



# The Role of the Caribbean Court of Justice as an Instrument of Peace and Justice

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

**The Role of the Caribbean Court of Justice as an Instrument of Peace  
and Justice held by the The Independent Jamaica Council for Human  
Rights (IJCHR)**

Jamaica  
10 December 2018

The Independent Jamaica Council for Human Rights (formerly known as the Jamaica Council for Human Rights) is the oldest human rights non-governmental organization in the Caribbean, having been formed in 1968 on the 20th anniversary of the Universal Declaration of Human Rights.

## **REMARKS**

**By**

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

**on the occasion of**

**The 70<sup>th</sup> Anniversary of Human Rights Day at the Independent Jamaica Council for Human Rights (IJCHR)**

**10 December 2018**

This year we commemorate two important events: the 70<sup>th</sup> Anniversary of International Human Rights' Day and the 50<sup>th</sup> anniversary of the establishment of the Independent Jamaica Council For Human Rights (IJCHR), the oldest human rights non- governmental organisation in the Caribbean. Two significant milestones. One international, one Jamaican. As I reflect on these two occasions, two things instinctively spring to mind. First, the enormous significance and durability of the Universal Declaration and secondly, because of his remarkable involvement in advancing human rights and the rule of law in the Caribbean, the immense contribution of Dr the Hon Lloyd Barnett.

The rights and principles laid out in the Universal Declaration remain as relevant today as they were in 1948 when the Declaration was adopted by the United Nations General Assembly. Indeed, some may say that those Principles have even greater relevance today because, despite the vast economic, scientific and technological advances humankind has achieved over the last 70 years, many people still live under the shadow of despotic rule.

Throughout the years, the Universal Declaration has inspired scores of international conventions and treaties. It has been the catalyst for an expanding system of human rights

protection for the physically challenged, for indigenous populations, for women, for minority groups, for those whose voices are unheard and for those who are everywhere facing injustice. The Declaration's influence is as poignant in peace time as it is amidst the clash of arms. The principles it espouses provide us with a road map to peace and justice and respect for human dignity. It promises to all a comprehensive range of economic, social, political, cultural and civic rights that is a necessary condition for full and wholesome human development. These rights are inalienable entitlements of people of every colour and ethnic group, every class or caste, creed or race, gender or sexual orientation.

All Caricom Member states have ratified the UDHR and many of the rights expressed in it have found expression in our national Constitutions. Those Constitutions also prescribe for independent and impartial courts to secure and enforce those rights. But the existence of such courts is never enough to secure the full enjoyment of human rights. There must be more. Each succeeding generation must be ever vigilant to ensure that the rights are always held sacred. Eternal vigilance, pro-active organisation, fearless and committed advocacy, bold champions are essential.

And this is why we cannot divorce the commemoration of the two important milestones we mark this year (the 70<sup>th</sup> anniversary of the UDHR and the 50<sup>th</sup> anniversary of the IJCHR) from a celebration of the contribution that has been made by Dr Lloyd Barnett, a great son of the Caribbean; a man who has played a defining role in the development of human rights and the advancement of the rule of law in our region.

Over the span of several decades, Dr Barnett has appeared as counsel in some of the region's most important human rights cases. He has also served in a leadership capacity on various local

and regional bodies, including the Jamaica Council on Human Rights; the Jamaican Bar Association; the Committee on Integrity of Parliamentarians; the Advisory Council on National Security; the Council of Legal Education; and the Organisation of Commonwealth Caribbean Bar Associations to name just a few. In each case, he has rendered yeoman service, selflessly and with excellence. He has inspired generations of human rights advocates in Jamaica and throughout the region.

This evening I would naturally wish to single out for special mention his contribution to the establishment and formative years of the Caribbean Court of Justice. He played a crucial role in the development of The Agreement establishing the Court, and in structuring the institutional framework governing the Regional Judicial and Legal Services Commission. He was one of the masterminds behind the architecture of the Trust Fund, that unique, internationally envied creature, established to finance the capital and operating budget of the Court and Commission free from any hint of political influence or control.

