

The Caribbean Court of Justice and International Human Rights Laws and Norms:
Universalism, Cultural Relativism and Transformation.

by

Herbert Wells

Thesis submitted to the University of Ottawa
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy

Faculty of Law – Common Law Section
University of Ottawa

ABSTRACT

The Caribbean Court of Justice (CCJ) was inaugurated in 2005. It is a regional court that serves Member States of the Caribbean Community (CARICOM), an international organization that promotes regional integration in the Caribbean. In this dissertation, I conduct a doctrinal examination and analysis of the human rights jurisprudence of the CCJ, to determine the nature and extent of the Court's use of International Human Rights Laws and Norms (IHRLN) in its adjudication. Although my main focus is the Court's human rights decision-making, I also conduct an analysis of some of its wider work, to the extent that this wider work, coupled with the Court's human rights decision-making, builds an understanding of the Court's definition of itself and explains the trajectories of the Court as a regional judicial institution. I conduct my doctrinal examination and analysis against the backdrop of three theoretical underpinnings, namely - human rights universalism; transformative justice; and Caribbean political economy and human rights cultural relativism. The goal is to understand how the CCJ, as a young regional Caribbean court, has navigated the region's historical, socio-cultural, and political contexts, in its use of what are regarded as universalist human rights norms in the law, as it adjudicates domestic human rights and constitutional law issues. I also evaluate where the Court ends up when it navigates these issues, in order to determine impact, and to assess whether the Court's outcomes can be rationalized or justified. The study demonstrates that this new court has adopted and adapted existing international human rights norms and ideas, notwithstanding some socio-cultural and political challenges in the Caribbean to some of these norms and ideas.

My major finding is that the CCJ is inclined towards a strongly *universalistic* perception and application of IHRLN, and relies quite heavily on these laws and norms to guide its human rights and constitutional law adjudication, although it does this sometimes in a way that indigenizes the application of these IHRLN. In some of the Court's human rights-related decisions, it has also acted in quite transformative ways, sometimes arriving at outcomes that challenge some Caribbean's socio-cultural and political norms or expectations, particularly on subjects such as LGBTQ+ rights, the death penalty, political corruption, and the strengthening of aspects of Caribbean Community Law. Through these transformative decisions, the CCJ has disturbed some of the expectations about the contours and boundaries of Caribbean constitutional law, and in places, has formulated new principles and doctrines which signal a clear yearning to use IHRLN

to take *Caribbean* law to new frontiers. It does this without completely disregarding Caribbean socio-cultural and political realities, but by sometimes mediating them.

This approach by the Court demonstrates independence and reflects an absence of the suspicions of some IHRL norms and ideas that are oftentimes reflected in the political economy dynamics of the wider Caribbean region. It likewise does not signify an embrace of some of the more well-known cultural reticence and relativist attitudes to some aspects of international human rights norms found in some quarters of the Caribbean. Instead, the study reveals a more nuanced positioning by the Court, in its human rights jurisprudence. The result, this dissertation has found, is a Court that has (a) accomplished critical legal reform in important areas of the law, (b) empowered CARICOM citizens in a number of ways, and (c) strengthened respect for indigenous regional institutions in the wider *politique* of Caribbean regional identity and integration. The Court has accomplished these goals through calculated persuasion, rationality, and normative reasoning.

The contribution of this dissertation is three-fold. Firstly, it formulates and presents a rigorous analysis of how the CCJ operationalizes IHRLN in its work. This is done, drawing on the literature on human rights universalism, cultural relativism, and transformative justice, and against the backdrop of regional human rights reticences that I explore, and which are premised on certain perceptions of the hegemonic and neo-colonial tendencies and potential of some IHRLN. Secondly, the thesis offers an in-depth and critical assessment and evaluation of the CCJ's impact on the human rights jurisprudence of the region as a whole. Finally, it offers an in-depth analysis of how the Court's work has so far contributed to the development of Caribbean law.

ACKNOWLEDGEMENTS

I am truly indebted to my doctoral supervision team, Professor Vanessa MacDonnell, my supervisor, Professor Jena McGill, and Professor Pacifique Manirakiza. The wealth of their personal and scholarly guidance and molding, as well as their moral support and their belief in, and keenness on this project could not have been greater.

Vanessa's constantly helpful and insightful comments and suggestions on the various drafts of this thesis, enabled me to constantly refine my thoughts, clarify my arguments, and stay on the path of building a rigorous, tight, manageable, and focused thesis. She challenged and stimulated me intellectually, and helped me immensely to write what I hope is a much more critically adventurous thesis than the project proposed at the outset. I feel exceptionally fortunate to have gained so much from her amazing intellectual investment in this project, and from her unfailing and sincere encouragement and reassurances throughout.

I also thank Jena and Pacifique immensely, for their always considered and productive guidance. Their probing and pragmatic comments and suggestions were always of tremendous value. Unquestionably, the project benefitted enormously. Thank you both also, for always helping to spark ideas and stimulate reflection on my part. All of this, combined, has helped to guide me towards a richer, more refined product.

I thank as well, Professor Elizabeth Judge, for being an unknowing role model. She has taught me so very much about legal methodology and good, sturdy academic writing, and has always been so kind to me throughout this journey. I remain indebted.

Finally, I thank the staff of the Faculty of Laws' Graduate Office, especially Elvira Evangelista.

DEDICATION

I dedicate this thesis to my siblings John, Jean, Gladstone, Pauline, and Lorna, and to my friend
since I was seven years old, Tony.

TABLE OF CONTENTS

ABSTRACT	ii
ACKNOWLEDGEMENTS	iv
DEDICATION	v
TABLE OF CONTENTS	vi
LIST OF ABBREVIATIONS	x
CHAPTER ONE: INTRODUCTION	1
1.1.Introduction.....	1
1.2.Research Question and Research Issues.....	11
1.3. Overview of the Main Argument.....	13
1.4. Contribution of the Study.....	13
1.5. Literature Overview.....	15
1.6. Methodology.....	16
1.7. Structure of the Study.....	18
 CHAPTER TWO: THE CARIBBEAN COURT OF JUSTICE: HISTORY, STRUCTURE, SELF-DEFINITION	21
2.1. Introduction.....	21
2.2. Background to the CCJ – From Treaty of Chaguaramas to <i>Revised</i> Treaty of Chaguaramas.....	22
2.3. The <i>Revised</i> Treaty of Chaguaramas and the CCJ.....	26
2.4. Agreement Establishing the CCJ.....	28
2.4.1. Jurisdiction.....	29

2.4.2. Original Jurisdiction.....	29
2.4.3. Appellate Jurisdiction.....	30
2.4.4. Appointment of Judges.....	36
2.4.5. Funding of the Court.....	40
2.5. The Regional Character of the CCJ.....	43
2.6. The CCJ – Shaping its Jurisdiction and Identity.....	47
2.6.1. Scoping Jurisdiction and Shaping Community Law.....	47
2.6.2. Community Law and State Liability.....	50
2.6.3. Making Community Law Prevail- Correlative Rights.....	52
2.6.4. Judicial Review Parameters.....	55
2.6.5. Role and Place of International Law.....	57
2.6.6. The Proper Administration of Justice.....	60
2.6.7. Having a <i>Talk</i> with the People.....	62
2.7. Conclusion.....	65

CHAPTER THREE: CARIBBEAN POLITICAL ECONOMY AND SOCIO-CULTURAL AND POLITICAL CONTEXT..... 68

3.1. Introduction.....	68
3.2. The Political Economy Landscape.....	69
3.3. Exploring Some Caribbean Human Rights Attitudes.....	77
3.4. Conclusion.....	100

CHAPTER FOUR: UNIVERSALISM, CULTURAL RELATIVISM AND TRANSFORMATION.....	102
4.1. Introduction.....	102
4.2. Universalism in International Human Rights.....	103
4.3. Cultural Relativism and Universalism.....	116
4.4. The Transformative Potential of <i>Young Courts</i>	132
4.4.1. Towards Understanding Transformation.....	132
4.4.2. <i>Young Courts</i> and Transformation.....	137
4.5. Conclusion.....	145
 CHAPTER FIVE: MAPPING THE CCJ'S HUMAN RIGHTS JURISPRUDENCE.....	 147
5.1. Introduction.....	147
5.2. Valuing IHRLN and Infusing Them in Caribbean Law.....	149
5.2.1. <i>JJ v. Child Care Board and SW</i>	149
5.2.2. <i>The Queen v. Ken O'Neil Lewis</i>	151
5.2.3. <i>Hyles and Williams v. Director of Public Prosecutions</i>	153
5.2.4. <i>Guyana Sugar Corporation v. Dukhi</i>	156
5.3. Respect and Independence.....	158
5.3.1. <i>Frank Gibson v. Attorney General</i>	159
5.3.2. <i>August and Gabb v. R</i>	163
5.4. Indigenizing and Creating.....	171
5.4.1. <i>Attorney General of Barbados v. Joseph and Boyce</i>	171
5.4.2. <i>Nervais v. The Queen and Severin v. The Queen</i>	179

5.5. Democracy and the Rule of Law.....	186
5.5.1. <i>Belize International v. Attorney General of Belize</i>	186
5.6. Breaking New Frontiers.....	189
5.6.1. <i>McEwan and Others v. Attorney General of Guyana</i>	189
5.6.2. <i>Tomlinson v. Belize and Tomlinson v. Trinidad and Tobago</i>	199
5.6.3. <i>Maya Leaders Alliance and others v. Attorney General of Belize</i>	204
5.6.4. <i>Shanique Myrie v. Barbados</i>	211
5.6.5. <i>Attorney General of Guyana v. Cedric Richardson</i>	216
5.7. Conclusion.....	221
CHAPTER SIX: UNIVERSALISM AND TRANSFORMATION THROUGH THE CCJ	222
6.1. Introduction.....	222
6.2. Discussion.....	224
6.2.1. IHRLN and the CCJ’s Emancipatory Trajectory.....	224
6.2.2. Elevating, and Fashioning New Norms.....	237
6.2.3. IHRLN in Defence of the Domestic.....	240
6.2.4. Indigenizing and Fashioning “Caribbean Law” through IHRLN.....	246
6.3. Conclusion.....	256
CHAPTER SEVEN: CONCLUSION	260
BIBLIOGRAPHY	276
CCJ CASES	293
NON-CCJ CASES	295

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CCSA	Constitutional Court of South Africa
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CJ	Chief Justice
COTED	Council for Trade and Economic Development
CSME	Caribbean Single Market and Economy
ECHR	European Convention on Human Rights
ECCA	Easter Caribbean Court of Appeal
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IHR	International Human Rights
IHRL	International Human Rights Laws
IHRLN	International Human Rights Laws and Norms
IMF	International Monetary Fund
JA	Justice of Appeal
JCCJ	Judge Caribbean Court of Justice

JCPC	Judicial Committee of the Privy Council
LGBTQ	Lesbian, Gay, Bisexual, Transgender and Queer
OECS	Organisation of Eastern Caribbean States
PC	Privy Council
PCCJ	President Caribbean Court of Justice
RTC	Revised Treaty of Chaguaramas
SICJ	Statute of the International Court of Justice
TWAIL	Third World Approaches to International Law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention of the Rights of the Child
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNHRC	United Nations Human Rights Committee
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

CHAPTER ONE

INTRODUCTION

1.1.Introduction

The Caribbean Court of Justice (CCJ) is an international court founded by the regional group of nations known as the Caribbean Community (CARICOM). The Court is established under the *Agreement Establishing the Caribbean Court of Justice*¹. It was inaugurated in April 2005. The CCJ is located in the Republic of Trinidad and Tobago (a CARICOM Member State), although it also has itinerant jurisdiction across the CARICOM region.²

The Court has both an Original Jurisdiction and an Appellate Jurisdiction. Under its Original Jurisdiction, the Court hears cases from signatories to the *Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy*³ (RTC), an international instrument that governs relations between CARICOM Member States. The Court's Original Jurisdiction is mandatory on matters arising for dispute settlement under the RTC. However, the CCJ's Appellate Jurisdiction is optional. At this point, of the fifteen CARICOM States that there are, only four (Barbados, Belize, Dominica, and Guyana) have accepted the Court's Appellate Jurisdiction. As recent as November 2018, Grenada, and Antigua and Barbuda held referenda on the question of joining the CCJ's Appellate Jurisdiction, but in both instances,

¹ Agreement Establishing the Caribbean Court of Justice, found online at: http://www.sice.oas.org/Trade/CCME/agreement_CCJ.pdf

² Article III(3) of the *Agreement Establishing the Caribbean Court of Justice* (the *Agreement*) provides that "The Seat of the Court shall be in the territory of a Contracting Party as determined by a qualified majority of the Contracting Parties but, as circumstances warrant, the Court may sit in the territory of any other Contracting Party". The Agreement is available online at https://ccj.org/wp-content/uploads/2011/09/ccj_agreement.pdf

³ *Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy*, CARICOM Secretariat, Guyana, found online - (<file:///C:/Users/HPW/Documents/RTC%20CARICOM.pdf>)

the people chose to retain the *Judicial Committee of the Privy Council* (JCPC or Privy Council) in the United Kingdom as their final appellate court.

In the years that the Court has been in operation, it has rendered dozens of written judgements spanning both its Original and Appellate Jurisdictions⁴. As such, the Court has had ample opportunity to fashion a judicial footprint and to develop a judicial identity that is capable of scrutiny, investigation, and interrogation.

This dissertation examines how the CCJ's human rights jurisprudence interacts with International Human Rights Laws and Norms (IHRLN). It does so against the backdrop of three bodies of literature: firstly, the debates on the universality of international human rights; secondly, the literature on transformative constitutionalism, and thirdly, the political economy dynamics of the Caribbean and culturally relativist concerns of some sections of Caribbean society, in respect of some human rights issues. I conduct a doctrinal examination and analysis of the CCJ's jurisprudence to determine the nature and extent of the IHRLN in its human rights adjudication. I also conduct a broader analysis of the Court's work to assess how the Court has sought to establish its credibility as a regional judicial institution. The goal is to understand how the CCJ, as a young regional Caribbean court, has navigated the region's historical, socio-cultural, and political contexts, in its use of what are regarded as universalist human rights norms in the law, as it adjudicates domestic human rights and constitutional law issues. I also evaluate where the Court ends up when it navigates these issues, in order to determine whether the Court's outcomes can be rationalized or justified. This study demonstrates that this *new* court has adopted and adapted

⁴ Article III(1) of the *Agreement* establishes both of these jurisdictions of the CCJ.

existing international human rights norms and ideas, notwithstanding some socio-cultural and political challenges to some of these norms and ideas.

The Caribbean polity has often perceived international human rights laws and norms as being in conflict with some “domestic” societal norms and customs. Even though States in the region subscribe, both formally or in principle, to many international human rights expectations, the degree to which they actually observe and realize some of these expectations on the ground has been problematic. In a number of important instances, there has been much reticence. This reticence stems largely from the perceived connection between IHRLN (or alternatively, the way in which these IHRLN are articulated and applied in certain quarters), and notions of imperialism, hegemony, neo-colonialism, and sovereignty. In other words, the contention on the ground, in some sectors of Caribbean society, is that IRHLN are inconsistent with many socio-cultural nuances and realities in the Caribbean. Importantly, however, this study is not an in-depth socio-cultural analysis of Caribbean human rights records. Instead, the study references these records to construct the setting and context against which the CCJ’s human rights output is probed, interrogated, and understood.

In seeking to understand the overall nature of the CCJ, we might look to the Preamble of the Agreement which establishes the Court⁵, which states that the Court “will have a determinative role in the further development of Caribbean jurisprudence”. In its 2013-2017 Strategic Plan⁶, the Court explained that its vision was to be “innovative, fostering jurisprudence that is reflective of

⁵ Supra, note 1.

⁶ Caribbean Court of Justice Strategic Plan 2013-2017, p. 13, found online at: <https://ccj.org/wp-content/uploads/2012/12/%e2%80%a2CCJ-Strategic-Plan-2013-2017-2.pdf>

our history, values and traditions, and consistent with international legal norms” [emphasis added]. In a similar vein, in *Attorney General of Barbados v. Joseph and Boyce*, the Court also explained that “[t]he main purpose in establishing this court [was] to promote the development of a Caribbean jurisprudence”.⁷ From these, therefore, one gleans that the Court sees itself as an institution meant to produce indigenous, “innovative” jurisprudence which recognizes both international legal norms as well as regional values.

Studying the CCJ in the way I propose in this dissertation is justified for three reasons. Firstly, international courts are not typically revolutionary in their lawmaking, but instead engage in a kind of “normative accretion”⁸. To do so, such courts often engage in “cross-fertilization” with other international tribunals.⁹ Burstein describes this behaviour as “reasoning through incrementalism”, whereby the court increases its political power by gradually establishing a norm of obedience.¹⁰ An international court such as the CCJ is potentially capable of offering us some insight into, and demonstration of this “normative accretion”, “incrementalism”, and “cross-fertilization”, especially in relation to IHRLN, the focus of this study. This is particularly interesting, in light of the political economy dynamics and the actual human rights reticences (discussed in Chapter 3) that are found in the Caribbean region.

⁷ *Attorney General, Superintendent of Prisons, Chief Marshal v. Jeffrey Joseph and Lennox Ricardo Boyce*, [2006] CCJ 3 (AJ), at para. 18, (Joint Judgment of The Rt Honourable Mr. Justice de la Bastide and The Honourable Mr. Justice Saunders).

⁸ Thomas Buergenthal, “Lawmaking by the ICJ and Other International Courts” (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 403, at p. 403.

⁹ *Ibid*, see generally.

¹⁰ See, Mike Burstein, “The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights” (2006) 24 *Berkeley J. Int’l L.* 423.

Secondly, international courts tend to be more independent from domestic governments than domestic courts. For this reason, there is a greater expectation of independence where the concern is human rights.¹¹ In other words, international courts are somewhat removed from domestic imperatives generated out of majority views on certain matters, from which certain abuses of rights can arise. Majority-held views can undercut the fundamental rights of those in the minority. In the Caribbean for example, as I demonstrate shortly, LGBTQ rights would be one such example. For this reason, studying the CCJ, with its heightened potential for independence, enhances the opportunity for us to probably see a less rigid treatment of certain issues, such as those covered in this study.

Thirdly, as Helfer et. al. point out there are several ways in which international courts can influence domestic behaviour. For example, they can offer judgements on highly important matters which then serve as a certain species of authority; set agendas by raising awareness; and pre-empt future litigation on issues the court has settled.¹² This could in turn impact broader public perceptions on certain issues. This capacity for norm-creation and norm-building, therefore, strengthens the importance of an institution such as the CCJ.

Altogether, hence, for the above reasons, the CCJ's jurisprudence is a fitting subject for this study. It is a regional Court that is independent and capable of setting a human rights agenda for the Caribbean region; it can most certainly be an agent of change, as some of its jurisprudence

¹¹ See, Andreas Follesdal, "Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights - or Neither" (2016) 79 *L. & Contemp. Probs.* 147.

¹² See, Laurence Helfer & Erik Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" (2014) 68(1) *Int'l Org.* 77.

thus far has clearly established; and it can also be a tool for raising awareness on wider human rights issues in the region. An additional consideration is that the “geographical proximity and cultural propinquity”¹³ of the CCJ to the socio-cultural and political nuances of the Caribbean makes it more probable that its jurisprudential renderings would have greater significance to the wider jurisprudence of the region, as these renderings would be coming from *within* rather than from *without*. Such an appeal would of course arise from the broad sense of a Caribbean *family* that largely exists in the region. This latter point would also be quite significant, in light of the continuing debates across the Caribbean about severing ties with the UK-based Privy Council as a final appellate court.

Notwithstanding the CCJ’s Caribbean credentials, however, the study shows that, in its human rights decision-making, the Court relies heavily on certain key international law instruments. These key instruments are the *Universal Declaration of Human Rights* (UDHR)¹⁴, the *International Covenant on Civil and Political Rights* (ICCPR)¹⁵, the *European Convention on Human Rights* (ECHR)¹⁶, *American Convention on Human Rights* (ACHR)¹⁷, and other corollary instruments, such as the *Convention on the Elimination of All Forms of Discrimination Against*

¹³ George Mugwanya, “Realizing universal human rights norms through regional human rights mechanisms: Reinvigorating the African System” (1999) 10 *Ind. Int’l. & Comp. L. Rev.* 35, at pp. 41-42.

¹⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217A (III).

¹⁵ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

¹⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

¹⁷ Organization of American States (OAS), *American Convention on Human Rights*, “*Pact of San Jose*”, Costa Rica, 22 November 1969.

Women (CEDAW)¹⁸; the *United Nations Convention on the Rights of the Child* (UNCRC)¹⁹ and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)²⁰. The Court also relies heavily on the jurisprudence of the decision-making organs connected with these international human rights law instruments, including, for example, the Inter-American Court of Human Rights, the Inter-American Human Rights Commission, the European Court of Human Rights and the United Nations Human Rights Council. It is therefore in these instruments and precedents that the Court invests, in order to forge its own path on the frontiers of Caribbean human rights protection.

In forging such a path, this thesis argues that the CCJ engages in a process of *indigenization*. This means that the Court utilizes and adapts international human rights laws and norms to the domestic regional, political, and socio-cultural and constitutional context, to fashion outcomes that clarify, strengthen, enhance, reinforce, and at times decolonize Caribbean law. This conceptualization of indigenization captures the essence of the role and the mission that the CCJ sees for itself, as an institution to “promote the development of Caribbean law”²¹, and one with an “explicit mandate” to play a decisive, constructive, and foundational role in the “further development of Caribbean jurisprudence”²². In this process of indigenization, the Court engages in a number of approaches. Firstly, it indigenizes by formulating interpretations of domestic constitutional law based on international human rights legal principles and norms, and applies

¹⁸ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, A/RES/34/180.

¹⁹ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

²⁰ UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295.

²¹ *Supra*, note 7.

²² *Infra*, notes 24 and 84.

these to the domestic context, to arrive at what the Court sees as just outcomes. Here, the Court does not necessarily create new principles or doctrines, but it uses IHRLN to amplify domestic law in a way that reinforces, enriches, or strengthens domestic law. My detailed discussions later in this thesis on the cases of *McEwan v. Attorney-General* and *Maya Leaders Alliance v. Attorney General*, for example, reflect this approach by the Court.

A second approach that defines the process of indigenization by the CCJ, is the way the Court examines IHRLN (as well as other fundamental rights jurisprudence that is steeped in a human rights ethos from other jurisdictions in the liberal democratic diaspora), and then fashions its own unique or indigenous legal frameworks for solving particular domestic legal problems. Such indigenization, beyond being just a reinforcement of domestic law with international standards, is an approach that embraces adaptation and creation, on the part of the CCJ. Ample demonstrations of this indigenization approach by the CCJ is found in Chapters 5 and 6 of the thesis, in the examination and analysis of the Court's judgment in *Gibson v. Attorney-General*, for instance. There, the Court fashioned a framework of "search for the truth", "access to justice", and the "presumption of innocence", to determine a unique fair trial issue concerning equality of arms for both the State and the defendant in a criminal trial.

Akin to the creation of fresh legal frameworks as part of the process of indigenization presented and argued in this thesis, is the approach by the CCJ of using both wider international law as well as international human rights laws and norms as bases or motivations to undergird and fashion new Caribbean legal *doctrines* or principles, to constrain governmental action and advance the protection of constitutional rights. Compelling examples of this approach to indigenization by

the Court are presented later in the thesis, in relation to the “legitimate expectation” *doctrine* that emerged from *Attorney General v. Joseph and Boyce*, and the expansion of the “rule of law” principle in *Belize International v. Attorney-General*, to encompass analyses of dignity, equality and freedom, in the context of resolving a dispute about the breach of a commercial contract by the Government of Belize.

A fourth way in which this thesis argues that the CCJ engages in indigenization is in the way the Court deploys IHRLN to untangle and unpackage some legal regimes of ostensible oppression in Caribbean law, which are progenies and legacies of the historical Caribbean experiences with slavery and European colonization. I argue that this leads to some emancipatory and decolonizing outcomes which impact the content and substance of certain constitutional rights. This is a particularly critical aspect of the indigenization carried out by the CCJ, as it carves out a role for the Court to untether a number of unjust and pernicious laws and constitutional provisions, that arguably might reflect or protect certain political and socio-cultural interests, but which severely perpetuate neo-colonial regimes of fundamental rights abuse and deprivation. In this regard, the Court’s indigenization attempts to achieve emancipation and transformation. The study captures this aspect of the CCJ’s indigenization credentials in its later analyses of cases such as *Maya Leaders Alliance v. Attorney-General*, *McEwan v. Attorney General*, and *Nervais and Severin v. Attorney-General*. As we see later, these cases respectively deal with the matters of the abuse of ancestral land rights of the Mayan Indigenous Peoples in Belize by the State; the protection of transgender rights – and more broadly LGBTQ rights in Caribbean society; and the “Savings Clause” in Commonwealth Caribbean constitutions which immunizes laws existing prior

to political independence and the departure of European colonial masters, from challenge under the fundamental rights provisions of these independent Caribbean constitutions.

Indigenization, as advanced in this thesis, therefore, largely signifies broad themes of convergence, revitalization, infusion, and strengthening of Caribbean law through IHRLN-inspired interpretations, analyses, and application. Further, we see the creation and adaptation of IHRLN to fashion unique *Caribbean* doctrines, principles, and frameworks, that are intended to advance fundamental freedoms and human dignity. There are also themes of emancipation and decolonizing, bringing potential shifts in Caribbean law, which disturb, or bear the potential to disturb, aspects of Caribbean political and socio-cultural realities. All of these, as the thesis ultimately argues, congeal to produce largely transformative outcomes for Caribbean law and peoples.

It is worth underscoring, however, that in the context of the human rights jurisprudence of the CCJ, indigenization on the part of Court, as far as the analysis in this study reveals, does not appear as being rivalrous with Caribbean society. Instead, indigenization as conceptualized and reflected here, signifies the CCJ's effort to adhere to deep constitutional propriety, through recognition of, or adoption and adaptation of IHRLN broadly, to the extent that the Court deems fit or helpful. The Court, as my analyses in later chapters reveal, is linking its work and its outlook, not only to its own parochial context and strictures, but rather, to wider foundational conceptualizations of rights found in IHRLN specifically, and in broader international law generally. I argue, therefore, that the goal of the Court in this indigenization process, is to better

preserve and protect core fundamental rights values for Caribbean peoples, in a way that works locally.

Through the process of indigenization, hence, the CCJ accomplishes things such as redefining and strengthening Caribbean law; remedying injustices such as land loss and alienation in the cases of the Belizean Maya Peoples and Caribbean transgender persons, respectively; mitigating and dislodging indefensible legacies of colonization rooted in modern Commonwealth Caribbean constitutions (the “Savings Clause” for example); exposing historical injustices grounded in outdated legal postulates; and facilitating empowerment of not only discreet Caribbean populations, but the broader Caribbean peoples as a whole. In this connection, therefore, as I introduce the study, indigenization is presented as a fundamentally important and highly functional component of the roles identified in this thesis for the CCJ, as gleaned from the discussions and analyses conducted.

1.2. Research Question and Research Issues

The research questions in this study, is:

To what extent, in what ways, and with what outcomes does the CCJ, as a young regional court, engage with international human rights laws and norms in its decision-making?

In answering this research question, I explore how the Court approaches its function, and the strategies that the Court employs in its interaction with IHRLN. As the Court itself has pointed out, its mandate is to indigenize Caribbean jurisprudence. The study also examines the Court's authority in terms of any agenda-setting goal that its human rights-related decisions reveal, particularly bearing in mind the geographical and cultural proximity of the Court to the region and peoples that it serves. In this connection, I consider (i) the intended audience of the Court's human rights decisions; (ii) any role the Court might have in shifting the culture, intentionally or otherwise; (iii) the reforming aspects of the Court's decision-making, and (iv) the degree of cognizance of local regional values in the Court's ideological paradigm. This of course is done against the background of the Court's own acknowledgement of its transformative mission. As Jamadar JCCJ stated recently in *Marin v. The Queen*²³:

*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...'. This directive is thus an expression of sovereign regional will. In no area is this role of greater salience than with regard to Caribbean constitutionalism, '... a goal which Caribbean courts are best equipped to pursue'. In this mandate, the Court's role is intended to be transformative of both law and society, conceived as mutually constitutive. It is a role that is consistent with constitutional edicts throughout the Region as to the responsibility of the Judiciary.*²⁴

From this, we see not only that the Court has transformation as part of a broader goal, but also that it views itself as an emissary for "sovereign regional will".

²³ *Solomon Marin Jr. v. The Queen* [2021] CCJ 6 (AJ) BZ.

²⁴ *Ibid*, at para. 28.

1.3. Overview of the Main Argument

The main argument made in this thesis is that, for the most part, the CCJ's human rights jurisprudence reflects a trend towards accepting the *universalism* of IHRLN. This trend is demonstrated in its repeated reliance on principles and opinions from international human rights tribunals and decision-making bodies, as well as domestic courts in other jurisdictions such as Canada and Australia. This study also reveals that in applying IHRLN in the region, the Court's goal is to uphold the rule of law and advance liberal democratic values. I argue, therefore, that the CCJ's reliance on IHRLN should not be understood through the frame of the cultural invasion, but instead, through the frame of protecting fundamental rights, such as respect for personal autonomy and human dignity, and respect for free agency and expression, these rights being essential to preserving the rule of law and democracy.

Ultimately, what this thesis shows is that the Court is gradually building its own legitimacy and credibility through transformative judicial decision-making, hoping of course that this will resonate with those it serves.

1.4. Contributions of the Study

This study makes three main contributions to scholarship. Firstly, it articulates a narrative about how the CCJ approaches human rights protection in the context of regional/domestic socio-cultural and political norms. Secondly, it assesses and critically evaluates the Court's impact on the human rights jurisprudence of the CARICOM region as a whole. Thirdly, it explores the

Court's transformative accomplishments based on the intersection between its human rights jurisprudence and IHRLN. Finally, the thesis constructs and articulates a narrative about the CCJ's legitimacy as a regional judicial institution.

1.5. Literature Overview

The contextual and theoretical framework of this study is centred on human rights universalism, transformative justice, and Caribbean political economy and socio-cultural and political attitudes to some human rights. These contexts and theories are discussed in detail in Chapters 3 and 4, but I introduce these themes now to explain the overarching role that they play in contextualizing the dissertation's findings and arguments. IHRLN are central to the assessment of the of CCJ's human rights adjudication. While the legitimacy of these laws and norms is generally accepted in mainstream IHR discourse, it must also be recognized and acknowledged that they are contested in important streams of IHR scholarship.

This study shows that the CCJ's reliance on IHRLN is premised on what the Court views as universal norms of equality, equity, fairness, and human dignity. A review of the scholarship on IHRLN universalism, and its criticisms, therefore, gives important context to my discussions and analyses. This review also helps us to situate the socio-cultural and political reluctances on human rights in the Caribbean, in the broader theoretical framework that exists.

The literature on the political economy of Caribbean societies serves two main purposes. It provides us with a way of understanding the historical, socio-cultural, political, and economic space within which the CCJ operates. My wider arguments on the direction, decisions and

outcomes of the Court's human rights jurisprudence cannot be viewed independently of the environment within which it operates. The Court is not distinct from the region or the people that it serves. Its legitimacy and credibility are partially a function of its surrounding realities, both historical and current, and likewise, its adjudication has to be cognizant of these realities, however it chooses to resolve the issues before it as a court. Secondly, the political economy literature demonstrates what may inform some of the historical, socio-cultural, and political attitudes that exist in the region to some human rights, in various sectors of Caribbean society. This is important, because the study shows that it is through the interplay of all these variables, and what the CCJ is setting out to do through its human rights adjudication, that we arrive at the outcomes discussed. These outcomes, I argue, are transformation through a blend of universalization of domestic law, and sometimes indigenization of international human rights law.

It is in this regard that the literature on transformative justice becomes helpful, as I unpack the approaches and outcomes of the human rights decision-making of the CCJ. Against the backdrop of the transformative justice literature, the study can then assess the degree to which the broader objectives of transformation are embodied in the CCJ's work. This includes the alignment of domestic law with international law, the infusion of international normative standards and values into domestic law, the shifting of both social and political culture, and the centering of core values such as equality and human dignity. This is precisely what the CCJ has been doing through its universalist application of IHRLN since its inception.

1.6. Methodology

In this thesis, I primarily use the doctrinal methodology to study the CCJ's human rights jurisprudence. Doctrinal research, explains Jain, "involves analysis of case law arranging, ordering and systematizing legal propositions and study of legal institutions through legal reasoning or rational deduction".²⁵ In a similar vein, Dobinson and Johns posit that "Doctrinal or theoretical legal research can be defined in simple terms as research which asks what the law is in a particular area. It is concerned with analysis of the legal doctrine and how it has been developed and applied.... It consists of either a simple research directed at finding a specific statement of the law or a more complex and in depth analysis of legal reasoning".²⁶

The doctrinal methodology has been used in this thesis for three main reasons. Firstly, this study is fundamentally an analysis and evaluation of the CCJ's human rights case law and incorporates discussions of relevant Caribbean statutes and Constitutions. This, of course, is supplemented by case law from other domestic jurisdictions and from the realm of international human rights law. In focusing on these cases, international legal instruments and statutory documents, the thesis is aimed at "studying" a raft of "legal propositions" about international human rights laws and norms in the Caribbean, as well as studying "legal institutions", primarily the CCJ, but collaterally, others such as the IACtHR, the IACoMHR, the ECtHR, the Eastern Caribbean Court of Appeal, as well as courts from jurisdictions such as South Africa and Canada, as examples.

²⁵ S. N. Jain, "Doctrinal and Non-Doctrinal Legal Research", in S. K. Verma & M. Afzal Wani, eds., *Legal Research and Methodology*, (Indian Law Institute: India, 2006), at p. 68.

²⁶ Ian Dobinson & Francis Johns, "Qualitative Legal Research", in Michael McConville & Wing Hong Chui, eds., *Research Methods for Law*, (Edinburgh University Press: Edinburgh, 2007), at pp. 18-19.

My second reason for employing the doctrinal methodology is that this dissertation is meant to rigorously study the human rights approaches, principles, and concepts that are embedded in the CCJ's human rights jurisprudence, and which define its human rights *modus operandi*. Not only does the thesis unpack these elements of the Court's human rights jurisprudence, but it also studies the motivations and rationales for the exercises of judgement engaged in by the Court regarding human rights in the Caribbean. It is from these motivations, rationales, and justifications that I formulate an understanding of where exactly the Court places itself on the wider spectrum of human rights adjudication. It is useful to acknowledge here, however, that studying the pure textual output of a court may not divulge the underlying philosophical positions taken or ideological compromises made by various members of the Court in arriving at broad outcomes, and this does present some limitation. Notwithstanding this, judicial opinions, and decisions, through their reasons and analyses are very powerful collective testimonials to outcomes that any given court wishes to transmit to the public as a whole.

My third reason for adopting a doctrinal methodology in this thesis is that the overarching goal is to determine how the jurisprudence, in its doctrinal essence and contours, reflects any manifestation of the theoretical literatures on (a) universalism in international human rights law, (b) transformative justice in *young* courts, and (c) culturally relativist critiques of IHRLN. Against this backdrop, the thesis constructs arguments and arrives at conclusions about what jurisprudential human rights law looks like at the CCJ, and potentially what doctrines and values inform and inspire these laws, (such as for example, universalism, transformation and reform, human dignity, right to protection of the law, and right to equality before the law, etc.).

The study also relies on the law and society methodology. One goal of this thesis is to analyse what the CCJ's transformative accomplishments mean for the people that the Court serves. In this connection, the thesis explains the impact of certain decisions on the rights of the Court's various constituencies, in relation to how transformation impacts lives. This is done particularly against the background of the factual circumstances of human rights in the Caribbean that are dealt with in Chapter 4, as well as the histories and consequences of colonialism that define much of the region's cultural, economic, political and social space, (also covered in Chapter 4). Law and Society studies typically ask three fundamental questions – What is the law? Why is the law what it is? and, what should the law be?²⁷ To that extent, incorporating some of this methodology offers the opportunity to explain and describe some of the legal phenomena covered in social terms. As Mather explains:

*Law is not autonomous, standing outside the social world, but is deeply embedded within society. While political scientists recognize the fundamentally political nature of the law, the law and society perspective takes this assumption several steps further by pointing to ways in which law is socially and historically constructed, how law both reflects and impacts culture, and how inequalities are reinforced through differential access to...legal procedures and institutions.*²⁸

My main doctrinal methodology is thus complemented by the law and society methodology.

1.7. Structure of the Study

Chapter 2 provides an overview of the history and nature of the CCJ, addressing matters such as the Court's structure; its financing; the appointment of judges to the Court; and the Court's

²⁷ See generally, Robin West, "A Reply to Pierre" (2009) 97 *Georg. L. J.* 865.

²⁸ Lynn Mather, "Law and Society", *The Oxford Handbook of Political Science*, ed., Robert E. Goodwin, Online publication, (2013), at 2.

hybrid/dual jurisdiction (*Original* Trade/Treaty law and *Appellate*). The Chapter also explores the initial perceptions and expectations of, and attitudes towards the Court; and the apparent resistance to the Court's Appellate Jurisdiction in most Caribbean States. The Chapter also examines decisions of the Court that articulate how the Court sees itself, its mission, and its approach. The chapter also discusses the CCJ's regional character.

In Chapter 3 of the study, I provide a social, cultural, and political context for the Court's work. I discuss the Caribbean's political economy dynamics and some of the attitudes and reticence towards international human rights in the Caribbean.

Chapter 4 explores the discourse on universalism in IHRLN. I also examine the cultural relativism critiques. Further, the chapter discusses the transformative potential of young courts such as the CCJ.

Chapter 5 is a mapping and discussion of the CCJ's human rights jurisprudence. The cases covered in the chapter span issues of trial within reasonable time and fair hearing; cruel, inhuman, degrading punishment/death penalty; due process; LGBTQ rights; liberty, speech, and privacy; and non-discrimination/equality before the law.

Chapter 6 is an in-depth analysis of what the study reveals when the human rights jurisprudence examined and discussed in Chapter 5 is placed under the *universalism*, *transformation*, and *cultural relativism* microscopes.

In Chapter 7, I offer a conclusion, reflecting a summary of my central findings, and share thoughts on the future of the CCJ. These summarized findings are that the CCJ is universalist in its use of IHRLN; it does not appear to share the reservations of the hegemonic potential of IHRLN; and that as a young court, its work has been transformational in important respects. Additionally, the study finds that the CCJ has adopted an incremental and pragmatic approach to its human rights law-making function; it has been strategic in its use of IHRLN and has established its credibility; and it has also carefully and effectively used its power thus far. For the future, the Court holds considerable promise for the further development and enrichment of Caribbean human rights law.

