35]
[25] [2018] CCJ 30 (AJ)

the clause would have preserved the sanctity of 19th-century repressive laws that conditionally criminalised, among other things, cross-dressing[26], loitering[27] and public gatherings[28].

Throughout various parts of the Anglophone Caribbean, colonial laws remain on the statute books that justify and reinforce a climate of intolerance of and even hostility towards the LGBTI+ community. Given that climate, Parliament is hardly likely to be the institution that will boldly rush in to protect the rights of persons who comprise that community. Legislatures tend to be unwilling or unable to address such contentious issues. The reasons are varied. Sufficient votes in the Assembly may not be available. There may be deep-seated opposition from conservative or religious groups. Parliamentarians may simply fear political backlash. In circumstances such as these, members of parliament are often content with courts taking the heat by doing what courts are called to do without fear or favour – providing justice according to law. This has been the case in many countries. Here in the Caribbean, we have seen in recent times that judges throughout the region have been striking down sodomy laws enacted during the colonial period. See the cases of *Caleb Orozco* in Belize[29], *Jason Jones* in Trinidad and Tobago[30], *Orden David* in Antigua and Barbuda[31], *Jamal Jeffers* in St. Kitts and Nevis[32]; *McClean-Ramirez et al*. in Barbados[33], and *BG v AG* in Dominica[34].

In states which retain a right of appeal to the JCPC and whose Constitutions contain a general savings clause, the approach taken by the British judges to the manner in which constitutional savings clauses must be construed places these gains by the LGBT community in serious jeopardy. In many of the cases just mentioned, it is interesting to note that the State has declined to appeal. In the Trinidadian Jason Jones case, however, a decision on an appeal lodged with the Court of Appeal is pending, and each side has made it clear that if they are dissatisfied with the

[26] Section 153(1)(xlvii) of Guyana's Summary Jurisdiction (Offences) Act Chapter 8:02 See also *McEwan v AG of Guyana* [2018] CCJ 30 (AJ)
[27] Section 153(1)(xlvi) of Guyana's Summary Jurisdiction (Offences) Act Chapter 8:02
[28] Section 153(1)(xlv) of Guyana's Summary Jurisdiction (Offences) Act Chapter 8:02
[29] Claim No.668 of 2010 (10 August 2016), conf'd (unanimously) *AG of Belize v Caleb Orozco* – Civil Appeal No 32 of 2016 (30 December 2019)
[30] Claim No.CV2017-00720 but an appeal filed by the government, heard in October 2023, is still pending.
[31] Claim No ANUHCV2021/0042 (5 July 2022, unreported)
[32] Claim No. SKBHCV2021/0013, (29 August 2022, unreported)
[33] Claim No. CV2020/0044 (25 May 2023, unreported)
[34] Claim No DOMHCV2019/0149 (22 April 2024, unreported)

Court of Appeal's decision, they will appeal further to the JCPC. If and when that occurs it would be interesting to see how the matter is ultimately resolved there[35].

In the Guyanese case of McEwan, which concerned a law dating back to 1893, which law (in these days of uni-sex clothing) outlawed cross-dressing[36], I noted that judicial treatment of the constitutionality of that law, indeed, of any law, cannot properly be divorced from the narrative that surrounds the law. To interpret the law, one must ask, "Why was it enacted in the first place? What interests did it serve at the time of its enactment? What interests does it currently serve"? To answer these questions, we must often turn to historians and social scientists. I also stated then, and I continue to hold the view, that if the interpretation of one part of the Constitution appears to produce an effect that obviously denies an individual their fundamental rights, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen her enjoyment of the fundamental right unless there is some overriding public interest[37]. This was the approach utilised by the CCJ in *Joseph and Boyce*[38] when it was faced with a clause contained in the Barbados Constitution that purported to oust the court's jurisdiction from reviewing any and all decisions of the Mercy Committee. In Joseph, the effect of the application of that clause collided with a man's right to protection of the law.

No one disagrees with the view that parliaments in the region do have a critical role to play in addressing anomalies posed by general savings clauses and the debilitating effect on human rights these clauses can produce. The parliaments of Barbados, Guyana and Jamaica (in substantial measure) have done this. It must be said, however, that pending any such parliamentary action, regrettable results accrue when courts tie their own hands by refraining from utilising reading-down devices. That approach will invariably place Caribbean states in breach of the American Convention on Human Rights and other international human rights instruments. Contrary to one of the great promises of our Independence and Republican Constitutions, that approach robs litigants whose rights are clearly infringed of access to an effective remedy. It distorts the constitutional balance by neutering the role of the court in the protection of human rights and it entrusts to parliament a responsibility that, constitutionally, lies with the judiciary. Most significantly, when all the legal technicalities are set to one side, it

[35] No final victory yet in Trinidad, says LGBTQ rights activist Jason Jones, https://76crimes.com/2022/12/07/no-final-victory-yet-in-trinidad-says-lgbtq-rights-activist-jason-jones/ accessed 15 November 2024
[36] Section 153(1)(xlvii) of Guyana's Summary Jurisdiction (Offences) Act, Chapter 8:02
[37] See McEwan v The State [2018] CCJ 30 (AJ)
[38] Joseph & Boyce v AG of Barbados [2006] CCJ 3 AJ; (2006) 69 WIR 104

feeds a narrative that colonial laws are sacrosanct because they were enacted by the colonising power.