Dr Barnett was appointed to the Regional Judicial & Legal Services Commission on 21<sup>st</sup> August 2003 and he served the Commission with distinction for some twelve years. For most of those years he served as Deputy Chairman. Throughout his tenure, he attended all but one of the Commission's statutory meetings, an attendance record that no one else has matched. He was instrumental in the conceptualisation and drafting of an array of rules, regulations and guidelines that have strengthened the regulatory framework of the operations of the Court.

Dr Barnett's retirement from the Commission left a void that will take a long time to fill, if indeed it can ever be filled. Only a profound love of people and an unyielding commitment to the rule of law can motivate someone to give of themselves so freely and tirelessly. I find it

impossible to think of anyone else in the region who has served for so long and so faithfully and with such distinction. On behalf of the judges and staff of the Court and of the Commission, and on behalf of the entire Caribbean I take this opportunity to salute Dr Barnett; to wish you long life and good health and to say Thank You for your service. The region needs so many more of you, Dr B.

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The CCJ has sought to be faithful to the ideals expressed in the Universal declaration when interpreting and applying the Constitutions of the region. This evening I wish to speak about three things the Court has done in this regard. I believe each of them contributes to peace, justice and the enjoyment of human rights by Caribbean citizens.

Firstly, the Court has clarified the interpretation of what used to be regarded as a mere constitutional preamble. In the process, the court has developed, as an independent, overarching constitutional norm, the concept of protection of the law as an adjunct to the rule of law.

Secondly, the Court has minimised, if not outright disabled, the harsh effects of the notorious savings clause – that anomalous constitutional feature that for so long served only to emasculate judicial power in the adjudication of constitutional and fundamental rights.

Thirdly, the Court has instituted monitoring mechanisms as a tool for ensuring compliance with its judgments. I believe each of these measures contributes to the enjoyment of human rights by Caribbean citizens.

## **The Rule of Law as an independent constitutional norm**

Each of our Constitutions is introduced with a statement that expresses the lofty aims, goals and aspirations of the people. In some Constitutions, the human rights chapter is also prefaced with some such statement. There was once a view that the soaring ideals contained in these introductory statements, whether they were to be found at the very outset of the Constitution as a whole or they immediately preceded the listing of the human rights, constituted “a mere preamble” of limited or no jurisprudential value. This was a view that was upheld and expressed by the Privy Council as recently as a few years ago. The CCJ has decisively broken ranks with the JCPC on that issue.<sup>1</sup>

The link between the so-called Preamble and the rest of the Constitution is inextricable. The introductory words contained in these “preambles” usually spell out the ethos, the values that underlie the country’s constitutionalism. Logically, therefore there must be some consistency between the ideals and aspirations proclaimed in them and the rest of the Constitution. It was former Trinidad and Tobago Chief Justice Sharma who stated, as a Justice of Appeal in *Peters v The AG*<sup>2</sup>, that judicial focus on the Preamble and an appreciation of the right principles can lighten the task of judges in constitutional interpretation.<sup>3</sup>

So, for example, when, in Barbados, the “preamble” to the human rights provisions – section 11 of the Barbados Constitution - boldly declares that every person is entitled, inter alia, to the protection of the law, the CCJ determined that that declaration had deep significance and that

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<sup>1</sup> Compare for example *Newbold v Commissioner of Police & Ors.* (2014) 84 WIR 8 and *Campbell-Rodrigues v A-G of Jamaica* [2007] UKPC 65, [2008] 4 LRC 526 with *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ) at [22] to [37]

<sup>2</sup> *Peters (Winston) v Attorney-General and Another, Chaitan (William) v Attorney-General and Another*, (2001) 63 WIR 244 (CA TT)

<sup>3</sup> *ibid* at 328

courts must acknowledge that significance in practice. That was the broad rationale for the CCJ's judgment in *Attorney General of Barbados v. Joseph and Boyce*<sup>4</sup>. In the later case of *Nervais*<sup>5</sup>, a decision the court handed down this year, the CCJ went further. The Court stated that section 11 actually declares fundamental and inalienable rights to which the citizens of Barbados are entitled.