CHAPTER TWO

THE CARIBBEAN COURT OF JUSTICE – HISTORY, REGIONALISM, STRUCTURE, AND SELF-DEFINITION

2.1. Introduction

Commonwealth Caribbean countries are states which are former colonies of Great Britain. Beginning in the 1960s, these states began a process of obtaining political independence from the colonial power. This process has resulted in the emergence of democratic self-government, with these states creating their own Constitutions, developing their own institutions of government, and taking control of their sovereignty over all wider political, economic, and social affairs. Notwithstanding these important developments, most of these states have kept the United Kingdom Privy Council (Privy Council) at the apex of their judicial system. This, in spite of the fact that these independent Commonwealth Caribbean States have created their own domestic court systems for regular civil and criminal cases²⁹. A large part of the retention of the Privy Council is related to the adherence in these States to the English Common Law legal system, wherein many of the laws and procedures are nearly completely based on laws and procedures found in English Law.³⁰

²⁹ At the present time, the politically independent Commonwealth Caribbean Countries that still maintain the Privy Council as their final or highest Appellate Court are Jamaica, Trinidad and Tobago, The Bahamas, St Lucia, St. Vincent and the Grenadines, Antigua and Barbuda, Grenada, and St Kitts and Nevis.

³⁰ For a general discussion of the legal systems of the Commonwealth Caribbean, see Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (London & New York: Routledge Taylor & Francis Group, 2008), Chapter 1.

In instances where the Privy Council remains the apex court, this is provided for in the various Constitutions.³¹ There are, however, four Commonwealth Caribbean States that have substituted the CCJ as their final appellate court in civil and criminal matters. These States are Barbados, Belize, the Commonwealth of Dominica (Dominica) and the Cooperative Republic of Guyana (Guyana). For these States that have made the shift, the wait has been quite long, as the process of bringing the CCJ to fruition occurred over many years. The following section of the study summarizes this journey.

2.2. Background to the CCJ: From Treaty of Chaguaramas to the Revised Treaty of Chaguaramas

In the early years following independence from the UK, the few newly independent Commonwealth Caribbean States that there were, started agitating for more meaningful detachment from the former colonial power. There was burgeoning interest in reducing the connection between themselves and their former colonizers, and a yearning for more connection with their other Caribbean neighbours. After a failed attempt at what was known as the *Federation of the West Indies*³², this yearning materialized in the creation in 1973 of the *Caribbean Community*

³¹ As examples, in The Bahamas, Article 104 of the Constitution provides that appeals relating to fundamental rights and freedoms “shall lie as of right to the Judicial Committee of Her Majesty's Privy Council”, and similarly in “other cases” provided for under Article 105, or to any “any other court established for the purpose in substitution for the Judicial Committee”. In the Jamaica Constitution, at sections 110(1) and 110(2), appeals from the Court of Appeal lie to the Privy Council as of right and with leave, respectively. Trinidad and Tobago, which incidentally has become a Republic, removing the British Monarch as Head of State, and instead installing a largely ceremonial President, also has similar appeal provisions in its Republican Constitution. Section 109 of that country's Constitution nearly completely mirrors the provisions in section 110 of the Jamaica Constitution, excepting that it adds to the list of matters appealable to the Privy Council, “final decisions in disciplinary matters under section 81(3) to (5) of the Supreme Court of Judicature Act and under the Legal Profession Act”.

³² The West Indies Federation, known also as the Federation of the West Indies was an attempt by British colonies in the Caribbean region to form a political unit, with a view to gaining independence from Great Britain (much like confederation in Canada or the Commonwealth of Australia). The federation lasted from January 1958 to May 1962, and was head-quartered in Trinidad and Tobago. The Federation however collapsed, as a result of internal political

and Common Market (CARICOM). This was accomplished through the signing of the *Treaty of Chaguaramas* (Chaguaramas being the town in Trinidad and Tobago where the Treaty was signed). The objective of this treaty was to establish a common market, with a view to enhancing regional economic independence and strengthening trade between the states involved.

The members of that first CARICOM aggregation were Barbados, Guyana, Jamaica, and Trinidad and Tobago. As the years rolled on, several other states joined the Community. Antigua and Barbuda, Belize, Dominica, Grenada, Montserrat, St. Lucia, St. Kitts and Nevis, and St. Vincent and the Grenadines joined in 1974, while The Bahamas signed up in 1983, Suriname in 1995 and Haiti in 2002. Notwithstanding this growth, in the first decade and a half or so, CARICOM struggled to make a compelling success of the integration process. Analyses of CARICOM during this period reflect a number of reasons for the Community's difficulties. These included, for example, high degrees of market penetration from outside the region, insularity between Members and their populations, conflicting internal perceptions of which Members were winning and which were losing, as well as neglect of Community processes and organizing principles.³³

Because of this malaise in the Community, at the Tenth Meeting of the Heads of Government of the Community in Grand Anse, Grenada, in 1989, it was agreed that they would “work expeditiously together to deepen the integration process and strengthen the Caribbean Community in all of its dimensions to respond to the challenges and opportunities presented by

conflicts over how it would be governed and how it would function. See Samuel J. Hurwitz, “The Federation of the West Indies: A study in Nationalism” (1966) 6:1 *Journal of British Studies* 139.

³³ Fauzya A. Moore, “Review Essay: The Report of The West Indian Commission - New Directions for CARICOM?” (1994) 43(2) *Social and Econ. Studies* 149.

the changes in the global economy”³⁴. A Declaration was passed to establish the *Independent West Indian Commission for Advancing the Goals of the Treaty of Chaguaramas*. This Commission was to comprise eminent West Indians and was to engage in a process of public consultation throughout the Caribbean region, involving “the peoples of CARICOM through leaders, teachers, writers, intellectuals, creative artistes, businessmen, sportsmen, trade unionists, churches and other community organisations”³⁵, in order to figure a way forward for the Community.

The *Independent West Indian Commission*, under the distinguished leadership of esteemed Caribbean son, Sir Shridath Ramphal, reported in 1992. The Report was intended to be a strategic document on the future of CARICOM, as well as an important insight into how Caribbean Peoples saw the Community. The entire process of consultation and reporting back, conducted by the Commission, considerably lifted the profile of Caribbean integration on the whole and generated much speculation on whether Caribbean leadership would indeed take necessary and difficult steps towards closer economic and political union³⁶. This was primarily because of how expansive the scope of the report was. As Brewster has remarked, “[t]he Report [was] literally a source of wisdom on everything under the sun: from currency to culture; from science to human rights; from exports to cricket; from CARICOM to gender issues”³⁷.

One of the Report’s most far-reaching recommendations was the creation of a CARICOM Single Market and Economy (CSME), within which there would be currency convertibility and

³⁴ CARICOM Secretariat, found at <https://caricom.org/communications/view/grand-anse-declaration-and-work-programme-for-the-advancement-of-the-integr>.

³⁵ CARICOM Secretariat, *Grand Anse Declaration*, 1989, Annex II, CARICOM Secretariat.

³⁶ *Supra*, note 34, at p. 150.

³⁷ Havelock R. Brewster, “The Report of The West Indian Commission, Time For Action - A Critical Appreciation” (1993) 39(1) *Caribbean Quarterly* 29, at p. 29.

capital and labour mobility³⁸. Over the years since the Report, CARICOM has placed an enormous amount of work in the creation of the CSME, which has largely focused on the free movement of goods, services, people and capital, as well as creation of the right to establish a business in any part of the Single Market.

An Inter-Governmental Task Force (IGTF) was set up to give effect to the Report. This IGTF comprised representatives of all CARICOM Member States. It produced nine Protocols for the purpose of amending the original Treaty of Chaguaramas. These nine Protocols were later combined to create a new version of the Treaty, the *Revised Treaty of Chaguaramas Establishing the Caribbean Community, including the CARICOM Single Market and Economy* (RTC). When the RTC opened for signature, it was signed by eight Member States. The RTC entered into force on 1 January 2006. As the years have passed, through a series of implementation phases, Member States have taken active steps towards implementing the provisions of the RTC, especially Chapter Three – Establishment, Services, Capital and Movement of Community Nationals; and Chapter Eight – Competition Policy and Consumer Protection.

For purposes of this study, the key chapter is Chapter Nine of RTC, which deals with the *Original Jurisdiction* of the CCJ.

³⁸ Shridath Ramphal, "Time for Action- Report of the West Indian Commission – Where are we Today?", Speech delivered by Sir Shridath Ramphal, Caribbean Exporter Colloquium, at p. 8, found at <https://www.carib-export.com/login/wp-content/uploads/2013/04/Time-for-Action-Report-of-the-WIC-Sir-Shridath-Ramphal.pdf>, last accessed on December 29, 2019.

2.3. The Revised Treaty of Chaguaramas and the CCJ

Chapter Nine contains the provisions for dispute settlement under the treaty. Articles 211 through 222 set out the parameters of the CCJ's *Original* or so-called "Trade" Jurisdiction. This jurisdiction relates only to the operation of the CARICOM CSME. Article 211 sets out the role of the CCJ in what are known as "contentious proceedings" (e.g. disputes between the Member States, disputes between the Member States and the Community, and referrals from national courts of the Member States). Article 222 sets out a process by which persons, both natural and juridical, may have standing before the Court, in its Original Jurisdiction. According to this provision, for those persons to be granted standing, "special leave" from the Court is required. The criteria for determining whether such a person should have standing are that (a) the RTC intended the litigated benefit or right to accrue to that person; (b) the person must have been prejudiced in the enjoyment of such a benefit or right; (c) the Member State from which the individual comes must have refused or omitted to bring the claim, or expressly agreed that the person may bring the claim; and (d), the Court is satisfied that it is in the interest of justice that the person be allowed to bring the claim.

The CCJ may, in its Original Jurisdiction, also render Advisory Opinions under Article 212, concerning the interpretation and application of the Treaty. Such Advisory Opinions can, however, only be at the request of a Member State who is a Party to a proceeding, or the Community itself. Further, the CCJ is also empowered under Article 211(c) to hear referrals from national courts of the Member States, if they are a Contracting Party to the *Agreement Establishing the Caribbean Court of Justice*, a separate Treaty which is dealt with in more detail below. On the

broader question of whether the CCJ has Original Jurisdiction in any given matter brought to the Court, however, the RTC declares that that is a matter to be determined by the Court itself³⁹.

In so far as the law to be applied by the CCJ in its Original Jurisdiction is concerned, in interpreting and applying the RTC, the Treaty indicates that this is to be “rules of international law”⁴⁰. In that connection, therefore, the CCJ is expressly forbidden from a “finding of *non liquet*”⁴¹ on the ground of silence or obscurity of the law”⁴². Concomitantly, the RTC has also expressly provided that the judgements of the Court “shall constitute legally binding precedents for parties in proceedings before the Court unless such judgments have been revised in accordance with Article 219”⁴³. This is clearly with a view to establishing predictability and clarity in the interpretation and application of the RTC.

So, while in international law, the doctrine of *stare decisis* is not formally recognized⁴⁴, the Framers of the RTC evidently determined that the operation of the CCJ required it. One might suggest that this was a decided effort to encourage confidence in the stability of the Court, such that it would not lend itself to volatility and jurisprudential indiscipline, but rather to a certain

³⁹ Article 216(2) of the RTC provides that “In the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by decision of the Court”.

⁴⁰ RTC, Article 217(1).

⁴¹ “The term ‘*non liquet*’ literally means ‘it is not clear’. In Roman law, it referred simply to the deferment of a case for insufficient information. But today, a finding of *non liquet* means that the court cannot decide a case due to a gap (or lacuna) in the law.” – Oxford Public International Law, found at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1669>, last accessed December 29, 2019.

⁴² RTC, Article 217(2).

⁴³ RTC, Article 221.

⁴⁴ See generally, Michael P. Van Alstine, “Stare Decisis and Foreign Affairs” (2012) 61:5 *Duke L. J.* 941; and Anthony Arnall, *The European Union and its Court of Justice*, (Oxford: Oxford University Press, 1999), at p. 533.

clarity of expectation and norms. This would have been valuable to encouraging Members of the Community to sign on to the RTC, including the provisions on the role and authority of the Court.

2.4. Agreement Establishing the CCJ

The RTC's provisions in respect of the CCJ, operate in tandem with the *Agreement Establishing the CCJ* (the Agreement). This Agreement was signed in February 2001. The signatories were Antigua and Barbuda, Barbados, Belize, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, Suriname, and Trinidad and Tobago. In 2013, the number of signatories rose to 12, with St. Vincent and the Grenadines joining in. The Court was officially inaugurated at its seat in Port-of-Spain, Trinidad and Tobago, in April 2005.

The Agreement made the Court one of the most unique and distinctive among international or regional Courts across the globe. McDonald captured this uniqueness and distinctiveness when he pointed to such things as (a) the unique nature of its jurisdiction; (b) the *non liquet* rule; (c) the role of the doctrine of *stare decisis* and precedent in the Original Jurisdiction; (d) *locus standi* for natural and juridical persons; (e) the “referral” procedure; (f) the advisory opinion capacity; (g) the modalities used for the appointment of judges and the President of the Court; (g) the mode of financing the Court; (h) the Court's itinerant nature; and (i) provisions for compliance with judgements and orders.⁴⁵ I say more about these now.

⁴⁵ Sheldon McDonald, “The Caribbean Court of Justice: Enhancing the Law of International Organizations” (2003) 27(4) *Fordham Int'l L. J.* 929, at p. 970.

2.4.1. Jurisdiction

Under the Agreement, the CCJ operates as a hybrid Court. Anderson tells us that despite the Court's bifurcation as an international and a domestic court, giving it dual competences, "the fundamental mission of the Court is singular. In a word, that mission is to define the Caribbean legal identity".⁴⁶ As a Court of Original Jurisdiction, the CCJ discharges its functions as an international tribunal, utilizing international laws to interpret and apply the RTC. This would be akin to the role of the European Court of Justice and the International Court of Justice. In its Original jurisdiction, the Court also speaks authoritatively on the rights and obligations contained in the RTC, whereas in its Appellate Jurisdiction, it pronounces on domestic Constitutional and other laws from the state out of which the dispute emerges.

2.4.2. Original Jurisdiction

The CCJ's Original Jurisdiction, as set out in the Agreement at Article XII, mirrors Article 211 of the RTC. Similarly, Articles XIII, XIV and XVII, dealing respectively with the Advisory Opinions of the Court, Referrals to the Court from domestic courts, and the compulsory jurisdiction of the Court, mirror Articles 212, 214, and 216 of the RTC. Article XVII of the Agreement, which addresses the application of international law norms in the Court's Original Jurisdiction, likewise replicates Article 217 of the RTC. This replication further obtains for Articles XXII and XXIV of the Agreement, relating to the application of the *stare decisis* rule and the *locus standi* of natural and juridical persons, respectively, transposed from Articles 221 and 222 in the RTC.

⁴⁶ Winston Anderson, "The IAS and its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ", p.18, found at: <file:///C:/Users/HPW/Documents/Winston%20Anderson%20The%20IAS%20and%20its%20Impact%20on%20Caribbean%20Human%20Rights%20Law....pdf>

2.4.3. Appellate Jurisdiction

The provisions dealing with the CCJ's Appellate Jurisdiction are contained in Part III of the Agreement. Most significantly, unlike the Original Jurisdiction that is "compulsory", the Appellate Jurisdiction of the CCJ is "optional". As Article XXV(1) of the Agreement makes clear, "In the exercise of its appellate jurisdiction, the Court is a superior Court of record with such jurisdiction and powers as are conferred on it by this Agreement or by the Constitution or any other law of a Contracting Party". In effect, hence, the Court does not only derive its jurisdictional authority from the RTC, but also from the Constitutions and laws of individual states.

A large part of the rationale for the optional nature of joining the CCJ's Appellate Jurisdiction, is the fact that this is the most politically and socially contentious aspect of the creation of the Court. That is why, even though the Agreement has been signed by 12 CARICOM Member States, only four countries have acceded to its Appellate Jurisdiction. In order to avail themselves of the CCJ's Appellate Jurisdiction, most of the countries that are signatories to the Agreement would need to amend their Constitutions to remove the UK Privy Council as their appellate court of last resort.

In Jamaica, for example, political harmony and consensus on the matter has been elusive, as both major political parties have had divergent views on the subject.⁴⁷ The Jamaica Labour Party

⁴⁷ This also the case in Trinidad and Tobago. That country's Constitution requires a majority vote of three-fourths of the House of Representatives and a vote of no-less than two-thirds of the Members of the Senate for the required change to take place. This amounts to a requirement of a "super majority" to remove the Privy Council from the Trinidad and Tobago Constitution, a scenario that has not proven likely over the years, in light of the two major political parties having opposing views on the issue. This has resulted in a political stalemate in that country.

is of the view that a referendum should be held, though not constitutionally required by the Jamaica Constitution, so that the people may have their voices heard on such a momentous decision. The People's National Party on the other hand, is of the view that the Parliament should simply join forces across the political divide and put together to amend the necessary provisions of the Jamaica Constitution to dislodge the Privy Council. Indeed, in a public opinion poll commissioned by *The Gleaner* (the main national newspaper in Jamaica) in 2003, two years before the inauguration of the Court, it was revealed that "even though most Jamaicans were in favour of the CCJ, a clear majority thought that the Government should hold a referendum. Some 63 percent of those interviewed [were] in favour of a referendum on the Court, while 34.5 percent [were] opposed to it"⁴⁸. Notwithstanding this, the People's National Party, which was in government in 2004, attempted to enact legislation to make the CCJ the nation's apex appellate court. This was challenged all the way to the Privy Council in the case of *Independent Jamaica Council for Human Rights (1998) Ltd and others v. Marshall-Burnett and The Attorney General*⁴⁹.

In that case, the Parliament of Jamaica had purportedly enacted three statutes, intending to abolish the right of appeal to the Privy Council in section 110 of the Constitution, substituting this with a right of appeal to the CCJ. The three statutes were all initially introduced as Bills in the Senate, and later passed by a simple majority of both the House of Representative and the Senate.

⁴⁸ Leonard Birdsong, "The Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English Speaking Caribbean" (2005) 36 *U. Miami Inter-Am. L. Rev.* 197, at p. 219.

⁴⁹ *Independent Jamaica Council for Human Rights (1998) Ltd and others v. Marshall-Burnett and Attorney General* [2005] UKPC 3; [2005] 2 WLR 923.

The challenge by the Appellants related to the constitutionality of the three new statutes. The first contention was that the CCJ would not enjoy the same entrenched protection which was afforded by the Jamaica Constitution to the Supreme Court⁵⁰ and the Court of Appeal, and that essentially, the result of the new statutes was that those inferior courts would be entrenched while the CCJ, a higher court, would not be. The second contention was that since the statutes had not been enacted in accordance with the parliamentary procedure mandated by section 49 of the Constitution for amendment of an entrenched provision, the statutes were void.

The Privy Council indicated that it had “no interest in the outcome of the appeal” and that the Jamaican people were “fully entitled to take appropriate steps to bring [the Privy Council’s] role to an end”⁵¹, but nevertheless explained that “an important function of a constitution [was] to give protection against governmental misbehaviour” and in that regard, the three statutes passed had the effect of “undermining the protection given to the people of Jamaica by entrenched provisions of Chapter VII of the Constitution”.⁵² The statutes were therefore struck down, as the procedure followed by the Jamaican Parliament was unconstitutional.

But the constitutional procedural flaw that was found in the *Independent Council for Human Rights* case was not the only problem faced by Jamaica and other Caribbean countries which might have wanted to introduce the Appellate Jurisdiction of the CCJ in the earlier years of

⁵⁰ The Jamaica Supreme Court is a trial court of inherent jurisdiction, equivalent to a provincial Superior Court in the Canadian judicial system.

⁵¹ *Independent Jamaica Council for Human Rights*, supra, note 49, at para. 5.

⁵² *Ibid*, at para. 21.

the signing of the *Agreement Establishing the CCJ*. There was also the issue of the results of the case *Pratt and Morgan v. Attorney General for Jamaica*⁵³.

In the *Pratt and Morgan* case, the Appellants had been convicted and sentenced to death in 1979. Over the next decade, there was a series of delays and setbacks in the prosecution and determination of appeals in the domestic courts. In one instance, a court took 45 months to deliver a judgement. Over the period of a decade, several warrants of execution were issued against the Appellants. In February 1991, the Appellants commenced proceedings in the Supreme Court of Jamaica, seeking constitutional redress based on the claim that their execution after such a protracted delay of some 12 years since they were sentenced to death, would be “inhuman ... punishment or other treatment” and thereby, in violation of section 17(1) (torture or inhuman or degrading punishment) of the Constitution. Their application was dismissed by the Supreme Court in June 1991 and by the Court of Appeal in June 1992. The Appellants then appealed to the Privy Council.

The Privy Council rendered a decision in November 1993, ruling that the treatment of the Appellants Pratt and Morgan was contrary to section 17(1) of the Jamaica Constitution. The Privy Council’s reasoning was grounded in an “instinctive revulsion” to the treatment of the Appellants, on account of their “humanity”, as it was “an inhuman act to keep a man facing the agony of execution over a long extended period of time”.⁵⁴ The Privy Council commuted the death sentences

⁵³ *Pratt and Morgan v. Attorney General for Jamaica* [1993] 4 All E. R. 769.

⁵⁴ *Ibid*, at p. 783.

imposed on the Appellants to life imprisonment. The Privy Council then declared that if Jamaica wanted to maintain the death penalty, it had an obligation to ensure that execution was done “as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve”, and that in this particular case, “to execute [the] men... after holding them in custody in an agony of suspense for so many years would be inhuman punishment” within the meaning of the Constitution.⁵⁵ This was against the background that part of the State’s argument was that much of the delay caused was to be attributed the Appellants themselves. In concluding the case, the Privy Council ruled that “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'”⁵⁶ [emphasis mine].

Jamaica’s loss in this case at the Privy Council, and the timing of the early efforts to consider joining the Appellate Jurisdiction of the CCJ, brought stunning and vocal objection, based on claims that because of Jamaica’s failure at the Privy Council, its desire to join the Appellate Jurisdiction of the CCJ was motivated by the yearning to enforce the death penalty through a regional court (the CCJ), as it had been effectively “abolished” by “five-year rule” emerging from *Pratt and Morgan*. The suspicion was that the CCJ, in this Appellate Jurisdiction, was going to become a “hanging court” (hanging being the method used in the Caribbean to carry out the death penalty), at the behest of Caribbean governments left disaffected by the *Pratt and Morgan* decision.⁵⁷

⁵⁵ Ibid, at p. 786.

⁵⁶ Ibid, at pp. 788-789.

⁵⁷ Infra, note 75, (*Wolfe-Robinson & Bowcott*).

With the “five-year rule” established by the Privy Council having a binding effect in Jamaica and the rest of the Commonwealth Caribbean, where at the time, all except Guyana had that Court at the apex of their court hierarchy, attempts to implement the Appellate Jurisdiction of the CCJ were met with heavy suspicion by many in civil society and the legal fraternity. This played a pivotal role in perceptions about the Court in those early days and militated against the Jamaican government being able to proceed with that aspect of the CCJ’s jurisdiction.

Although much of the “hanging court” problematique has dissipated, in part because of decisions of the Court on the issue over the years since its inauguration, that has not resulted in broad-based enthusiasm for the Court’s jurisdiction. As recent as November 2018, the populations of two Caribbean countries (Antigua and Barbuda; and Grenada), rejected the adoption of the Appellate Jurisdiction of the CCJ as their final appellate court, in favour of the Privy Council, in separate referenda.⁵⁸ A *Daily Observer* newspaper article in Antigua summed up the arguments of the referendum this way:

Some of the arguments that stood out as it relates to why the country should retain the Privy Council [were] that; the people do not trust the local and regional judiciary; they want to see emphasis on reforming and improving courts, prison, police stations and case management locally before thinking about changing the final appellate court; the Privy Council does not cost the Antigua and Barbuda government anything so there’s no risk of undue influence and that the Privy Council has served well for nearly 200 years so there’s no need to move or fix what exists. On the other side the arguments in support of the move to the CCJ included that it would further advance the nation’s independence; it is too expensive to go to the Privy Council making it inaccessible; that its set-up insulates it from political interference; the court is fully aware and familiar with the culture of Caribbean people hence its judgments would be from a place of greater understanding; the judges are as

⁵⁸ Caribbean 360.com, “CCJ Disappointed with referenda Results in Grenada and Antigua and Barbuda,” 7 November 2018, online: <<http://www.caribbean360.com/news/ccj-disappointed-with-referenda-decisions-in-grenada-and-antigua-barbuda>> [<https://perma.cc/55WH-GRVZ>]

*qualified as those serving the Council and; costs are generally lower at the CCJ.*⁵⁹

The proponents of the Court's Appellate Jurisdiction were however not to win the day when the votes were cast.

2.4.4. Appointment of Judges

One of the initial fears about the Court was that it would be packed with political appointees, who would do the bidding of the respective Member States, and who would be susceptible to corruption, much more so than judges of the JCPC would⁶⁰. Vasciannie noted this concern with particular respect to the appointment of the President of the Court who was to be selected by CARICOM Heads of Government, highlighting that such a process, “in our highly tribalised societies, would not augur well for judicial independence or for the perception that the Court is meant to operate independently of the executive”⁶¹. The better approach, indicates the author, would be for the President to be chosen by the Regional Judicial Services Commission, just as was to be the case for other judges of the Court. The critical goals in this regard, he continued, should be creating a structure which was “patently immune from interference” and ensuring that “the President of the final appellate court is not perceived as owing his or her position of authority to particular political leaders”⁶².

⁵⁹ *The Daily Observer* of Antigua, November 2, 2018, online at <https://www.antiguaobserver.com/defeat-for-ccj-what-is-next/>.

⁶⁰ See Dennis Byron & Maria Dakolias, “The Regional Systems in the Organization of Eastern Caribbean States and the Caribbean”, in ed., EdgardoM. Favaro, *Small States, Smart Solutions: Improving Connectivity and Increasing the Effectiveness of Public Services*, (Washington D.C.: The World Bank, 2008), at pp. 91 and 114.

⁶¹ Stephen Vasciannie, “The Caribbean Court of Justice: Further Reflections on the Debate”, (1998) 23:1/2 *West Indian L. J.* 66.

⁶² *Ibid.*

Arising from these contending positions, the matter became a deeply polarizing national issue, not only between political interests, but in other sectors of civil society such as the church, business, and the legal community. Indeed, the parliamentary opposition party in Jamaica had publicly vowed in those early years to withdraw from the Court when it returned to political office if the ruling party had not held a referendum. Vasciannie also weighed in on this element of the debate and advanced the view that “there [was] a powerful case that the matter should be put to the people in the form of a referendum”.⁶³ In effect, the issue had then become a socially and politically divisive one, threatening any unity towards a common regional integration objective.

When the dust finally settled, the appointment of judges was entrusted to a Regional Judicial and Legal Services Commission under Article V, which was to comprise (a) the President of the CCJ as Chair; (b) two persons nominated jointly by the *Organisation of the Commonwealth Caribbean Bar Association* and the *Organisation of Eastern Caribbean States Bar Association*; (c) one chairman of the Judicial Services Commission of a Contracting Party selected in rotation in the English alphabetical order for a period of three years; (d) the Chairman of a Public Service Commission of a Contracting Party selected in rotation in the reverse English alphabetical order for a period of three years; (e) two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS⁶⁴ for a period of three years

⁶³ Ibid, p.76.

⁶⁴ The Organisation of Eastern Caribbean States (OECS) is a Caribbean sub-regional group of nations, which was created on June 18, 1981. The Member States of the OECS are all Member States of the larger CARICOM organization. Both organizations are, however, separate and legally distinct and independent. The OECS has eleven full members, namely, Antigua and Barbuda, Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, Saint Lucia and St. Vincent and the Grenadines. There are also associate members, including the British Virgin Islands, Anguilla, Martinique and Guadeloupe. The main goals of the OECS are to “Advance, support and accelerate regional trade, economic and social integration”; Mainstream climate, economic, environmental and social resilience”; “Promote and support equity and social inclusion; and leverage the cultural and linguistic diversity of the OECS”; Support alignment of foreign policy of Member States with the development needs of the OECS”; “Align and strengthen the

following consultations with regional non-governmental organisations; (f) two distinguished jurists nominated jointly by the Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education; and (g) two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.⁶⁵

The effect of this arrangement is that judges are not directly selected by governments. To that extent, there is greater likelihood for the appointments process to be insulated from political interference. The broad cross-section of Commissioners is unique to the CCJ. In the ECJ and the ICJ, for example, states typically field candidates, either in the individual capacity of the candidate, or as a representative of the state. In contrast, the CCJ uses the Judicial and Legal Services Commission and applies a method of advertisements being placed in the media, inviting applications. A short-list is selected for interviews, and from there, a successful candidate is eventually named. With this system, ostensibly, considerations of geography or political support are not considered, but rather “high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society”⁶⁶ on the part of the applicants. In addition, judges to the Court must have had at least five years’ experience as a judge in a Court of unlimited jurisdiction in a Common or Civil Law jurisdiction, or be practicing or teaching law for a period of not less than 15 years.⁶⁷ Incidentally, at the present time, two of the Judges of the CCJ

institutional systems of the Commission to effectively deliver its mandate”; and to pursue and agenda of sustainable development. [Found at <https://oecs.org/who-we-are/strategic-objectives>]

⁶⁵ *Agreement Establishing the CCJ*, Article V(1).

⁶⁶ *Agreement Establishing the CCJ*, Article IV(11).

⁶⁷ In terms of geography in the origins of the judges of the Court, while it is unknown if the Commission considers this factor, the only express, relevant provision is Article IV(10), which reads-

are from Trinidad and Tobago, and one from Jamaica, two States that are not Contracting Parties that are subject to the Court's Appellate Jurisdiction. Notwithstanding this, those judges render judgements not only in the Court's Original "trade" Jurisdiction, but also in its Appellate Jurisdiction.

Regarding the tenure of office of Judges of the CCJ, this is tied to the attainment of a fixed age of retirement rather than a term limit. This is unlike the majority of judges on international courts and tribunals who typically serve fixed term limits. The current retirement age for CCJ judges is seventy-two years, with discretion given to the Judicial and Legal Services Commission to grant an extension of an additional three months, if requested, and if the services of the judge are deemed necessary for the work of the Court. The President of the Court is permitted to serve a non-renewable term of seven years, or until she or he attains the age of seventy-two years, whichever is earlier⁶⁸.

There have been concerns that judges of the Court do not have security of tenure in the way that judges of the higher judiciary do in the wider Commonwealth Caribbean, as entrenched

10. A person shall not be qualified to be appointed to hold or to act in the office of Judge of the Court, unless that person satisfies the criteria mentioned in paragraph 11 and –

(a) is or has been for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself in that office; or

(b) is or has been engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting parties, and has distinguished himself or herself in the legal profession.

⁶⁸ *Agreement Establishing the CCJ*, Article IX(2).

in the Constitutions of these territories. Article IX of the CCJ Agreement, however, stipulates that judges of the Court can only be removed for inability to perform the functions of the office, whether because of illness or misbehaviour, and such removal can only be done upon invocation of a weighty procedure contained in Article IX.

2.4.5. Funding the Court

Another unique feature of the CCJ is the way that it is funded. Article XXVIII(1) of the CCJ Agreement requires that every State that is a party to the Agreement pays its proportionate share of expenses of the CCJ. The funding of the Court is governed by the *Revised Agreement Establishing the Caribbean Court of Justice* (the Revised Agreement). This Revised Agreement establishes a Trust Fund known as the *Caribbean Court of Justice Trust Fund*⁶⁹. The purpose of the Fund is “to provide the resources necessary to finance the biennial capital and operating budget of the Court and the Commission in perpetuity”⁷⁰. The Trust Fund (the Fund) is financed from the contributions of the Members of the CCJ, from the income generated by the Fund, and from contributions of Third Parties which are not likely to prejudice the independence or integrity of the Court.⁷¹ The initial investment in the Fund was set at US\$1,000,000.00, which was raised by the Caribbean Development Bank through international financial markets, and lent to Member States at low interest rates, repayable over a period of 15 to 20 years. It was then paid over to the Board of Trustees of the Fund.

⁶⁹ *Revised Agreement*, Article II.

⁷⁰ *Revised Agreement*, Article III.

⁷¹ *Revised Agreement*, Article I.

This Board of Trustees (the Board) operates the Fund, and includes the (a) Secretary-General of CARICOM; (b) Vice-Chancellor of the University of the West Indies; (c) President of the Insurance Association of the Caribbean; (d) Chairman of the Association of Indigenous Banks of the Caribbean; (e) President of the Caribbean Institute of Chartered Accountants; (f) President of the Organisation of Commonwealth Caribbean Bar Associations; (g) Chairman of the Conference of Heads of the Judiciary of Member States of the Caribbean Community; (h) The President of the Caribbean Association of Industry and Commerce; and (i) President of the Caribbean Congress of Labour.⁷² The Board is responsible for managing the Fund, including making prudent investments, preparing budgets for use of the Fund, facilitating the auditing of the Fund, and reporting on the Fund to the Member States of the Court. According to one retired Judge of the Court, “[t]his arrangement for financing an international Court has been commended by experts knowledgeable about the operations of international courts. It [was] certainly a novel arrangement, and again, another feature of the Court’s uniqueness”⁷³.

The CCJ, therefore, even though funded indirectly by Caribbean governments through the Fund, which they do not do for the Privy Council, offers a much less expensive option for the Caribbean litigant, considering that the Court is geographically closer to where these litigants live, which reduces travel costs; it is an itinerant Court⁷⁴ which is authorized to travel to the various territories in the region for hearings; and it utilizes a large degree of modern technology to transact

⁷² *Revised Agreement*, Article VI(1).

⁷³ Desiree Bernard, “The Caribbean Court of Justice: A New Judicial Experience” (2009) 37(2) *Int’l J. Leg. Info.* 219, at p. 237.

⁷⁴ *Supra*, note 46.

its business and to hold hearings⁷⁵. This of course is also helped by the Court's obvious inclination to grant *forma pauperis* motions⁷⁶. All of this culminates, argues Maharajh, in the result that "[t]he CCJ has...[provided] a forum to create jurisprudence in the midground of Caribbean law where the Privy Council was previously unable to tread...[allowing] the court to hear the types of Caribbean cases that the Privy Council had never known"⁷⁷. Further, contends Maharajh, "The diversity of cases being handled by the CCJ has started to address the perceived need, among Caribbean citizens, for a body of jurisprudence tailored to the nuances of Caribbean society"⁷⁸.

From all of the foregoing, it is clear that at its core, the CCJ is meant to be a truly Caribbean institution. This is important not only for acceptance of the Court by the various Caribbean stakeholders and constituencies, but for the Court itself, in its own understanding of its purpose and its role. In this connection, the study now briefly examines the regional importance of the place held by the CCJ.

⁷⁵ See, CCJ increases accessibility with the use of technology, 19 December 2017, Loop News, <https://www.looptt.com/content/ccj-increases-accessibility-use-technology>; Maya Wolfe-Robinson & Owen Bowcott, "The Global Fight to End Capital Punishment", The Guardian, (May 6, 2012), <http://www.guardian.co.uk/world/2012/may/06/global-fight-end-capital-punishment>

⁷⁶ As the Court pointed out *Ross v. Sinclair* CCJ Appeal No. CV 13 of 2007 – "The fact that the CCJ Rules have conferred on the Court of Appeal the power to grant leave to appeal as a poor person, does not in our view mean that a refusal of such leave by the Court of Appeal disables this Court, if it considers that the interest of justice so requires, from making an order of its own granting such leave. We are mindful in this connection of the overriding objective of the CCJ Rules which as defined in rule 1.3, is "to enable the Court to deal with cases fairly and expeditiously so as to ensure a just result" [para. 20]. In this case, leave to appeal as poor person was refused by the Guyana Court of Appeal and the Applicant was ordered to pay security for costs in the sum of GUY\$100,000 within a 90 day period, failing which, the appeal would ordered dismissed. The Applicant who was blind and penniless, applied to the CCJ to proceed with the appeal as a poor person. Although the CCJ Rules made no specific provision in this regard, the Court nevertheless used Rule 1.3 to ground and make the order. The Court continued, "...we are satisfied that this Court has the power to make the order sought by this application. This, however, is a residual power which we will only exercise when necessary to eliminate a real risk of a miscarriage of justice occurring... We are also satisfied that the applicant is genuinely unable to provide security for costs and, therefore, if required to do so as a condition of her appeal proceeding, her right of appeal will have been rendered nugatory" [paras. 22 & 25].

⁷⁷ Andrew N. Maharaj, "The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court" (2014) 47:3 *Cornell Int'l. L. J.* 735, at p. 747.

⁷⁸ *Ibid.*, at p. 748.

2.5. The Regional Character of the CCJ

At its heart, the CCJ must be understood as a *project* and a symbol of regional integration. This is so, as its creation is premised on a paradigm of open regionalism. The increasing globalization of the world economy and the resultant culture of competition to gain the edge in matters of international trade and other forms of co-operation, makes regionalism a useful tool of survival, particularly for small states such as those in the Caribbean. Increasingly, many smaller and lesser developed states in particular, have come to view the creation of regional and sub-regional economic systems and subsystems as the only viable way of withstanding the overall inequalities in the world trading system, which have, for the most part, operated to the benefit of the larger hegemonic powers.⁷⁹ As a fundamental part of this fabric of economic convergence, many other ancillary aspects of integration such as matters arising in the spheres of law and justice, for example, have emerged as being central. In the context of the CCJ and CARICOM, the institutional importance of the Court, in many ways, will be the result of ideas about “the relationship among member states and institutions of CARICOM within the overarching framework of regional integration”⁸⁰. Against that background, it is useful to situate the CCJ within understandings of how integration operates.

To appreciate the dynamics of integration today, commonly characterized as “new regionalism”, it is crucial to realize that it is a somewhat new phenomenon compared to the “old regionalism” that took flight in the 1950s. In those early post World War years, regionalism was materially constructed within a framework of Cold War bipolarity, whereas in today’s modern

⁷⁹ See generally, Robert Read, “The Implications of Increasing Globalization and Regionalism for the Economic Growth of Small Island States” (2004) 32:2 *World Development* 365.

⁸⁰ Joris Kocken & Gerda van Roozendaal, “Constructing the Caribbean Court of Justice: How Ideas Inform Institutional Choices” (2012) 93 *Europ. Rev. of Latin Am. And Carib. Studies* 95, at p. 100.

realm, it has been largely fueled by, and related to, the overall transformation in the organization of the current world system. As a result, “new regionalism” has become a more prosperous political pursuit for many more areas within the global system, although the popularity of the notion has not necessarily always been translated into actual success. According to Hettne,⁸¹ “new regionalism” is “a multidimensional process of regional integration which includes economic, political, social and cultural aspects”. As Mistry explains:

...Such a definition goes well beyond notions of free trade areas and the integration of several national markets into a single functional unit. It views geographical identity, political convergence, collective security and regional coherence as being more important features. Under this definition, the new regionalism is viewed as spontaneous and from below, that is, driven by demands of firms, industries, consumers and markets. In contrast to the old variety of regionalism which was seen as imposed from above; that is, by the dictates (fiat) of technocrats, bureaucrats, and political visionaries with grand designs⁸²

In general terms therefore, “new regionalism” depicts integration characterized by liberalization of intraregional trade in services and intellectual property; free movement of capital and labour; and the harmonization of regulatory regimes. Hence, the two most inescapable components of the “new regionalism” are that it promotes a greater extent of interaction between the region (wherever) and the rest of the world, rather than inhibiting it, and two, that visible trade relations are much less significant than other economic, security and political dimensions.