The judgment of the Privy Council in the recent Saint Lucia case of *Hilaire v Chastanet*[39] strengthens this last point. A brief paper has been written on the implications of this decision by my former Court of Appeal colleague in the ECSC, Mr Michael Gordon QC[40]. I have taken the liberty here to borrow both from his analysis and also from the arguments of Senior Counsel, Mr Anthony Astaphan, who appeared as counsel before their Lordships.

The brief background to the case is this. In 1956, when Saint Lucia was still a colony, that country's Civil Code was amended to insert Article 917A. The amendment came into force in 1957. According to this amendment, subject to certain provisions of the article, from and after the coming into operation of the amendment, "the law of England for the time being relating to contracts, quasi-contracts and torts shall mutatis mutandis extend to Saint Lucia."

The question which arose for determination in Hilaire v Chastanet was whether this provision immediately and automatically imported into independent Saint Lucia, mutatis mutandis, every single statute enacted by the Westminster Parliament relating to contracts, quasi-contracts and torts. Specifically, for the purpose of the particular litigation in issue, the question was whether the Defamation Act 2013 of the UK formed part of the Law of Saint Lucia by virtue of Article 917A.

Senior Counsel urged that this question should be addressed against the background that Article 917A was enacted not by the sovereign parliament of Saint Lucia but by the country's colonial legislature. Counsel argued that Saint Lucia's 1979 Independence Constitution grants only to the Saint Lucia Parliament the power to make laws for Saint Lucia. The Saint Lucia Constitution is supreme, and all laws inconsistent with it are void to the extent of the inconsistency. The Constitution stipulates how new laws are to be made. Among other things, as and when new laws are made the same must be published in Saint Lucia in a particular manner. Counsel submitted that Article 917A was an inconsistent provision because, if it were interpreted to mean that any Act relating to contracts, quasi-contracts and torts that was passed by the UK Parliament immediately and automatically formed part of the law of Saint Lucia, this would result in the UK legislating extra-territorially for sovereign and independent Saint Lucia without even seeking or obtaining the request or consent of Saint Lucia. Counsel concluded that, in all these

[39] [2023] UKPC 22

[40] Hilaire and Chastanet v The Civil Code, unpublished, 19 July 2023.

circumstances, if Article 917A could not be suitably modified, it should be declared void to the extent of its inconsistency.

The Privy Council dismissed each of these arguments as fair, as did the Court of Appeal of the ECSC. The attitude of the JCPC to existing laws and to the manner in which those laws are to be construed in light of an Independence Constitution that is supreme is summed up in paragraph [18] of the judgment, which stated that -

".. the grant of independence to Saint Lucia and the creation of a Parliament within the newly created independent sovereign State could not, without more, have the effect of rendering invalid within the new State existing laws which had previously applied within the colony…"

What is particularly interesting about this case is that, for what it is worth, Saint Lucia does not have, embedded in its Constitution, a general savings clause as, for example, does Trinidad and Tobago. The reasoning in Hilaire v Chastanet, therefore, goes well beyond Matthew and Chandler. Apparently, even without an applicable constitutional savings provision, the courts of a former colony may not render invalid colonial laws that are inconsistent with self-determination, with international law and with some of the most prized features of the country's supreme Independence Constitution. The laws of the former coloniser, of the old order, however inconsistent they are with the new legal order created by the Constitution, must remain in place until they are altered by the sovereign parliament of the independent state.