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<sup>4</sup> *The Attorney General of Barbados et al v Joseph and Boyce*, [2006] CCJ 3 (AJ) at [18]

<sup>5</sup> *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ)

The case of *Joseph and Boyce* is an interesting one. This was a case where Mr Joseph, Mr Boyce and another accused – let’s call him the third accused - got into an altercation that resulted in the death of the deceased. It was actually the third accused who was the main assailant. But Joseph and Boyce were present and contributed to the murder of the deceased. At trial the prosecution offered to accept from all three accused a plea of manslaughter. The third accused (recognising that he was indeed the main assailant) gladly accepted that offer and he was sentenced to a few years. Joseph and Boyce thought they were not guilty of either murder or manslaughter. They declined the offer of manslaughter. Unfortunately for them they were convicted of murder. And Barbados had an automatic death penalty for everyone convicted of murder. Joseph and Boyce unsuccessfully appealed their murder convictions all the way up to the Privy Council. They then petitioned the IACHR claiming that the death penalty imposed upon them was contrary to the ACHR. While their petition process was pending, the Mercy Committee decided to sanction their execution. Death warrants were read to them. They launched constitutional proceedings. The issue before the CCJ was whether they could be hanged while they had petitions pending before the IACHR. The State asserted that the court could not inquire into the Mercy Committee’s decision to have them executed. In support of this view, the AG pointed to an ouster clause in the Barbados Constitution<sup>6</sup> that, on its face, appeared to preclude the court from inquiring into the performance by the Mercy Committee of its advisory functions in relation to the exercise of the prerogative of mercy.<sup>7</sup> The CCJ rejected that argument. The Court held that the ouster clause could not prevail over a fair consideration of the fundamental rights of the condemned men. The State then argued that the particular right to the protection of the law that was being claimed by the men, namely, procedural fairness, was not included in the detailed elaboration of that right in the section 18 of

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<sup>6</sup> Barbados Constitution, Section 77(4).

<sup>7</sup> *The Attorney General of Barbados et al v Joseph and Boyce* [2006] CCJ 3 (AJ), (2006) 69 WIR 104 (CCJ Bds).



the human rights chapter of the Constitution. Section 18 really addresses itself to pre-trial procedural fairness. The Court's response was that *in the preamble*, a broad right to protection of the law was promised to all and the limited elaboration of that right in section 18 did not exhaust the high ideals referenced in the preamble. President de la Bastide and I stated: "The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18".<sup>8</sup>

The practical effect of the CCJ's judgment was that the Mercy Committee was not entitled to sanction the hanging of Joseph and Boyce while their petitions were pending before the Inter-American Commission on Human Rights. It had to await the result of the petition process. The broader view of the decision is that if one part of the Constitution appears to run up against an individual fundamental 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.

The court anchored the human right to protection of the law in the reference to the rule of law contained in the opening words of the Constitution. Those opening words are found in section 3 of the Barbados Constitution. Justice Wit noted that those opening words fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general and that of Barbados in particular.

The Court's judgment in *Joseph and Boyce* set the stage for more to come regarding this question of the rule of law. Indeed, it wasn't long before there was more.

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<sup>8</sup> *ibid* at [60]

Building on the court's judgment in *Joseph and Boyce*, in the case of *Lucas v The Chief Education Office et al*<sup>9</sup>, in separate Opinions, Justice Wit and I went further. Our Opinions in *Lucas* were dissents but our disagreement with the majority was not about the law we expounded but rather about the sub-stratum of fact to which the law was applied. And indeed, in subsequent judgments of the CCJ<sup>10</sup>, our approach to the law in *Lucas* was specifically adopted by the Court.