In the context of new regionalism, the CCJ ought to be seen fundamentally, as a project to deepen and widen Caribbean integration in the realm of the law. As an institution, it is not intended to recalibrate or impose on the sovereignty of Caribbean States, but rather, to build on the

⁸¹ See Bjorn Hettne & A. Inotai, *The New Regionalism. Implications for Global Development and International Security*, (UNU/WIDER, 1994).

⁸² See Percy S. Mistry, “New Regionalism: Impediment or Spur to Future Multilateralism?”, in eds., Bjorn Hettne, Andras Inotai & Osvaldo Sunkel, *Globalism and the New Regionalism*, (UNU/WIDER, 1999), p.123.

negotiated settlement of CARICOM States, through the RTC and the Agreement establishing the Court, and to settle disputes through binding processes that reflect who Caribbean peoples are, what they aspire to, and what they set out to accomplish. Born out of the RTC and the Agreement, therefore, the CCJ is not constructed in the vein of imposing from the “top” down, in a bald supra-national sense, but rather, more so in the mold of an arbiter, simply following a mandate that sovereign governments have given it.

Notwithstanding the remits of the power of the Court textually, through the RTC and the Agreement, however, the regionalist importance of the Court has not been missed. This importance has been clearly understood by Caribbean scholars such as Simmons, who argues that “if Commonwealth Caribbean countries can legitimately claim political independence, it must surely be the case that they are not truly and fully independent while their highest court sits outside the region, in London, and is staffed by judges from outside the region”⁸³. Similarly, Pollard has recognized this reality, but has expressed optimism when he opines that:

*“[t]he establishment of the Caribbean Court of Justice in its appellate jurisdiction will not only sever the last remaining vestige of a colonial condition, but will signal the birth of autonomous judicial decision-making in Member States of the Caribbean Community and close the cycle of independence which commenced as early as 1962...[T]he Court will mark the culmination of initiatives to create our own legal institutions to facilitate and promote the development of an indigenous jurisprudence reflective of the moral, political, social and economic imperatives of our Region...”*⁸⁴.

Implicit in this, is an expectation that as the Court develops its identity and solidifies its legitimacy, the prospects of it enhancing its power are indeed feasible.

⁸³ David Simmons, “The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity” (2005) 29:2 *Nova L. Rev.* 171, at p. 180.

⁸⁴ Duke Pollard, *The Caribbean Court of Justice: Closing the Cycle of Independence*, (Kingston: The Caribbean Law Publishing Company Ltd, 2004), at p. 204.

In the milieu of “new regionalism”, the rationale for supporting a regional court is that its rulings are informed by local norms and culture. This therefore explains the intensity of questioning of how any Caribbean state could be dithering in joining the Appellate Jurisdiction of the Court. As one editorial has put it, “The recurring question of the bewildered among us is: for how much longer must the rest of the independent CARICOM states...continue to maintain a colonial preference for accessing the PC in London instead of the CCJ...?”⁸⁵. Synchronized with this frustration is the claim of Panton J.A. (former President of the Jamaica Court of Appeal), that the ones wanting to keep the Privy Council are “the very wealthy, murderers and the ones with colonial mentality”⁸⁶, or the contention of Archie C.J. (of Trinidad and Tobago), that “the notion that somehow we will receive a superior form of justice from London bespeaks a self-doubt and an unwillingness to take responsibility for our jurisprudential self-determination”⁸⁷. Even farther afield, the lament has been seen, where Jacobs, for example, has pointed out that:

*“[a] supreme court of high calibre has been established in the Caribbean which would be able to take account of local values and develop a modern Caribbean jurisprudence in an international context...[but] [i]t is regrettable that political difficulties have obstructed acceptance of its jurisdiction...[while] the outdated jurisdiction of the Judicial Committee of the Privy Council survives, in often bizarre detail, for many of those States. All possible steps should be taken to encourage the Caribbean States to accept the jurisdiction of their own supreme court”*⁸⁸.

The regional character and of the CCJ therefore, is a crucial part of the Court’s identity. This lies in the fact that, firstly, it is part of a wider project of new regionalism, which encompasses not just economic integration, but broader social, cultural, and institutional harmonization and

⁸⁵ *NationNews*, Barbados Editorial, 4 October 2011.

⁸⁶ *Jamaica Gleaner*, 26 December 2010.

⁸⁷ *NationNews*, Barbados, 18 September 2010.

⁸⁸ Francis Jacobs, “The State of International Economic Law: Re-thinking Sovereignty in Europe” (2008) 11:1 *J. Int’l. Econ. L.* 5, at p. 39.

strengthening – including the judicial system; secondly, it represents regionalist aspirations which are wrapped up in ideas of political independence, liberation, self-actualization, and maturity; thirdly, there are expectations of the Court that it will reflect and accentuate “Caribbean” norms and culture; and fourthly, the Court is viewed as a vehicle for the intended indigenization of Caribbean Law.

2.6. The CCJ – Shaping its Jurisdiction and Identity

I turn now to address the matter of how the Court has attempted to shape its identity and jurisdiction since its inception. This is important to the dissertation as it helps to inform the broader understanding of some of the approaches taken by the Court in a number of the human rights cases that are examined in Chapter 5; it gives us insight into the larger philosophies of the Court; and it enables the study to conduct a more unified, informed and cross-sectional assessment and evaluation of the impact of the Court.

2.6.1. Scoping Jurisdiction and Shaping Community Law

The early days of the CCJ saw a Court struggling to figure out *who* it was and where it wanted to go. This struggle arose even in trying to establish its own jurisdiction. The two most prominent cases in which the Court did this were *Trinidad Cement v. Guyana*⁸⁹ and *Trinidad Cement v. CARICOM*⁹⁰. In *Trinidad Cement (Guyana)*, the Court dealt with several issues, including the scope of standing under Article 222 of the RTC, bearing mind that the applicant had to be “persons, natural or juridical, of a Contracting Party”. Guyana’s argument in this case was that in order to have standing, a party was required to be a “national”. The Court concluded that in

⁸⁹ *Trinidad Cement Limited v. Guyana* [2009] CCJ 1 (OJ). [*Trinidad Cement (Guyana)*]

⁹⁰ *Trinidad Cement Limited v. The Caribbean Community* [2009] CCJ 2 (OJ). [*Trinidad Cement (CARICOM)*]

order to fall within the scope of Article 222, meaning “persons, natural or juridical, of a Contracting Party”, it was “sufficient for such an entity to be incorporated or registered in a Contracting Party”⁹¹.

In this case, the Court also addressed a second matter, whether the applicant, as a private entity of a Contracting Party, had met the requirements under Article 222 of the RTC which deals with the question of whether a private entity of a Contracting Party is entitled to bring proceedings against that Contracting Party, arising from the fact that “the Contracting Party entitled to espouse the claim in proceedings before the Court has (i) omitted or declined to espouse the claim, or (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled”⁹². Guyana had argued that as a matter of policy, the RTC intends that a private entity cannot bring proceedings against its own State. The Court rejected this argument, reasoning that:

...it was not the intention of the Member States to prohibit a private entity from bringing proceedings against its own State...Firstly, any such prohibition would frustrate the achievement of the goals of the RTC...[and] would impact negatively not only on nationals...but also on companies owned by non-nationals...who chose to incorporate in an allegedly delinquent State. The latter could be encouraged to violate the RTC with impunity in circumstances where such persons were the only ones who suffered prejudice. Conversely, such persons would have imposed upon them a serious fetter on the vindication of rights inuring to them pursuant to Article 222(a).⁹³

The Court emphasized that “[e]qual access to justice, a fundamental principle of law subscribed to by all the Contracting Parties, would be compromised”, and maintained that “it is in the interest of justice that the Applicants be permitted to espouse the proposed claim”.⁹⁴

⁹¹ Ibid, at para. 28.

⁹² RTC Article 222(c).

⁹³ *Trinidad Cement v. Guyana*, supra, note 89, para. 40.

⁹⁴ Ibid., at paras. 42 and 45.

In *Trinidad Cement v. CARICOM*⁹⁵, the CCJ also concretized its jurisdiction by deciding, as it did in *Trinidad Cement (Guyana)* that the RTC gave “the Court power, as a matter of procedure, to enable private entities to appear before it in all manner of disputes concerning the interpretation and application of the Revised Treaty including allegations that a body or organ of the Community acted ultra vires”⁹⁶. The net effect of these two judgements was that Article 222 of the RTC was viewed by the Court in a manner which placed private parties at the centre of the system. Both judgements were groundbreaking as they made it possible for private persons and entities to advance claims directly to the CCJ, on Community issues, and to do so without relying first on the exhaustion of domestic remedies.

The Court also used *Trinidad Cement (Guyana)* to introduce a doctrine of *Correlative Rights*. The Court described the doctrine this way:

*Rights and benefits under the RTC are not always expressly conferred although some of them are, for example the rights referred to in Articles 32 and 46. Many of the rights, however, are to be derived or inferred from correlative obligations imposed upon the Contracting Parties. Unless specifically otherwise indicated, the obligations set out in the RTC are imposed on Member States (or a class of Member States) collectively. Where an obligation is thus imposed, it is capable of yielding a correlative right that enures [sic] directly to the benefit of private entities throughout the entire Community.*⁹⁷

In the context of defining its jurisdiction, this doctrine was pivotal, as it enabled the Court to construe rights for applicants to pursue claims where the right is not expressed, but where non-fulfilment of an expressed right would result in damage to the applicant’s interest.

⁹⁵ *Trinidad Cement (CARICOM)*, supra, note 90.

⁹⁶ Ibid, at para. 30.

⁹⁷ *Trinidad Cement v. Guyana*, supra, note 89, at para. 32.

2.6.2. Community Law and State Liability

In the earlier years, the Court also came to recognize that in Community Law, the principle of *state liability* applied.⁹⁸ This it did in the separate case of *Trinidad Cement v. Guyana* [2]⁹⁹. In examining jurisprudence from the European Court of Justice, the CCJ proffered that the new CARICOM - CSME was “based on the rule of law”¹⁰⁰, which implied compensation ought to be the remedy where rights which fall to individuals and private entities under the RTC are contravened by a Member State. The Court underscored, however, that State liability in damages was not automatic, as an applicant had to demonstrate that the provision about which the allegation of a breach arose, was intended to benefit them. That applicant would also need to go further to prove that the breach was serious, that there was “substantial loss”¹⁰¹ and that there is a “causal

⁹⁸ The application of the concept of “state liability” by the Court is particularly useful, considering that the RTC has no remedies that are prescribed for breach of Community law. The intention, it appears, was not to fetter the discretion of the Court in redressing grievances under the treaty. As such, there are no provisions in the treaty spelling out the sanctions to be meted out for its breach. In a similar vein, the CCJ has no apparatus of its own for enforcing its orders. Article XXVI of the *Agreement Establishing the CCJ* states, however, that-

The Contracting Parties agree to take all the necessary steps, including the enactment of legislation to ensure that:

(a) all authorities of a Contracting Party act in aid of the Court and that any judgment, decree, order or sentence of the Court given in exercise of its jurisdiction shall be enforced by all courts and authorities in any territory of the Contracting Parties as if it were a judgment, decree, order or sentence of a superior court of that Contracting Party;

(b) the Court has power to make any order for the purpose of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of any contempt of court that any superior court of a Contracting Party has power to make as respects the area within its jurisdiction.

Article 215 of the RTC also declares that “The Member States, Organs, Bodies of the Community, entities or persons to whom a judgment of the Court applies, shall comply with that judgment promptly”.

⁹⁹ *Trinidad Cement v. Guyana* [2], [2009] CCJ 5 (OJ).

¹⁰⁰ *Ibid*, at para. 27.

¹⁰¹ *Ibid*.

link”¹⁰² between the breach by the State and the loss or damage to the applicant. According to the Court, the rationale was that there was the need to prevent States from being “harassed”¹⁰³ by claims for breaches that were technical or minor procedural defects. The Court pointed out that the spectrum of potential breaches by a Member State may range from minor breaches to “flagrant and contumacious abuses of State power”¹⁰⁴. The threshold for eligibility for damages, hence, was necessarily a “high one”¹⁰⁵, ensuring that not every infringement would invite damages. In determining damages however, the CCJ iterated that the Court may have regard to any excuses or justification advanced by the State.

The significance of this decision for the CCJ, is three-fold. Firstly, it demonstrates that in the absence of specifically delineated remedies in the founding documents of the Court, its approach to determining suitable remedies would not be *original* and unnecessarily *experimental* and haphazard, but rather, would reflect alignment with already widely applied principles on matters of this nature, drawn from the international law sphere, and found in judgments of other much older judicial institutions. Secondly, the decision has significance as it gives clarity and transparency to the approach of the Court on the questions of liability and the remedy of damages, in respect of State Parties to the RTC. This bolsters the legitimacy, consistency and credibility of the Court’s adjudicative function. Thirdly, by infusing the “rule of law” so deliberately into its liability and damages discourse, the Court signals values, principles and precepts which would have normative appeal for the institutions and peoples that the Court serves, again enhancing legitimacy and credibility.

¹⁰² Ibid.

¹⁰³ Ibid, at para. 28.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

2.6.3. Making Community Law Prevail – Correlative Rights

Perhaps one of the most far-reaching decisions by the CCJ relating to a fashioning of what CARICOM Community Law should look like, came in the *Shanique Myrie*¹⁰⁶ case, where the Community right of free movement was in issue. At the centre of this aspect of the case, was a 2007 Decision of the Conference of CARIOM. In the RTC, “the Conference” is an organ of the Community, which comprises “the Heads of Government of the Member States” or any Minister or other person designated by a Head of Government “to represent him or her at any Meeting of the Conference”¹⁰⁷. The Conference is also “the supreme Organ of the Community”, and it determines and provides policy direction for the Community, and in most instances, is the final authority for the “conclusion of treaties on behalf of the Community and for entering into relationships between the Community and international organisations and States”.¹⁰⁸

In 2007, the Conference had made a decision to establish a policy of free movement of CARICOM nationals between Member States of the Community, in an attempt to actualize Article 45 of the RTC, where Member States committed themselves “to the goal of free movement of their nationals within the Community”. The Conference “AGREED that all CARICOM nationals should be entitled to an automatic stay of six months upon arrival in order to enhance their sense that they belong to, and can move in the Caribbean Community, subject to the rights of Member States to refuse undesirable persons entry and to prevent persons from becoming a charge on public funds”¹⁰⁹. At the hearing of the case, Myrie argued that her right to free movement in the Community, and in this instance, her right to enter Barbados without any form of harassment, was

¹⁰⁶ *Shanique Myrie v. The State of Barbados* [2013] CCJ 3 (OJ).

¹⁰⁷ Article 11, RTC.

¹⁰⁸ Article 12, RTC.

¹⁰⁹ *Myrie v. Barbados*, supra, note 106, at para. 43.

grounded in Article 45 of the RTC and the 2007 Conference Decision. Barbados countered, that, among other reasons, the 2007 Conference Decision had not been incorporated into domestic law, and to that extent, could not create a legally binding right for Community nationals to enter Barbados under any free movement regime of CARICOM. The CCJ rejected this argument, first, because the CARICOM Secretariat and the various Organs of the Community had all regarded and treated the Decision as valid and binding, and had all taken steps to implement the Decision. Secondly, and perhaps more critically, however, the Court found that the Decision had “brought about a fundamental change in the legal landscape of immigration throughout the Community...[as] in contradistinction to foreigners in general, Community nationals now [had] a right to enter the territory of...[CARICOM] Member States unless they qualify for refusal under the two exceptions...[in the Decision]”¹¹⁰.

As far as the Court was concerned, it was “inconceivable”¹¹¹ that domestic legislation would be required to give effect to such a fundamental policy decision of the Conference on a Community right. This, especially in contemplation of Article 240(2) of the RTC which requires Member States to “act expeditiously to give effect to decisions of competent Organs and Bodies in their municipal law”. For the Court, this was a clear indication that Member States could not blockade Community law by simply withholding the enactment of relevant Community Law into “municipal” law. To the Court, its logic that Community law was about Community rights and not about “municipal law” was clear, reasoning thus:

Although it is evident that a State with a dualist approach to international law sometimes may need to incorporate decisions taken under a treaty and thus enact them into municipal law in order to make them enforceable at the domestic level, it is inconceivable that such a transformation would be

¹¹⁰ Ibid, at para. 50.

¹¹¹ Ibid, at para. 51.

*necessary in order to create binding rights and obligations at the Community level...If binding regional decisions can be invalidated at the Community level by the failure on the part of a particular State to incorporate those decisions locally the efficacy of the entire CARICOM regime is jeopardized....*¹¹²

The words “entitled to an automatic stay” in the Conference Decision were therefore highly dispositive for the Court, as this, in the Court’s view, did not invite “discretionary evaluations”¹¹³ by immigration authorities. The Decision, in the Court’s assessment, fell squarely within the concept of free movement, as a policy of the Community. With this judgement, on the particular point of the 2007 Conference Decision, the CCJ entrenched its doctrine of correlative rights, wherein binding obligations on Member States arise from Community decisions and treaty provisions, which are capable of direct application and enforcement. The Court clearly took a muscular approach to protecting Community rights in the *Myrie* case. It gave the Court an opportunity to clarify the relationship between CARICOM and domestic law. It also gave the Court a window of opportunity to provide force and momentum to Community law, ensuring that individuals and corporations (*Trinidad Cement* case) get robust and direct protection of Community rights, at the Community level, whether through harmonization with domestic law, or as in the *Myrie* case, through effective and instrumental interpretation of Community Law.

The *Myrie* case, in this instance, demonstrated the Court’s determination to protect the average Caribbean citizen once they were entitled to a given right. This is important for the Court to have established, bearing in mind that ultimately, the purpose of the Court is to be of service to the people of the region. In a striking way, therefore, the Court gave a “voice” to its ultimate and

¹¹² Ibid, at paras. 51 & 52.

¹¹³ Ibid, at para. 64.

most important constituency, the people. Considering also that one of the proclaimed goals of the Court is to indigenize and fashion a brand of “Caribbean” law, an achievement such as that attained in this case, the broadening of rights due to the people, inures to the *decolonizing* project of which the Court finds itself a part. This, particularly so, as the case created an additional layer of rights adjudication for the citizen, an international layer, beyond the municipal, in so far as Community rights were concerned. In this respect, the Court made very wise use of the case before it, delineating one aspect of the power that it was intent on taking and confidently using.

2.6.4. Judicial Review Parameters

An important part of the journey to sufficiently demarcate its jurisdiction in the earlier years also meant that the Court had to establish for itself, in what circumstances it would engage in judicial review of the actions of State Parties or other permitted disputants under the RTC. Clearly, this was important, as the Court could not appear to be too impetuous on the one hand, intervening in every trite dispute, or too deferential on the other, allowing States to violate the RTC with impunity.

The issue was first raised in *Trinidad Cement Limited v CARICOM* [2]¹¹⁴. The claimant, a manufacturer and seller of cement throughout the CARICOM region, sought to quash two decisions emanating from the Community, and an organ of the Community, COTED, to suspend the Common External Tariff on imports of grey cement into the region. The case gave the Court the opportunity to deal with the issue of when to deploy its judicial review powers. The Court anchored its analysis in Article 187 (c) of the RTC, which permits the settlement of disputes where

¹¹⁴ *Trinidad Cement v. CARICOM*, [2009] CCJ 4 (OJ). [*Trinidad Cement v. CARICOM* [2]].

there are allegations that a Community organ or body had “acted ultra vires”, and on Article 216(1), which recognized the compulsory and exclusive jurisdiction of the Court to hear and determine disputes relating to the interpretation and application of the RTC. Part of the Court’s analysis was also premised on the fact that the CSME had been transformed into a “rule-based system” which had to operate under the broad expectations and requirements of the “rule of law.”

The Court explained its role this way:

*In carrying out such review the Court must strike a balance. The Court has to be careful not to frustrate or hinder the ability of Community organs and bodies to enjoy the necessary flexibility in their management of a fledgling Community. The decisions of such bodies will invariably be guided by an assessment of economic facts, trends and situations for which no firm standards exist. Only to a limited extent are such assessments susceptible of legal analysis and normative assessment by the Court. But equally, the Community must be accountable. It must operate within the rule of law. It must not trample on rights accorded to private entities by the RTC and, unless an overriding public interest consideration so requires, or the possibility of the adoption of a change in policy by the Community was reasonably foreseeable it should not disappoint legitimate expectations that it has created.*¹¹⁵

Accordingly, the Court has also resolved, as it did later in *Hummingbird Rice Mills Ltd. v. Suriname and CARICOM*¹¹⁶ that it had the power to “to scrutinize the acts of the Member States and the Community to determine whether they are in accordance with the rule of law”¹¹⁷. The Court went further to assert the legitimacy of its approach by reiterating that “judicial review [was] a fundamental principle of law accepted by all the Member States of the Community”¹¹⁸.

¹¹⁵ Ibid., at para. 39.

¹¹⁶ *Hummingbird Rice Mills Ltd. V. Suriname and The Caribbean Community* [2012] CCJ 1 (OJ), where the Court relied on in *Trinidad Cement Limited v Caribbean Community* [2].

¹¹⁷ Ibid, at para. 30.

¹¹⁸ Ibid, at para. 30.

What the Court obviously wanted clear was that it would “recognize and retain judicial competence” wherever the actions and decisions of the Organs of the Community were “capable of legal analysis”.¹¹⁹ The Court was concerted, however, to establish that such judicial competency or jurisdiction would always be exercised with the full recognition that Organs of the Community must have “necessary space for policy-making”¹²⁰, and that the Court would not engage in mindless substitution of the assessments of these Organs, with assessments of its own, but would nevertheless “simultaneously insist that there be adherence to established normative standards”¹²¹. Put simply, as the Court explained, “a margin of discretion [was] reserved to the community actors”¹²². The Court then gave currency to the approach it had fashioned for itself by concluding that a similar approach had been adopted in the context of the European Union, where the European Court of Justice had pointed out in *Portugal v. Commission*¹²³ that “the Commission enjoys a wide margin of discretion, the exercise of which involves assessment of an economic and social nature which must be made within the Community context”¹²⁴.

2.6.5. Role and Place of International Law

One of the other critical things that that early decision in *Trinidad Cement v. Guyana* did, in terms of how the Court defined itself and its powers, was to demonstrate how, and to what extent

¹¹⁹ Ibid, at para. 32.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ *Portugal v. Commission*, Case C-88/03, Judgment of the Court (Grand Chamber) of 6 September 2006. In that case, the ECJ had ruled that “As a preliminary point, ... the Commission enjoys a wide margin of discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Court, in reviewing whether that freedom was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers...”, [para. 99].

¹²⁴ Supra, note 116, at para. 32. [*Hummingbird Rice Mills v Suriname*]

the CCJ would rely on international law, as permitted under Article 217(1)¹²⁵. In this regard, the Court started with the “canons of interpretation” of treaty law, as found in broader international law. It harkened to the *Vienna Convention on the Law of Treaties*¹²⁶ (VCLT), Article 31(1), determining that in relation to the application for special leave¹²⁷ before it in the case, it needed to consider “the context, object and purpose of the RTC; the status and role of private entities accorded by the Treaty; the intention of the States Parties to the RTC; the ordinary meaning to be attributed to the language of the text of the Treaty; and the subsequent conduct of the States Parties establishing their understanding of the instrument”¹²⁸.

The Court also relied on the opinion of Anthony Aust¹²⁹ that the VCLT discouraged purely textual analysis when interpreting treaties. This reliance on Aust’s opinion was entirely consistent with Article 38(1)(d) of the *Statute of the International Court of Justice*¹³⁰ (SICJ) that “the

¹²⁵ The article reads, “1. The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.”

¹²⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

¹²⁷ Under the *Agreement Establishing the CCJ*, special leave is required, in the Original Jurisdiction of the Court, for nationals to be allowed to appear in proceedings. This would be, because the Original Jurisdiction of the Court only extends to “(a) disputes between Contracting Parties to this Agreement; (b) disputes between any Contracting Parties to this Agreement and the Community; (c) referrals from national courts or tribunals of Contracting Parties to this Agreement; (d) applications by nationals in accordance with Article XXIV, concerning the interpretation and application of the Treaty”. To permit individuals to participate, therefore, the Court would have to determine that the rights being litigated by the Contracting States are for the direct benefit of the individual seeking special leave; that such individual has been prejudiced, relative to the benefit concerned; that the Contracting Party related to the case has opted not to advance the claim in questions or has given express consent for the individual to espouse the claim; and that the interests of justice, justify allowing the individual concerned to advance the claim in question (Article XXIV). Regarding the Appellate Jurisdiction of the Court, under the *Agreement*, the Court of Appeal in a Contracting Party may grant leave for a litigant to appeal a decision of such an appellate court to the CCJ where the question involved is of “great general or public importance or otherwise, ought to be submitted” to the CCJ, (Article XXV(3). The CCJ itself can, however, grant special leave for any civil or criminal matter to be submitted to it for determination (Article XXV(4).

¹²⁸ *Trinidad Cement* [2009] CCJ 1 (OJ), at para. 10.

¹²⁹ Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 2006), p. 185. See para. 11 of *Trinidad Cement*, *Ibid*.

¹³⁰ United Nations, *Statute of the International Court of Justice*, 18 April 1946.

teachings of the most highly qualified publicists of the various nations, as subsidiary means [can be relied on] for the determination of rules of law”. The Court then proceeded to conduct the requisite analysis of the RTC, indicating that from the Preamble of the Treaty, it was able to deduce that, “in an age of liberalization and globalization”¹³¹, Caribbean governments, in creating the CSME, were intent on making the region a “viable collectivity of States for sustainable economic and social development of their peoples”¹³².

The Court also considered whether an international treaty could make a person the subject, as opposed to the object, of its provisions. In contemplating the issue, the Court discussed the classic rule of customary international law that states are the subjects of treaty law while individuals are the object. This, the Court correctly pointed out, flowed from the fact that treaties were made between states. The Court included in its discussion on this point, the view of the *Permanent Court of International Justice* as presented in the *Mavrommatis Palestine Concessions* case, that “... by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure, in the person of its subjects, respect for the rules of international law”.¹³³ Having considered that learning, the Court seemed to have accepted it, but in what appears to be an attempt to hone its own unique approach to the issue, in light of its earlier remarks that the CSME was ultimately about the “peoples” of the region, the Court formulated its own departure from the main international law perspective by ruling that:

Notwithstanding this conception of the role and place of the individual in international law there was nothing to preclude States, as an attribute of sovereignty, from according in a Convention a right to their nationals to bring

¹³¹ *Trinidad Cement*, supra, note 128, at para. 13.

¹³² *Ibid.*

¹³³ *Ibid.*, at para. 15.

*an action against any of the States Parties to the Convention including the State of nationality of the private entity... In modern international relations, States remain the primary but are not the exclusive subjects of international law. States can and occasionally do confer directly upon individuals, whether their own citizens or aliens, international rights which the latter can enforce in their own name before international tribunals without the intervention of municipal legislation.*¹³⁴

This development is particularly important for the fields of human rights and economic integration agreements¹³⁵. A large part of the justification for the departure made by the CCJ on this issue was rooted in its apparent belief that there was an “important role envisaged for private economic entities in achieving the objectives of the CSME” and that the governments of CARICOM, in agreeing the RTC, “clearly intended that such entities should be important actors in the regime created by the RTC; that they should have conferred upon them and be entitled to enjoy rights capable of being enforced directly on the international plane”.¹³⁶ The CCJ, by this ruling, clearly signified that it was prepared to nuance some aspects of *standard* international law, as, from its perspective, the peoples and private entities of the region must be placed at the heart of the objectives and purposes of the RTC and the CSME. This, I suggest, was an attempt at independence and boldness by the CCJ.

2.6.6. The Proper Administration of Justice

In the early years of finding its feet, the CCJ was keen to establish a reputation that it had the highest regard for the proper administration of justice. In its first case in 2005, *Barbados Rediffusion Service v. Mirchandani & Others*¹³⁷, the Barbados Court of Appeal had dismissed an

¹³⁴ Ibid, at para. 16.

¹³⁵ Ibid.

¹³⁶ Ibid, at para. 18.

¹³⁷ *Barbados Rediffusion Service v. Mirchandani & Others*, CCJ Application No. AL 0001 of 2005, BB Civil Appeal No. 18 of 2000, delivered 26 October 2005.

appeal against an order made by a judge of the Barbados High Court, striking out the amended defence of the Defendant in the initial filing (the Applicant before the CCJ), in an action for defamation. Beyond the core legal issues that the case resolved, in the context of the administration of justice, it also addressed the element of *delay* which had plagued the case.

While the Court chided the parties on their delays in meeting timelines that were applicable or fixed by the lower courts, as the matter progressed through the system, it reserved its most dramatic condemnation regarding delay for the hearing judge and the Court of Appeal. This was an unveiling of enormous self-confidence for a Court that was rendering a decision related to its first case after inauguration. The Court declared quite stridently that the seven years of delayed judgements by the local courts “deny parties the access to justice to which they are entitled and undermine the public confidence in the administration of justice”¹³⁸. This left no doubt that the CCJ was intent on taking a stand and setting an example for the proper administration of justice at this very early stage. For a new court, this was a positively constructive first footprint to have left for the future definition of the Court.

On a separate but related note, concerning how the Court would administer justice, the Court has also explained how it would make its decisions, bearing in mind that, in its Appellate Jurisdiction, it was a successor to an apex appellate court (the Privy Council) which had set a lot of precedents and had marked a lot of judicial and legal territory. The pragmatism in the approach of the Court in this regard, is brought out in its recognition that such precedents, heavily influenced by English law as they were, had a continuing validity, at least formally, until they were overturned

¹³⁸ Ibid, at para. 45.

or modified by the CCJ. What the Court signalled was that it would adhere, where validly proper and reasonable to do so, but would equally chart its own course, where it felt compelled or moved to do otherwise. As the Court made clear in the later decision of *Attorney General v. Joseph and Boyce*¹³⁹:

*We are mindful of the fact that the establishment of the Caribbean Court of Justice has been accompanied by much speculation as to the approach we might take to JCPC judgments and in particular to those rendered in death penalty cases...[W]e therefore... begin by outlining some basic features of the approach we adopt in addressing these issues. The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC... [are] binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court.*¹⁴⁰

After this rendition, there was no doubt where the CCJ stood on the matter of the judgements of the Privy Council.

2.6.7. Having a Talk with the People

One of the emergent privileges that the CCJ has also claimed for itself, is that of “having a talk” with the people - meaning its various stakeholders. An example where this was displayed is *Hall v. The Queen*¹⁴¹. While this case established very important legal principles on the matter of good character directions by a court in criminal trials, I enlist it here, in the context of this study, to illustrate one way in which the Court serves Caribbean peoples and its other stakeholders, by “having a talk” with them.

¹³⁹ *Joseph and Boyce*, supra, note 7.

¹⁴⁰ Ibid, at paras. 17 & 18.

¹⁴¹ *Carlton Junior Hall v. The Queen* [2020] CCJ 1 (AJ).

In this case, I suggest that the Court attempted to send a signal about becoming an institution that was close to those it served, and was about serving their interests. Such signaling by the Court occurred in the unlikeliest of ways. On the surrounding facts of the case, a murder had occurred at a crowded fete, and the police struggled to investigate, as only the single eye-witness who testified at the trial co-operated. In a defining epilogue to the case, framed in a construct about the proper administration of justice, Anderson JCCJ had this to say:

The pivotal witness in this case, Mr. Julian...Benn, is to be highly commended for his service to the administration of justice. There must have been scores of persons who witnessed the incident which took place at the end of what should have been a happy social event... When the police responded to [the] sound of gunfire and arrived on the scene, 'There were a number of persons around and they were screaming.' Yet, only Mr. Benn was concerned enough and/or courageous enough to come forward. His maintenance over a five-year period of his commitment to see justice done is praiseworthy. More such responsible and brave citizens are required if the society is to confront and conquer the menace of crime. The administration of justice as practised in these jurisdictions cannot long survive without the active support and participation of civic minded citizens.¹⁴²

But the learned judge did not end there. He cast his net to the investigation of the crime itself and continued:

Although it was not fatal to the outcome of this case, the minimalist nature of the investigation and prosecution cannot escape criticism. We would note that barebones investigations and prosecutions appear to have become almost routine, not just in relation to this appeal, but in respect of several criminal cases coming before us from several of the jurisdictions subscribing to the appellate jurisdiction of this Court. Without suggesting that investigating officers in any of our police services in the region must magically be transformed into a Colombo or a Hercule Poirot, it does not take much imagination to suggest that there could be far more searching investigations in this and several other cases that have come before us. Criminal cases, especially capital cases, require and deserve fulsome investigation and presentation of the relevant evidence. As a rule, witnesses are not only competent to testify but also compellable to do so. Citizens unwilling to do their civic duty may have to be compelled to do the right thing. In any event, greater effort must be made to acquire more, and more diverse, forensic evidence. The acquisition of facilities and expertise to acquire, process and

¹⁴² Ibid, at para. 69.

present DNA evidence, and thus reduce reliance on witnesses, is the holy grail to which our jurisdictions must strive... Effort, diligence and commitment are required to ensure that the public interest in law enforcement is safeguarded and promoted. The exercise of these responsibilities would appear to warrant greater attention from the office of the DPP.¹⁴³

Taken together, I suggest that these kinds of blunt, unvarnished *addresses* would not have likely, comfortably emanated from the Privy Council in the United Kingdom, benched primarily by non-Caribbean older white men, who are faced with perceptions of neocolonialism and empire in the institution that they serve, and troubled by reverberations of illegitimacy from many quarters in the Caribbean. As a Caribbean Court, however, and a Caribbean man himself, the learned judge must have felt significantly empowered and entitled, to speak the way he did, in effect, having a *talk*, with his *own*. What was important in this epilogue though, was that he addressed a most fundamental thing about the Caribbean reality, in a most direct and unapologetic way, namely, the malfunctions in some aspects of the administration of justice in the region. From the failure of citizens to co-operate and actively participate in solving crime and enabling the rendering of justice; to the inadequacy and incompetence in criminal investigations; to the dearth of the use of forensics and technology to solve crime, and of the availability and use of experts; as well as the absence of certain infrastructure for law enforcement to do proper investigations, Anderson JCCJ took them all on in a baldly candid manner.

The salience of this for the image of the Court, and for building its identity, as I see it, is that the epilogue was an affirmation that the Court cared about much of what mattered to the ordinary people that it truly wants to serve and tries to serve. The Court cared that a witness, an

¹⁴³ Ibid, at paras. 70 & 71.

ordinary citizen, by doing his civic duty of testifying to a crime he witnessed, had the fortitude to come forward and do the “right thing”, in the face of suspected adversity and discomfort, as intimated by the Court. The Court cared that a poor investigation was done, and that the local authorities might not have gone the extra mile in investigating this crime, in an environment where rampant criminality and injury to public safety were troubling realities. For the image of the Court, I suggest that this telegraphed a deeper sense of attachment, engagement and *knowing*, that forms part of the personality of the Court, as an indigenous, regional institution, that it is the *property* of the peoples it serves.

2.7. Conclusion

As is often said, we must know where we are coming from, in order to know where we are going. In this Chapter, I have given a reflection of both, in respect of the CCJ. As I have described, the CCJ must be understood as a uniquely Caribbean project. It forms a critical part of the yearning of a region and its peoples to build an institution that is both responsive and accountable to those that it serves. Woven into the fabric that is the CCJ, is a combination of the political, social, cultural, and economic aspirations of the region, in its quest to establish an independent and mature identity, that signals to the world, that the region has come of age. Considering the significant challenges that regionalism has encountered in the Caribbean, from the failed West Indies Federation to CARICOM, in its current incarnation, the establishment of a premier regional institution such as the CCJ signals an abiding respect for institutionalism, democratic values and the rule of law, within the Caribbean polity.

In seeking to create a judicial organ that could be reposed with respectability, independence and success, Caribbean governments have been careful, as this Chapter has shown, to formulate and institute structures and processes for the appointment of judges to the Court, and for the funding of the Court, for example, to avoid claims that impeach the Court's integrity. This has positively impacted the perceptions of the Court over the years, bearing in mind the deep, earlier hesitations and pronouncements that the Court was only meant to be a "hanging court", which would be stacked with political emissaries who would do the bidding of respective CARICOM governments or institutions as a whole. Notwithstanding the progress made by the Court, however, the fact that only four of the fifteen full CARICOM Member States are a part of the Appellate Jurisdiction of the Court, is a salutary reminder that the tentacles of colonialist attachment may yet still be a bit tightly wrapped to the minds of many a Caribbean people. The recent referenda in Antigua and Barbuda and Grenada, and the perennial hesitation to join this second jurisdiction of the Court, by larger, more influential Caribbean States such as Jamaica and Trinidad and Tobago illustrate this. As I intimated earlier in this Chapter, the irony is not lost that in respect of these two States for instance, while not being Members of the Appellate Jurisdiction of the CCJ, a total of three of the seven judges on the Court currently, are from those two states, rendering Appellate Jurisdiction decisions impacting other States that are subject to that jurisdiction but not their own territories of origin. The fact that the Court is also seated in Trinidad and Tobago reflects part of that irony as well.

But what this Chapter has also demonstrated through its overview of the wider attempts by the Court to define itself and lay markers of what it stands for and how it approaches its lawmaking function, is that it has not been deterred in building itself. To the contrary, if anything, what this

overview has shown is an obvious determination by the Court to boldly configure its personality and legitimacy, through its jurisprudence as a whole, such that it demonstrates and projects self-confidence, while simultaneously and incrementally building the confidence of the region in its work; dynamism; responsiveness; intellectual rigor; political, cultural and social awareness; emotional intelligence; and good judgement.

This chapter has provided background that demonstrates the vibrant desire of the Court to effectively define its personality, identity, approaches, and philosophies, and its obvious wish to establish its legitimacy through its work, in the context of the doubts that ostensibly exist in some parts of the Caribbean, as evidenced in their failure to sign on to the CCJ's Appellate Jurisdiction.

Having introduced both the CCJ as well as the overall study, in this and the previous chapter, the dissertation now continues by presenting the social, cultural, political and economic context of the study, as this is eventually juxtaposed to the universalism, cultural relativism, and transformation literature, on the one hand, and the CCJ's jurisprudence on the other, to produce the analysis in Chapter 6.