I have heard it said that judges who embrace social context in their decision-making are politicians in robes, "judicial activists" unfaithful to "proper legal interpretation". This has always been a profoundly misguided notion for me. Interpretation of a Constitution is unlike interpretation of a contract entered into by two private citizens. Constitutional interpretation is a deeply contextual and practical exercise. Although it can involve abstract reasoning, it cannot be detached from the lived experiences of those it affects. Apex court judges invariably make policy choices when interpreting a constitution. The choices made are conditioned by the values that spring from the Constitution's guiding principles. Those choices will be ineffective if they are not anchored in a philosophical understanding of societal values or if they are unresponsive to societal needs. That is precisely why we utilise techniques like reading down and reading in; strict interpretation at times and generous interpretation at other times. Effective judges embrace or at least are alive to the narrative, the aspirations, and the social needs of the people whose disputes they try. When judges lack that appreciation, and worse, when that failing is compounded by the circumstance that the judges do not personally experience for themselves the real consequences of the decisions they make, there is likely to be a significant deficit in the

decision-making process. It is this deficit, perhaps, that helps us to understand the profound contrast in the approach to constitutional interpretation we see displayed between the equally brilliant legal minds of, say, Lord Hoffman in *Matthew*[41] and Telford Georges in *Thornhill*[42].

I recently came across an article in the 1988 volume of Public Law[43] written by Justice Bertha Wilson, the first female judge ever appointed to the Canadian Supreme Court. Her article dealt with the implications of the passage of the Canadian 1982 Constitution Act. Among other things, that Act allowed Canada to change its Constitution without the consent of Britain. This is how her article begins –

"On April 17, 1982, Canada entered a new phase in the evolution of its constitution with the proclamation … of the Constitution Act 1982. For the first time in our history, control over our constitution has passed exclusively into the hands of Canadians, thereby marking the final step in our journey towards fully independent status as a nation."

In the same way, Caribbean people must proudly strive for control over our constitutions to pass exclusively into the hands of Caribbean people, thereby marking the final step in our journey towards fully independent status. The late Justice Duke Pollard said the same thing in different words. He wanted to see us in the region complete the circle of our independence.

The establishment of Caricom and, the entering into force of the Revised Treaty of Chaguaramas, the creation of institutions like the University of the West Indies, the Council of Legal Education, The Caribbean Development Bank and the Caribbean Examinations Council … are all indispensable measures that have strengthened our ability to close that circle. We must nourish and treasure these initiatives. My understanding is that, commendably, steadfast moves are currently underfoot to replace the Royal Charter that governs the UWI with a regional treaty. In a similar vein, the countries of the OECS must begin to give serious consideration to replacing, with a regional treaty, the 1967 Statutory Instrument that still governs the ECSC.

The establishment of the Caribbean Court of Justice is perhaps the greatest achievement of Caricom, and the states of Barbados, Guyana, Belize, Dominica, and Saint Lucia must be resoundingly complimented for acceding to the appellate jurisdiction of the Court. On top of the

[41] [2005] 1 AC 433
[42] Thornhill v AG (1974) 27 WIR (HC T&T), affd (1976) 31 WIR 498 (PC T&T)
[43] P.L. 1988, Aut, 370-384, The making of a constitution: approaches to judicial interpretation

fundamental reasons that justify that move, the fact is that appealing to the Privy Council is so expensive an undertaking that persons of average means are dissuaded from appealing good arguable cases.

When appeals to a final appellate court are choked off because people of ordinary means are unable to access their final court, the rule of law is compromised because important cases where the law is uncertain or is in need of review by an apex court are left unresolved or insufficiently addressed. There are many cases where the CCJ has heard disputes that, in all likelihood, would never have reached the Privy Council. These were cases that have made a profound contribution to clarifying the law and the Constitutions of the respective States.

The importance of de-linking from the JCPC was recently underscored by the Chief Justice of the most populous state in Caricom. According to the Gleaner newspaper, while addressing the Norman Manley Law School Class of 1984 during a dinner in Montego Bay, Chief Justice Bryan Sykes questioned why a nation that has produced such strong figures of resistance and self-determination as Jamaica still clings to the colonial legacy of the United Kingdom-based Privy Council. The Chief Justice critically examined Jamaica's path towards decolonisation, juxtaposing the accomplishments of the country's national heroes and heroines with the current political leadership's reluctance to fully embrace Caribbean sovereignty[44]. So well said, Chief Justice Sykes!

I wish also to commend OCCBA and those constituent Bar Associations that have in the past supported this call. Completing the circle of our independence must be kept on OCCBA's front burner and that of each individual Bar Association. It is, in my view, an aspiration that must be pursued relentlessly right down to the end. The legal profession has an obligation to play a vital role to play in ennobling our Caribbean jurisprudence, in removing the barriers to full access to justice for all and in promoting self-determination and the enjoyment of human rights. Let us not leave it to generations to come to complete the circle of our independence. Let us instead be proactive in fulfilling this role lest succeeding generations consider us to have been entirely remiss in our responsibilities.

I thank you.

[44] See https://jamaica-gleaner.com/article/lead-stories/20241021/sykes-be-our-heroes?utm_source=newsletter&utm_medium=email&utm_campaign=am_newsletter, accessed 15 November 2024