In *Lucas*, echoing what Justice Wit had stated in *Boyce*, I noted that the Constitution's preamble provides a useful reference point from which the court can expound the meaning of the detailed fundamental rights. I said that the Preamble contextualises these rights and so may assist in illuminating, clarifying and even supplementing the content of the detailed rights. I encouraged resort to the preamble in order to obtain a better insight into the full scope of the detailed rights. I reiterated that the right to the protection of the law is anchored in and complements the State's commitment to the rule of law. The rule of law demands, among other things, that the citizenry be provided with access to appropriate avenues to prosecute, and effective remedies to vindicate, any interference with fundamental rights. The citizen must be afforded "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power".<sup>11</sup> I stated that the right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial. There is therefore likely to be a breach of the right whenever a litigant is absolutely compelled to seek vindication under the Constitution for infringement by the State of a fundamental right. But even where no stated fundamental right is impacted, the right to

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<sup>9</sup> [2015] CCJ 6 (AJ) at [138]

<sup>10</sup> See *Maya Leaders Alliance v. Attorney General of Belize*, [2015] CCJ 15 (AJ) and also *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ)

<sup>11</sup> See per Wit J, *The Attorney General of Barbados et al v Joseph and Boyce*, [2006] CCJ 3 (AJ) at [45].

protection of the law may also be implicated when there is a violation of due process and a denial of the citizen's expectations of fairness, procedural propriety and natural justice and no avenue is available through which the citizen may lawfully seek redress for such violation. In the same case Justice Wit stated that the right to protection of the law forms part of the rule of law, guaranteeing to every person in the State whose rights have been infringed a right to an effective remedy by due process of the law.<sup>12</sup>

This conception of the rule of law as a constitutional norm that can be independently and separately enforced gained currency in the decision of the court in the case brought by the Maya people of the southern district of Toledo in Belize.<sup>13</sup> The Maya had filed a suit against the State claiming a breach of their right to the protection of the law because the State did not recognise their customary land tenure rights. The Court agreed with them in a judgment that was largely premised on the content of the Constitution's preamble. Firstly, the Belize preamble explicitly recognizes that state policies must protect the culture and identity of the indigenous peoples and secondly, the preamble stresses the obligation on the part of the State to abide by the rule of law. In *Lucas*<sup>14</sup> Justice Wit and I had noted that 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. In the Mayan case the State was ordered to do just that. The State is therefore currently involved in the arduous task of grappling with the rights of the Maya to respect for their customary land tenure rights.

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<sup>12</sup> *ibid* at [20]

<sup>13</sup> *Maya Leaders Alliance v. Attorney General of Belize*, [2015] CCJ 15 (AJ) <sup>14</sup> [2015] CCJ 6 (AJ)

In *McEwan*<sup>14</sup> which we recently decided, the CCJ demonstrated that the right to the protection of the law is a right that must be made available to every single member of society. In *McEwan*, we ensured that members of the LGBTI community were able to avail themselves of that protection. We noted that in order to give due respect to everyone's humanity, civilised society has a duty to accommodate suitably differences that abound among human beings. The Court stated that no one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference that poses no threat to public safety or public order. In *McEwan* we therefore felt obliged to strike down a law that criminalised cross-dressing in public. The Court's majority noted that, apart from its vagueness, that law impacted disproportionately on transgendered persons by violating their gender identity and their freedom of expression. The judgment acknowledges that the gender expression of trans persons confuses, frightens and even disgusts some persons. But, this has to be balanced against the right to dignity that all people must enjoy, and the State should not countenance the derision and violence sometimes wreaked upon members of the LGBT community whose only crime is that they are different. Difference is as natural as breathing and judges must afford the protection of the law to those who experience the brunt of such intolerance. An important feature of *McEwan* for me is that, thanks to the rigour of counsel's preparation, the Court received and was in part influenced by the research of non-legal academics on the subject matter before the Court. The court in its judgment accepted that questions of constitutional interpretation will invariably involve historical and surrounding context and to provide that context judges must sometimes turn to historians and social scientists whose expertise is often vital to the interpretive process