CHAPTER THREE
CARIBBEAN POLITICAL ECONOMY AND SOCIO-CULTURAL AND POLITICAL
CONTEXT

3.1. Introduction

In this chapter, I discuss the socio-cultural and political context to the study. Some of the reticence towards human rights discussed in Chapter 1 stems from the view that some of the norms underpinning these rights are part of a wider pattern of hegemonic cultural penetration, neo-colonialist imposition, and Western political capture. This is not entirely surprising, given that Caribbean nations have had a long, painful history of slavery, colonization, and post-independence economic, social, and political dependency.

The chapter begins by outlining the main features of the Caribbean political economy discourse. Secondly, it provides an account of some Caribbean socio-cultural and political attitudes to certain international human rights norms that can pose a challenge for a universalist-minded court. Thirdly, the chapter overviews the literature on transformative justice that very often emerges from young constitutional or international courts. This is an important part of the argument that this thesis makes, that through the CCJ's adoption and adaptation of core universalist international human rights norms and laws, the Court, in its human rights adjudication, has accomplished significant transformational outcomes. This transformation, as the thesis discusses later, sometimes poses a challenge to some socio-cultural and political attitudes that emerge from the political economy realities of the region.

3.2. The Political Economy Landscape

The Caribbean political economy literature highlights themes of the relative power of the *First World*, and the negative impact that this power has on the conditions in, and aspirations of the *Third World*. Such themes include the dynamics of *core* and *periphery*; development and underdevelopment; metropolitan exploitation and Caribbean subordination; and neo-colonialist and imperialist hegemonic domination and regional political and economic dependency. The use of economic and political “dependency” as a component of Caribbean political economy analysis, according to Girvan, is a part of the “historical/structural/institutional method to diagnose the underlying causes of underdevelopment”¹⁴⁴ in this part of the globe. Thus, McIntyre notes that “[o]ne of the most striking features of West Indian development is, that the progress made towards political independence has not been accompanied by parallel advances in the economic field...[making] West Indian territories...outstanding examples of dependent economies”¹⁴⁵. This dependency has become an enduring problem for small states the world over, and has had enduring implications for sovereignty and economic viability. The essence of the problem has been articulated in myriad ways, but as encapsulated by Braveboy-Wagner:

The developing countries as a group (small and large) have had their socio-economic progress hampered by a range of circumstances, including: the decolonisation process; the difficulties of reducing their economic

¹⁴⁴ Norman Girvan, “The development of Dependency Economics in the Caribbean and Latin America: Review and Comparison”, (1973) 22:1 *Social & Econ. Studies* 1.

¹⁴⁵ Alister McIntyre, “Some Issues in Trade Policy in the West Indies”, in eds., Norman Girvan and Owen Jefferson, *Readings in the Political Economy of the Caribbean*, (Mona, Jamaica: New World Group Limited, 1971), (First published in 1963), at p. 165. In presenting dependency in a comparative construct, Girvan and Girvan note that it is a “contrast between an image of an independent, national economy, represented by the developed metropolitan countries, and the reality of the dependent, expatriate nature of West Indian economies”, (Norman Girvan & Cherita Girvan, “The Development of Dependency Economics in the Caribbean and Latin America: Review and Comparisons”, (1973) 22:1 *Social & Econ. Studies* 1, at p. 10). These authors also explain that writers from the wider Latin America have “developed the ‘dependency’ concept to suggest that the [political economy] analysis is not complete without a specification of both the independent, dominant part and the dependent, subordinate parts of the global system. Dependence [hence, is] a state in which the interplay of internal economic, social and political variables is conditioned by factors which function within the system, but which are determined from outside of it” (at p. 22).

*dependence on the northern countries once they become independent; the lasting effect of the Cold War polarities; ...internal ethno-political conflict...; their own wanting efforts of governance; severe social problems stemming from rapid modernisation and industrialisation; and the inexorable deepening of global integration.*¹⁴⁶

The crux of dependency as a political economy model for the Caribbean is that extra-regional power over the region has created a “distorted consciousness”. This places limits on the “development of institutions of education, culture, research, and science”, resulting in the propagation instead of “institutions which [foster] inappropriate values [and]...tastes...[which] are distorted towards metropolitan standards: all undermining the possibility of national development”.¹⁴⁷ All of this conspires towards a framework of development that becomes premised on the foreign “master”¹⁴⁸, and one which is rooted in neo-colonial structures¹⁴⁹. These realities, therefore, make *dependency*, as a model of Caribbean political economy, a part of the critical approach to political theory,¹⁵⁰ grounded in a Marxist analysis.¹⁵¹ As an approach, hence,

¹⁴⁶ Jacqueline Braveboy-Wagner, “The Diplomacy of Caribbean Community States: Searching for resilience”, in eds., Andrew F. Cooper and Timothy Shaw, *The Diplomacies of Small States Between Vulnerability and Resilience*, (New York and Hampshire: Palgrave Macmillan, 2009), at pp. 96-97.

¹⁴⁷ Richard Bernal, Mark Figueroa & Michael Witter, “Caribbean Economic Thought: The Critical Tradition”, (1984) 33:2 *Social & Econ. Studies* 5, at p. 43.

¹⁴⁸ Ibid.

¹⁴⁹ See, generally, Norman Girvan, “Caribbean Dependency Thought Revisited” (2006) 27:3 *Canadian J. Dev. Studies* 328; and Vennesa Weedmark, “Caribbean Dependency Theory and the Case of Jamaican Development” (2013) 6 *Glendon J. Int’l. Studies* 31.

¹⁵⁰ Supra, note 147, at p. 5.

¹⁵¹ Marxist analysis has had quite a long history in Caribbean political economy scholarship. See, for example, Clive Y. Thomas, *Dependence and Transformation: The Economics of the Transition to Socialism*, (New York: Monthly Review Press, 1974) ; Michael Witter, “Race and Class in the Jamaican Social Economy”, (Kingston, Jamaica: Mimeo – Department of Economics, University of the West Indies, 1982); Trevor Munroe, “Developed Idealism & Early Materialism: Left Caribbean Thought in Transition”, (Kingston, Jamaica: Mimeo – University of the West Indies, 1976); Mark Figueroa, “A Critical Essay on Caribbean Political Economy”, (Kingston, Jamaica: Mimeo - Department of Economics, University of the West Indies, 1977); Donald J. Harris, *Capital Accumulation and Income Distribution*, (London: Routledge & Kegan Paul, 1978); Richard Hart, *Origin and Development of the People of Jamaica* (Kingston, Jamaica: Trade Union Congress Education Department, 1955); Richard Hart, *Blacks and Bondage*, (Kingston, Jamaica: Institute of Social and Economic Research [ISER], 1980); Cheddi Jagan, *Forbidden Fruit: The Story of British Guiana*, (Lawrence & Wishart, 1955); Ken Post, *Arise Ye Starvelings: The Jamaican Labour Rebellion of 1938 and its Aftermath*, (The Hague, Boston & London: Martinus Nijhoff, 1978); Ken Post, *Strike the Iron: A Colony at War: Jamaica 1939-45*, (New Jersey: Humanities Press, 1981); and Don Robotham, “Agrarian Relations in Jamaica”, in eds., Carl Stone and Aggrey Brown, *Essays on Power and Change*, (Kingston, Jamaica: Jamaica Publishing House, 1977).

dependency highlights the “unequal power relations” that undergird international economic relations, and ultimately forces regions such as the Caribbean to adopt a strategy of “collective diplomacy through regionalism, which allows such states to coordinate their foreign policies in order to increase their bargaining power and strengthen their negotiating positions in the international system”.¹⁵² As Weedmark, for instance, tells us, these unequal power relations spoken to by Grenade are not only a feature of state-to-state economic relations, but are also a dynamic of international organizations and institutions, which reinforce these inequalities in development outcomes. In addressing this aspect of the dependency problem, using the practical illustration of the Caribbean state of Jamaica, and indeed the wider Caribbean, Weedmark explains:

*The IMF (and other international institutional) loans are a direct perpetuation of this cycle, with grants loans and aid only serving the improvement of structures that assist or promote metropolitan values, interests and industries. As such, the entire system serves as a tool to keep Jamaica, and other Caribbean nations, dependent on external injections of capital...[and] ‘aid’... [D]evelopment aid as the metropole understands it cannot be about true development, as it must take into consideration the needs and interests of the Caribbean peoples, and focus on internal welfare-improving policies that are designed to be Caribbean-centric with the short and long-term goal of ending the dependent metropolitan-hinterland relationship in order to emancipate these oppressed states from the historically embedded and enforced system of domination.*¹⁵³

¹⁵² Wendy C. Grenade, “Small States and Risky Global Intercourse: The Grenada-Taiwan Dispute” (2013) 62:3/4 *Social & Econ. Studies*, 183, at p. 184. See also, Girvan and Girvan who have explained that “[t]o a much greater extent than large economies, ...small economies must rely on international trade to secure economic development. As a result, their dependence on the decisions and tastes of foreign consumers and producers, and on foreign technology and technical change, will inevitably be greater. Therefore the capacity of a small country to fully transform its production structure, and to sustain its own development endogenously, is significantly limited by the fact of size itself. These limitations impart special urgency to policies of regional economic integration; such policies, by expanding the effective economic size of the economies, will expand the possibilities for structural transformation. (Norman Girvan & Cherita Girvan, “The Development of Dependency Economics in the Caribbean and Latin America: Review and Comparisons” (1973) 22:1 *Social & Econ. Studies* 1, at p. 6.)

¹⁵³ Vanessa Weedmark, “Caribbean Dependency Theory and the Case of Jamaican Development” (2013) 6 *Glendon J. Int’l. Studies* 31., at p. 45.

This analysis of the role of international institutions and organizations is part of what fuels the wider perceptions of external domination by many in the Caribbean. These perceptions are often also heightened by certain trends in international law, which appear to give enormous powers to organizations such as the IMF and WTO; and to institutions such as the International Criminal Court.

These concerns are also echoed in Caribbean political economy and social science discourse as well. Distinguished Jamaican Professor, and internationally recognized Pan-African cultural icon Rex Nettleford has, for example, spoken to this as the “battle for space”. He argued that:

*in the Caribbean world where colonial dependency, super-ordinate/subordinate, powerful/powerless categories determine...social reality...[t]he ensuing battle for space, in both an elemental and physical sense, constitutes, then, the force vitale of a still groping society. To this day the phenomenon of numerical majorities functioning as cultural and power minorities persists in the Commonwealth or Anglophone Caribbean despite the disappearance of the British Raj, the coming of the one-man-one-vote principle, and the strident rhetoric aspiring to participatory democracy.*¹⁵⁴

This shortcoming of Caribbean development, Nettleford goes on to suggest in this work, causes a high premium to be placed on the goal of overturning projects of European hegemony. In this connection, as Best argues, what must be pursued and attained instead, is a socio-political dynamic that honors ideas which are cognizant of Caribbean reality, placing the Caribbean in a distinctive space of historical uniqueness.¹⁵⁵ The goal for Nettleford, thus, as Joseph sees it, is

¹⁵⁴ Rex Nettleford, *Inward Strength, Outward Reach: A Voice from the Caribbean*, (New York: The Macmillan Press, 1995), at p. 81.

¹⁵⁵ See generally, Lloyd Best, “Reflections on the reflections”, in ed., Selwyn Ryan, *Independent Thought and Caribbean Freedom: Essays in honour of Lloyd Best*, (St. Augustine, Trinidad: Sir Arthur Lewis Institute of Social and Economic Studies, 2003), pp. 423-441.

“reclaiming the mainstream, and overcoming marginalization...of creative Caribbean philosophical, intellectual and artistic pursuits...overcoming the marginalization imposed by contact with Europe”¹⁵⁶.

The broader discourse on Caribbean dependency thought has also been accompanied by the “plantation economy” framework, another foundational Caribbean political economy perspective. “Plantation economy” scholarship proffers explanations for Caribbean socio-political and economic experiences from the inheritances of colonialism, post-colonialism, and Caribbean historical plantation roots. The theory of the plantation economy, explain Nurse and Crichlow:

*...at its base[,] provides an historical and institutional analysis of metropole-hinterland (i.e. core-periphery) relations, ... [and] is associated with the ‘dependentista school’ and other globalist development theories...that critique the history and structure of the modern capitalist global economy. [Scholars] see the plantation as a ‘globally integrated peripheral economy’, hence the term ‘externally propelled’ to describe the extraverted, inorganic, fragmented and vulnerable nature of this mode of insertion into the capitalist economy. They also recognize that all plantation economies are not the same and that there are different modes of engagement with global capitalism, with different distributional effects between the metropolises and the hinterlands as well as within the hinterlands...*¹⁵⁷

Caribbean political economy scholars have addressed the different dimensions of the plantation economy theory. According to Green, George Beckford, the most well-known Caribbean exponent of the plantation economy theory places focus on “the institution, mode of production and social relations of the plantation”, Lloyd Best, alongside Kari Levitt, deal primarily with “the reproduction of dependency...generated by institutional colonial and neocolonial trade linkages”,

¹⁵⁶ Tennyson S. D. Joseph, “Reclaiming W. A. Lewis for the Caribbean Political thought Tradition” (2009) 58:3/4 *Social & Econ. Studies* 29, at p. 36.

¹⁵⁷ Keith Nurse & Michaeline Crichlow, review of, *Essays on the Theory of Plantation Economy: A Historical and Institutional Approach to Caribbean Economic Development*, eds., Lloyd Best & Kari Polanyi Levitt, (2011) 60:3/4 *Social & Econ. Studies* 203.

and Norman Girvan focuses on “the reproduction of race and class structures peculiar to the colonized society and the generation of a racially mediated anticolonial national consciousness, leading to a (flawed) version of independence”.¹⁵⁸

Regarding the body of work from Beckford, he uses “plantation economy” to describe those states “where the internal and external dimensions of the plantation system dominate the country’s economic, social, and political structure and its relations with the rest of the world”¹⁵⁹. The plantation, in Beckford’s analysis, “was an instrument of colonization”¹⁶⁰, mirroring the view of Best, that the plantation:

*...is structurally part of an "overseas economy"... [comprising, firstly,] ...a metropole which is the locus of product elaboration and disposal and the source from which the system is provisioned with capital, technical and managerial skill, and other ancillary services needed for production... [and] is the locus of initiative and decision, the critical linkage point between international demand and supply and the nexus through which the pattern of resource combination is determined. Secondly, there is in the overseas economy, a set of hinterlands each of which is, strictly speaking, an entity for supplying materials, propelled by specific demands from its metropole and, in return, receiving the supplies needed to fulfil these demands.*¹⁶¹

What is clear from this, is that the plantation economy model of Caribbean socio-economic organization is grounded in an historical register of analysis, and it emphasizes the limited scope for transformation that there is in peripheral economies like in the Caribbean. This is as a result of the large extent to which certain structural imperatives define and sustain plantation-type

¹⁵⁸ Cecilia Green, “Caribbean Dependency Theory of the 1970s”, in eds., Brian Meeks & Folke Lindahl, *New Caribbean Thought: A Reader*, (Kingston, Jamaica: University of the West Indies Press, 2001), p. 40, at pp. 43-45.

¹⁵⁹ George Beckford, *Persistent Poverty: Underdevelopment in the Plantation Economies of the Third World*, (New York: Oxford University Press, 1972), at p. 12.

¹⁶⁰ *Ibid*, at p. 30.

¹⁶¹ Lloyd Best, “The Mechanisms of Plantation-type Economies: Outlines of a Model of Pure Plantation Economy” (1968) 17:3 *Social & Econ. Studies* 283, at p. 302.

ideologies and constructs. This historical framework, although modified over time, endures, and has impacted the nature of Caribbean socio-political society. While plantation economy theory might be viewed as being fundamentally an economic model, Best and Levitt have “locate[d] the economic analysis within the understanding that Caribbean culture and society occupies a distinctive position in the history of the global political economy”¹⁶². Therefore, it is not only an economic representation of Caribbean society, but also a broader sociological and political one too.

This discussion of Caribbean political economy bears much resemblance to the dependency approach discussed above. Here, in plantation economy theory, we are equally able to identify themes of imperialist control by the global North; Third World subjugation; minimalization of sovereignty and autonomy in smaller, less powerful, developing states; neo-colonialism; and socio-economic and political hegemony of powerful states, all reflected through the archetype of the historical slavery sugarcane “plantation”.

Notwithstanding the historical paradigm that informs and undergirds the plantation economy model, both this approach and that of the dependency model, are consistently argued to have remained relevant and persistent, even within a newly globalized world. In other words, “the essential facets of the economy remain the same”¹⁶³. As Chawla points out, economies such as

¹⁶² Supra, note 157, at p.206.

¹⁶³ Rex McKenzie, “The Caribbean Plantation Economy and Dependency Theory”, in eds., Ushehweu Kufakurinani, Ingrid Harvold Kvangraven, Frustuoso Santana & Maria Dyveke Styve, *Dialogues in Development*, (2017) Volume 1: Dependency, (Institutes of New Economic Thinking, 2017), 42, at p. 45.

those in the Caribbean “are still at best at the margin of globalisation”¹⁶⁴. Holding a similar view, Sanders contends that:

*...[f]or the Caribbean, globalisation has been a one-way street of impositions by powerful countries: fiscal sovereignty has been violated by the strong; tax competition remains under threat from the mighty; economic growth and development have been impeded by unfair and unequal trade arrangements; and the real perils that global warming and sea-level rise pose to the very existence of Caribbean islands are intensifying... Weak and vulnerable small states are powerless to respond. In fear of sanctions, such as blacklisting by OECD countries and the EU Commission, and penalties from the United States, they acquiesce, surrendering their autonomy. For these small states, globalisation has best manifested itself in frustration and marginalization.*¹⁶⁵

To that extent hence, the thinking is that the more things change, the more they remain the same.

The foregoing analysis explains the political economy literature of the Caribbean provides a backdrop to the geo-political space within which the CCJ, as a premier judicial institution in the Caribbean, operates. This scholarship helps in building an understanding of the awarenesses, sensibilities, and responses of the Court to the attendant socio-cultural and political realities of the region, when it relies on or utilizes a body of *globalized, universalist* international legal rules which are embodied in IHRLN, as it exercises its law-making functions. It also strengthens the main argument that I make, which is that although the Court is a product of the Caribbean region, by and large, it does not reflect the wider attitudes of suspicion towards some IHRLN, which is grounded in concerns about First World metropolitan incursions, cultural penetration, hegemonic and imperialist value-incursions, and subaltern propensities.

¹⁶⁴ R. L. Chawla, “Caribbean Economies: Dependency and Beyond” (2004) *India Quarterly* 218, at p. 238. (Special Issue on the Caribbean.)

¹⁶⁵ Ronald Sanders, *Globalisation has left Commonwealth Caribbean Small States Behind*, (The Round Table: The Commonwealth Journal of International Affairs, 2017), at pp. 2 & 4.

It is also important to consider how the foregoing socio-political perspectives manifest themselves in the ordinary lives of people in the Caribbean. These are important to highlight as they form part of the rationale given within the Caribbean for being wary of some international human rights norms. Prime examples of these, as I show shortly, relate to things such as the death penalty, police brutality, extra-judicial killings by law enforcement, and LGBTQ rights.

3.3. Exploring Some Caribbean Human Rights Attitudes

Within the Commonwealth Caribbean (the Caribbean) as a whole, there is a reluctance to fully embrace some IHRLN. This reluctance is entrenched in the region's socio-cultural realities and politics. In seeking to understand the challenges for human rights in the Caribbean region, it is inescapable that one encounters, in many, though not all instances, patterns of resistance, indifference, apathy and suspicion. What one also sees is a disjuncture between the international human rights framework to which all Caribbean countries sign up, and the lived experiences and daily enjoyment of human rights by some sectors of the populations. To that extent, while these Caribbean states are signatories to the very important body of international human rights instruments that have emerged over the decades, it is not at all clear that this fact has led to scrupulous observance and actualization on the ground, as social and political challenges with regard to inequality; discrimination; insecurity and violence; and poverty abound. So while the international norms are freely accepted and signed on to by these Caribbean States, the practical impact on individual lives in the region, are not consistently realized. To this extent, signing up may really be more about strategic politics than it is about deep commitment.

The anomaly between accepting international human rights norms on the one hand and practicing them on the other has been noted by scholars such as Vasciannie, who explains that:

there is, strictly speaking, no one set of Caribbean perspectives on human rights...[A]lthough the English speaking countries of the Caribbean share common traditions and broadly similar constitutional structures...societal perspectives on some human rights issues may turn on the religious orientation in a particular country...they may pursue different approaches to the same problems owing to local circumstances and internal political issues... But although there are different approaches within Caribbean societies to human rights issues, there is a core commitment to human rights values, at least at the level of legal pronouncements [and]...most Commonwealth Caribbean countries genuinely believe that their laws are consistent with the requirements of human rights. Governments are thus keen to emphasize that they are part of the human rights mainstream, and when they examine the strictures of various treaties on human rights, they may take pride in the fact that the rights recognized in such treaties already appear to be incorporated in domestic legislation.¹⁶⁶

An illustration of the impediment posed by religion to which Vasciannie refers can be found, for instance, in Caribbean perspectives on LGBTQ rights. According to the United Nations Development Programme, “LGBTI people in the Caribbean face legal, social and economic barriers to full inclusion and enjoyment of their human rights...[T]here remains much work to be done to guarantee equality of LGBTI people under the law and ensure protection from violence and discrimination as well as equal access to services...Punitive laws, policies and practices contribute to pervasive stigma and discrimination, which can lead to hate crime, police abuse, torture and ill-treatment, and family and community violence”¹⁶⁷. Similarly, as Holness points out, “the Caribbean’s apprehension to...LGBTI rights advocacy is deeply rooted in the region’s

¹⁶⁶ Stephen Vasciannie, “Caribbean Perspectives on Human Rights”, found online at http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXII_curso_derecho_internacional_2005_Stephen_Vasciannie.pdf, at pp. 351 & 352.

¹⁶⁷ “Being LGBT in the Caribbean: Reducing Inequality and Exclusion Experienced by LGBT People”, *September 2018 project update for the Being LGBTI in the Caribbean (BLIC) Project*, United Nations Development Programme, Barbados and the Eastern Caribbean, found online at <https://www.bb.undp.org/content/barbados/en/home/projects/BLIC.html>.

tragically oppressive colonial experience”.¹⁶⁸ Because of this, many persons in the Caribbean view the “attempt by the West toward more tolerance for the gay community as post-colonial imperialism”,¹⁶⁹ a view consistent with Massad’s position that the global gay rights movement is a neo-colonial enterprise.¹⁷⁰

Jasbir Puar has developed the conceptual frame of *homonationalism* as a way of “understanding the complexities of how ‘acceptance’ and ‘tolerance’ for gay and lesbian subjects have become a barometer by which the right to and capacity for national sovereignty is evaluated”¹⁷¹. Puar claims that this structure has even been operationalized through the superstructure of capitalism, with “neoliberal accommodationists economic structure[s]” using *homonationalism* to “proliferate Euro-American constructs of identity”, across the world.¹⁷² This collage of views on the culturally imperialistic nature of international human rights law, especially regarding queer rights, helps explain why homophobia has persisted as a human rights issue in the Caribbean region¹⁷³, not only from a legal standpoint, but similarly from the perspective of some aspects of the cultural expressions of the region, for example, in music.¹⁷⁴ Homophobia and

¹⁶⁸ Toni Holness, “Lesbian, Gay, Bisexual, Trans, and Intersex Rights in the Caribbean: Using Regional Bodies to Advance Culturally Charged Rights” (2013) 38:3 *Brook J. Int’l. L.* 925, at p. 926.

¹⁶⁹ Charlene L. Smith & Ryan Kosobucki, “Homophobia in the Caribbean” (2011) 1 *J. L. Soc. Deviance* 1, at p. 32.

¹⁷⁰ Joseph Massad, “Re-orienting Desire: The Gay International and the Arab World”, 14:2 *Pub. Cult.* 361.

¹⁷¹ Jasbir Puar, “Rethinking Homonationalism” (2003) 45:2 *Int’l. J. Middle East Studies* 336.

¹⁷² *Ibid.*, at p. 338. See also Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, (Durham, N. C.: Duke University Press, 2007).

¹⁷³ See generally, David McFadden, “Gays Live – and die – in fear in Jamaica”, *Associated Press*, (July 20, 2009), found online at <http://www.sandiegouniontribune.com/sdut-cb-jamaica-gay-bashing-071909-2009jul19-story.html>; Charlene L. Smith and Ryan Kosobucki, *Supra*, note 170; Robert Carr, “On ‘Judgments’: Poverty, Sexuality-Based Violence and Human Rights in 21st Century Jamaica” (2003) 2 *Carib. J. Soc. Work* 71; Tim Padgett, “The Most Homophobic Place on Earth”, *Time.com*, (April 12, 2006), found online at <http://content.time.com/time/world/article/0,8599,1182991,00.html>.

¹⁷⁴ Camille A. Nelson, “Lyrical Assault: Dancehall versus the Cultural Imperialism of the North-West” (2008) 17 *South. Calif. Interdis. L. J.* 231. See also, generally, Derek Chadee, Chezelle Joseph, Claire Peters, Vandana Siew Sankar, Nisha Nair, & Jannel Phillip, “Religiosity, and Attitudes Towards Homosexuals in a Caribbean environment” (2013) 62:1/2

transphobia have been reflected in very jarring incidents of public resentment, often morphing into mob violence against LGBTQ individuals.¹⁷⁵ A stark illustration was the murder of 16 year-old Dwayne Jones, a “cross-dressing” teenager, by a mob, in July 2013 in Montego-Bay, Jamaica. At the time this murder occurred, Human Rights Watch spoke to the realities of homophobia in Jamaican society:

*If someone does not conform to gender expectations...they face widespread verbal and physical abuse that can range from beatings to armed attacks to murder...They are often driven from their homes and communities. The Jamaican government has a poor record of investigating and holding to account those who commit violence because of the victim's sexual orientation or gender identity. Some individuals have sought to justify Jones' killing with comments in mainstream or social media that he provoked the attack by 'bringing his behavior into the public'.*¹⁷⁶

Even *Time* magazine has chronicled this abject proclivity for violence against LGBTQ persons in Jamaica, writing that that country was the “Most Homophobic Place on Earth.”¹⁷⁷ Offering evidence in support of the title of his piece, Padgett observed that:

*... two of the island's most prominent gay activists, Brian Williamson and Steve Harvey, [were] murdered — and a crowd even celebrated over Williamson's mutilated body. Perhaps most disturbing, many anti-gay assaults have been acts of mob violence. In 2004, a teen was almost killed when his father learned his son was gay and invited a group to lynch the boy at his school. Months later, witnesses say, police egged on another mob that stabbed and stoned a gay man to death in Montego Bay. And this year a Kingston man, Nokia Cowan, drowned after a crowd shouting "batty boy" (a Jamaican epithet for homosexual) chased him off a pier...*¹⁷⁸

Social & Econ. Studies 1; Christopher A. D. Charles, “Representations of Homosexuality in Jamaica” (2011) 60:1 *Social & Econ. Studies* 3; Noel M. Cowell, “Public Discourse, Popular Culture and Attitudes Towards Homosexuals in Jamaica” (2011) 60:1 *Social & Econ. Studies* 31; and Latoya Lazarus, “Enacting citizenship, debating sex and sexuality: conservative Christians’ participation in legal processes in Jamaica and Belize” (2020) 58:3 *Commonwealth & Comp. Politics* 366.

¹⁷⁵ See generally, Human Rights Watch, “This Alien Legacy: The Origins of ‘Sodomy’ Laws in British Colonialism”, (2008) found online at <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>

¹⁷⁶ “Jamaica: Cross-Dressing Teenager Murdered Investigate, Condemn Violence, Respect Rights of LGBT People”, Human Rights Watch, August 1, 2013, found online at <https://www.hrw.org/news/2013/08/01/jamaica-cross-dressing-teenager-murdered>

¹⁷⁷ Supra, note 17, Padgett.

¹⁷⁸ Ibid.

Jamaican homophobia is unfortunately not only entrenched in social attitudes, but exists also in the corridors of political power, where some politicians conduct themselves in ways that normalize discrimination. I draw as an example what occurred in 2011 during a general election debate, after a candidate in the race to become the Prime Minister, Portia Simpson Miller, suggested that she would not have a policy of excluding sexual minorities from becoming Cabinet Ministers (as one former Prime Minister had said he would). In response, the then serving Minister of Energy from the opposing political party, Clive Mullings, warned that “God [had] brought down fire and brimstone on Sodom and Gomorrah”.¹⁷⁹

In a 2013 article dealing with the promulgation of the Cayman Islands Constitution in 2009, Vlcek described Caribbean opposition to LGBTQ rights in the region, generally. There, he explains that at that time, when the Cayman Islands was considering a revised Constitution that had a Bill of Rights including queer rights, Caymanians saw this as “a form of subterfuge intended to force this ostensibly global norm for sexual preference on them”¹⁸⁰ by the government of the United Kingdom. This, Vlcek described as the introduction of a norm, not through “socialization, institutionalization, and demonstration,” as the means of incorporating rights for sexual minorities, but instead through a process of “norm cascade” or direct imposition through “dominant mechanisms,”¹⁸¹ representing an imposed distribution of “modern” norms as a potential example of “imperialist/neo-colonial modernization”.¹⁸²

¹⁷⁹ “Go Sista – Sodom and Mrs. Simpson Miller”, *The Economist*, (January 7, 2012), found at <https://www.economist.com/the-americas/2012/01/07/go-sista> (Mrs. Simpson-Miller was affectionately referred to by the population as “Sista P”, an abbreviated reference to her first name, “Portia”, hence the title “Go Sista...”)

¹⁸⁰ William Vlcek, “Crafting Human Rights in a Constitution: Gay Rights in the Cayman Islands and the Limits to Global Norm Diffusion” (2013) 2:3 *Global Constitutionalism* 345, at p. 346.

¹⁸¹ *Ibid*, at p. 347.

¹⁸² *Ibid*, at p. 368.

One of the harshest manifestations of hostility towards the protection of LGBTQ+ rights in the Caribbean is in the popular culture. The situation of hostility, generally, has been argued to be a crisis¹⁸³, and has been posited to be the result of homosexuality being viewed in Jamaica as “cultural imperialism”, “white perversion” and “foreign”.¹⁸⁴ Much of the hostility has been emergent in the popular “dance hall” genre, an associated form of reggae music. This dance hall music is typically played on local sound systems at dances and social gatherings, features lyrics that celebrate sex, masculinity, and violence, and according to Stolzoff¹⁸⁵, is concentrated in inner-city communities. Over the years, dance hall music has become a part of the wider Caribbean culture, and is celebrated widely across the region.

One of the most popular features of dance hall music is its venom towards LGBTQ+ persons. In the 1990s hit song “Wicked in a bed” by dance hall performer “Shabba Ranks”, for example, he calls for the death of homosexuals – “Lick shot inna a maamaman head...” [shoot gay men in their head]. Similarly, dance hall performer “Buju Banton”, in his song “Boom bye”, declared – “Boom bye bye inna batty bwoy head” – [shoot gay men in the head], while other performers such as “Capleton” and “Elephant Man” have called for the burning of gay men.¹⁸⁶ Indeed, at many of the dance hall venues where this kind of music is featured prominently, the music selectors and disc jockeys attempt to unite and whip-up the crowd into a frenzy by spewing

¹⁸³ Ian Boxill, J. Martin, T Meikle, et. al., “National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships”, *Report for Aids- Free World*, (2011), found online at <https://ufdc.ufl.edu/AA00003178/00001/28j>

¹⁸⁴ Jamilah King, “Outing the Center: Homophobia in Jamaica”, (2006), Independent Study Project (ISP) Collection, 380, at p. 40.

¹⁸⁵ See N. Stolzoff, *Wake the Town and Tell the People: Dancehall Culture in Jamaica*, (Durham, NC: Duke University Press, 2000).

¹⁸⁶ In Capleton’s song “Bun Out Di Chi Chi”, loosely interpreted to mean “burn out the gay”, he calls for homosexuals to be executed by fire, while in his song “Log On”, Elephant Man performs a dance that mimics setting fire to a gay person and stomping on that individual while the person is lying on the ground burning.

anti-gay utterances, simultaneously asking the crowds to show hands and wave rags to demonstrate hatred for gay men and women. As Stolzoff explains it, “Since no one wants to be associated with these despised groups...most men will follow the selector’s command”¹⁸⁷ to wave hands and rags to manifest anti-gay support. It is demonstrations and musical lyrics such as these that help to reinforce in the popular culture, the strong societal reticences towards LGBTQ+ persons in Caribbean societies.

It is noteworthy as well that much of this attitude to the human rights of the LGBTQ+ community in the Caribbean is rooted in religion. The role of the church in dictating a wide cross-section of social norms in Caribbean societies is widely documented.¹⁸⁸ As Senior, a leading Caribbean feminist scholar tells us, “Even a passing knowledge of Caribbean culture shows what a potent force religion is and always has been... Religion can significantly affect male-female relationships and modify community norms and expectations...”¹⁸⁹. Lewis and Carr, and Curtis, more recently, have also highlighted the centrality of Christian beliefs to issues of sexuality in the Caribbean region, not only among dance hall entertainers, but also among politicians and other sectors of society.¹⁹⁰ This view is supported by Campbell and Wheatle who have proffered that “There are no major pieces of legislation addressing issues of gender, reproductive rights and

¹⁸⁷ See, N. Stolzoff, *Wake the Town and Tell the People: Dancehall Culture in Jamaica*, (Durham, NC: Duke University Press, 2000), at p. 208. [Stolzoff]

¹⁸⁸ See for example, Carolyn Cooper, *Noises in the Blood: Orality Gender, and the “Vulgar” Body of Jamaican Popular Culture*, (Durham, NC: Duke University Press, 1995); D. Thomas, *Modern Blackness: Nationalism, Globalization, and the Politics of Culture in Jamaica*, (Durham, NC: Duke University Press, 2004); B. Chevannes, “Gender and Adult Sexuality”, in P. Mohammad, ed., *Gendered Realities: Essays in Caribbean Feminist Thought*, (Kingston, Jamaica: University of the West Indies Press, 2002), pp. 486-494; and Ian Boyne, “Gay Rights and Wrongs”, *Jamaica Gleaner*, 25 March 2007.

¹⁸⁹ Olive Senior, *Working Miracles, Women’s Lives in the English-Speaking Caribbean*, (Cave Hill, London, Bloomington, ISER: James Currey, Indiana Press, 1991), at p. 185.

¹⁹⁰ Anthony R. Lewis & Robert Carr, “Gender, Sexuality and Exclusion: Sketching the Outlines of the Jamaican Popular Nationalist Project”, (2009) 3 *Caribbean Rev. of Gender Studies* 1; and Debra Curtis, *Pleasure and Perils: Girl’s Sexuality in a Caribbean Consumer Culture*, (New Brunswick, NJ: Rutgers University Press, 2009).

sexuality that have been passed by, or debated in, the parliaments of the Commonwealth Caribbean without input from religious organisations. Given the growth and popularity of Evangelical churches, and despite the growing influence of human rights groups across the region, it is clear that the influence of the church will continue to increase”.¹⁹¹

A compelling illustration of this reality, and how it has impacted human rights in the Caribbean was seen in the Bermudian case of *Ferguson v. Attorney General and others*¹⁹². Here, the applicant, relying on section 8 (freedom of conscience) of the Bermudian Constitution, challenged a provision of *Domestic Partnership Act, 2018*, which effectively prohibited same-sex marriage. The claimants argued that the provision was enacted for a religious purpose, and that this was not permissible. The Act was an attempt by the state to nullify an earlier court ruling in a separate case, that made same-sex marriage a constitutional entitlement. In the *Ferguson* decision, the Supreme Court (Superior Court) made it clear that “satisfying the religious demands of opponents of same-sex opponents”¹⁹³ was one of the clear motivations for the impugned Act, and noted that, in relation to the initial unrelated case making same-sex marriages constitutional, “It [was] a notorious fact that this decision attracted both acclaim and disdain”¹⁹⁴. The objective of the Act was to recognize “domestic partnerships” for same-sex couples, disenfranchising them of the right to legal marriage. In voiding the provision of the Act that was in question, the Court ruled *inter alia* that “A law which prevents same-sex couples from marrying interferes with (or hinders) the ability of those who believe in a legally recognised marriage as an important institution to

¹⁹¹ Yonique Campbell & Se-Shauna Wheatle, “Contradictions in faith in the Caribbean context: postcolonialism, religion and the constitution”, (2020) 58:3 *Commonwealth & Comp. Politics* 277, at p. 278.

¹⁹² *Ferguson v. Attorney General of Bermuda and others* [2018] SC (Bda) 46 Civ (6 June 2018).

¹⁹³ *Ibid*, at p. 34.

¹⁹⁴ *Ibid*, at p. 6.

manifest that belief by participating in a legally recognised marriage ceremony”¹⁹⁵, pointing out that “No reasonable court properly directing itself could possibly find that providing differing types of legal recognition for same-sex and heterosexual couples was not differential treatment in general terms”¹⁹⁶.

A further illustration of the significant role played by religion in the attitudes of some sectors of Caribbean society to the human rights of LGBTQ+ persons in the region might be drawn from the 2016 Constitutional Referendum in The Bahamas on gender equality in the Bahamian Constitution. The Bahamas Constitution denies married Bahamian women the right to confer citizenship to children born abroad on an equal basis with Bahamian men. It also denies unmarried fathers the ability to confer citizenship to children born abroad. Moreover, while the law makes provisions for a Bahamian man to transmit his citizenship to a foreign spouse, Bahamian women are denied this equal right.

The main objective of the referendum, as declared by the Bahamian government, was to reform the Constitution of The Bahamas to advance equality, by canvassing four bills which, overall, would guarantee that Bahamian men and women have an equal right to pass citizenship to their children and opposite sex spouses, and to enshrine equality between women and men in the Constitution, in order to guarantee that the country’s citizens would not be denied the same rights and opportunities because of their sex.¹⁹⁷ After a heated period of debates, public meetings and

¹⁹⁵ Ibid, at para. 81

¹⁹⁶ Ibid, at para. 100.

¹⁹⁷ The first Bill was to give children born outside of The Bahamas, to Bahamian women, the right of citizenship. The second Bill was to give foreign husbands of Bahamian women the right of citizenship. (At the time, Bahamian men may pass on their citizenship to their foreign wives.) The third Bill would have given children born to a Bahamian

fora, campaigns by various groups including the ubiquitous *Bahamas Cristian Council* (BCC), the referendum failed when the vote was held. A major reason for the failure of the referendum was that the BCC had campaigned vociferously against the Bills, telling its church members (most Bahamians) to vote against the proposals, as they were strategies by the government to clandestinely introduce a path-way to legalizing same-sex marriage.¹⁹⁸ Then Prime Minister Christie repeatedly reiterated that he had no such intention, stating that “I do not and have never advocated for an LGBT agenda”¹⁹⁹, but the wider public, on account of social and religious attitudes to queer rights, never accepted his word. The ultimate reality of the “no” vote, therefore, was that those other fundamental components of gender equality which were mostly acceptable and uncontroversial, were sacrificed by the majority of the electorate, just to *prevent* something that was not even contemplated by the State, as part of its objectives for the constitutional amendment. The result, hence, was the persistence of discrimination in a constitution, which ironically, is intended to serve as the apex law, guarding fundamental and other civil and political rights, in a modern democracy such as The Bahamas.

This is not particularly unlike what occurred in Jamaica in the mid-2000s when the new *Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act*, 2011 was being piloted through the Jamaican Parliament. The *Jamaica Forum for Lesbians, All-Sexuals and Gays* (J-FLAG) lobbied heavily for sexual orientation to be included as a prohibited ground of discrimination. This was strongly opposed by the church and other religious-oriented groups, including for instance, the *Lawyers’ Christian Fellowship of Jamaica* who warned, in a letter to

father outside the Bahamas the right of citizenship. The fourth Bill, the most controversial, sought to “end discrimination based on sex”.

¹⁹⁸ See, for example, “Christian Council President: I’m Voting No To Bill 4”, *The Tribune*, 1 June 2016.

¹⁹⁹ Jones, Royston, Jr. “PM ‘not Pushing LGBT Agenda’”, *The Nassau Guardian*, 6 June 2016.

the Attorney General at the time, “Like David who had been tending the sheep, we were ready for battle”²⁰⁰, this of course being a reference to the biblical King David. It ultimately appears, however, that a “battle” was not required, as indeed, the Joint Select Committee of Parliament considering the constitutional amendment noted that J-FLAG’s proposals were not easily reconcilable with a “Christian society like Jamaica”²⁰¹. Within the Caribbean context, Lazarus explains this phenomenon of religion impacting social norms, and then consequently rights, as Christians “visibly mobilis[ing] to engage as a legitimate part of civil society with agendas...of protecting their Christian values and beliefs...[and] to protect their religious rights within societies that are increasingly confronted with conflicting ideologies and practices”²⁰². This she posits has become obvious in those discussions that surround “gender and sexuality - that depart from traditionally held beliefs about what ought to be considered ‘normal’, ‘natural’ and ‘appropriate’”²⁰³.

From this reality flows the wider social reticence that becomes embedded in socio-cultural and political norms of Caribbean Societies, which have been played out in various ways, notably including the isolation of sexual minorities. The case of a group of homeless gay men in the New Kingston area of Jamaica’s capital, Kingston, is a stark example of the indifference and ill-treatment that derives from the failure of the State to guard the human rights of such persons. This particular group of individuals resides in a gully below a highly trafficked main road, in the city’s

²⁰⁰ Latoya Lazarus, “This is a Christian Nation: Gender and Sexuality in the Processes of Constitutional and Legal Reform in Jamaica”, (2012) 61:3 *Social and Economic Studies* 117, at p. 132.

²⁰¹ Latoya Lazarus, “Heteronationalism, Human Rights, and the Nation-State: Positioning Sexuality In the Jamaican Constitutional Reform Process”, (2011) 36:71 *Canadian J. of Latin Am. & Carib. Studies* 71, at p. 88.

²⁰² Latoya Lazarus, “Enacting citizenship, debating sex and sexuality: conservative Christians’ participation in legal processes in Jamaica and Belize”, (2020) 58:3 *Commonwealth & Comp. Politics* 366, at p. 369.

²⁰³ Ibid.

business and commercial district. The gully is a concrete underpass that transports effluent and wastewater. These young homeless gay men have in common, that they have been excluded from their homes and communities as a result of their sexuality. They sleep in the gully in question on discarded broken-down cardboard boxes, and conduct all household activities such as cooking and washing in this concrete gully. At nights they earn a living by prostituting themselves to men who drive by in cars to pick them up. Quite often they are abused, beaten, and robbed, but neither the state nor agents of the state such as the police notice them.²⁰⁴ In the wider society, these young men are held to ridicule, with very few persons raising this as an important human rights issue.²⁰⁵ Not only is there general disinterest from the wider society and the government as a whole, but the media likewise sometimes indulges in attitudes of demonization and insularity as well. It is therefore not uncommon to see headlines such as “Rowdy gays Strike”²⁰⁶ or “Gays wreak havoc”²⁰⁷.

The case of *Tomlinson v. Television Jamaica (TVJ), CVM Television and other* brings to the fore the attitude of media to matters that are of importance to sexual minorities in Jamaica. In this case, Tomlinson, an attorney-at-law, and gay rights activist attempted to have a 30-second video about safe sexual conduct, in order to minimize the spread of AIDS, aired on both TVJ and CVM (the two local television stations) as a public service announcement. Both stations refused

²⁰⁴ See “Jamaica’s Underground Gays”, *Unreported World*, Channel 4, United Kingdom, QuickSilver Media, (2014), documentary found online at <https://www.youtube.com/watch?v=wuc3aYRrMlw>; and “Young and Gay: Jamaica’s Gully Queens”, *Vice News Production, Inc.*, (2014), documentary found online at <https://www.youtube.com/watch?v=ILXVpFQVEbw>

²⁰⁵ The Member of parliament for the area has tried to assist, but the unreserved support of the State is not systemic. See “Julian Robinson seeks solutions for homeless gay youth in New Kingston”, *The Gleaner*, 18 May 2015.

²⁰⁶ “Rowdy Gays Strike: J-FLAG abandons raucous homosexuals misbehaving in New Kingston”, *The Gleaner*, 30 September 2012.

²⁰⁷ “Gays wreak havoc- Cops say homosexuals too much to handle in South-East St. Andrew”, *The Gleaner*, 25 January 2013.

to air the video. Tomlinson filed a constitutional challenge under the Jamaica *Charter of Fundamental Rights and Freedoms*, claiming a violation of his right to freedom of expression, and the right to seek, receive, distribute, or disseminate information, opinions, and ideas through any media. Tomlinson lost in the Full Court of the Supreme Court (superior court) and appealed. The Jamaica Court of Appeal found that while “It was clearly the intent of Parliament that the rights in the Charter were to be upheld, and that provisions in the Charter would now bind not only the State but also, ‘natural and juristic’ persons”²⁰⁸, which included TVJ and CVM, “Tomlinson's right to freedom of expression and the right to distribute or disseminate information, opinions and ideas does not give him the right to use someone else's property to publish his advertisement”²⁰⁹.

Setting aside the correctness or otherwise of the decision of the Court of Appeal for a moment, the facts leading to the litigation point to a larger societal challenge. The refusal of both TVJ and CVM, as powerful national media houses, to air an innocuous public service announcement from an LGBTQ+ advocate, about a serious public health issue that disproportionately impacted the male homosexual population, reflected a wider problem, hesitancy to associate with any issue that even seems obliquely to give voice to a heavily disenfranchised and socially ostracized population in Caribbean society.

Critically, part of this derives from the attitude of political leadership to issues impacting sexual minorities. In other words, if persons in positions of political authority and power do not set the right tone, denoting respect for the lives and human rights of LGBTQ+ persons, then it is very hard to cultivate a broader societal culture which achieves such objectives. As illustrations of

²⁰⁸ *Tomlinson v. Television Jamaica, CVM Television & other* [2020] JMCA Civ 52, at para. 88.

²⁰⁹ *Ibid*, at para. 133.

this, in a political campaign for general elections in Jamaica in 2002, the Leader of the Opposition, Edward Seaga, a 72-year-old man, used the popular “Chi Chi Man”, a derogatory song that championed the murder of gay men by setting them on fire, as his political party’s campaign song. Not much better was the Prime Minister at the time, Percival J. Patterson, who, in the lead-up to the 2001 election, in relation to whispers about his own sexuality in the wider public, gave a radio interview on *The Breakfast Club*, a morning news magazine programme, emphatically declaring – “My credentials as a life-long heterosexual person are impeccable”²¹⁰. Yet a different Prime Minister, Bruce Golding, in a 2010 BBC interview, was also reported as saying – “The encouragement or recognition of the appropriateness of the homosexual lifestyle is going to undermine the effectiveness of family ... and, in that process, undermine the basic fabric of a society”²¹¹. Such is the discourse spewed by political leadership, which, while in part, reflects socio-cultural norms, simultaneously entrenches stereotypes, undermining basic respect for human rights. As Cowell and Saunders summarize it, “This translates into a situation in which the rights of less powerful homosexual men can be trampled”²¹².

The foregoing illustrations reflect some of the reticence that exists in Caribbean society to the shifts towards the evolving universalist approach to LGBTQ+ rights at the international level, although Miller, for example, cautions that while “[a]t the international level, UN human rights

²¹⁰ Carolyn Cooper, “Gays out of the closet into the Cabinet”, *The Gleaner*, 23 February 2020, found online at <https://jamaica-gleaner.com/article/commentary/20200223/carolyn-cooper-gays-out-closet-cabinet>

²¹¹ “Not safe at home: Violence and discrimination against LGBT people in Jamaica”, *Human Rights Watch*, found online at https://www.hrw.org/report/2014/10/21/not-safe-home/violence-and-discrimination-against-lgbt-people-jamaica#_ftn26. See generally, also, “Jamaica: Country Report for use in refugee claims based on persecution relating to sexual orientation and gender identity”, *University of Toronto Faculty of Law International Human Rights Program*, June 10, 2009, found online at https://ihrp.law.utoronto.ca/utfl_file/count/documents/SOGI/Jamaica%20Updated%20SOGI%202012_FINAL.pdf

²¹² Noel Cowell & Tanzania S. Saunders, “Exploring Heteronormativity in the Public Discourse of Jamaican Legislators”, (2011) 15 *Sexuality & Culture* 315, at p. 329.

bodies are increasingly taking on new norms and laws relating to sexual diversity, health, and harm... Local and national struggles for legal re- form[,] engage with sexuality and rights claims ... and emerging demands for sexual non-discrimination”²¹³. In the Caribbean, these hesitations poignantly embody some of the culturally relativist attitudes to the increasing acceptance of these rights, internationally. As Franke sees it, there has been a “centrality and manipulation of sexuality and sexual rights in struggles for and against the civilizing mission that lies at the heart of key aspects of globalization”.²¹⁴ This is effectively a probing of the democratic legitimacy of international human rights law.²¹⁵ As Donoho summarizes it:

*“...questions exist concerning both the formal and perceived (political and popular) democratic legitimacy of present and future international human rights governance. On the formal level, there is little doubt that international human rights institutions have been properly created and entrusted with some degree of legal authority pursuant to the adoption and approval of their constitutive treaties. Rather, the potential controversy over formal legitimacy will concern the proper scope of their legal mandate and limitations on the domestic legal status of their decision-making...[I]nternational human rights institutions may best achieve legitimacy if they identify and account for core principles essential to the various forms of democratic governance...Concern about the democratic legitimacy of international governance is most pronounced when unaccountable or unrepresentative international decision-makers have the capacity to generate rules and decisions that are, in some sense, binding or authoritative within domestic legal systems.”*²¹⁶

This offers us a helpful overview of the problem as it exists in the Caribbean at the macro level, and exposes much of what informs the questions about the cultural legitimacy of IHRLN in societies in the region. It is also useful to understand that debates about legitimacy are largely “concerned with the relative unaccountability of international decision-makers and the potential

²¹³ Alice M. Miller & Carole S. Vance, “Health and Human Rights”, (2004) 7:2 *Sexuality, Human Rights, and Health* 5.

²¹⁴ Katherine Franke, “Dating the State: The Moral Hazards of Winning Gay Rights” (2012) 44:1 *Columbia Human Rights Law Review* 1, at p. 2.

²¹⁵ See generally, Douglas Leo Donoho, “Democratic Legitimacy in Human Rights: The Future of International Decision-Making” (2003) 21 *Wiscon. Int’l. L. J.* 1.

²¹⁶ *Ibid*, at pp. 20, 22 and 27.

displacement of domestic democratic choices”²¹⁷. As Helfer sees it, for instance, when international human rights norms confront local socio-cultural and political norms, a perception of the over-legalization of international law arises, wherein international courts expand “the legalized quality of the Caribbean governments’ human rights obligations, [making] what began as agreements with both hard and soft law elements, ... much harder law in practice.”²¹⁸ This, Helfer further explains, is viewed as a kind of “judicial imperialism”, resulting in the imposition of “Eurocentric notions and values” on the region.²¹⁹ It is no wonder therefore that as Cowell has posited, “[t]he imposition of human rights norms formulated at the international or supranational level is often resisted by states from the global South, especially if those human rights are perceived as imposing limitations on a state’s autonomy and ability to legislate”²²⁰. Such resistance is very often “intertwined with the history of colonisation and of economic dominance by the global North”²²¹. It is no wonder, therefore, that the creation of the CCJ, a regional court, was seen as marking “the closing of a circle on independence” and the “sunset of British colonial rule”.²²² This clearly gives context to the view that owing to the Caribbean’s “shared socio-cultural characteristics”, consensus on how to advance the rights of LGBTQ persons needs to emanate from the norms of the region, as opposed to being from external “gay” rights advocacy.²²³

²¹⁷ Ibid, at p. 5.

²¹⁸ Laurence R. Helfer, “Over-Legalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes” (2002) 102(7) *Colum. L. R.* 1832, at p. 1892.

²¹⁹ Ibid, at p. 1888.

²²⁰ Frederick Cowell, “LGBT rights in Commonwealth forums: politics, pitfalls and progress?”, in eds., Corinne Lennox & Matthew Waites, *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth*, (School of Advanced Study, University of London, Institute of Commonwealth Studies, 2013), at p. 133.

²²¹ Ibid, at pp. 133-134.

²²² See generally, Leonard Birdsong, “Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English-Speaking Caribbean” (2005) 36 *University of Miami Inter-American Law Review* 197.

²²³ Supra, note 171, at p. 945.

Ultimately, however, the disconnect that the foregoing discussion raises between human rights on paper and human rights in action, in the Caribbean, exists not only in relation to LGBTQ+ rights, as one example, but also in many other aspects of Caribbean society, such as in the arena of police brutality and impunity, and in the extra-judicial killing of citizens by law enforcement. There are numerous reports of state security forces committing “arbitrary and unlawful

killings”²²⁴; and allegations of “cruel, inhuman, and degrading treatment or punishment towards individuals in police custody”²²⁵.

²²⁴ “Jamaica 2018 Human Rights Report”, Country Reports on Human Rights Practices for 2018, United States Department of State, Bureau of Democracy, Human Rights and Labor, found online at <https://www.state.gov/wp-content/uploads/2019/03/JAMAICA-2018.pdf>, at p. 1. (See generally, also, “Trinidad and Tobago: End police immunity for unlawful killings and deaths in custody”, Amnesty International, April: 2006, found online at <https://www.amnesty.org/download/Documents/72000/amr490012006en.pdf>; and “Jamaica: Country of Origin Information Report”, the Home Office, United Kingdom, October: 2005, found online at https://www.justice.gov/sites/default/files/eoir/legacy/2013/06/12/jamaica_2.pdf). One case which offers a very graphic portrait of the inhumanity and degradation of remand conditions in Jamaica, for example, but common throughout the Caribbean as a whole, is *Doris Fuller v. Attorney General* (1998) 56 WIR 337. In this case from the Court of Appeal of Jamaica, the Appellant had litigated against the state, for the estate of her son, Agana Barrett, a 20-year-old second-class carpenter, who died on 24 October 1992, while in police custody at the Constant Spring police lock-up, in Kingston. He had been detained and locked up two days before. At p. 389 of the judgement, Patterson, J.A. recounted some disturbing facts:

The judge accepted the evidence of one Shawn Coleman, who had been imprisoned in the same cell as [Agana Barrett], the deceased, as to the conditions that existed in that cell. The cell was about 8 feet long, 7 feet wide, with a 2-foot-wide concrete bunk projecting from one of the walls reducing the available concrete floor space. The reinforced concrete walls had no windows, and the only door was made of two metal sheets welded on to steel bars between them. The only sources of ventilation were small irregular perforations in the metal sheets located in such a way that the free flow of air was interrupted and a view of the outside was restricted. There was no light in the cell; it was hot and 'dark like midnight in there'. That was the cell in which the deceased was imprisoned and remained along with eighteen other men from about 7.30 pm on 22 October 1992, until '7 to 8 am' the next day. The men were huddled together in a manner that inhibited sleep. They cried out for the excessive heat generated by their bodies and the witness said, 'They talk loud saying, "Officer, man a faint, we can't take the heat. We want water. We hot, we thirsty"', while beating on the cell door. Their cries fell on deaf ears. When the cell was eventually opened in the morning there was water on the floor that came dripping from the walls and ceiling of the cell as a result of condensation generated by the body heat of the men. They were fed 'hot sugar and water and crackers' while confined in a passage outside the cell. The deceased partook of the lowly fare. At about 9.30 am the deceased and the other men were returned to their cell and locked away until about 1.00 pm when they were again let out in the passage and fed lunch by the police. The men complained to the police about the unbearable heat in the overcrowded cell and drew their attention to the water on the floor. After about 30 or 40 minutes, the men were returned to their cell. They were not fed again and their shouts for water throughout the night went unheeded. Some fainted from the heat. They remained locked in the cell until about 8.00 am the following day. By then, the deceased and two others had succumbed to the horrible conditions that continued throughout the night. The starvation of oxygen and excess of carbon dioxide was too much for the deceased. The forensic pathologist who performed a post-mortem examination attributed the deceased's death to cardio-respiratory failure consistent with cerebral hypoxia and hypercapnia.

²²⁵ *Ibid*, at p. 2, (*Country Report*, 2018).

With regard to extra-judicial police killings, for instance, the “Braeton” and “Kraal” cases in Jamaica, are powerful examples. In the Braeton case, occurring in March 2001, seven youths²²⁶ were shot and killed in one incident by the police, in the community of Braeton, St. Catherine, Jamaica. According to the police, they had gone to the community to arrest an individual, in relation to an alleged murder. They arrived at a particular house, announced themselves, and asked that the front door to the house be opened. Instead of compliance, contended the police, heavy gunfire erupted at them outside, from inside the house. They returned the gunfire, and when the dust settled, they discovered the bodies of the seven young men inside the house. In the aftermath of the incident, the police did not initially report that they had actually entered the house before killing the youths. This was only revealed after eyewitnesses gave statements that the police had in fact entered the house, and that the young men in the house “were screaming for help and shouting ‘murder’, ‘dem [*them*] murdering us’”²²⁷. Some witnesses even reported that after a brief pause, they had heard the police inside the house telling the youths to “say their prayers”, before “the area echoed with gunfire: 46 shots in all”²²⁸.

In a report on the killing of the “Braeton seven” by the police, produced by Amnesty International after an investigation, this was stated:

It is difficult to accept that all seven youths were killed by shots fired [by the police] from outside the building. Six [of the youths] were shot in the head. In total, 46 gunshot wounds were found on the bodies and only 22 bullet holes in the metal window covers and doors through which the officers fired [from outside]. The government ballistics expert found only three bullet holes in the metal window covers indicative of shots fired from inside the house, and one of these was made by a 5.56 mm round that did not correspond to the weapons

²²⁶ These youths were Reagon Beckford, aged 15, Lancebert Clark, 19, Christopher Grant, 17, Curtis Smith, 20, Andre Virgo, 20, Dane Reynaldo Whyte, 19, and Tamayo Wilson, 20.

²²⁷ Gary Younge, “ ‘We don’t have police, we have gunmen’: Outcry over ‘kill or be killed’ ethos of the law officers trying to halt crime on the streets of Jamaica”, The Guardian Newspaper (www.theguardian.com), August 29, 2003.

²²⁸ Ibid.

*the police said were found in the house.... According to the government pathologist, ... Beckford had 12 wounds...Clark was shot seven times in the back and head...Grant was shot six times in the head, the abdomen [etc.] ...Smith was shot five times...four times in the head; Virgo was shot four times in the head [etc.] ...Whyte had seven wounds...[including] two to the top of the head...caused by bullets travelling in a downward path...Wilson was shot five times, twice in the back of the head...*²²⁹

The police officers involved in the Braeton case were charged with murder. They were acquitted on a directed verdict by the Court based on a “no-case” submission. The jury was not permitted to render a considered verdict. At the time, the Opposition Critic on Justice was reported to have vented that “he knew [*that*] ‘not a damn thing would come of this case’...[d]escribing the crime scene as severely compromised from the very beginning”. It was also reported that critical evidence was excluded by the Court, with the trial judge allegedly stating that “the evidence would be ‘tantamount to *persecuting* the officers’”.²³⁰

In the Kraal²³¹ case, four persons were killed by the police in May 2003, in the rural farming district of Kraal, Clarendon, Jamaica²³², in what was described as a “shoot-out” by the police. The police allege that they had gone to the district to arrest a “wanted” individual. That individual was never caught, and four people ended up killed by the police. Notwithstanding the claim of a shoot-out by the police, the residents of the community refuted this, indicating that when the police entered the building where the killings occurred, a 10-year-old child was first removed from the house by the police. The police then, according to the residents, “murdered” the adults.²³³

²²⁹ *Jamaica: The killing of the Braeton Seven – A justice system on trial*, Amnesty International, March 2003, AI Index: AMR 38/005/2003, at pp. 3 & 17.

²³⁰ *Cops Acquitted of Murder Charges in Braeton 7*, Confidential Diplomatic Cable, Public Library of United States Diplomacy, February 18, 2005, at p. 3.

²³¹ Alternatively spelt as “Crawle” in some reports.

²³² These persons were Angella Richards, aged 45, Ferris Lewena Thompson, 38, Kirk Gordon, and Matthew James.

²³³ “The Crawle Killings”, The Jamaica Observer Newspaper, (www.jamaicaobserver.com), March 23, 2013.

According to a report on the Kraal killings from a local human rights group, *Jamaicans for Justice*, “[e]xperts who observed and reviewed the post-mortem autopsies concluded that the victims’ bullet wounds indicated they were all shot at close range. One victim, Angela Richard’s gunshot wounds appeared to have occurred as she was sitting down. Additionally, it appeared that another victim, Matthew James’ arms were raised when he was fatally shot”.²³⁴ Eventually, six police officers were charged with murder. In December 2005, all six were found not guilty.

In a telling summary of the international human rights implications of the degree of extrajudicial killings in Jamaica, in the context of the American Convention on Human Rights, the *Jamaicans for Justice* report stated:

Without a doubt,...the relentless practice of fatal shootings by Jamaican police, a substantial percentage of which constitute extrajudicial executions, gives rise to egregious violations of [the] American Convention... [which] imposes on state parties a positive obligation to respect and ensure the rights and freedoms recognized under the Convention. In light of the evidence presented, Jamaica’s grave violations of the right to life of citizens who fall victim to police shootings are as widespread and systematic as the practice itself. In addition to the substantive violations ... generated by the practice of summary executions, Jamaica’s failure to properly investigate all fatal police shootings, or to prosecute and punish police perpetrators of unlawful killings, gives rise to ongoing procedural violations of the right to life as well. ... Jamaica’s failure to investigate police shootings diligently and punish perpetrators also produces continuing violations of [the] ACHR...²³⁵

There are, therefore, clearly several broader human rights issues at hand here, including a severe absence of accountability for thorough and proper investigations of these incidents; ineffective and long-delayed trials where charges are mounted; inefficiencies in the judicial system; and a public attitude of impunity for police officers in situations such as *Braeton* and *Kraal*, largely because of

²³⁴ *Killing Impunity: Fatal Police Shootings and Extrajudicial Executions in Jamaica: 2005-2007*, A Report prepared by Jamaicans for Justice and the International Human Rights Clinic of the George Washington University Law School for submission to the Inter-American Commission on Human Rights, March 18, 2008, at p. 22.

²³⁵ *Ibid*, at p. 36.

public frustrations with a crippling and debilitating crime problem in parts of the region. This latter issue translates into a cultural rejection of the idea that extra-judicial killings are a human rights violation. For these citizens, the police killing of alleged “criminals” is not, as IHRLN would have it, a violation of the right not to be subjected to inhuman and degrading treatment, or the right to life, or the right to a fair trial before an impartial tribunal, but rather, as an act of “service” to “protect the people” from criminal tyranny. This is much the same way as many in the region would see exclusion of sexual minorities from certain rights that other citizens have, not as a violation of human dignity, equality of the law, protection before the law, free expression, or privacy, all embedded in IHRLN, but rather as a protection of religious and cultural beliefs.

Thus, while Caribbean States have become parties to a “critical mass of human rights instruments, they have fallen short in giving effect to them”²³⁶. In this way, they have come to see human rights as a “burden”, “rather than the wings on which they rode to freedom and equality, as well as legal obligations they have voluntarily undertaken”²³⁷. The irony in this, however, is that the whole purpose of accepting the international human rights treaties and obligations that they have, is to protect the citizens whom the governments in these Caribbean states serve. As the CCJ has demonstrated in a number of ways, depicted and discussed in later sections of this study, signing such IHRL documents is not a cursory act, but rather, creates responsibilities and enjoin these states to honour what they have covenanted to, and declared that they would do. Failure in this respect, it must be understood, has consequences for real lives.

²³⁶ Dutima Bhagwandin, “Scaling-up human rights impact in the English-speaking, Commonwealth Caribbean”, Office of the High Commissioner for Human Rights (OHCHR), 30 September 2017, at p. 35.

²³⁷ Ibid, at p. 39.

In spite of the challenges to a greater respect for certain human rights norms in the Caribbean, however, there is some evidence of positive change, primarily in the courts of the region. As Mendez et. al put it, “there is no doubt that the domestic law of most Latin American and Caribbean nations is gradually becoming more protective of human rights...the attitude of some political leaders and government officials...is also to be credited. Judges and court officials are also becoming more sensitive to the needs of persons and collectivities whose rights have been ignored”²³⁸. The words of Rampersad J. in *Jones v. Attorney General* exemplify this shift:

*[T]he court feels compelled to state in conclusion that it is unfortunate when society in any way values a person or gives a person their identity based on their race, colour, gender, age or sexual orientation. That is not their identity. That is not their soul. That is not the sum total of their value to society or their value to themselves.... This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition, is not the belief of all... all are protected, and are entitled to be protected, under the Constitution. As a result, this court must and will uphold the Constitution to recognize the dignity of even one citizen whose rights and freedoms have been invalidly taken away.*²³⁹

So, while there have been setbacks, progress has not entirely eluded the region. As Wheatle & Campbell have suggested, and with which I agree, while the region continues to develop its constitutional identity, “it must simultaneously grapple with international norms and the particularities of the regional context. States must contend with the growing idea of ‘global’ public goods such as human rights...Both constitutional identity and constitutional faith must...be built through domestic delivery of norms informed by both domestic and global imperatives”²⁴⁰.

²³⁸ Juan E. Mendez & Javier Mariezcurrena, “Human Rights in Latin America and the Caribbean: A Regional Perspective”, A paper submitted to the Human Development Report 2000 “Human Rights and Human Development”, (November: 1999), at p. 22.

²³⁹ *Jones v. Attorney General of Trinidad and Tobago and others*, Claim No. CV2017-00720, in the High Court of Trinidad & Tobago, judgement delivered on 12th April 2018, (unreported), at paras. 173-174.

²⁴⁰ Se-Shauna Wheatle & Yonique Campbell, “Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law” (2020) 58:3 *Commonwealth & Comparative Politics* 344, at p. 356-357.

3.4. Conclusion

The resistance, indifference, and suspicion to certain international human rights norms that emerge from the foregoing survey are largely consonant with much of the cultural relativist scholarship, the essence of which is, that international law is a “hegemonic tool” employed by hegemonic states to “reinforce preexisting imperial tendencies in world politics”.²⁴¹ This hegemony, claim *Third World Approaches to International Law* (TWAIL) scholars, for example, becomes further enhanced or problematic when the Third World comes to rely on these “traditional sources of cosmopolitan discourses in international law”.²⁴² As Mutua explains it, international law in general, and more particularly, the international human rights corpus, “falls within the historical continuum of the Eurocentric colonial project...[promoting] a Eurocentric ideal”²⁴³.

With this in mind, a pertinent question which arises, in the context of the institution being studied in this dissertation is - How does the CCJ treat IHRLN, in light of the socio-cultural and political dynamics of the region, bearing in mind the constitutional and democratic imperatives in our wider domestic constitutional and other legal regimes? Similarly, another important question is – Can a Caribbean court such as the CCJ make meaningful change and achieve transformation, development and advancement of ideas and perspectives in the law, and in the wider regional

²⁴¹ Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy” (2006) 27(5) *Third World Q.* 767, at p. 768. See generally, also, other works by Rajagopal such as Balakrishnan Rajagopal, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy”, (2006) 27:5 *Third World Q.* 767; and Balakrishnan Rajagopal, “The International Human Rights Movement Today” (2009) 24:1 *Md. J. Int’l. L.* 56.

²⁴² Ibid, [*Counter-Hegemonic International Law*...]

²⁴³ Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights” (2001) 42:1 *Harv. Int’l. L. J.* 201, at p. 204. See also, generally, Makau Mutua, “Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State” (1995) 89 *Am. Soc. Int’l. L. Proceedings* 487; Makau Mutua, “Human Rights and Powerlessness: Pathologies of Choice and Substance” (2008) 56:4 *Buff. L. Rev.* 1027; and Makau Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry”, (1994) 16 *Mich. J. Int’l. L.* 1113.

society, in light of these socio-cultural and political dynamics in the region? Both of these questions are answered as this study progresses, but as part of the analysis that comes with answering them, it is important to consider the relevant concepts of human rights universalism and cultural relativism. In light of the main argument prefaced in my introductory chapter – that the CCJ displays very strong universalist approaches in its deployment of IHRLN – and the cultural attitudes to some human rights explored in this chapter, the next chapter explores these concepts.

CHAPTER FOUR

UNIVERSALISM, CULTURAL RELATIVISM AND TRANSFORMATION

4.1. Introduction

This chapter reviews the literature on human rights universalism and cultural relativism, and young courts and transformation. The former has significance for two reasons. Firstly, my main argument is that the CCJ utilizes international human rights laws and norms in the exercise of its adjudicative function, in a manner that embraces a universalist approach to the application of these laws and norms. The Court, as I conclude, generally does not adopt a culturally relativist approach. This is true, I argue, despite the fact that the Court operates in an environment that scholars insist, depicts “plantation” political economy dynamics. Secondly, it also has significance, on account of the widely skeptical responses to some international human rights laws and norms in the Caribbean region. In light of my core argument, it is important to offer a framework upon which that argument is made.

The literature on transformation by *young* courts is similarly important to the study, as my analysis reveals that the manner in which the CCJ utilizes IHRLN is very consistent, transformative, and progressive, notwithstanding the political economy space within which the Court operates, and the reticence of many Caribbean people to much of what is embodied in the wider international human rights rubric. I therefore use this chapter to explore the various debates, such that there is an understanding of much of what underlies the Court’s approach in its human rights work.

4.2. Universalism in International Human Rights

The universality of human rights debate is one that has grown from the thinking that all human beings are equal, and are born with certain inalienable rights. These inalienable rights are “supposed to be valid in all times and places, quite independently of the particular culture each person was born into”²⁴⁴. This understanding of the universality of human rights largely emanates from Western liberalism, and has its conceptual origins in a fusion of *natural law* and *natural rights* philosophies.²⁴⁵

Natural law situates universal moral principles in the order of nature, and is grounded in the idea that certain moral laws have an existence independent of the human mind, as they are in the natural order of the universe.²⁴⁶ As Sidorsky explains, “[I]t was the fusion of the...view that moral values are built into the natural order of things, with the doctrine of the immanent operation of divinely revealed moral laws, that led to the theory of natural law”²⁴⁷. Natural law theory, hence, advances the view that certain norms of conduct carry a status in virtue, which is not based in any contingencies of particular cultures, or any other features of human societies that are transitory or momentary.

²⁴⁴ Massimo Iovane, “The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations” (2007) 14 *Int’l. J. on Minority & Group Rights* 231.

²⁴⁵ Thomas Pogge, “How Should Human Rights be Conceived”, in Patrick Hayden, ed., *The Philosophy of Human Rights: Reading in Context*, (Paragon House, 2001) pp. 187-210.

²⁴⁶ Jack Donnelly, *The Concept of Human Rights*, (Croom Helm: London & Sydney, 1985), at pp. 45-47.

²⁴⁷ David Sidorsky, “Contemporary Reinterpretation of the Concept of Human Rights”, in David Sidorsky, ed., *Essays on Human Rights: Contemporary Issues and Jewish Perspectives*, (Philadelphia: Jewish Publication Society of America, 1979) at p. 91.

By contrast, *natural rights* theorists introduce the human subject as a holder of rights, shifting the emphasis from “nature” or “divinity” to *human*. Writers such as Rousseau and Locke, in their analysis, posit a state of nature in which humans enjoy certain rights.²⁴⁸ These rights are then collectively traded by individuals to a state, in exchange for the protection and security of these rights by that state, done through laws and constitutional instruments. Combining both natural *law* and natural *rights* theses, therefore, culminates in the perspective that human rights are held by *human* rights-holders, and can be claimed against states and institutions.

This synthesis of natural law and natural rights theories captures a more general ethical conception, which is undergirded by notions of moral values. This is why, for instance, much of what fundamentally grounds human rights is rooted in respect for human dignity. While, admittedly, dignity might be a protean and extremely versatile concept, fundamentally, as Glensy explains:

The basis of dignity can be said to lie in the autonomy of self and a self-worth that is reflected in every human being's right to individual self-determination. It is thus universal and unfringeable by the state or private parties. Consequently, the 'dignity of the human person as a basic ideal is so generally recognized as to require no independent support.' ... The centrality of dignity in a democratic society cannot be underestimated. In fact, '[h]uman dignity is...bound up with forms of governance', and is a central feature in a significant amount of modern constitutional states. Indeed, 'democracy serve[s] as a core value of state formation because it accord[s] with fundamental notions of fair governance and [gives] expression to the values of human dignity and equality'. One of the key facets of twenty-first century democracies is the primary importance they give to the protection of human rights. From this perspective, dignity is the 'expression of a basic value accepted in a broad sense by all peoples,' and thus 'constitutes the first cornerstone in the edifice of ... human rights.' Therefore, there is a certain fundamental value to the notion of human dignity, which some would consider

²⁴⁸ See Jean-Jacques Rousseau, “Discourse on the Origin of Inequality”, in Donald A. Cress, trans. & ed., *The Basic Political Writings*, (Hackett Publishing Co, 1987); and John Locke, *Second Treatise on Government*, (Hackett Publishing Co, 1987) 8-14.

a 'pivotal right' deeply rooted in any notion of justice, fairness, and a society based on basic rights."²⁴⁹

Indeed, it is the recognition of this dignity by others which represents the basis upon which the system of human rights protection that we have, thrives.²⁵⁰

From a perspective of political history, universal human rights as we know them now, emerged out of World War II. These rights are premised on the idea of the dignity and liberty of human beings. This is highlighted in the Preamble to the 1945 *United Nations Charter*, for instance, which "reaffirm[s] faith in fundamental human rights, in the *dignity* and worth of the human person, in the equal rights of men and women and of nations large and small"²⁵¹. Similarly, the UDHR reaffirms "the *dignity* and worth of the human person and in the equal rights of men and women"²⁵², and speaks to "the inherent *dignity*"²⁵³ and "the equal and inalienable rights of all members of the human family"²⁵⁴. It further states that "all human beings are born free and equal in *dignity* and right"²⁵⁵.

All of this has been repeated in various ways over the years through a variety of international instruments, such as the *Vienna Declaration and Programme of Action*, adopted in 1993 by the United Nations World Conference on Human Rights which declares that "all human rights derive from the *dignity* and worth inherent in the human person, and that the human person

²⁴⁹ Rex D. Glensy, "The Right to Dignity" (2011) 43:1 *Colum HRLR* 65, at pp. 67-69.

²⁵⁰ *Supra*, note 244.

²⁵¹ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

²⁵² Preamble to the *Universal Declaration of Human Rights*, UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

²⁵⁵ *Ibid.*, Article 1.

is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms”.²⁵⁶ Likewise, the *Convention on the Elimination of All Forms of Discrimination against Women* which affirms “that discrimination against women violates the principles of equality of rights and respect for human *dignity*, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity”²⁵⁷. This landscape of international human rights instruments, as examples, clearly articulates an ecology of *universality*, embedded in the moral value of human *dignity*, that constitutes human rights.

The literature on human rights universalism is vast. This thesis could not possibly fully traverse it all. As such, I continue by highlighting a few approaches to the topic found in various parts of human rights scholarship. Much of what is found in these approaches mirrors the “natural rights”/“morality” thesis, highlighting that human rights retain a special status in the hierarchy of our moral thinking. As Raz explains it, “Rights have a special role in our moral universe”²⁵⁸. This

²⁵⁶ Preamble to the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

²⁵⁷ Preamble to *Convention on the Elimination of All Forms of Discrimination Against Women*, UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13. See also the Preamble to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976), which acknowledges a “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.

²⁵⁸ Joseph Raz, “Human Rights in the Emerging World Order”, (2010) 1:1 *Transnational Legal Theory* 37.

underpinning has thereby led to what has been described as a wide cultural and political uptake of the human rights ideal.²⁵⁹

Although there may be differences in the degree to which universalism scholars see human rights as natural rights, they all nevertheless share common strands of similarity on the fundamental and inalienable nature of these naturally grounded rights, by virtue of these rights belonging to human beings. In this connection, Cranston contends that human rights are the same things as natural rights, and even though they have achieved maturation over an extended period of history, and have been referred to in different ways over this journey, this is merely linguistic rebranding which has not impacted the essence and philosophical idea inhering these rights.²⁶⁰ This perspective largely mirrors Ignatieff's take, which posits that "our species is one, and each of the individuals who compose it is entitled to equal moral consideration. Human rights is the language that systematically embodies this intuition"²⁶¹. This idea, which informs the universality orthodoxy, is that all human rights drive a fundamental body of universal moral entitlements which have application to them in a state of nature, and which do not originate from political intervention, but rather, are protected institutionally by such intervention. In this regard, Simmons views human rights as "those natural rights that are innate and cannot be lost", neither can they be given-away, forfeited or taken away.²⁶² This, argues Beitz, another universalism scholar, is the case, as human rights are not given based on any particular or unique relationship with any government,

²⁵⁹ See for example, Fiona Robinson, "The Limits of a Rights-based Approach to International Ethics", in Tony Evans, ed., *Human Rights Fifty Years On: A Reappraisal*, (Manchester: Manchester University Press, 1998).

²⁶⁰ See Maurice Cranston, *What are Human Rights?* (London: The Bodley Head Ltd., 1973), and Maurice Cranston, "Are there any Human Rights?", (1983) 112:4 *Daedalus* 1.

²⁶¹ Michael Ignatieff, *Human Rights as Politics and Idolatry*, (Oxfordshire: Princeton University Press, 2001), at pp. 3-4.