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<sup>14</sup> *McEwan, Clarke, Fraser, Persaud and SASOD v Attorney General of Guyana*, [2018] CCJ 30 (AJ)

The upshot of these decisions of the CCJ (*Joseph and Boyce*; *Lucas*; *Maya Alliance*; *Nervais*; and *McEwan*) is that protection of the law or more broadly the rule of law is now clearly established as a constitutional norm that can be independently enforced. In this respect the rule of law can be classed in the same category as Separation of Powers<sup>15</sup> and Judicial Independence<sup>16</sup>. These overarching norms are fundamental to our constitutionalism, to our democratic traditions and to the enjoyment of our human rights. Their application to concrete circumstances will be a continuing, challenging duty of the judiciary.

### **The CCJ's approach to the Saving's Clause**

I turn now to the CCJ's position on the "savings law clause". This is a provision that is to be found in some form in the Constitutions of all Commonwealth Caribbean States. In the first set of states to gain independence, i.e. Jamaica, Trinidad and Tobago, Guyana and Barbados, the broad effect of the clause has been that the human rights, so carefully laid out in the Constitution, were forced to give way to the dictates of all pre-Independence law unless the post-independence legislature amended the pre-independence law so that it could no longer be regarded as a law existing at the time of independence.

As Sir Dennis noted earlier this year in the case of *Nervais* referenced earlier<sup>17</sup>:

"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."

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<sup>15</sup> See *Director of Public Prosecutions v Mollison* [2003] UKPC 6

<sup>16</sup> See *Suratt and others v Attorney General of Trinidad and Tobago* [2008] UKPC 38

<sup>17</sup> *Nervais v The Queen and Severin v The Queen* [2018] CCJ 19 (AJ) at [59]

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 naturally pose severe challenges both for courts and for constitutionalism. In effect, they contradict important norms such as constitutional supremacy and the power of judicial review.

In 2005, the Judicial Committee of the Privy Council had an occasion to address this contradiction in the case of *Boyce*.<sup>18</sup> Incidentally, Boyce is the same convicted murderer we spoke of earlier. Having exhausted their criminal appeals, he and Joseph appealed all the way up to the Privy Council in separate constitutional proceedings.

The key question for decision by the Bench in *Boyce* and in *Matthew*<sup>19</sup> was whether the judiciary should persist with the traditional understanding of the savings clause as a measure that immunises pre-independence laws from judicial scrutiny, or whether the court should accept a novel argument

The case of Boyce was heard together with a similar case from Trinidad and Tobago, the case of *Matthew*. The Privy Council empanelled an expanded 9 member Bench to hear the cases. A Jamaican judge sat on that expanded Bench. It was, I believe, the last time a Caribbean judge sat among their Lordships in the Privy Council.

The underlying issue in the cases of *Boyce* and *Matthew* respectively had to do with the pre-independence law that prescribes a mandatory death penalty for murder in Barbados and Trinidad and Tobago. Now, everyone agrees and accepts these days that the *mandatory* death penalty is contrary to the constitutional right to be treated in a humane manner. The Eastern Caribbean Court of Appeal decided this as long ago as the year 2000 and this decision has been accepted and followed by the Privy Council and other Supreme Courts in Africa. The question was whether,

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<sup>18</sup> *Boyce (Lennox) and Joseph (Jeffrey) v R*, [2004] UKPC 32, (2004) 64 WIR 37

<sup>19</sup> *Matthew (Charles) v The State*, [2004] UKPC 33, (2004) 64 WIR 412

notwithstanding this fact, the effect of the savings clause was to save this anti-human rights law. Alternatively, should a purposive approach be adopted that would accept that the intention all along was that pre-independence laws should be brought into conformity with the Constitution. Accepting the latter view would have meant that the law prescribing the MDP could be modified to yield a discretionary penalty instead.