²⁶² A. John Simmons, "Human Rights and World citizenship: The Universality of Human Rights in Kant and Locke", in *Justification and Legitimacy: Essays on Rights and Obligations*, (Cambridge: Cambridge University Press, 2001), at p. 185.

institution, or governing individual such as monarch, but instead, exist even in the absence of any such conditional relationship.²⁶³

As such, it is the underpinning morality imperative of these human rights, possessed by all human beings, which determines their availability to humanity as a whole. One scholar who advances this approach to universalism is Tasioulas, who, in his writings, captures three important notions to the universality of human rights, these being, firstly, that human rights are requirements of morality, secondly, that human rights belong to every person at all times, and thirdly, that people have human rights, simply because they are human beings.²⁶⁴ These, argues Tasioulas, give human rights their special place in moral thought, capturing what he describes as the “normative core”²⁶⁵ of human rights. As he puts it – “With the language of human rights we embark on a distinctively moral discourse...[going] beyond the domain of interests and capabilities in order to capture the distinctive moral character of human rights”²⁶⁶.

In developing his approach to the universalism literature, which centralizes morality, Tasioulas highlights three key features which explain the significance of rights in moral thinking. These are that rights are sources of duties; rights are individualistically grounded; and they are a directed character.²⁶⁷ On these bases, rights therefore become the basis of imposing duties upon others, duties that are embodied with certain responsibilities, with any failure to perform these

²⁶³ Charles Beitz, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009), at pp. 52-53.

²⁶⁴ See, for example, John Tasioulas, “The Moral Reality of Human Rights”, in Thomas Pogge, ed., *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, (Oxford: Oxford University Press, 2007), and John Tasioulas, “On the Nature of Human Rights”, in Gerhard Ernst & Jan-Christoph Heilinger, eds., *The Philosophy of Human Rights: Contemporary Controversies*, (Berlin: De Gruyter, 2012).

²⁶⁵ Ibid, (*The Philosophy of Human Rights...*), at p. 17.

²⁶⁶ Ibid, at p. 22.

²⁶⁷ John Tasioulas, “Taking Rights out of Human Rights”, (2010) 120:4 *Ethics* 656, at pp. 656-657.

duties and responsibilities resulting in a “wronging of the right-holder”²⁶⁸. Hence, the relationship that exists between the right-holder and the duty-bearer becomes a moral one, such that where violations of these rights, human rights, occur, someone must be made to answer for the failing. This, claims Tasioulas, demarcates these rights from other universal interests, giving them a “distinctively moral discourse”²⁶⁹. Douzinas as well, supports this core morality imperative of human rights when he explains that – “Human rights are moral rights or claims by individuals, which may or may not be recognized by a particular legal system... [and] introduce certain minimum standards of treatment to which people are entitled and create a moral framework within which state policy, administration and the law should operate”²⁷⁰.

In much the same way as Tasioulas, Gewirth also centres morality as a major aspect of the rationale for the universality of human rights, and posits that human rights are a special subset of moral rights.²⁷¹ To this extent, whether these human rights are written in a treaty or declaration, or in any domestic law for that matter, they have moral force, as their existence transcends law or practice. This is because their efficacy relies on them having normative force, even where the law may negate or ignore these human rights. In this regard, Gewirth, Douzinas, and Tasioulas are at one, as Tasioulas has explained that “[i]t is not necessary for human rights to exist that they be enforceable, or enshrined in law, or even socially recognized as rights”²⁷². The innateness of these rights, hence, is the basis for their existence, rather than the presence or absence of any particular

²⁶⁸ Ibid, at p. 657.

²⁶⁹ Supra, note 264 [Tasioulas, “The Moral Reality of Human Rights”], at p. 22.

²⁷⁰ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Hart Publishers, 2000), at p. 9.

²⁷¹ Alan Gewirth, *Human Rights: Essays on Justification and Applications*, (Chicago: Chicago University Press, 1982), at p. 1.

²⁷² Supra, note 264 [Tasioulas, “On the Nature of Human Rights”], at p. 36.

relationship, or the recognition of any geographic place, or the attachment of an individual to any special group.²⁷³

Gewirth's similarity of approach in this regard is clear, as he argues that the universal nature of human rights is legitimized by the fact that these human rights are "*generic rights*", as they are rights for the "agency, freedom and well-being" of humans, and "directly enter into the supreme principle of morality"²⁷⁴. The argument being made by Gewirth here, is that all potential right-holders have inherent capabilities and qualities which allow them to advance claims that are geared towards the protection of certain interests, such as the freedom and well-being that he speaks to. When these right-holders also recognise the free agency of other right-holders to make similar claims to their freedom and well-being as well, then the free agency or humanity of all, legitimises these claims. It is in this scenario of mutual acceptance and legitimization of claims to freedom and well-being, therefore, that individuals pursue a worthwhile life. This element of mutuality in Gewirth's analysis is supported by Waldron, for instance, who makes the case that a direct result of the nature of human rights, is that where one claims a right, that individual is also bound to recognise the exact same claim by someone else.²⁷⁵ When this becomes the case, says Waldron, such rights become "universalistic and universalisable"²⁷⁶.

The case for the universality of human rights has also been made by Griffin, who explains that in understanding human rights, what is important is that we consider these rights to be "what

²⁷³ Ibid, at p. 37.

²⁷⁴ Alan Gewirth, *Reason and Morality*, (Chicago: University of Chicago Press, 1978), at p. 64.

²⁷⁵ Jeremy Waldron, *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man*, (Routledge, 1987), at p. 197.

²⁷⁶ Ibid.

is needed to function as a normative agent”²⁷⁷. This, he explains, references those interests that are pivotal to all normative agents, such that they are enabled to live autonomously, in pursuit of a life that is worthwhile. With this approach, Griffin appears to limit the range of interests that have the capacity to generate a right. What he is clear on, however, is that human rights should be grounded in “personhood”²⁷⁸, as this gives them a much more substantive foundation. In explaining this, Griffin notes that “[g]rounding human rights in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human good or flourishing, but merely to what is needed for human status. They are protections of...a characteristically human life, not of a good or happy or perfected or flourishing human life”²⁷⁹. Human rights, therefore, protect fundamental interests that are held by normative agents. It is in this proposition that Griffin’s universality of human rights resides, as the ultimate purpose of these rights is to protect the vital interests and needs that all human beings have, and which they autonomously pursue, with the aim of a more worthwhile life.

But what are these universal interests and needs that must be protected? This is an important consideration, in light of the absence of agreement on this aspect of the debate in the literature²⁸⁰, although consensus appears to exist on the point that these interests and needs are rights for the protection and benefit of all human beings, and are rights that are deserved. Notwithstanding the divergencies on the “what”, in justifying the universality of human rights, one thing that is consistent in universalism scholarship is that there is a universal necessity to secure or safeguard certain things that are fundamental to human autonomy and agency.

²⁷⁷ James Griffin, *On Human Rights*, (Oxford University Press, 2008), at p. 88.

²⁷⁸ *Ibid*, at p. 33.

²⁷⁹ *Ibid*, at p. 34.

²⁸⁰ Marcus Arvan, “Reconceptualizing Human Rights”, (2012) 8 *J. of Global Ethics*, 91.

As regarding the “what” of universal human rights, William Talbott sets out to settle a series of human rights which he argues should be universal. In constructing his rationale for the proposed universal human rights that he sets out, Talbott underscores that “[t]he basic human rights are the rights necessary for the development and exercise of autonomy”²⁸¹, and posits that these rights should be guaranteed for two basic reasons. Firstly, because human beings are “capable of autonomy and should be permitted to develop and exercise it”²⁸², and secondly, because these rights “contribute to...well-being”²⁸³. While Talbott is not of the view that autonomy is critical to well-being, he nevertheless believes that with all things being equal in human society, “autonomous lives are usually happier than nonautonomous lives”²⁸⁴.

On all of the foregoing bases, therefore, Talbott proffers these particular rights to be universal – physical security; physical subsistence (to earn, for those who can); education; freedom of the press; freedom of thought and expression; freedom of association; personal autonomy free from paternalistic influence; and the children’s rights to what is necessary for proper development, cognitively, emotionally, physically, and behaviourally.²⁸⁵ To this list, Talbott has also argued that democratic political rights should be added, such as the right to vote, to engage in political opposition, to run for office, among others, on the basis that in the exercise of the earlier rights he enumerates, democratic values demand this wider remit, in order to protect a rights-respecting democracy. Going further, a major part of this democracy aspect of universal human rights for Talbott, is the place of the judiciary. In his view, “No democratic system will reliably protect basic

²⁸¹ William Talbott, *Which Rights Should be Universal?* (Oxford University Press, 2005), Kindle edition, at Location 1675 of 3247.

²⁸² Ibid.

²⁸³ Ibid, Kindle edition, at Location 1681 of 3247.

²⁸⁴ Ibid, Kindle edition, at Location 1982 of 3247.

²⁸⁵ Ibid, Kindle edition, at Location 2031 of 3247.

human rights unless it includes an independent judiciary to enforce them”, and as such, “...in addition to the usual democratic rights, a rights-respecting democracy must also include a reasonably independent judiciary”.²⁸⁶

Talbot’s over-arching argument on universal human rights (as he identifies them), is therefore undergirded by the basic proposition that all human beings have the capacity to make judgements about their own good, and that human rights “provide the background conditions that develop and enable them to exercise it”²⁸⁷. This is not unlike the argument crafted by Rawls that human rights reflect the basic ingredients that are necessary for individuals to have the capacity to effectively engage in social interaction.²⁸⁸ Each society, hence, indicates Rawls, has an obligation to protect interests that are fundamental to this engagement, with the underlying objective being to set a “necessary, though not sufficient, standard for the decency of domestic political and social institutions... [such that] they are binding on all peoples and societies”²⁸⁹, hence the universality. To this extent therefore, there would be no apparent need to apply specific religious, philosophical, or moral doctrines, considering that human rights flow from a need to protect and ensure individual subsistence.²⁹⁰ Ultimately then, as Rawls sees it, the significance of human rights and their universality is to “limit... a regime’s internal autonomy”, so that the individual members of any given society are empowered to actualize their autonomy.

²⁸⁶ Ibid, Kindle edition, at Location 2319 of 3247.

²⁸⁷ Ibid, Kindle edition, at Location 247 of 3247.

²⁸⁸ John Rawls, *Law of the Peoples*, (Cambridge University Press, 1990), at p. 80.

²⁸⁹ Ibid.

²⁹⁰ Ibid, at p. 87.

Another widely cited scholar who writes extensively on human rights universalism is Jack Donnelly. Donnelly formulates a tri-partite approach to understanding the universality of human rights, these being the *functional universality*, *international legal universality*, and *consensus universality* “senses”. As a starting point, Donnelly considers that human rights are “equal rights”²⁹¹ that individuals have, by virtue of being human, with these rights being “inalienable”²⁹², and not subject to being earned or lost. In this context, thus, human rights are “universal”²⁹³. While as Donnelly accepts, this operates at the conceptual level, it likewise, importantly, operates at the substantive level as well, hence, his tri-partite “senses”²⁹⁴ of substantive universality.

Describing *functional universality*, Donnelly indicates that this sense of universal human rights emerges from the recognition that, with modern markets and globalization, there are threats to human dignity, similar to those threats emanating from post-war Europe, for which human rights enforcement is the “only effective means to assure human dignity in societies dominated by markets and states”²⁹⁵. In this way, universal human rights serve a functional purpose, “[w]hatever our religious, moral, legal and political resources, [as] we all need equal and inalienable universal human rights to protect us from those threats”²⁹⁶.

International legal universality, for Donnelly, engages the acknowledgment of the “widespread active endorsement of internationally recognized human rights law”²⁹⁷. To

²⁹¹ Jack Donnelly, “The Relative Universality of Human Rights”, (2007) 29:2 *Hum. Rts. Q.* 281, at p. 282.

²⁹² *Ibid.*

²⁹³ *Ibid.*, at p. 283.

²⁹⁴ *Ibid.*, at p. 282.

²⁹⁵ *Ibid.*, at p. 288.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

demonstrate this, Donnelly references the UDHR for example, which has been “elaborated” in a variety of international instruments dealing with such matters as discrimination against women (CEDAW), the protection of children (Convention of the Rights of the Child), civil and political rights (ICCPR), social and economic rights (International Covenant on Economic Social and Cultural Rights), as well as basic human rights (the AfCHPR; ACHR; and the ECHR). Although international legal universality operates at the inter-state level, explains Donnelly, the rights embodied in that “universal” framework have penetrated more deeply, and have become part of the *values* of movements for social justice and political opposition, for instance.²⁹⁸ Donnelly also points to the ways in which internationally recognized human rights have been incorporated into wider international law, such as in global trade and finance, migration, and access to pharmaceuticals.²⁹⁹ The outflow of this concludes Donnelly is that states “clearly have *chosen*, and continue to *choose*, human rights over competing conceptions of national and international political legitimacy”³⁰⁰.

This “choice” identified by Donnelly, underpins his third conceptualization, *overlapping consensus universality*, wherein, in spite of the vast variety of cultural and anthropological practices that prevail across the world, human rights are becoming the “preferred option”, even though there is “great variety of social practices other than human rights which provide the basis for realizing foundational egalitarian values”.³⁰¹ This third “sense” of universality from Donnelly borrows from Rawls’ “overlapping consensus” argument, that society can accomplish such a consensus across the world’s comprehensive moral doctrines, leading to an overlapping consensus

²⁹⁸ Ibid.

²⁹⁹ Ibid, at p. 289.

³⁰⁰ Ibid.

³⁰¹ Ibid, at p. 291.

that is consistent with political liberalism.³⁰² What this *overlapping consensus universality* signifies, argues Donnelly, is that “the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world. This convergence, within and between civilizations, provides the foundation for a convergence on the rights of the [UDHR]”³⁰³. The reason for this, suggests Donnelly, is that no culture is ostensibly or naturally incompatible with human rights, as all cultures are “immensely malleable”. As such what emerges is an “overlapping consensus” on a political conception of justice. A “justice” which flows through the mechanisms of human rights, notwithstanding the cultural and political diversity in the international society. To this extent therefore, human rights become a part of the universal political space, not so much because of cultural domination by any dominant power per se, but more so, because states respond to “some of the most important social and political aspirations of individuals, families, and groups, in most countries of the world”³⁰⁴. This, says Donnelly, “principally reflects [the UDHR’s] cross-cultural substantive attractions”, and as such, when people are given the opportunity to, they will choose human rights, “irrespective of region, religion, or culture”³⁰⁵.

4.3. Cultural Relativism and Universalism

Cultural relativism is a primary source of contestation to the universality of human rights. Cultural relativism “insists that human rights cannot be universal because, as a matter of social fact, cultures maintain highly divergent mores and conceptualize human rights differently, or not

³⁰² See generally, John Rawls, *The Law of Peoples*, (Harvard: 1999) and John Rawls, *Political Liberalism*, (Columbia: 1996), at pp. 133-72.

³⁰³ Supra, note 291, [Donnelly – “*The Relative...*”], at p. 291.

³⁰⁴ Ibid. at p. 291.

³⁰⁵ Ibid, at p. 292.

at all, and those mores conflict in intractable ways that belie partnership with ‘universality’”³⁰⁶. The posture of cultural relativists, including TWAIL scholars, is not that international human rights instruments are not legally valid because they interfere with cultural traditions, but instead that the values that are codified in their instruments, meaning the rights, either “impose a value hegemony anathema to their cultural traditions...or...often receive interpretations informed by cultural biases that fail to acknowledge alternative, but equally valid, cultural constructions of these legally codified principles”³⁰⁷.

Cultural relativism is a challenge that is primarily raised by non-Western States, many of them arguing that the close relationship between liberal Western thought and human rights codifications forces Western norms upon them. In this regard, these non-Western States analogize *universalism* to *colonization*, because, in their view, human rights have been argued to be derived from Eurocentric or imperial norms and values, and do not, in many instances, articulate some of the dominant cultural values of Third World States. The contention, therefore, as Ibhawoh explains it, is that “moral codes and social institutions reflect a vast scope of cultural variability and that such variations should be exempt from outside criticism...[based on the] notion of communal autonomy and self-determination... [which recognizes] infinite cultural variability in human society and no absolutes”³⁰⁸.

³⁰⁶ Robert D. Sloane, “Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights”, (2001) 34:3 *Vand. J. Transnational L.* 527, at p. 531.

³⁰⁷ *Ibid*, at p. 540.

³⁰⁸ Bonny Ibhawoh, “Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse”, (2001) 19:1 *Netherlands Q. of Hum. Rts.* 43, at p. 46.

The theory of cultural relativism covers a broad spectrum of ideas, with a number of variations. This is partly attributable to how culture is conceptualized. Boas³⁰⁹, for example, offers a conceptualization of culture that presents it as a static and homogenous entity which is distinct and largely unamenable to change.³¹⁰ This approach has been described as “time insensitive”, determining “the destiny of the population and the ways in which they think, feel, judge and behave”.³¹¹ It has also been critiqued as being highly favourable to suppressive political regimes, which justify certain repressive conduct by anchoring themselves to static notions of what culture represents.³¹² On the other end of the spectrum lies what might be described as the contemporary conceptualization of culture, which views it as “unbounded, contested, and connected to the relations of power”³¹³. This approach to conceptualizing culture highlights its “internal inconsistencies, conflicts and contradictions”³¹⁴, thus making culture more fluid, and is consistent with Merry’s analysis that the “boundaries” of culture are fluid, and that it is “marked by hybridity and creolization rather than uniformity or consistency”³¹⁵. In spite of such varying conceptualizations of culture, what is agreed, however, is the significance that it has in influencing social, political, and ideological aspects of individual human behaviour in society.³¹⁶ As An-Na’im describes it, culture is a “primary force in the socialization of individuals and a major determinant

³⁰⁹ Franz Boas, *The Mind of Primitive Man*, (Forgotten Books, 2012). See, also, Ruth Benedict, *Patterns of Culture*, (Routledge & K. Paul, 1961).

³¹⁰ See, Ann-Belinda Preis, “Human Rights as a Cultural Practice: An Anthropological Critique”, (1996) 18 *Hum. Rights. Q.* 286, at p. 295.

³¹¹ Xiarong Li, *Ethics, Human Rights and Culture: Beyond Relativism and Culture*, (Palgrave Macmillan, 2006), at pp. 9-10.

³¹² See M. Iovane, “The Universality of Human Rights and the International Protection of Diversity: Some Theoretical and Practical Considerations”, (2007) 14 *Int’l. J. on Minority & Group Rights* 231. See also, L. Donoho, “Relativism versus Universality in Human Rights: The Search for Meaningful Standards”, (1990-1991) 27 *Stan. J. of Int’l. L.* 345.

³¹³ Sally Engle Merry, “Human Rights Law and the Demonization of Culture (And Anthropology along the way)”, (2003) 25 *PolAR* 55, at p. 67.

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*, at pp. 55 and 64.

³¹⁶ See C. Geertz, *Interpretations of Cultures*, (Basic Books, 1973), at p. 49.

of the consciousness and experience of the community... [and is] powerful and deeply embedded in... self-identity and consciousness”³¹⁷. With culture being so pivotal to human society, therefore, cultural relativism can be understood to be a recognition of the impact that culture has on the way in which judgements and evaluations are made by individuals in a given society.³¹⁸

Stricter versions of cultural relativism hold two main beliefs, firstly, that values and moral beliefs are distinctly culturally specific³¹⁹, and secondly, that the spectrum of variations between cultural beliefs and values among societies is so wide that the possibility of constructive dialogue between cultures is not possible.³²⁰ Indeed, this genre of cultural relativism claims that cultures are incomprehensible to each other.³²¹ As Cassese underscores it, any search for human rights universality is an effort in vain, because of “profound divergences in the philosophical conception of human rights”, and the fact that “[n]ot only are human rights observed differently... in different countries; but they are also conceived differently”.³²² In the context of human rights, hence, strict cultural relativism means that “local cultural traditions... properly determine the existence and scope of [human] rights enjoyed by individuals in a given society [and] no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable”³²³.

³¹⁷ Abdullahi An-Na'im, "Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment", in Abdullahi An-Na'im, ed., *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1995), at p. 23.

³¹⁸ A. Rentlen, "Relativism and the Search for Human Rights", (1988) 90 *American Anthropologist* 56, at p. 57.

³¹⁹ W. Meyer, "Toward a Global Culture: Human Rights, Group Rights and Cultural Relativism", (1996) *Int'l J. on Group Rights* 169, at p. 175.

³²⁰ See, T. Spaak, "Moral Relativism and Human Rights", (2007) 13 *Buff. Hum Rights Rev.* 73, at p. 75.

³²¹ Ibid.

³²² Antonio Cassese, "Human Rights in a Challenging World, (Philadelphia: Temple University Press, 1990) at pp. 50-51.

³²³ Fernando R. Tesón, "International Human Rights and Cultural Relativism", (1984-1985) 25 *Virg. J. of Int'l. L.* 869, at pp. 870-871.

This approach has been criticized in various parts of the literature, but the essential evaluation is that “by limiting critical assessment of human works [strict cultural relativism] disarms us, dehumanizes us, leaves us unable to enter into communicative interaction; that is to say, unable to criticise cross-culturally, cross-sub-culturally, cross-individually, [ultimately leaving] no room for criticism at all. In other words, behind relativism nihilism looms.”³²⁴. I agree with this position, as strict cultural relativism defeats any interaction and communication across cultural lines and has the potential of shielding certain cultural practices from mainstream international human rights discussion or debate, on the premise that certain cultural beliefs, values or practices are “incomprehensible” to those that are outside. The implication or consequence of this could potentially be that political actors and regimes avoid scrutiny from external checks and balances of any meaningful kind. This in turn fuels the risk of oppression in certain cases, based on the claims that cultural values are internal, context specific, and immune from comprehension to others who are outside of a particular cultural boundary.

A more moderate articulation of cultural relativism, however, exists in other parts of the literature. Dembour, for example, while contending that universalism bears the potential to convey arrogance, as it “excludes the experience of the other”³²⁵, strict cultural relativism risks indifference to immoral situations.³²⁶ Similarly, Mullender insists that it is not the case that universalism and cultural relativism cannot accommodate the insights of each other³²⁷, “[a]s those

³²⁴ I. C. Jarvie, “Rationalism and Relativism”, (1983) 34 *British J. of Soc.* 44, at p. 45.

³²⁵ Marie-Benedicte Dembour, “Following the movement of a pendulum: between universalism and relativism”, in Jane Cowan, Marie-Benedicte Dembour & Richard Wilson, eds., *Culture and Rights: Anthropological Perspectives*, (Cambridge University Press, 2001), at p. 58.

³²⁶ Ibid.

³²⁷ Richard Mullender, “Human Rights: Universalism and Cultural Relativism”, (2003) 6:3 *Critical Rev. of Int’l. Soc. & Pol. Philosophy* 70, at p. 71.

who cleave either to localism or to universalism fail to exhibit the open-mindedness associated with the determination to take human rights seriously”³²⁸. Consistent with such views, several scholars have emerged as moderate cultural relativists, recognising the benefits of both universalism and cultural relativism, and attempting some measure of reconciliation between the two. Moderate cultural relativism acknowledges the inimitable value of culture in human rights discourse, and as such, aligns more so with a far less strict conceptualization of culture. In this regard, culture is conceptualized as unbounded and fluid, contested, and amenable to reform, by virtue of its porous boundaries. In this way, culture is liable to be influenced, despite diverse interpretations of human rights, as one moves across cultures. As An-Na’im explains it – “Despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a ‘common’ culture of universal human rights”³²⁹. The goal here, therefore, is to make human rights values more acceptable and much better implemented across cultures, and to make human rights more culturally legitimate, validating “human rights in terms of the values, norms, and processes of change belonging to the relevant cultural traditions”³³⁰. In a similar vein, Lenzerini posits that when we rationalize rights based on a recognition of a given culture, and attribute meaning that is “culturally intelligible in light of the intellectual patterns of the community”³³¹, support for a given value no longer becomes viewed as external, or as an affront to national sovereignty.

³²⁸ Ibid, at p. 91.

³²⁹ Abdullahi An-Na’im, “Problems and Prospects of Universal Cultural Legitimacy for Human Rights”, in Abdullahi Ahmed An-Naim & Francis M. Deng, eds., *Human Rights in Africa: Cross Cultural Perspectives*, (Brookings Institution, 1990), at p. 321.

³³⁰ Ibid, at p. 339.

³³¹ Federico Lenzerini, *The Culturalization of Human Rights Law*, (Oxford University Press, 2014), p. 551 of 1920 – Apple Books electronic edition.

Also critical to moderate cultural relativism is the encouragement of internal discourse, as this fosters reform. The goal of internal discourse is to avoid the appearance of values being dictated from outside, while encouraging the reinterpretation of cultural beliefs from the inside³³², thereby promoting conformity to international human rights law. As An-Na'im states, "There must be room for external influence, which is considerate and sensitive to cultural concerns, while committed to enlightened ideals which can be shown to be the common wisdom of mankind"³³³. This internal discourse is also accompanied by cultural dialogue, wherein diverse cultures, building on the internal discourse agree on the meaning and scope, and implementation of human rights.³³⁴ Renteln takes a slightly different approach to this perspective, claiming that there might realistically be absence of support for some international human rights norms, primarily because there would not be support for those rights, worldwide. As such, international human rights law would be reduced to those rights that are accepted by major cultural traditions.³³⁵ An-Na'im disassociates from this approach, arguing instead that to adopt that perspective is to be "content with the existing least common denominator"³³⁶. The alternative for An-Na'im therefore, is to facilitate cross cultural dialogue with a view towards broadening the content and quality of consensus among various cultural traditions, so that the widest possible foundation and range is accomplished for the protection of human rights. The more the dialogue occurs, suggests An-Na'im, the greater there is commonality of what constitutes international human rights across

³³² Abdullahi An-Na'im, "The Rights of Women in International Law in the Muslim Context", (1987) 9 *Whitter L. Rev.* 491, at p. 515.

³³³ *Ibid.*

³³⁴ *Supra*, note 320, at pp. 27-28, [Abdullahi An-Na'im, "Toward a Cross Culture Approach..."].

³³⁵ Alison Dundes Renteln, *International Human Rights: Universalism versus Cultural Relativism*, (Quid Pro Quo Book, 2013), at pp. 62-65.

³³⁶ *Supra*, note 317, at pp. 19-20, [Abdullahi An-Na'im, "Toward a Cross Culture Approach..."].

cultures. This ultimately fosters co-operation and enhances the influence and acceptability of universal rights at the domestic level.³³⁷

Donnelly also supports the moderate approach to cultural relativism, as he insists that there is a place for cultural particularity in human rights universalism. Donnelly contends that there can be universality without imperialism. The danger arises, claims Donnelly, where there is “excessive or false universalism”. Donnelly’s argument in this regard, starts with the proposition that rights are “interests that have been specifically entrenched in a system of justifications”, and which have been substantially transformed, to such an extent, that they have now been “given priority, in ordinary circumstances” over things such as “utilitarian calculations, mere interests, or considerations of social policy”.³³⁸ To this extent, at least theoretically, these (human) rights have come to imply a body of morally weighty social norms that take precedence, and are only defeasible in limited circumstances. As such, the international human rights norms, laws, and values that we have, even where there is incomplete acceptance by some, must be used to challenge and sanction objectionable conduct. This of course would be conduct that does not justify acceptance by the wider human family.

To highlight the efficacy of this reasoning, Donnelly points, for example, to the use of *universal* human rights norms to challenge such behaviours as anti-Semitism, bonded labour of “untouchables”³³⁹ in India, and violence against homosexuals. In the latter regard, Donnelly’s

³³⁷ Abdullahi An-Na’im, “State Responsibility Under International Human Rights Law to Change Religious and Customary Law”, in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives*, (University of Pennsylvania Press, 1994), at p. 173.

³³⁸ Jack Donnelly, *The Concept of Human Rights*, (Routledge: London & New York, 1985), (e-book edition.), at p. 28.

³³⁹ *Supra*, note 291, at p. 304 [Donnelly, “The Relative Universality...”]

point is that because international human rights norms and laws engage the *value* of the protection and security of the person, where a state refuses to protect sexual minorities on the basis that same-sex intimacy is immoral, for instance, that state would be violating the basic human rights to security and protection of the persons who are being targeted. To allow that state impunity in such a situation would be thoroughly incongruous with any plausible conception of the duty by that state to protect individual human rights, dignity, and personal autonomy. That incongruity and implausibility would be heightened where such persons, solely on the basis of their sexuality, are imprisoned or killed by the state as punishment for exercising a consensual expressive freedom. In Donnelly's view, with which I concur, no amount of cultural relativism or disagreement on human rights' universality could justify such a situation. The concern for Donnelly, therefore, is not universality in its conceptual or substantive essence, (and which he believes can withstand critique from cultural relativism), but where that universality becomes what he describes as "arrogant and abusive 'universalism'", and "perverse 'unilateral universalism'"³⁴⁰.

Sloane is similarly attuned to this rejection of the "crude relativist challenge", and has argued that rejection of universal human rights norms and values is sometimes just a façade, reflecting the self-interests of elites rather than a genuine attempt to uphold traditions and practices of cultural communities as a whole. As Sloane observes, "frequently it is not cultural values that inhibit societies from realizing a legal order that respects universal human rights; it is the self-serving manipulation of these values by elites. Authoritarian leaders often invoke cultural relativism to cloak the characteristic abuses of totalitarian rule"³⁴¹.

³⁴⁰ Supra, note 291, [Donnelly, *"The Relative"*], at p. 305.

³⁴¹ Supra, note 306, [Sloane], at p. 585.

A similar assessment has been offered by Tharoor, who argues that while the application of *universal* human rights values might unfold in different ways in various cultural contexts, the interplay between these cultural interpretations and the universal norms can only enrich the way we understand and implement human rights. In Tharoor's view, much like Sloane and Donnelly, culture is sometimes only advanced to "justify the non-observance of human rights"³⁴². This is unfortunate, suggests Tharoor, as "there is nothing sacrosanct about culture anyway[,] [as] [c]ulture is constantly evolving in any living society, responding to both internal and external stimuli"³⁴³. In this regard, the *culture* argument, claims Tharoor, may mask totalitarianism as it disregards objections of any objective criticism, and often attempts to subsume all members of a given society under a cultural framework that may not correspond to their interests. The starkness of the dilemma for cultural relativism is laid bare by Tharoor when he argues – "If one picks up the more contentious Covenant - on Civil and Political Rights - and looks through the list, what can one find that someone in a developing country can easily do without? Not the right to life, I hope. Freedom from torture? The right not to be enslaved, to be physically assaulted, to be arbitrarily arrested, imprisoned or executed? No one actually advocates in so many words the abridgement of any of these rights"³⁴⁴. Tharoor's point here, is materially reinforced by the fact that African States have codified human rights in the *African Charter of Human and Peoples Rights*³⁴⁵ in ways that are not materially dissimilar to the ways such rights are presented in any other normative international human rights instrument.

³⁴² Shashi Tharoor, "The Universality of Human Rights and Their Relevance to Developing Countries" (1990) 59 *Nordic J. Int'l. L.* 139, at p. 146.

³⁴³ *Ibid*, at p. 147.

³⁴⁴ *Ibid*, at p. 148.

³⁴⁵ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

In their approach to the study of international human rights, Marks and Clapham³⁴⁶ also express reservations about the universalist approach to the application of human rights. They argue that “universality must not simply be elided with the norms and practices of any single society or set of societies”, as “contexts count”.³⁴⁷ In developing this argument, these scholars go further to proffer that “contexts” are not monolithic nor fixed, and to that extent, achieving universality should not be premised on such a thinking. Instead, suggest the authors, “[r]ather than scrutinizing diverse traditions for their points of commonality and difference, each tradition should also be considered with a view to its contradicted or contested character, and to its capacity for change”.³⁴⁸ To that extent, therefore, “[t]he work of establishing a universal basis for human rights should become less a matter of recording consensus among cultures than of harnessing dissensus within them”.³⁴⁹

One of the ways suggested by Marks and Clapham to achieve this outcome of reconciling universality and diversity, is to draw a distinction between the concepts of *universalism* and *universality*. In this connection, the authors present *universalism* as “an attempt to eliminate particularity and achieve uniformity at [the] global level”, while they describe *universality* as “the attempt to bring out and develop the global resonance of particular ideas”. This distinction, explain the authors, avoids the implied imperious aims of *universalism*, while the “generality” of *universality* prevails. To that extent, ultimately, the universal significance of human rights, for the authors, resides in “generality” (*universality*), as opposed to “uniformity” (*universalism*).

³⁴⁶ Susan Marks & Andrew Clapham, *International human Rights Lexicon*, (Oxford: Oxford University Press, 2005)(electronic version).

³⁴⁷ *Ibid*, at p. 891 of 2316.

³⁴⁸ *Ibid*, at p. 892 of 2316.

³⁴⁹ *Ibid*.

Based on the scope of the literature so far presented in this chapter on universalism, universality, and cultural relativism, this thesis does not accept the distinction drawn between *universalism* and *universality* by Marks and Clapham, and as such, does not subscribe to it. To that extent, throughout the thesis, both terms are used interchangeably to reflect the core understanding found in the overwhelming mainstream of the literature on *universal* human rights, that these rights represent a body of norms, however manifested, that are inalienable to human beings, albeit that there may be a variety of articulations and interpretations of how such rights are exercised and constructed across cultures. As An-Na'im explains:

*The criteria I would adopt for identifying universal human rights is that they are rights to which human beings are entitled by virtue of being human. In other words, universal standards of human rights are, by definition, appreciated by a wide variety of cultural traditions because they pertain to the inherent dignity and well-being of every human being, regardless of race, gender, language, or religion ... In content and substance, I submit that universal human rights are based on two primary forces that motivate all human behavior, the will to live and the will to be free. Through the will to live, human beings have always striven to secure their food, shelter, health, and all other means for the preservation of life At one level, the will to be free overlaps with the will to live, in that it is the will to be free from physical constraints and to be secure in food, shelter, health, and other necessities of a good life. At another level, the will to be free exceeds the will to live in that it is the driving force behind the pursuit of spiritual, moral, and artistic well-being and excellence.*³⁵⁰

I adopt this simple but compelling approach to the *universal* nature of human rights, and see no compelling practicality for a distinction between *universalism* and *universality* as proffered by Marks and Clapham.

³⁵⁰ Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, (Syracuse, N.Y.: Syracuse University Press, 1990), at p. 227.

My reason for not subscribing to the distinction between *universalism* and *universality* suggested by Marks and Clapham, firstly, is that both arise from the fundamental starting premise that human rights ought to be *universal*, by their very nature. That *universal* ingredient, signifier, or quality, I argue, induces a valuing of the human condition, which is not based on hegemonic dictates, when properly understood, but rather on the essence of what I would refer to as the basic state of “human-hood”. Further, based on the wider foregoing literature discussed above, *universalism*, I contend, is the proposition that some ideas, in this case, basic human dignity, autonomy, personhood, and human-well-being, have *universal* necessity and applicability, wherever a person may live, and regardless of the cultural diaspora that he or she may belong to. (As I address shortly, this does not abrogate or make cultural nuance and diversity impossible.) Similarly, I argue that *universality* addresses the quality of something being appropriate for a variety situations, again here in reference to basic human dignity, autonomy, personhood, and human well-being. When put together conceptually therefore, *universalism* and *universality* reflect a conceptual idea that respecting human dignity, autonomy, personhood, and human well-being is a norm or value that is “necessary”, “applicable”, and “appropriate” to all human beings, notwithstanding their cultural circumstances, even though this norm or value might be reflected differently across a cultural spectrum.

My second rationale for rejecting this dichotomous approach offered by Marks and Clapham, is that, as I have demonstrated with the literature thus far, a *universal* approach to human rights is not founded on the absence of cultural diversity, but on the fundamental principle that human rights are grounded, as Tasioulas explains, in their “normative core”³⁵¹, and represent a

³⁵¹ Supra, note 265.

“distinctively normative discourse”³⁵². In a similar vein, Douzinas reminded us that international human rights are fundamentally about “minimum standards of treatment”³⁵³ for human beings, wherever they may be, and which must be found in laws, as well as in State policies and administration. Gerwith, as shown above, likewise supports this understanding of the *universal* nature of human rights, to the extent that human rights are “generic rights” to agency, freedom and well-being”. As such, indicates Griffin, we need universal human rights to function as “normative agents”, which grounds our “personhood” as human beings.

In this vein therefore, dichotomizing *universalism* and *universality*, I argue, is not necessary, in order to account for cultural relativist critiques of *universal* human rights, or for the diversity or dissensus envisioned by Marks and Clapham. Indeed, I argue that the discussions of Donnelly and others above, convincingly establish that there can be *relativity* in the application of universal human rights, in order to address more dogmatic or hegemonic presentments of universal international human rights. For instance, Donnelly spoke to *functional* universality, *consensus* universality, and international *legal* universality. All of these permutations, I argue, create space for the diversity and dissensus sought by Marks and Clapham, without the need for a distinction between *universalism* and *universality*. Similarly, as I have demonstrated with An-Na'im recently above, and in earlier discussions in this part of the thesis, notwithstanding the variety of peculiarities and diversity across cultures, human beings and societies share identifiable interests, concerns, qualities, traits, and values that “can be identified and articulated as the framework for a ‘common’ culture of universal human rights”.³⁵⁴ This understanding of human rights

³⁵² Supra, note 266.

³⁵³ Supra, note 270.

³⁵⁴ Supra, note 329.

universalism and *universality* is supported by Lenzerini, who as illustrated above as well, emphasized that rights ought necessarily to be actualized in ways that are “culturally intelligible”, in light of the “intellectual patterns of that society”. In other words, universal rights to basic moral obligations to such things as dignity and human well-being for instance, can be actualized without dismissing culture. This would be wholly consistent with Gewirth’s approach outlined earlier, that human rights are *universal*, because they are “generic rights” which give “agency, freedom and well-being”.³⁵⁵

Given the foregoing therefore, when *universalism* and *universality* are used in this thesis, it is on the understanding and recognition that both convey the same fundamental notion that human beings are entitled to human dignity, autonomy, personhood, self-actualization, and personal development, and that these are based on the *universal* principle that they are inalienable, fully accepting that these may manifest differently in various societies, based on cultural diversity. This coincides with Walzer’s³⁵⁶ view, for example, that “thin morality”, which is morality “close to the bone”, consists of normative patterns that are “reiterated in different times and places, and that are seen to be similar even though they are expressed in different idioms and reflect different histories and different versions of the world”.³⁵⁷ Indeed, these variations in cultural context might even inure to the benefit of, or induce positive changes in a given cultural context as well, suggest Marks and Clapham themselves. They explain that:

...another way of approaching the universality of human rights is to start from a conception of human rights as instruments for change...[viewing them further] in terms of the capacity of each to be reconsidered, reinterpreted and reconfigured... It is also on identifying vacillations, instabilities, contradictions, and disagreements within them, and the

³⁵⁵ Supra, note 274.

³⁵⁶ M. Walzer, *Thick and Thin*, (Notre Dame, Ind.: University of Notre Dame Press, 1994).

³⁵⁷ Ibid, at p. 17.

*transformative potentials thereby entailed...let us call this 'cross-cultural critique' ...*³⁵⁸

Universalism and universality in this thesis, therefore, are not to advance the view that all societies and cultures are to be governed by exactly the same rules or laws or policies, but instead, that those rules, laws, and policies must have the core normative values of protecting the human dignity, autonomy, personhood, and human well-being that I have so far highlighted. It is for this reason, for example, that even in circumstances where Western citizens are arrested and prosecuted in countries which are considered to have hostile, undemocratic and rogue regimes in charge, the interest of the country of origin of these hostages, is that the process, outcomes, and treatment must be fair, based on the fundamental norms and values found in universal human rights.

The upshot here is that States will have cultural and traditional differences, but to acknowledge these, or even to understand them does not mean a rejection of basic norms that guard and protect human dignity, freedom, and autonomy. Universalism and universality in human rights are not simply concerned with the assertion of inalienable rights, but more fundamentally, are about providing redress for unfairness, injustice, and inequality. As such, these rights are *universal* on account of their intrinsic and instrumental value to the dignity of human beings.

In the context of the CCJ, it is important to understand the universality of human rights, considering that my main argument is that the Court embraces IHRLN, despite the political economy and socio-cultural ecology of the Caribbean region and its sometimes culturally relativist approaches to some IHRLN. This universality of IHRLN clearly figures prominently and

³⁵⁸ Supra, note 346, (*Marks & Clapham*), at pp. 885 & 886 of 2316.

consistently in the CCJ's judicial approaches. Secondly, in the process of indigenization which the Court sees as part of its mission, it is obvious that the Court is not detained, as far as the cases reveal, by considerations of hegemony, neo-colonialism, or cultural wariness. Rather, it has embarked on a clear path that signals reflection and accentuation of regionalist aspirations and norms that are heavily *universalism*-coded or articulated. As a result of these approaches, I argue that clear transformative results are transpiring. Against that background, the study now reviews the literature on the transformative capacity of *young* courts, as a way to partly ground my later analysis of the main argument.

4.4. The Transformative Potential of Young Courts

4.4.1. Towards Understanding Transformation

A major part of the argument of this dissertation is that through its human rights adjudication, the CCJ has made a significant contribution to the transformation of Caribbean jurisprudence, particularly through what has been described in the literature as *transformative constitutionalism*. As a legal concept, transformative constitutionalism is not rooted in an objective of advancing any classic *political* agenda. Instead, it is used as a means to achieve certain emancipatory commitments, by using the law to steer state action and propel change. Transformative constitutionalism focuses on things that courts are able to do to broaden the impact of constitutional rights in the wider society, even when it is believed by some that this leads to activism or expansion of the judicial role.³⁵⁹ In short, transformative constitutionalism “envisages

³⁵⁹ See generally, P. N. Bhagwati & C. J. Dias, “The Judiciary of India: A Hunger and Thirst for Justice”, (2012) 5 *Nat’l. U. Jurid. Stud. L. Rev.* 171; Madhav Khosla, “Addressing Judicial Activism in the Indian Supreme Court: Towards an Evolved Debate”, (2009) 32 *Hastings Int’l. & Comp. L. Rev.* 55; and Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005*, (Cambridge University Press: 2013).

a meaningful improvement in the material conditions of people's lives together with a real change in legal culture".³⁶⁰

Brickhill et. al. offer us a more fulsome summary of what transformative constitutionalism captures:

*Transformative constitutionalism... is best understood as an 'enterprise of inducing large scale social change through nonviolent processes grounded in law'... [T]herefore, transformative constitutionalism is a 'project' or 'enterprise'. [I]t is specifically a political project pursued through the law... Certainly, 'transformative' constitutionalism must mean something more than the general notion of constitutionalism... Transformative adds a dynamic element of change, specifically change to socio-economic conditions and to legal culture... Under transforming conditions, the law is able to produce (or conduce towards) outcomes in line with the constitutional values of equality, multiculturalism and participatory democracy when confronted, through independent political action, with the real life conditions of individuals and groups whose vulnerability and disadvantage are reinforced by historical circumstances.*³⁶¹

Klare, also tells us that transformative constitutionalism is:

*...a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.*³⁶²

From both of these offerings, we glean that at minimum, the objectives of transformative constitutionalism are the achievement of substantive equality or equity, socio-economic transformation, and transformation of the legal culture.

³⁶⁰ Jason Brickhill & Yana Van Leeve, "Transformative Constitutionalism – Guiding Light or Empty Slogan", in eds., Alistair Price & Michael Bishop, *A Transformative Justice: Essays in Honour of Pius Langa*, (Juta Juridica: 2015), at p. 143.

³⁶¹ Ibid, at p. 148.

³⁶² K. Klare, "Legal Culture and Transformative Constitutionalism", (1998) 14 *S. Afr. J. Hum. Rts.* 150, at p. 150.

The role of courts as the agents of transformative constitutionalism has been the study of a great deal of empirical research, wherein the direct and palpable impact of certain judicial decisions on social, economic, and other transformations in given societies, is evaluated. One method has been to apply a strict causality test to determine if certain decisions have had the transformative effect, constitutionally, that was expected. This approach is exemplified in the work of Rosenberg in relation to the United States Supreme Court decision in *Brown v. Board of Education*.³⁶³ This was a landmark case in which the Court determined that state laws which had established racial segregation in public schools were unconstitutional, even where the segregated schools were otherwise equal in quality. This was a unanimous decision of the Court which declared that "separate educational facilities [were] inherently unequal"³⁶⁴ and therefore violated the *Equal Protection Clause* of the Fourteenth Amendment of the United States Constitution.

Rosenberg argued that contrary to the conventional view that *Brown* had a revolutionizing effect on race relations in the United States, and contributed to the birth of the 1960s civil rights movement, the case in fact had little effect. As such, the Court was not an agent of social change, as had been widely thought. Indeed, Rosenberg saw such assessment of the transformative impact of *Brown* as "hollow hope"³⁶⁵ and as being "flawed"³⁶⁶, and instead proffered that it was actually the work of the civil rights movement and its political mobilization, along with statutory reform over a period of time, that made the difference, as opposed to the Supreme Court's decision.

³⁶³ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954)

³⁶⁴ *Ibid*, at para. 15.

³⁶⁵ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991), at p. 156.

³⁶⁶ Michael J. Klarman, *Brown v. Board of Education and the Civil Rights Movement*, (Oxford University Press: 2007), (e-book), at p. 10.

Klarman has expressed a similar view. He points out that *Brown* “provoked greater white resistance than did earlier racial changes”³⁶⁷, “radicalized[d] southern politics”, “encouraged extremism”, and led to “retrogression”.³⁶⁸ Klarman concludes that “*Brown* did make important contributions to the 1960s civil rights movement, but they were mostly counterintuitive and occasionally, almost perverse...[It] influenced the subsequent course of American race relations – raising the salience of race issues, convincing blacks that transformative racial change was possible, encouraging blacks to litigate rather than use alternative methods of social protest..[but it also] impel[led] white southerners to try to destroy the National Association for the Advancement of Colored People, [and] create[ed] a climate ripe for violence”³⁶⁹.

Another area of American constitutional law in which Klarman advances a similar assessment of what one might describe as his thesis on the miscalculation of the transformative potential or effect of Courts, is that of same-sex marriage. In his work in this regard³⁷⁰, Klarman contends that the decisions of American courts over the years to gradually utilize constitutional law to approve and affirm same-sex marriage rights resulted in much political backlash. Political backlash, claims Klarman, “is especially likely when a court decision... contravenes public opinion”³⁷¹, and in that connection therefore, it becomes less likely that such backlash will arise where courts are more “incremental”³⁷² in making transformative social change through constitutional devices, allowing the society to “gradually adjust”³⁷³. Importantly, however,

³⁶⁷ Ibid, at p. 435.

³⁶⁸ Ibid, at p. 486.

³⁶⁹ Ibid, at p. 13.

³⁷⁰ See Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, Oxford University Press: 2013), (e-book).

³⁷¹ Ibid, at p. 537.

³⁷² Ibid, at p. 522.

³⁷³ Ibid, at p. 523.

Klarman was clear in his analysis that while same-sex marriage litigation in the U.S. might have led to political backlash, it nevertheless had several important and beneficial consequences, such as “forcing Americans to discuss and form opinions about social reform that previously would have struck most as incomprehensible”, it inspired gay rights activism, it placed a public face on the issue – allowing millions of Americans to see same-sex couples, it gave an avenue for defending against dubious and sometimes baseless conservative pronouncements about the “deleterious consequences” that gay marriage might produce, and it also “increased public support for compromise positions” on the matter.³⁷⁴ To this extent hence, claims Klarman, “gay marriage rulings met with little outright resistance”,³⁷⁵ although his larger conclusion remained true.

Klarman’s recognition of the positive effects of decisions from American courts on gay marriage, on American society, as well as those earlier positive effects noted by Rosenberg above, in relation to *Brown*, are interpreted very differently by other scholars. For Klarman and Rosenberg, while these effects are positive, they did not have “direct effect” in changing a norm. They view the accompanying “political backlash” as more the “direct effect”. Writers such as Bourdieu, however, see transformative change not only in terms of “direct effect”. Bourdieu argues that transformation can occur in “indirect” ways as well, such as where decisions of courts alter the perceptions of social actors, giving legitimacy to the worldview of the actual persons involved in the litigation.³⁷⁶ In other words, this perspective on transformative constitutionalism sees a much broader relationship between law and society, beyond just “direct effect” only. As Bourdieu puts

³⁷⁴ Ibid, at pp. 18-19.

³⁷⁵ Ibid, at p. 554.

³⁷⁶ See Pierre Bourdieu, “The Force of Law: Toward a sociology of the Juridical Field”, (1987) 38 *Hastings L. J.* 805, (translation by Richard Terdiman).

it – “The law is the quintessential form of ‘active’ discourse, able by its own operation to produce its effects”³⁷⁷.

4.4.2. Young Courts and Transformation

Studies on the work of courts and transformative constitutionalism are wide-ranging. In respect of the ECtHR, for example, it has been observed that important explanations for the Court’s transformative power include “the independent status of the court and the authority of its judges”³⁷⁸, the “socialising effect of the public nature of the Court’s judgments”³⁷⁹, as well as the way in which the Court has “fulfilled its role of interpretation [of the Convention] and standard setting”³⁸⁰, leading to such important notions and doctrines as the *margin of appreciation*, the *fair balance test*, and the principle of *positive obligations*.³⁸¹ Another area of the transformative power of the ECtHR is the impact of the Court on national law³⁸² for States subject to the Court’s jurisdiction on issues including trade union rights, access to justice and to courts, LGBTQ rights, privacy rights, and free speech rights, to name a few. A 2016 study of the ECtHR demonstrated that at some point, and to some degree, every state within the Court’s jurisdiction has made some

³⁷⁷ Ibid, at p. 839.

³⁷⁸ Janneke Gerards, “The Paradox of the European Convention on Human Rights and the European Court of Human Rights’ Transformative Power”, (2017) 4:2 *Kutafin Uni. L. Rev.* 315, at p. 322.

³⁷⁹ Ibid, p. 323.

³⁸⁰ Ibid.

³⁸¹ Ibid, at p. 324.

³⁸² See, for example, H. Keller and A. Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, (Oxford University Press: 2008); G. Martinico and O. Pollicino, eds, *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, (Groningen, European Law Publishing: 2010); L.R. Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, (2008) 19 *Eur. J. Int’l. L.* 125; J. H. Gerards & J. W. A. Fleuren, *Implementation of the European Convention on Human Rights and of the judgements of the ECtHR in national case law: A Comparative Analysis*, (Intersentia: 2014); P. Popelier, C. Van de Heyning & P. van Nuffel, eds., *Human rights protection in the European legal order: The interaction between the European and the national courts*, (Antwerp, Intersentia: 2011); I. Motoc & I. Ziemele, eds., *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, (Cambridge University Press: 2016); and K.J. Alter, L.R. Helfer & M.R. Madsen, “How Context Shapes the Authority of International Courts”, (2016) 79 *Law & Contemporary Problems* 1.

fundamental change to their domestic law, whether systemic or substantive, as a consequence of a judgement of the Court.³⁸³

One of the matters that arises for analysis in the literature, has been the transformative effect of *new* or *young* courts, where there has been some domestic democratic political transition. Much of the discussion surrounding such transitions, relative to the courts, and law and society, has been centred on whether the responses to the transitions, when considered against the wider goals of transformative constitutionalism and transitional justice, will bring meaningfully positive outcomes for democracy.³⁸⁴ In that regard, in transitional justice through constitutional transformation, the rule of law³⁸⁵ does not usually reflect or search for idealism, but rather, it is “constructed in relation to past conceptions of injustice”³⁸⁶. A large part of the analysis, hence, highlights a process of “disentrenching” – upending or reshaping the interpretation of human rights in the image of the new, more egalitarian dispensation – which becomes the purpose of the

³⁸³ See the report by the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, *Impact of the European Convention on Human Rights in States Parties: selected examples*, Strasbourg, 8 January 2016), AS/Jur/Inf (2016) 04.

³⁸⁴ See, generally, Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation”, (1997) 106:7 *Yale L. J.* 2009.

³⁸⁵ In this thesis, except where used or referenced in a specific context by a Court of or Judge, I adopt the conception of the rule of law below, advanced by the United Nations through former Secretary General, Kofi Annan, in his 2004 report – *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, (S/2004/616, 23 August 2004).

The “rule of law” is a concept ...[which] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. (Para. 6.)

³⁸⁶ *Supra*, note 384, *Teitel*, at p. 2077.

transformation or transition.³⁸⁷ In this way, “transformation occurs through the use of the law to clarify and sanction past wrongs... [It] exposes and delegitimizes the value system associated with [the past], clearing the way for transformative norm change... [and] attempts to delimit and pass judgment upon past abuses of state power”, making the society “operate as a more liberal order”.³⁸⁸

Importantly, however, this transition or transformation is not only premised on new or newly interpreted domestic constitutional law, but also on international law. Teitel describes this connection:

Another mediating concept of the transitional rule of law is international law. International law posits institutions and processes that transcend domestic law and politics... [It] is continuous and enduring. Local courts rely upon these international understandings... In the contemporary moment, international law is frequently invoked as a way to bridge shifting understandings of legality... The rule of law require[s] continuity. Such continuity [is] considered to exist in international legal norms... In periods of political flux, international law offers a useful mediating concept... Grounded in positive law, but incorporating values of justice associated with natural law, international law mediates the rule-of-law dilemma... Moreover, in its normative circumscription of the most heinous abuses, international law offers a source of normative transcendence... Whereas international law preserves the ordinary understanding of the rule of law as settled law, it also enables transformation. In so doing, it mediates the transition.³⁸⁹ [Emphases mine.]

In the context of this study, this mediating force of international law on the domestic rule of law is important, as it is this deployment of international human rights law that this thesis argues, the CCJ uses in addressing some of the human rights challenges in the region that the study discusses. This is particularly relevant, in light my discussion on Caribbean human rights reticence and wider political economy issues of North/First World hegemony.

³⁸⁷ Ibid, at p. 2059.

³⁸⁸ Ibid, at pp. 2078-2079.

³⁸⁹ Ibid, at pp. 2028-2029.

One *new* or *young* court that has been widely studied, in terms of its transformative effects, both in the context of constitutionalism and transition, particularly in the context of wider domestic democratic political transition, is the Constitutional Court of South Africa (CCSA). Describing the essence of this kind of constitutional court in the context of democratic transitions, Risteska & Shurkov explain:

*'[M]ost of what courts do is not political, but what most Constitutional courts do is political, as they select from among competing rules, interpret new ones, or act in absence of clearly articulated executive, legislative or constitutional norms.' They are policymakers even when they make a decision not to decide or to support the status quo. The policymaking role of courts in transition countries has been seen... as a cornerstone of transitioning democracy, especially due to its power to 'limit misuse of power and distortion of democracy by the political elites' and for protecting basic human rights.*³⁹⁰

What is arguably critical to the transformative mandate of that Court is that it was designed to reflect and promote “a post-apartheid vision of South Africa founded on the values of dignity, equality, non-racialism and non-sexism...[and to be] the main agent advancing transformative constitutionalism”³⁹¹. These are critically important, in light of the previous racialized, discriminatory nature of politics and governance in that country, such that what was needed was a “shift in the disgracefully racist, authoritarian, apartheid past, to a more egalitarian society”³⁹². Christiansen suggests that the roles of the CCSA are to facilitate transformation and transition by, firstly, *overseeing, guiding and correcting* lower courts tarnished by the history of apartheid, and

³⁹⁰ Marija Risteska & Emil Shurkov, “The Transformative Role of the Macedonian Constitutional Court”, Working Paper Series, Center for Research and Policy Making & Center for Social Research, Sarajevo, 2016, at p. 18.

³⁹¹ Jackie Dugard, “Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and the Constitutional Court socio-economic rights decisions, 1994-2015”, (2016) 20:8 *Int'l J. Hum. Rts.* 1132, at pp. 1132-1133.

³⁹² Melanie Murcott, “Transformative Environmental Constitutionalism’s Response to the Setting Aside of South Africa’s Moratorium on Rhino Horn Trade” (2017) 6:4 *Humanities* 84, at p. 10, online: <<http://dx.doi.org/10.3390/h6040084>>.

secondly, to transition the South African legal system and culture to democratic constitutionalism, and into a new human rights regime.³⁹³

Assessing the Constitutional Court of South Africa, in its earlier transformative role, van Huyssteen concludes that the Court:

- (a) “demonstrated a willingness to use its power of judicial review in ways which are compatible with the conventional liberal notion of constitutionalism, but has shied away from developing its role beyond this”; and
- (b) enhanced individual rights protection, primarily by “employing a notion of democracy that emphasises the protection of the weak, vulnerable and marginalised minorities and human dignity”.³⁹⁴

In the same breath, however, the author contends that the Court has shown a reluctance to “encroach” on the legislature, to solve disputes between private litigants, and to become entangled with the state over allocation of resources. van Huyssteen claims that the Court has failed to “develop a coherent and systematic theory of democracy and power, on which to base a ... ‘rigorous jurisprudence of substantive reasoning’”.³⁹⁵ Cockrell concurs, declaring that the Court has produced jurisprudence that is “wishy-washy”, and which relies on “a bland assertion that all normative options can be accommodated in harmonious coexistence”³⁹⁶. As a court dispensing transitional justice, however, within the framework of transformative constitutionalism, van

³⁹³See, generally, Eric Christiansen, “Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice”, (2010) *J. Gender, Race & Justice* 575.

³⁹⁴ Elsa van Huyssteen, “The Constitutional Court and the Redistribution of Power in South Africa: Towards a Transformative Constitutionalism”, (2000) 59:2 *African Studies* 245, at p. 258.

³⁹⁵ Ibid.

³⁹⁶ A. Cockrell, “Rainbow Jurisprudence”, (1996) 12 *South Afr. J. on Hum. Rts.* 1, at p 11.

Huyssteen suggests that its transformational worth must be viewed as “the articulation and mobilisation of a particular vision of democratic practice, not simply a mode of adjudication, and as a public product which involves government, the judiciary, other state institutions... and which lies in the vision of democracy and citizenship contained in the Constitution itself”³⁹⁷.

A review of a number of the CCSA’s decisions over the years demonstrates this “vision of democratic practice”, which aligns meaningfully with the transformational object of transformative constitutionalism. Examples of such decisions include *Minister of Home Affairs v. Fourie*³⁹⁸ which led to the legalization of same-sex marriage, and which arose out of the constitutional protection against discrimination on the basis of sexual orientation; *National Coalition for Lesbian & Gay Equality v. Minister of Justice*³⁹⁹ where consensual same-sex sexual activity between adult men was decriminalized; *National Coalition for Lesbian & Gay Equality v. Minister of Home Affairs*⁴⁰⁰ which secured equal immigration to “partners” of a permanent same-sex relationship, the same immigration rights as married heterosexual couples; *Satchell v. President of the Republic of South Africa*⁴⁰¹ which culminated in same sex partners of judges having the same employment benefits accorded to opposite sex spouses; *Du Toit v. Minister of Welfare and Population*⁴⁰² where denial of second-parent adoption rights to gay couples was established; and *J and B v. Director General of Department of Home Affairs*⁴⁰³, which granted adoptive rights after artificial insemination of one party in a female same-sex “life partnership”.

³⁹⁷ Supra, note 394, [van Huyssteen], at pp. 259-260.

³⁹⁸ *Minister of Home Affairs v. Fourie* [2005] ZACC 19.

³⁹⁹ *National Coalition for Lesbian & Gay Equality v. Minister of Justice* [1998] ZACC 15.

⁴⁰⁰ *National Coalition for Lesbian & Gay Equality v. Minister of Home Affairs* [1999] ZACC 17.

⁴⁰¹ *Satchell v. President of the Republic of South Africa* [2003] ZACC 2.

⁴⁰² *Du Toit v. Minister of Welfare and Population* [2002] ZACC 20.

⁴⁰³ *J and B v. Director General of Department of Home Affairs* [2003] ZACC 3.

In a similar vein, the Court has also worked towards a transformative constitutionalism in other ways, including, restraining governmental action where it was not satisfied that “meaningful engagement” and consultation had occurred before a city government decided to evict over four hundred occupants of inner-city residential housing. This, the Court pointed out, was to avoid “dire consequences”.⁴⁰⁴ Here, the Court outlined a new constitutional requirement of “meaningful engagement”, of its own volition and authority, as a way of supporting the new values of the post-Apartheid Constitution, thereby expanding social welfare and dignity protections.

This would not be unlike *Fourie*, for instance, where in relation to sexual orientation-related rights, the Court issued this compelling and unequivocal defence of transformational constitutionalism:

*[O]ur Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough...A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference... The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.*⁴⁰⁵

What the Constitutional Court unequivocally conveyed here was that South Africa was not just now a liberal democracy, but further, that it was now a human rights state, reformed and on its

⁴⁰⁴ *Occupiers of 51 Olivia Road v. City of Johannesburg* [2008]ZACC 1. .

⁴⁰⁵ *Fourie*, supra, note 398, at paras. 59-60.

way to a distinctly new judicial culture. In this case, the Court was clearly on a mission to advance substantive justice, rebuking the state, and giving it a one-year deadline and a collection of requirements for the eventual same-sex marriage legislation. In this way, the Court clearly leveraged its democratic authority, claiming a space for the expansion of constitutional equality in the South African state. This was also clearly an indication of a dialogic intent of the Court, with the legislature, to ensure constitutional and legislative alignment in the pursuit of justice, social change, and political transformation.

What the foregoing overview of transformative constitutionalism and the transformative potential of *young* courts has demonstrated is that the broad goal of *transformation* involves a re-orientation of how certain laws are interpreted, in order to reflect a new egalitarian legal culture. While there may be debates about whether these kinds of transformative courts are activist in nature, what appears clear is that there is an *emancipatory* essence to the work that they do and the broad outcomes that they accomplish. This is particularly so where human rights are concerned - typically done through transformative constitutionalism - and is primarily aimed at “disentrenching” older notions of what these rights mean and reflect, delegitimizing older value systems in the process. There is also, as shown above, an important degree of the use of international law in this process of transformation, as international law is used to mediate misalignments between domestic and international laws and interests.

In the context of the Caribbean and the CCJ, the *emancipatory* outcomes as I show with the cases examined and the analysis conducted in Chapters 5 and 6 respectively, relate to several things. These include the protection of LGBTQ+ persons to freely express themselves and

dress the way the wish to in public, the right of persons condemned to death to pursue violations by their governments of international human rights treaties before being put to death by the state, the right of citizens to challenge the reliance by the state on constitutional provisions that limit the exercise or enjoyment of certain fundamental entitlements, and the right of Indigenous Peoples to enjoy control and access to the resources of ancestral lands that are being exploited by multinational corporations and investors.

As this dissertation demonstrates shortly, the CCJ has been able to effectively engage in a transformational process of its own, as a *young* court, and has repeatedly shown how IHRLN may be used to mediate misalignments between international and domestic/regional laws and interests. This is done, as I argue, through a tacit acceptance of and adherence to the universalist values of IHRLN, in a manner that illustrates that the Court is not drawn in by the plantation economy culture or reluctant human rights dynamics described earlier in Chapter 3. With a vibrant alternative approach from the Court, this thesis shows that it is on an *emancipatory* trajectory, as described in transformative constitutionalism, engaging in a more egalitarian orientation in the application of IHRLN, to the interpretation of domestic/regional law.

4.5. Conclusion

This chapter has set out the theoretical framework which the study relies on for both its core argument about the human rights adjudication of the CCJ, relative to IHRLN, as well as its wider set of collateral arguments about the socio-cultural and political attitudes of significant sectors of Caribbean society to certain human rights issues. The chapter has therefore built on

the earlier contextual, conceptual and analytical ground work of the study discussing the socio-cultural and political economy construct of Caribbean society, as regards some human rights issues. The study now moves to the mapping of the CCJ's human rights jurisprudence, in order to demonstrate the tangible propensities of the Court, through its actual human rights adjudicative work.

CHAPTER FIVE

MAPPING THE CCJ'S HUMAN RIGHTS JURISPRUDENCE

5.1. Introduction

The CCJ, unlike the African Court of Human and Peoples' Rights or the European Court of Human Rights, for example, is not a human rights court *simpliciter*. Rather, as explained in Chapter 2, it is a dual-purpose regional court that adjudicates trade-related disputes under the RTC and an apex appellate apex court in regular civil and criminal matters. Notwithstanding this fact, the Court has seized the opportunity to adjudicate across the spectrum of its authority in a manner that displays cognizance and sensitivity to the human rights of the peoples that it serves. As former President of the Court, Sir Dennis Byron, has noted, even before his tenure at the Court, while he served as Chief Justice of the Eastern Caribbean Supreme Court, it was “well settled law that domestic provisions[,] whether of the Constitution or statute law should as far as possible be interpreted so as to conform to the state’s obligations under international law”⁴⁰⁶. Likewise, former Professor Winston Anderson (who is currently a Judge of the CCJ) has expressed the view academically that even though the CCJ emanated from what is fundamentally an economics treaty, “a community cannot live by economics alone. In order for it to survive and thrive, CARICOM must embrace the robust protection of human rights which on the liberal theory of western democracies reflected in Caribbean constitutions, is also fundamental to facilitating economic growth by private enterprise”⁴⁰⁷. Justice Anderson continued that:

Caribbean courts have held that in the interpretation of the Bills of Rights recourse is properly to be had to the international instruments and to the cases decided under them. Accordingly, the Court [CCJ] already has some of the tools it needs to assist in building a vibrant culture of human rights ... [I]t would seem to be both permissible and desirable to draw upon decisions

⁴⁰⁶ *Spence v. The Queen* and *Hughes v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997, Eastern Caribbean Court of Appeal, delivered April 2, 2001, at para. 37.

⁴⁰⁷ *Supra*, note 46, at p. 18. [Anderson, “The IAS and its Impact...].

*of other regional and global human rights bodies, as well as decisions of supreme courts which grapple with these issues. The market-place of ideas, which is accessed through international comparative human rights law, provides an excellent opportunity to identify “best practices” and the most appropriate solution to specific problems coming before Caribbean courts.*⁴⁰⁸

Interestingly, the CARICOM *Charter of Civil Society*⁴⁰⁹, adopted by the CARICOM Heads of Government in 1997, also deals meaningfully with the respect for human rights in the region, though importantly, it is not considered to be directly justiciable, as the Member States have simply resolved to “pay due regard to the...principles by which our Governments commit themselves to respect and strengthen the fundamental elements of a civil society”⁴¹⁰. The Charter is only mentioned in the RTC in passing, where it is recalls in the Preamble that “the Charter of Civil Society adopted by the Conference of Heads of Government on 19 February 1997 [reaffirms] the human rights of [our] peoples”⁴¹¹. As Justice Anderson points out, the Charter was not mentioned in the “dispositive sections” of the RTC, a reality which highlights a “significant human rights deficit”, in the “regional integration movement”.⁴¹²

What has become clear, notwithstanding this, is that the CCJ has not been deterred from charting a ground-breaking path of inter-connectivity between its own jurisprudence and IHRLN. This has occurred in both its Appellate and Original Jurisdictions, but as Justice Anderson has acknowledged, the former has been a “more fertile area”⁴¹³ for the adjudication of human rights

⁴⁰⁸ Ibid, at pp. 19-20.

⁴⁰⁹ Charter of Civil Society for the Caribbean Community, CARICOM Secretariat, Georgetown, Guyana, 1997, found online at https://caricom.org/documents/12060-charter_of_civil_society.pdf

⁴¹⁰ Ibid, at p. 9.

⁴¹¹ Supra, note 3, at p. 3, (RTC).

⁴¹² Winston Anderson, “The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Dimensions” (2011) 21:1 *J. of Trans. L. & Pol.* 1, at p. 8.

⁴¹³ Ibid, at p. 9.

litigation, considering that in its role as an appellate apex court, it has a broader canvass to operate, on the basis of fundamental rights provisions in Caribbean Constitutions.

In this Chapter I map and examine the human rights jurisprudence of the CCJ in detail, and consider how the Court has made use of IHRLN. In the next chapter, I then analyze this mapping and examination in order to address the research question posed in this dissertation.

5.2. Valuing IHRLN and Infusing Them into Caribbean Law

In this section, I examine three cases which demonstrate how the CCJ values IHRLN in principle, and infuses it into its fair trial jurisprudence in a variety of ways. This valuing and infusion, sometimes also determine substantive outcomes in these cases. The cases considered are *JJ v. Child Care Board and SW*, *The Queen v. Lewis*, *Hyles v. Director of Public Prosecutions*, and *Guyana Sugar Corporation v. Dukhi*.

5.2.1. JJ v. Child Care Board and SW⁴¹⁴

In this case, where a child's custody was the underlying dispute, the mother of the child in question sought an interlocutory order in the Barbados High Court to have the file notes of an officer from the Child Care Board disclosed to her. The Board had issued a report to the Court recommending that both parents be granted custody of the child, but that care and control be removed from the mother and be awarded to the father. The Report further recommended that

⁴¹⁴ *JJ v. Child Care Board and SW* [2017] CCJ 6 (AJ).

liberal access be granted to the mother.⁴¹⁵ The disclosure order sought by the mother was granted by the High Court. This decision was overturned by the Court of Appeal at the instance of the Child Care Board, which argued *inter alia*, that the High Court should not have relied as heavily as it did on international human rights law in the adjudication of the matter. When the Child Care Board succeeded at the Court of Appeal, the mother sought special leave of the CCJ to appeal the ruling to this Court. The CCJ treated the special leave hearing as the substantive hearing of the matter, and quashed the decision of the Court of Appeal, restoring the decision of the High Court to grant the disclosure order sought by the mother.

This case is one in which the CCJ pronounced in a fairly thorough way on the role of international human rights law in its jurisprudence. This was in response to the Child Care Board's argument that the High Court should not have relied on international human rights law in the way that it had, as the correct approach was to rely on the common law, in preference to ECtHR cases which did not bind Barbadian courts.⁴¹⁶ The CCJ firmly rejected this assertion, indicating that the Judge had "carefully and correctly analysed the Barbados Constitution and statute law, relevant conventions and treaties, and leading common law and ECtHR cases"⁴¹⁷. The CCJ applauded the trial court's "insightful use of international standards", and expressed the view that "[i]n the realm of human rights adjudication, it [was] a profound error to think that the modern jurisprudence of international human rights courts is of little relevance to domestic judges".⁴¹⁸ The CCJ even went further, by relying on international human rights law, to chastise the High Court for its fourteen-month delay in rendering a decision initially, stating - "It goes without saying that the best interests

⁴¹⁵ Ibid, at para. 7

⁴¹⁶ Ibid, at para. 21.

⁴¹⁷ Ibid, at para 22.

⁴¹⁸ Ibid, at para. 32.

of the child requires the practice of the courts in cases involving children to be measured against ... international standards ... that custody cases like these should normally be resolved quickly and with a material outcome.⁴¹⁹ The Court therefore used international law in this case, not only to affirm the High Court's analysis of the best interests of the child, relative to international human rights standards on the issue, but also as an instrument of chastisement. What was clear ultimately, was the Court's commitment to international human rights laws and norms.

5.2.2. *The Queen v. Ken O'Neil Lewis*⁴²⁰,

In this case, the CCJ incorporated IHRLN into its decision-making by universalizing the concept of a fair hearing and giving broader legitimacy to the concept in a manner beyond simple localized constitutionalism. In doing so, the Court reinforced in its judgement that the concept was not merely a narrow constitutional proposition that simply needed domestic interpretation, but instead, was one that required wider amplification through the wider human rights polity, as conveyed for instance in the ECHR and the ICCPR. To this end, the Court escalated the significance of the right to a fair hearing, positioning it on the plain of a universally acclaimed human right, without explicitly saying so. In my view, this demonstrates an intent on the part of the Court to associate domestic constitutional principles with wider international human rights norms and values.

⁴¹⁹ Ibid, at para. 33.

⁴²⁰ *R. v. Ken O'Neil Lewis* [2007] CCJ 3 (AJ).

In this case, the respondent *Lewis* was convicted of murder and sentenced to death in the Barbados High Court. He successfully appealed both his conviction and sentence in the Barbados Court of Appeal on the basis that he did not receive a fair hearing at his trial. A new trial was ordered. The Court of Appeal's decision rested on the fact that persons who eventually became jurors in the trial had heard certain allegations against the trial judge made by counsel for Lewis in a preliminary application to have the Judge recuse himself from the case.⁴²¹ The recusal application was grounded in remarks made by the Judge when the case had come before him on two earlier occasions, prior to the trial. Lewis alleged that those remarks suggested a bias against him. The Crown appealed this decision. The question arose as to whether the Crown could actually appeal, as the relevant statutory provision stated that an appeal was only available if the court had interpreted a provision of the Constitution. The Crown contended that the Court of Appeal had done so, while Lewis argued that all the Court of Appeal did was to apply settled constitutional principles on fair hearing to the recusal issue.

The CCJ concluded that the Court of Appeal was not engaged in an interpretation of the Constitution, but instead, had simply applied “judicially predetermined principles encapsulated in the term fair hearing”⁴²² to the facts found in this case about a recusal. Pollard JCCJ, in his concurring opinion, emphasized this by pointing to decisions of both the ECtHR and the UNHRC.⁴²³ For the CCJ, what was meant by fair hearing was already determined by the “weight of judicial authority”⁴²⁴, including the international human rights cases referred to by the Court,

⁴²¹ Ibid, at para. 2.

⁴²² Ibid, at para. 78.

⁴²³ His Lordship relied on the cases of *Fitt v. United Kingdom*, App. No. 29777/96, (16 February 2000); and *Morael v. France* Communication No. 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (28 July 1989).

⁴²⁴ Supra, note 420, at para. 93. (*The Queen v. Ken O'neil Lewis*).

and as such, as Pollard JCCJ explained, “the Court of Appeal must be seen to have applied the generally accepted right to adversarial proceedings being based on the principle of equality of arms...even though no explicit reference was made to these principles”.⁴²⁵

In associating with international human rights principles in this way, the CCJ did two important things. Firstly, it measured what the Court of Appeal found to be a lack of a fair hearing against international human rights norms to ensure that what the Court of Appeal did, comported with a wider universal human rights standard. Secondly, it crystalized a clear role for international human rights jurisprudence in the Court’s own framing of basic constitutional law principles. In both regards, the Court demonstrated and reinforced that IHRLN had an operative role in its adjudicatory approach, thereby giving IHRLN instrumental value in the jurisprudence that it produced. So, while on the substantive issue of the Crown’s right to appeal the Court decided in Lewis’ favour, the Court nevertheless took the opportunity to have a wider discussion on the meaning of a fair hearing in the circumstances of the case, relative to wider IHRLN, as it assessed the approaches of the lower courts to the issue.

5.2.3. *Hyles and Williams v. Director of Public Prosecutions*⁴²⁶

In this case, among other things, the Court was called upon to determine whether the ordering of a retrial violated the double jeopardy rule in criminal law.⁴²⁷ The Court refused to order a retrial for various evidentiary and legal reasons, but nonetheless upheld the lawfulness of retrials.

⁴²⁵ *R. v. Lewis*, supra, note 420, at para. 94.

⁴²⁶ *James Hyles and Mark Williams v. Director of Public Prosecutions* [2018] CCJ 12 (AJ).

⁴²⁷ *Ibid*, at para. 29.

In rejecting the notion of a retrial being double jeopardy, the Court relied heavily on international human rights law.

In conducting its analysis, the CCJ reasoned that Article 144(5) of the Guyana Constitution must be understood in the context of Article 14(7) of the ICCPR (to which Guyana is a signatory), which states that “No one shall be liable to be tried or punished again for an offence for which he has already been *finally* convicted or acquitted in accordance with the law and penal procedure of each country”.⁴²⁸ While this provision was plainly meant to prevent double jeopardy, the Court pointed out that this was “not an absolute rule”.⁴²⁹ The Court explained that while a state should not use the resources of that state to make repeated attempts at convicting an individual, to understand Article 144(5) as a comprehensive embargo on a retrial, where errors might have been made for instance, was not consistent with international human rights norms.

To support this proposition, the Court relied on the United Nations Human Rights Committee’s (UNHRC) General Comment 32⁴³⁰, dealing with Article 14 of the ICCPR. Paragraph 57 of General Comment 32 indicates that the “The prohibition of article 14, paragraph 7, is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal”.⁴³¹ This Comment, explained the CCJ, was proof positive of the view it took, that the ordering of a retrial by the Court

⁴²⁸ Ibid, at para 38.

⁴²⁹ Ibid, at para. 38.

⁴³⁰ General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial, Human Rights Committee, CCPR/C/GC/32 23 August 2007.

⁴³¹ Ibid, para. 56.

of Appeal was not in principle repugnant to international human rights law. While the Court, relying on the judgement from the ECtHR, accepted that the “rule of law...requires that where the Courts have finally determined an issue, their ruling should not be called into question”⁴³² and that “legal certainty presupposes respect for the principle of *res judicata*...the principle of the finality of judgements”⁴³³, it nevertheless saw that as just a “fragment of the argument”⁴³⁴. This was the case as far as the Court was concerned, as Article 144(1) of the Guyana Constitution equally required “the protection of the rights of other stakeholders in the criminal justice process and it demands, to the maximum extent possible, a fair balance between the interests of an individual and the need to ensure the effectiveness of the system of criminal justice”⁴³⁵. For the Court then, the gravamen of its position was that above all, the criminal justice process must be made to safeguard the interests and rights of all concerned. Otherwise, it would be an inefficient, and worse yet, unfair criminal justice system. To this extent, where there was a material irregularity in a trial, the Court ought properly to order a retrial, where the demands of justice validated it.