By a 5 – 4 majority, the Privy Council majority held that the savings clause was a complete ouster of any jurisdiction to review pre-independence laws to test their constitutionality. The four judges in the minority, on the other hand, took a different view and I shall shortly outline what that different view was.

Well, a few months ago, the CCJ again broke ranks with the Privy Council. In *Nervais*, we expressed our complete agreement with the JCPC minority position and we struck down the MDP in Barbados. Sir Dennis Byron first examined what may have been the purpose for the savings clause. Two rival contentions have been posited in the past. The traditional view was expressed by Lord Devlin in *Director of Public Prosecutions v Nasralla*<sup>20</sup> and Lord Diplock in *de Freitas v Benny*<sup>21</sup>. This view posited that pre-independence laws already embodied the most perfect statement of fundamental rights and that it was not possible that they could ever be in conflict with the fundamental rights provisions set out in the Constitution. That view is now outdated. The other, more rational view, as expressed by Lord Hope in *Watson v The Queen*<sup>22</sup> was that the purpose of the savings clause was merely to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. Indeed, Belize is one of the last countries to

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<sup>20</sup> *Director of Public Prosecutions v Nasralla* (1967) 10 WIR 299

<sup>21</sup> *de Freitas v Benny* (1975) 27 WIR 318

<sup>22</sup> *Watson v the Queen* [2004] UKPC 34

become independent and in the Belizean Constitution their savings provision is given a time horizon of five years.

In *Nervais* Sir Dennis rejected the traditional view. The savings clause could not be interpreted as to forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent. It is now going to be interesting to see whether the Privy Council will maintain their traditional view as expressed in *Boyce* or whether they will reverse themselves and follow the CCJ on this question. I'm sure we won't have long to wait.

In *McEwan*, the CCJ provided guidance to judges on how they should approach the savings clause so as to ameliorate the harsh consequences of its application. We said that, Firstly, because of its potentially devastating consequences for the enjoyment of human rights, *the savings clause must be construed narrowly, that is to say, restrictively.*<sup>23</sup> Since it is the duty of the court to adopt a generous interpretation of the provisions related to fundamental rights, as far as possible, full effect should be given to the guarantees promised to the citizen in the statement of those rights. So, for example, a law will lose its status as a saved or existing law if the post-independence parliament interfered with the penalty aspect of the law.<sup>24</sup>

Secondly, the CCJ noted that the savings clause only saves laws that infringe the individual human rights referenced in the clause itself.<sup>25</sup> It does not preclude the court from holding a pre-independence law to be invalid if in fact the law runs counter to a core constitutional value such as the rule of law, or the separation of powers or judicial independence. I could well see that this

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<sup>23</sup> [2018] CCJ 30 (AJ) at [42]

<sup>24</sup> See per Rattray in *R v Samuda*, Criminal Appeal No. 134 of 1996

<sup>25</sup> [2018] CCJ 30 (AJ) at [43]



may have the effect of disabling entirely any harmful effect of the savings clause because, if a litigant can establish that a fundamental right promised by the Constitution is denied her only because of the existence of the savings clause, then the litigant may well argue that such a state of affairs deprives her of her right to the protection of the law. But, this is only a theory. We shall see how this develops if and when a case reaches the courts.

A third approach courts may take towards the savings clause is that where application of the clause may result in placing the State on a collision course with its treaty responsibilities, judges should bear in mind the well-known principle that *courts should, as far as possible, avoid an interpretation of domestic law that places a State in breach of its international obligations.*<sup>26</sup>

The fourth approach<sup>27</sup> is the one that was adopted by the Privy Council minority in *Boyce* and embraced by the CCJ in *Nervais*. It can be referred to as the modification first approach. In the various Commonwealth Caribbean states, the country's Constitution is actually a Schedule to an Act of Parliament. The Constitution contains a supreme law clause that states that the Constitution is the supreme law of the country and any other law in conflict with the Constitution is void to the extent of the inconsistency. The body of the Act invariably contains a provision allowing for the modification of pre-independence laws by the court to bring them into conformity with the Constitution.

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<sup>26</sup> *ibid* at [44]

<sup>27</sup> *ibid* at [45]

The question which arose in *Boyce* is how does the modification clause relate to the savings clause contained in the supreme law. The Act in which the modification clause is found, is not a part of the Constitution. So, should the modification clause be applied to existing or pre-independence laws before any attempt is made to save these laws or should we ignore the modification clause and enforce all existing laws even if they are incompatible with the human rights laid out in the Constitution? These were the questions which engaged the expanded nine-member panel of the Privy Council in the case of *Boyce & Joseph v R.*<sup>28</sup>

As stated earlier, by a narrow margin of 5 – 4, the conventional wisdom carried the day. The majority held that the savings clause was a complete ouster of any jurisdiction to review existing laws to test their constitutionality. The minority, on the other hand, took the view that the effect of the savings clause, read together with the modification clause, was to permit the court to identify an inconsistency between an existing law and the fundamental rights in the Constitution and to modify the inconsistency out of existence. The savings clause would only be needed where it proved utterly impossible to modify the existing law to make it conform with the Constitution. The CCJ's judgment in *Nervais*<sup>29</sup> came down firmly on the side of the JCPC minority. At [64] we stated unequivocally that Where any person alleges that an existing law has contravened or is contravening or is likely to contravene their fundamental rights, the Court must read the modification clause together with the savings clause. Where there is a conflict between an existing law and the Constitution, the courts must apply the existing laws with such modifications as may be necessary to bring them into conformity with the Constitution.

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<sup>28</sup> [2005] 1 AC 400, [2004] UKPC 32.

<sup>29</sup> [2018] CCJ 19 (AJ).

### **Monitoring of Judgments to secure enforcement**

The third measure devised by the CCJ which I believe is relevant to the enjoyment of rights is more administrative than jurisprudential. Both in its appellate and original jurisdictions, when very important judgments are given, the court would sometimes advise the parties of a date on which they must appear before the court to report on whether the court's order has been complied with and if it has not, the reasons why. In other words, the court has taken to monitoring compliance with and enforcement of its judicial orders and directives.

This measure has helped to ensure that all of the court's judgments to date have been satisfied. In the Maya case<sup>30</sup>, because satisfying the judgment we issued requires a raft of legislative, administrative and technical measures by the State of Belize, the ongoing monitoring provided by the court is pivotal.

Distinguished guests, ladies and gentlemen, I tend sometimes to be provocative. And I wish to close now by making some provocative statements. In the Agreement establishing the CCJ, Caricom's leaders expressed the view that Caribbean courts are best equipped to promote the development of a Caribbean jurisprudence. This is a truth that the judges of the JCPC not only recognise but they continually demonstrate it in their judgments, and extra judicially as well.

The case of *Basdeo Panday v Ken Gordon*<sup>31</sup> provides an illustration. Mr Gordon brought a defamation action against Mr Panday who had labelled Mr Gordon a pseudo racist. The trial judge agreed that it was a terrible thing for Prime Minister Panday to call Mr Gordon a pseudo racist.

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<sup>30</sup> [2015] CCJ 15 (AJ)

<sup>31</sup> [2005] UKPC 36

The judge awarded Mr Gordon \$600,000 in damages. Mr Panday appealed and lost, but the Court of Appeal reduced the damages to \$300,000. Mr Panday appealed again to the Privy Council. He had two grounds of appeal. Firstly, he said it was not a big thing in Trinidad and Tobago to call someone a pseudo racist and so Mr Gordon's case should have been dismissed.

Secondly, Mr Panday argued that, if you don't agree that the case should have been dismissed, the \$300,000 in damages was still way too much and the Privy Council should reduce that amount further. What did the Privy Council say?

On the first issue, the Privy Council said that the judges of Trinidad and Tobago are in the best position to assess whether in Port of Spain it is a bad thing to call someone a pseudo racist and so they were not going to reverse the judgment on that point. As to the amount of the damages, I will quote for you exactly what the Privy Council judges said. They said "The seriousness of a libel and the quantification of an award are matters where judges with knowledge of local conditions are much better placed than" we are.

In effect, the Privy Council told Mr Panday, we can't reverse the judgment of the Trinidad judges because we are not best equipped to promote the development of a Caribbean jurisprudence.

The Privy Council reiterated this same position in July of this year in the case of *The Honourable Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago*.<sup>32</sup> In upholding the decision of the Court of Appeal, the JCPC judgment stated and I quote, "The local courts in Trinidad and Tobago are far better placed than is this Board to consider what the fair-

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<sup>32</sup> [2018] UKPC 23

mindful and informed observer in Trinidad and Tobago would make of the matters complained of.”

In 2003 Lord Hoffman went even further. He told the Law Association of Trinidad and Tobago: “The CCJ is necessary if Trinidad and Tobago is going to have the full benefits of what a final court can do to maintain democratic values in partnership with the other two branches of Government — the Executive and the Legislative”.

I like to think of the law as a huge overarching tapestry of rules and regulations and court judgments that governs every facet of our lives; constraining our choices, shaping our actions, ensuring order and stability, economic and social progress. This tapestry has many creases and corners and crevices that are obscure. The only way some of them will come to light and be unravelled is when a dispute emerges that touches on them. If access to justice at the apex level is impeded, these corners and crevices will remain relatively obscure.

The CCJ helps to shine a light on these obscurities. Many more of them can now come before the court for suitable decisions to be made. A comparison of the volume of cases heard from Belize before and after that country joined the appellate jurisdiction of the CCJ in 2010 shows a dramatic increase. The comparable figures for Barbados are even more astonishing. For this year alone, we have heard seven times as many cases as were dealt with in one year by that country’s final court before the CCJ was inaugurated. And what’s more the level of this access today extends to many who previously would not have been able to have their appeals heard. While some states who do not need a referendum procrastinate, the stark reality is that the people of Barbados, Guyana, Belize and Dominica enjoy a greater level of access to justice at the highest level than Jamaicans currently do. Consider this: Jamaica has 10 times the population of the State of Barbados. How many

judgments has the JCPC given from Jamaica this year to date? Two. How many judgments has the CCJ given from Barbados this year? Seven. Failure to accede to the CCJ in its appellate jurisdiction frustrates litigants, denies to poor people justice at the highest level and retards the development of the rule of law. But, I don't want anyone to take my word for it. I naturally have a bias. I invite all to examine the statistics for themselves.

The recent referendum results in Grenada and Antigua & Barbuda, though disappointing, will naturally not deter the CCJ from being an instrument of peace and justice for the people of Barbados, Guyana, Belize and Dominica. And in our Original Jurisdiction, of which I have not spoken this evening, we will continue to provide justice for those who like Shanique Myrie<sup>33</sup> see fit to prosecute instances of breaches of the Caricom treaty.

It has been a delight for me to make this address. I offer sincerest congratulations to the Independent Jamaican Council for Human Rights (IJCHR) on this important milestone of 50 years defending human rights in Jamaica. I thank you all for your attentiveness and for all the courtesies extended to me.

Thank you.

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<sup>33</sup> *Myrie v The State of Barbados* [2013] CCJ 1 (OJ)