Although the retrial ordered by the Court of Appeal was ultimately reversed by the CCJ and Hyles’ acquittal restored, the case did an important thing in clarifying the fundamental criminal and constitutional law principles against double jeopardy. The CCJ did this by analyzing IHRLN which affirmed that the principle was not an absolute one. Further, the principle did not apply where the trial process was not complete, (including appeals), as was the case with Hyles. As the Court noted, the ultimate decision in each situation must be grounded in a balance of the rights of all concerned, much as IHRLN dictates. On this basis, the Court concluded that “the rights of

⁴³² *Brumarescu v. Romania*, ECtHR No. 28342/95, 28 October 1999, at para. 61.

⁴³³ *Ryabykh v. Russia*, ECtHR No. 52854/99, 24 July 2003, at para. 52.

⁴³⁴ *Hyles v. DPP*, supra, note 426, at para. 42.

⁴³⁵ *Ibid.*

accused persons finally acquitted of perpetrating very serious crimes and their right to be left alone, important as it is, cannot be seen as absolute but must be balanced against the rights of [others]. That is why in exceptional circumstances the rights of the accused must[,] to the maximum extent in fairness possible[,] give way to the rights of others”⁴³⁶.

Here again, as in *Lewis and Child Care Board*, we see the CCJ methodically infusing IHRLN into domestic law, not necessarily to make any critical or dramatic changes, but instead to create alignment, reinforce association beyond its parochial boundaries, and bolster legitimacy in its decisions. This reflects one of the uses of international law that I discussed in Chapter 4, based on Teitel’s analysis of transformative courts, that of international law being a “source of normative transcendence”. With this process of “transcendence” and infusion, the Court implicitly validates its own solidarity to these wider international human rights congruities, and simultaneously builds its own character as an international institution. This also integrates the Court in very simple ways with the brethren of international courts, burnishing its own credibility and building its own esteem through this process of infusion. In my view, this would be important to how the Court sees itself, how the Court is likely to want to be perceived by other international courts, as well as to the wider public that it serves.

5.2.4. *Guyana Sugar Corporation v. Dukhi*⁴³⁷

One other case that I use to illustrate this infusion and the valuing of IHRLN in the CCJ’s human rights jurisprudence in quite simple, but intentional ways, is *Guyana Sugar Corporation v.*

⁴³⁶ Ibid, at para. 43.

⁴³⁷ *Guyana Sugar Corporation v. Tulsieram Dukhi* [2016] CCJ 17 (AJ), (referred to below as the *GUYSUCO Case*).

Dukhi (GUYSUCO). The question that arose for resolution in this case, was whether the Guyana Court of Appeal could have interfered with an award of damages made by the High Court, when the trial Judge did not give reason for the award that was made to the plaintiff (Respondent at the CCJ). Of significance for this study, however, was the Court's approach to the collateral issue of the duty on a court to give reasons.

According to the CCJ, the duty to give reasons has taken on a "human rights" and a "constitutional" dimension, over the years, which was a shift from the original common law position of centuries ago.⁴³⁸ The Court explained that in certain instances, "the failure to give reasons [could] give rise to a breach of the right to a fair trial"⁴³⁹. Although, unfortunately, the Court did not pursue a fulsome discussion of the matter, it nevertheless signaled that "from the jurisprudence of the European Court of Human Rights surrounding Article 6 of the [ECHR]"⁴⁴⁰, the shift was evident. While the CCJ accepted the view of the duty to give reasons as expounded in international human rights jurisprudence from the ECtHR, it nevertheless rejected the appellant's claim that the absence of reasons in the High Court violated its right to "natural justice and to a fair hearing" as guaranteed under Article 144(8) of the Guyanese Constitution. The basis for this decision was that even though written reasons were not given, "[t]he trial judge's order clearly reflected ...[who] were found wholly liable in negligence"⁴⁴¹, such that an assessment of damages could be done.

⁴³⁸ Ibid, at para. 25.

⁴³⁹ Ibid, at para. 25.

⁴⁴⁰ Ibid, at para. 25.

⁴⁴¹ Ibid, at para. 27.

Notwithstanding the outcome of the case, in considering the duty to give reasons as a human right, the CCJ elevated a typically common law-rooted principle to a somewhat higher plain. This process of universalizing a key common law concept through IHRLN, again demonstrates a willingness by the Court to cascade international human rights norms into its own jurisprudential discourse, lending to a kind of evolution of its work into a transcendence of just local, basic legal norms. The signal from the Court is that its work must be built or molded in a manner that reflects unison with, and validity from international human rights norms. As my next section will show, however, this does not necessarily imply uncritical or unmodified obedience and application, but rather, in instances, implies respect but independence of use.

5.3. Respect and Independence

In this section of the study, I look at two cases which illustrate how the CCJ effectively employs IHRLN in an independent manner, while at the same time exhibiting trust in, and respect for, it. This independence is exemplified in the Court's occasional inclination to use aspects of IHRLN as building blocks in creating its own version of a particular concept or principle, or using IHRLN protections in a manner that is slightly untypical. What these two cases say about the Court, is that while it values and infuses IHRLN in its decision-making, it does so on its own terms. This speaks to the indigenizing mission of the Court, discussed earlier in this study, as well as to the decolonizing potentialities that it possesses. This is important, as the Court, in its Appellate Jurisdiction, exists parallel to the United Kingdom-based Privy Council that continues to be the apex court of most CARICOM Commonwealth countries, even though they have been politically independent from Great Britain for many decades now.

5.3.1. *Frank Gibson v. Attorney General*⁴⁴²

This case has significance for the study of the CCJ's deployment of IHRLN in several respects. First, it gives an example of how the Court proceeds in situations in which international law offers different approaches to a particular legal concept. In this particular situation, the Court was faced with two approaches to understanding "facilities", in the context of ensuring that an accused in a criminal trial has the benefit of a level playing field in the advancement of their defence. What the Court did was to adopt the narrower of the two approaches from international human rights law, from which it fashioned an indigenous "facilities" concept. This reflects the way in which the case is significant, as it demonstrates the techniques the Court employs to resolve tensions found in international law that it wishes to utilize, such that it properly advances domestic constitutional principles through alignment with wider international human rights values.

This case is also significant in two other ways. One, it depicts the approach of the Court in the way it perceives and shapes its power relative to the other branches of government, without expressly saying so, and two, it highlights that even where the Court prioritizes or emphasizes certain fundamental freedoms and basic universal human rights principles and norms, it does not ignore the responsibility it has to ensure that the administration of justice is not undermined or impaired. In other words, the Court does not behave recklessly.

In this case, the central issue was the right to a fair trial, in light of a request by the accused to have the State finance a defence expert, based on the nature of the evidence intended to be used at trial by the Crown. Briefly, the appellant was charged with murder. There were no eye-witnesses

⁴⁴² *Frank Gibson v. Attorney General of Barbados* [2010] CCJ 3 (AJ).

to the crime. The only evidence against the appellant was the forensic testimony of a dentist, who, having taken an impression of the teeth of the deceased in her upper and lower jaw, and of a bite injury found on the right bicep of the accused, poured through models, and determined “without doubt”⁴⁴³ that the injury to the appellant’s bicep was caused by a human bite mark. According to the dentist the bite mark could only have come from the deceased. Incidentally, the dentist was not a forensic odontologist, but he had done some training in the field.

On the basis of this proposed evidence, the appellant sought to have the state pay for his expert in odontology to aid in his defence. The Crown initially refused, however, it subsequently offered the equivalent of US\$1,000.00 for the expert, upon the condition that the appellant would be required to disclose any report produced, to the Crown. There were two problems with this. In the first place, the sum offered was tantamount to no assistance at all, bearing mind the costs that would be involved in retaining the expert and paying for the relevant forensic tests. Secondly, the condition attached to the offer amounted to compelled disclosure by the accused to the Crown, a concept which is unknown to Barbados criminal law, from where the case emanated. The accused refused the offer and filed a motion to compel the state to provide funding for the expert, as failing to do so would lead to a violation of his constitutional right to a fair trial. That matter was heard by the High Court and then by the Barbados Court of Appeal, both of which denied the accused’s constitutional motion, hence the appeal to CCJ under the Court’s Appellate Jurisdiction. By this time, the accused had been in custody on pre-trial detention for nearly 10 years.

⁴⁴³ Ibid, at para. 7.

At issue in this *fair hearing* claim before the CCJ, was the meaning of the term “facilities”, as used in Article 18 of the Barbados Constitution. The state’s position was that this could not be interpreted to include an obligation to finance an expert for the accused, even though he was an indigent person. The accused argued that it did. In addressing the issue, the CCJ examined how the concept of “facilities” was interpreted in the domain of international human rights law. Starting with the ECHR, the Court noted that there was more than a passing resemblance between Article 6(3) of that Convention and Barbados’ Article 18.

The CCJ examined three cases from the ECtHR and the European Commission of Human Rights. The first of these was *Jespers v. Belgium*⁴⁴⁴. In that case the Commission interpreted “facilities” to include “*all relevant elements that have been or could be collected by the competent authorities*”, the prosecution, as opposed to “relevant elements” collected by the defence at the expense of the state. In the other case, *Mayzit v. Russia*⁴⁴⁵, however, the interpretation of “facilities” was broader, and focused on what was required to secure the “*fairness of the proceedings as a whole*”⁴⁴⁶. Having examined both *Jespers* and *Mayzit*, the CCJ took the view that both “gave no support to the contention that the expression should be interpreted to include the provision of an expert funded by the State”.⁴⁴⁷ Rather restrictively in my view, and more in keeping with the restrictiveness of *Jespers*, the CCJ continued that “facilities” related to tangible things such as paper, pens, books, computer access, the prosecution’s file where disclosure is allowed by law, access to investigation materials from competent authorities, and if the accused is detained, facilities that would permit that accused to prepare for trial. The Court supported this view of the

⁴⁴⁴ *Jespers v. Belgium* (App. No. 8403/78), 14 December 1981.

⁴⁴⁵ *Mayzit v. Russia* (App. No. 63378/00), 20 January 2005.

⁴⁴⁶ *Ibid*, at paras. 77-79.

⁴⁴⁷ *Gibson v. Attorney General*, *supra*, note 442, at para. 28.

issue by reviewing *General Comment 32*⁴⁴⁸ on Article 14 of ICCPR, which deals with the rights to equality before courts and tribunals and to a fair trial. The Comment explains that “facilities” “is an important element of the guarantee of a fair trial and an application of the principle of equality of arms”⁴⁴⁹, and that “[a]dequate facilities” must include access to documents and other evidence; [which] access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory”⁴⁵⁰.

While I am of the view that the CCJ could have, on the authority of *Mayzit*, concluded that a badly needed expert in odontology was a “facility” (especially in light of the fact that the Crown was purely relying on forensic odontological evidence to try and convict the accused, an indigent person, for murder), the Court instead dealt with the issue through the more cautious and less troublesome avenues of “fair hearing” in Article 18(1) of the Constitution; the presumption of innocence in Article 18(2)(a); and the legal principle of the “pursuit of the truth” in a criminal prosecution.

Regarding the latter, “pursuit of the truth”, the Court declared that it must “ensure that at [the]... trial the truth is established”⁴⁵¹. The Court relied for this proposition on the Supreme Court of Canada’s decision in *R. v. Harrier*⁴⁵², where McLachlin J. (as she then was) affirmed that “[a]t base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community... A fair trial is one that satisfies the public interest in getting at the

⁴⁴⁸ UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32.

⁴⁴⁹ *Ibid*, at para. 32.

⁴⁵⁰ *Ibid*, at para. 33.

⁴⁵¹ *Supra*, note 442, at para. 38 (*Gibson*)

⁴⁵² *R. v. Harrier* [1995] 3 SCR 562.

truth”⁴⁵³. Harnessing the thrust of the opinion in *Harrer*, the Court ruled that the accused could not receive a fair trial if he were deprived of access to the services of the expert. It then moved on to fashioning a fix for the problem, ruling that there would be no trial, and that the charge would be dismissed, unless the parties could, on their own, but subject to the Court’s supervision, settle the issue of the payment for the defence expert. In other words, the Court was clearly not comfortable in directly compelling the state to pay, but instead created wiggle room for the State, by leaving it to them “to decide whether to provide the funding or to abandon...the prosecution of Gibson”⁴⁵⁴. The Court’s resolution, even though it did not compel the State to pay for the defence expert, vindicated the fundamental constitutional and human right to a fair trial, as articulated not only in the Barbados Constitution but in guidance from several international human rights instruments such as the ICCPR and the ECHR.

5.3.2. *August and Gabb v. R.*⁴⁵⁵

This case also helps us to understand how the CCJ aligns with IHRLN in its decision-making, drawing not only from human rights resources from international bodies and tribunals, but also from courts in its own Caribbean region. In this latter regard, we see the Court relying on the jurisprudence of the Eastern Caribbean Court of Appeal, which itself drew on IHRLN in a related precedent. Thus, the CCJ formulated its own perspective, based on a cross-section of ideas from various sources. Having done so, however, the Court then applied the principles it had extrapolated in a manner that tells us something important as well about how the Court seeks to

⁴⁵³ *Gibson v. Attorney General*, supra, note 442, at para. 38.

⁴⁵⁴ *Ibid*, at para. 41.

⁴⁵⁵ *August and Gabb v. R. Gregory August and Alwin Gabb v. The Queen* [2018] CCJ 7 (AJ).

formulate and exercise its own *political* power. As I show with my discussion below, the Court creatively refrained from fermenting any speculation about the integrity of potential Executive power, in the way it was invited by the Appellants to consider. Instead, it *protected* the Executive, and further sent signals, I argue, about how the Executive and the Legislature could cure certain shortcomings on the horizon, in respect of the legislation in issue.

To do this, the Court took a big-picture approach, followed by what I suggest was a strategic give-and-take with the other branches of government, to signal a path forward in fixing what was potentially shaping up to become a problem in Belize's newly legislated parole system. In other words, the Court used IHRLN, having made its respect for the relevant guidance it provided clear, to devise and execute an independent strategy to fix the domestic problem that had arisen. By doing so, it protected the guard rails of a fundamental human right to a fair trial for the Appellants, while at the same time safeguarding the right of the other branches of government to rightfully exercise their proper functions of governance.

In this case, both Appellants were convicted and sentenced for murder. They each appealed their conviction and sentence, with one of the major issues being the constitutionality of their sentence of imprisonment for life without parole. The Belize Court of Appeal held, by a majority, that the mandatory minimum sentence of life imprisonment without parole for murder was *ultra vires* sections 6 and 7 of the Belize Constitution (equality before the law and not being subjected to torture or inhuman and degrading treatment or punishment). The appellate court imposed a sentence of 30 years imprisonment on August, less time already served.

As a result of the Court of Appeal's decision, the National Assembly of Belize enacted three pieces of legislation. Importantly, this was done while the appeals of both August and Gabb were pending before the CCJ. Two of these pieces of legislation had implications for the pending challenge on sentencing that both men had before the CCJ. As a result, the Court dealt with the sentencing issue being litigated by the Appellants, relying on the two new pieces of legislation that impacted them, the *Criminal Court (Amendment) Act* and the *Parole Act*.

The Appellants' issues were with the new *Parole Act*. The nub of the argument against the *Parole Act* was that the Parole Board (the Board), for which the Act provided, did not have characteristics akin to a Court, was not impartial and independent, and had deficiencies in its procedures. Altogether, in the view of the Appellants, this made the entire system for imposing the minimum mandatory sentence of life imprisonment for the offence of murder unconstitutional. To support this argument, the Appellants relied on section 5 of the Belize Constitution, which states that the exercise of powers over the liberty of the citizen resides with courts. In their analysis, the Board was not a "court", and as such, the authority given to it to preside over the liberty of the offender was inconsistent with the spirit and intent of the Constitution.

In navigating its way through this argument, the CCJ looked to the international human rights jurisprudence of the ECtHR. In that forum, the issue arose in respect of the parole board in England and was litigated through under Articles 5(1) and 5(4) of the ECHR (liberty, security of the person, and unlawful detention). The leading decision from the ECtHR that the CCJ relied

upon was *Weeks v. United Kingdom*⁴⁵⁶. In that case, the ECtHR explained that “[t]he “court” referred to in Article 5 para. 4 [of the Convention]...does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country”⁴⁵⁷, but also bodies that had fundamentally common features such as independence from the Executive and capacity for the enforcement of certain substantive and procedural guarantees. With the benefit of *Weeks v. United Kingdom*, the CCJ reasoned that the Board’s role in the new scheme was not unconstitutional, even though it was not a court in the classic sense.

The Court also examined the lack of impartiality claims of the Appellants against the Board by scrutinizing the structure of the Board, which in the statute, comprised nine persons to be appointed by the Minister. The Court noted that while the Minister was involved in the selection of five of the nine persons, they were only directly required to select two. This meant that direct interference by the Executive, or undue ministerial control in the selection of the Board, as claimed by the Appellants, was not a likely outcome, as most of the other members who were not included ex-officio, needed to be appointed based upon consultation and recommendations. On this score, again, the CCJ also took its cue from the *Weeks* case and decided that it would “adopt the position of the ECtHR that, ‘the judge member and other members of the Board remain wholly independent of the executive and impartial in the performance of their duties’”⁴⁵⁸.

⁴⁵⁶ *Weeks v. United Kingdom* (App. No. 9787/82), 2 March 1987.

⁴⁵⁷ *August and Gabb v. The Queen*, supra, note 455, at para. 93.

⁴⁵⁸ *Ibid*, at para. 98.

The Court was notably careful in not wanting to imply unethical and disreputable conduct on the part of the Minister appointing the Parole Board, or the Board members themselves. To this end, it categorically declared that there was no “objective reason to conclude that the exercise of a power to select undermines independence of any person appointed”, as the Board had not yet commenced operations at the time, and to that extent, there was “no evidence of the manner in which [its] practice will develop”.⁴⁵⁹

On this particular issue, importantly, not only did the Court directly rely on the reasoning of the ECtHR in *Weeks*, it also called on the wisdom of a fellow regional court, the *Eastern Caribbean Court of Appeal* (ECCA)⁴⁶⁰. That Court in an earlier decision, *Attorney General of Anguilla and others v. Lake*⁴⁶¹, had pointed out, while dealing with a similar issue of impartiality in respect the decisions of a Board of Assessment in a land matter, that in assessing the composition and appointment of an adjudicative Board “[t]he entire regime must be looked at as a whole, including the purpose for its unique features, before one can determine whether the Board can be

⁴⁵⁹ Ibid.

⁴⁶⁰ The Eastern Caribbean Supreme Court is a recognized institution of the regional Caribbean grouping of States known as the *Organization of Eastern Caribbean States* (OECS). The Court consists of two divisions, a Court of Appeal and a High Court of Justice. The Court of Appeal hears appeals from all subordinate courts (High Courts, Magistrates Courts and the Industrial Court in Antigua and Barbuda). In respect of the High Court, the Court of Appeal has jurisdiction to hear and determine “any matter arising in any civil proceedings upon a case stated, or upon a question of law reserved by the High court or by a judge.” This is, however, subject to “any power conferred in that behalf by a law in operation in that State.” Subject to certain exceptions, the Court of Appeal is empowered to “hear and determine the appeal from any judgment or Order of the High Court in all civil proceedings.” For the purposes of determining any issues incidental to an appeal and the remedies, execution, and enforcement of any judgment or order made thereto, the Court of Appeal has “all the powers, authority and jurisdiction of the High Court.” [Adapted from the website of the Court at <https://www.eccourts.org/court-overview/>]

⁴⁶¹ *Attorney General for Anguilla and others v. Bernice Lake and others*, Civil Appeal No. 4 OF 2004, judgement delivered April 4, 2005, (unreported).

said to be lacking in independence and impartiality”⁴⁶². The CCJ embraced this position. In adopting this perspective, the ECCA had also called in aid the jurisprudence of the ECtHR.⁴⁶³

A further issue raised by the *August and Gabb* appeal for the CCJ was the constitutionality of the Parole Board’s procedure in determining parole eligibility and enforcement of its decisions. This was raised, notwithstanding the absence of regulations, which were to follow. The Appellants contended that section 4 of the Act, which dealt with functions, powers, and duties of the Board, did not provide a constitutionally fair procedure. They contended particularly that section 4(3) (things to be taken into account in determining parole) did not establish an over-riding statutory goal which would offer guidance to the Board in granting parole and had instead just listed a number of factors to be considered, some of which they claimed were irrelevant.

In considering this argument, the CCJ took the position that “the only legitimate penological ground for continued detention can be societal protection or dangerousness”.⁴⁶⁴ In formulating this proposition, the CCJ invested in the ECtHR’s decision in *Stafford v. United Kingdom*⁴⁶⁵, where the issue was clarified. The ECtHR in that case explained that “[o]nce the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life...murderer cases, must be considerations of risk and dangerousness... [I]t is not apparent how public confidence in the system of criminal justice could legitimately require the continued incarceration of a prisoner who has served the term

⁴⁶² Ibid, at para. 16.

⁴⁶³ Ibid, at para. 15. Here the ECCA relied on the ECtHR case of *Findlay v. United Kingdom* (App. No. 22107/93), 25 February 1997, at para. 73.

⁴⁶⁴ *August and Gabb v. R.*, supra, note 455, at para. 108.

⁴⁶⁵ *Stafford v. United Kingdom* [2002] ECHR 46295/99, (2002) 13 BHRC 260.

required for punishment for the offence and is no longer a risk to the public.”⁴⁶⁶. In applying *Stafford* in *August and Gabb*, while it appears that the CCJ accepted the broader focus on risk and dangerousness adopted from the ECtHR, it appears that the Court did not want to go the step further of saying that there was therefore merit in the complaint of the Appellants that there were a number of irrelevant factors appearing in the list at section 4(3) of the *Parole Act*. I proffer this view on the basis that the Court started out by admitting that the section “has not limited itself to this basis [of risk and dangerousness] and has expanded the factors which the Parole Board can consider in deciding whether to extend the duration of imprisonment beyond the time fixed by the judge for punitive...punishment”⁴⁶⁷.

Notwithstanding this, however, at no point did the Court expressly declare that some of the factors in the section 4(3) list had crossed the line into being extraneous. Instead, in my view, what the Court said, in hedging its way out of being forced to categorically reject some of the irrelevant factors, was to say that some of those factors could relate to the issue of protection of the public “if they are considered within the context that the only legitimate reason for continued detention after the expiration of the punitive element of the sentence is the protection of the public. However, if considered as individual factors, they would allow consideration of matters that are irrelevant to that overriding principle and expand the remit of the Board’s power...”⁴⁶⁸ This was not good enough I suggest, especially considering that the Court went on to state that “the extension of the power to continue detention beyond the judge-stipulated minimum period, for reasons other than the safety of the public constitutes a violation of constitutionally guaranteed rights”⁴⁶⁹.

⁴⁶⁶ Ibid, at para. 80.

⁴⁶⁷ *August and Gabb*, supra, note 455, at para. 109.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid, at para. 110.

It appeared that what the Court decided to do was to grant the state a certain leeway in the vein of the proverbial “margin of appreciation”, as it later broached the idea that the jurisprudence could ultimately guide the development of the practice, expressing the “expectation” that “the Regulations will be drafted so as to accord with the jurisprudentially established best practices...[and] other guidance offered throughout [the] judgment by way of commentary on the issues raised by the Appellants”.

As I suggested earlier, the Court was keen to send signals to the Executive and the Legislature about the way forward through the yet-to-be-produced Regulations, but was not keen on inserting itself into the governance function of those arms of the government, preemptively. In other words, were those other branches of government to heed the Court’s guidance, that would *prevent* the Court from invalidating the considerations in the statute at some future juncture. I argue that this reflects a *dialoguing* with the political arms of the government, rather than proceeding to usurp their power at this preliminary stage, when firstly, the general principles on the relevant issues from in IHRLN could accommodate the current regime without too much trouble, and secondly, any waiting on the State to resolve the concerns raised would not at that point undermine the fundamental rights of the Appellants, as there was a way to *fix* the potential challenges.

In my view, what both of the foregoing cases illustrate is that even where IHRLN are in play, and are positioned by the CCJ to ensure ample constitutional protections for the people it serves, the Court retains its independence on the rudiments and mechanics of deployment. To this extent, even with its regard for, and use of IHRLN, the Court is not indiscriminate or rigid about

its use, but is instead strategic and calculated, in so far as there is not an obvious risk of sacrifice or compromise of fundamental human and constitutional rights.

5.4. **Indigenizing and Creating**

A key part of the role that the CCJ sees for itself is bringing to life “Caribbean” law, through a process of indigenization.⁴⁷⁰ As I show shortly, the CCJ has not been shy in this regard, and as it has built its body of human rights jurisprudence, this trajectory has been made clear. In this section of the study, I analyze two decisions of the Court, *Attorney General of Barbados v. Joseph and Boyce* and *Nervais and Severin v. The Queen*.

5.4.1. *Attorney General of Barbados v. Joseph and Boyce*⁴⁷¹

One of the most striking developments in the human rights jurisprudence of the CCJ is the way in which it has used the legal doctrine of *legitimate expectation*. Ordinarily, legitimate expectation has been most recognized in its classic usage in the administrative law realm. However, through the CCJ’s decision in *Attorney General v. Joseph and Boyce*, there is now a settled expansion of the application of the legitimate expectation doctrine in constitutional and human rights *due process* terms, bringing a widening breadth to the concept, and thrusting it into the orbit of Commonwealth Caribbean human rights law. Significantly, the CCJ used the *Joseph and Boyce* decision to broaden the application of the concept of legitimate expectation, in the

⁴⁷⁰ See, Winston Anderson, “The Caribbean Court of Justice and the Development of Caribbean Jurisprudence”, Distinguished Lecture, Jamaica, (March 2013), at pp. 7-8, found online at <https://ccj.org/wp-content/uploads/2013/03/CCJCDistLECTURE.pdf>.

⁴⁷¹ *Attorney General of Barbados, Superintendent of Prisons, and the Chief Marshall v. Jeffrey Joseph and Lennox Ricardo Boyce* [2006] CCJ 3 (A.J.)

context of constitutional law, relying on an IHRLN perspective. Significantly in this case as well, the CCJ established a clear role for international law in domestic courts, even where it has not been incorporated domestically through enabling legislation. The Court thus clearly signalled that states ought to respect their international legal commitments, especially where the fundamental human rights of their citizens are at stake.

In *Joseph and Boyce*, both men had been convicted of murder and sentenced to death. They had lost a series of appeals, including to the JCPC (which was the apex appeal court for Barbados at that time). Following on this, through Counsel, they advised the State, that both men would pursue their rights under the American Convention on Human Rights, which Barbados had ratified but not implemented into domestic law. Notwithstanding this communication, the local Privy Council (BPC) advised the Governor-General that the death penalty sentences should not be commuted, as a result of which, death warrants were read to the men. In response, Joseph and Boyce filed a motion in the High Court seeking a commutation of the death sentence, on the basis that their rights to life, security of the person, the protection of the law and their right not to be subjected to cruel, inhuman, and degrading treatment, had been violated. Having lost in the lower courts, the matter got to the CCJ, which by then was Barbados' new apex court.

The CCJ stated that the issue in the case was “whether the State [was] under an obligation to defer execution of a condemned man until the determination of any petition filed by him with an international body pursuant to the provisions of a human rights treaty entered into and ratified by the State but *not incorporated into domestic law*”⁴⁷² [emphasis mine]. On account of this, the

⁴⁷² Ibid, at para. 12.

CCJ examined the relationship between domestic law and unincorporated treaties. In doing so, it considered *Hilaire v. Trinidad and Tobago*⁴⁷³, in which the IACtHR indicated that mandatory death sentences were inconsistent with the right to life found in the ACHR, which was designed to stringently proscribe the application and scope of the death penalty. The Court also examined the provisions of the ICCPR which speak to the “inherent right to life” (Article 6(1)), and the “right to seek pardon or commutation of the sentence” (Article 6(4)). It then continued by exploring dualism in law. The Court accepted that ratification does not lead to direct effect in domestic law. Notwithstanding the absence of *direct effect*, the Court concluded that “[i]t does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity”⁴⁷⁴.

In the circumstances of this case, the Court engaged with IHRLN through the constitutional concepts of *due process* and *protection of the law*, which, being clearly normative and obviously known to domestic constitutional law, afforded the Court a way to integrate the international treaty considerations into its analysis. The Court was particularly keen to widen the scope of the protection of the law principle and relied on the Privy Council case of *Ong Ah Chuan v Public Prosecutor*⁴⁷⁵ which arose from Singapore. In that case Lord Diplock pointed out that:

...[i]n a Constitution founded on the Westminster model and...that purports to assure to all individual citizens the continued enjoyment of fundamental

⁴⁷³ *Case of Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, Inter-American Court of Human Rights, Judgement of June 21, 2002, Series C 94.

⁴⁷⁴ *Joseph and Boyce*, supra, note 471, at para. 56.

⁴⁷⁵ *Ong Ah Chuan v Public Prosecutor* [1981] AC 648.

*liberties or rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like...refer to a system of law which incorporates those fundamental rules of natural justice... It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.*⁴⁷⁶

The CCJ relied on the reasoning in *Ong Ah Chuan* to have regard to an international treaty, even where it was not incorporated into domestic law. It buttressed that with the thinking that *due process of law* did not refer to any particular law, whether statute or common law, but rather invoked a concept of law which was emblematic of universally accepted standards of justice, acknowledged by civilized states. This was a clear opening of the international law door through which it could walk its analysis. To do this, the Court pivoted to the doctrine of legitimate expectation, reasoning that, “[l]egitimate expectations issuing from treaty provisions conferring rights directly on private entities and reinforced by implementation or treaty-compliant executive conduct at the municipal plane must be seen...to have a peculiar character requiring a higher standard of curial protection”⁴⁷⁷.

To ground its reasoning, the Court took an excursive tour through jurisprudence dealing with the role of unincorporated treaties from England⁴⁷⁸, New Zealand⁴⁷⁹, Australia⁴⁸⁰, Canada⁴⁸¹, India⁴⁸² and Ontario⁴⁸³. The Court was drawn to the view of Cooke P. in the New Zealand case on the issue, noting that the court declared in that case that “the law as to the bearing on domestic law

⁴⁷⁶ Ibid., at p. 670.

⁴⁷⁷ Separate concurring judgement of Pollard JCCJ, at para. 41.

⁴⁷⁸ *Regina v. Secretary of State for the Home Department, ex parte Brind* 3 [1991] 1 A.C. 696.

⁴⁷⁹ *Tavita v. Minister of Immigration* [1994] 1 LRC 421.

⁴⁸⁰ *Minister of State for Immigration and Ethnic Affairs v. Teoh* [1995] 3 LRC 1.

⁴⁸¹ *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817.

⁴⁸² *People's Union for Civil Liberties v. Union of India* [1999] 2 LRC 19.

⁴⁸³ *Ahani v. Regina* 208 D.L.R. (4th) 66.

of international rights instruments...[was] undergoing evolution”⁴⁸⁴. The CCJ was also similarly impressed by *Minister of State for Immigration and Ethnic Affairs v. Teoh*⁴⁸⁵, a decision of the High Court of Australia given in April 1995. The question in that case was whether Australia’s ratification of the Convention on the Rights of the Child created a legitimate expectation on the part of a Malaysian man who had entered Australia and married an Australian woman with whom he had young children, that the Minister would act in conformity with it and treat the best interest of the applicant’s children as a primary consideration. In holding that the man’s residence application had to be reviewed considering the Convention, Mason C.J. and Deane J., in their joint opinion, explained:

*[R]atification of a convention is a positive statement by the executive government... to the world and to the ... people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention... It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.*⁴⁸⁶

As such, the CCJ arrived at the view that there was a “distinct, irreversible tendency towards confluence of domestic and international jurisprudence”⁴⁸⁷. In the context of the case before it, the CCJ laid it bare:

Put in stark terms, by ratifying the treaty, the Executive has thrown to the condemned man, fighting for his life to be spared, a lifeline, albeit one that perhaps offers only a slim chance of rescue. The real issue facing judges is this: As the man is about to grasp this lifeline, is it fair for the Executive, which placed it there in the first place, to yank it away? Is it enough for the court then merely to explain to the man that unincorporated international treaties form no part of domestic law; that he has derived no “right” from

⁴⁸⁴ *Joseph and Boyce*, supra, at note 471, at para 81.

⁴⁸⁵ *Minister of State for Immigration and Ethnic Affairs v. Teoh*, supra, note 480.

⁴⁸⁶ *Ibid*, at para. 34.

⁴⁸⁷ *Joseph and Boyce*, supra, note 471, at para. 106, (Joint Judgment of de la Bastide PCCJ and Saunders JCCJ).

*the mere accession of his Government to the treaty; that the Executive does not have to await the determination of his petition by the international body before executing him, even though the report of that body, if it were available, would have to be considered by the authority responsible for exercising the prerogative of mercy and might persuade that authority to spare his life? Those are the haunting questions that cause judges much discomfort.*⁴⁸⁸

The Court was evidently immersed in a tension. On the one hand, there were two men staring down the abyss of death who, in the Court's view, had a legitimate expectation of being given sufficient time to pursue a right and a remedy which existed in an international treaty ratified by their State (though unincorporated in domestic law). On the other hand, there were the interests of the state, framed by the CCJ only as "policy objectives"⁴⁸⁹ and the *Pratt and Morgan* "time limit"⁴⁹⁰ (five-year time limit to carry out executions), which led to a refusal to await an international process before executing two *lawfully* condemned men. In resolving the tension, the Court reasoned that:

*to deny the substantive benefit promised by the creation of the legitimate expectation...would not be proportionate, having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body.*⁴⁹¹

Even with such a definitive opinion on the legitimate expectation issue, the Court was careful not to formulate an overbroad perimeter, preferring instead to take a narrow, streamlined approach. In doing so, the Court remarked that the legitimate expectation to which Joseph and Boyce were entitled did not include an obligation on the BPC to give effect to the IACoMHR's eventual report. Their position was limited to the legitimate expectation of condemned persons to

⁴⁸⁸ Ibid, at para. 110.

⁴⁸⁹ Ibid, at para. 124.

⁴⁹⁰ Ibid, at para. 125. As the Court noted, "[i]t appears from what was represented to the Court of Appeal in this case that, apart from the constraints of the *Pratt* time-limit, the State of Barbados claims no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled" (para. 125).

⁴⁹¹ Ibid, at paras. 127 & 130.

benefit from a *procedure* that should be followed before actioning a death sentence.⁴⁹² The Court further circumscribed its *legitimate expectation*-international human rights creation, by indicating that its opinion was not to be taken as “opening up avenues for the wholesale domestic enforcement of unincorporated treaties”⁴⁹³.

By taking this approach, the Court asserted its independence on a matter fundamental to the rule of law, due process, and protection of the law, but simultaneously telegraphed caution and unambiguous respect for the state. This, of course, would be critical in one sense for the credibility of the Court. In a further sense, it would also be important for building on the confidence of the state, in the Court. In my view, striking this balance makes the Court seem less as a reckless interloper or a callous judicial activist, and more a rational and fair agent for the protection of basic constitutional principles.

Ultimately, the Court’s decision to adopt the legitimate expectation doctrine in the way that it did in *Joseph and Boyce*, confirmed that the Court was not simply going to be an uncritical bystander when fundamental rights that are given in international human rights laws and principles are being violated by governments, simply because of concerns about dualism. To the contrary, the court demonstrated that it would apply such international human rights laws and principles for the protection of the citizen, through the medium of domestic constitutional rights and values. As Belle Antoine has written:

The Court...displayed a remarkable ability to manoeuvre between competing schools of thought, often weaving through a multitude of precedents from several jurisdictions... [showing] a fine appreciation of the local circumstances at play, [which] enabled the Court to master the art of

⁴⁹² Ibid, at para. 125.

⁴⁹³ Ibid, at para. 131.

*distinguishing precedent to find appropriate judicial balances in problem solving... This is what we ask of a final court, a superior court – we ask for legitimacy, and we have it.*⁴⁹⁴

The decision in *Joseph and Boyce* therefore, placed the doctrine of legitimate expectation on a more sure-footed plinth. It must be emphasized, however, that the decision was restricted by the Court to the specific actions of the Barbados government in relation to the death penalty, and the condemned men involved. The Court's modesty in this regard might lead some to argue that it was a *special* case, decided on *particular* facts, and that the precedential utility of the case is limited, but I would argue the contrary. In my view, the broader significance of the enormous effort put into the "doctrine" of legitimate expectation by the CCJ in this case, on the intertwining of international human rights law and the notion of domestic effect, means that the genie has left the proverbial bottle. What would be the point of all the juridical justifications and logic constructed by the Court, if that architecture were not to have meaningful effect, whether in a gradual, managed, and staged fashion or otherwise. Yes, as with nearly everything in the law, nuance can be critical. Where doors are opened, however, opportunity will walk through. Constrained as the Court may have wanted its decision to seem in this case, it is evident that a philosophy of the law in relation to the broader legal concepts dealt with, had clearly fermented. There is no telling how critical this judgement will be, however nuanced, in the years ahead. Afterall, this is a Court that is on a "Caribbeanizing", "indigenizing" mission, seeking to affirm its unique and independent identity.

⁴⁹⁴ Rose-Marie Belle Antoine, "Assessing 10 Years of the Caribbean Court of Justice in its Appellate Jurisdiction: Encouraging Signs of a Mature, Relevant Jurisprudence" (2015) 3:2 *Carib. J. Int'l. Rel. & Dipl.* 69, at p. 74.

5.4.2. *Nervais v. The Queen and Severin v. The Queen (Nervais and Severin v. The Queen)*⁴⁹⁵

In *Nervais and Severin v. The Queen*, the CCJ also displayed its willingness to deploy IHRLN to expand constitutional protections for the citizen. It did so in this case, by elevating the significance and wealth of every word of the Constitution that dealt with fundamental rights. It also unpackaged preconceived notions and arguments about what “preambles” *versus* “substantive provisions” meant for those that sought, and were entitled to rights protection under the Constitution. Here, the Court also made light work of dispensing with the overbearing *Savings Clause*. This is a clause in Commonwealth Caribbean Constitutions that protects pre-independence laws from challenge, where such laws are inconsistent with the Bills of Rights provisions in the new post-independence Constitutions. The clause therefore ring-fences these potentially offensive pre-independence laws from constitutional scrutiny, which, in turn, impedes the reclaiming of full constitutional sovereignty and supremacy over all laws against the forces of earlier colonial masters. As such, the sweeping enforcement of basic constitutional freedoms in Caribbean legal systems cannot be realized.

In *Nervais and Severin*, both Appellants were separately convicted of a different murder, and sentenced as per section 2 of the *Offences Against the Person Act* (OAPA) to mandatory death. Both men unsuccessfully appealed their conviction and sentence to the Barbados Court of Appeal, resulting in this appeal to the CCJ in its Appellate Jurisdiction. At the heart of the Appellants’ contentions was the constitutionality of the mandatory death penalty, relative to the Preamble of the fundamental rights provisions of the Barbados Constitution and the several other relevant standing provisions in the said fundamental rights part of the Constitution. At the CCJ, both

⁴⁹⁵ *Jabari Sensimania Nervais and Dwayne Omar Severin v. The Queen* [2018] CCJ 19 (AJ).

convictions were upheld, but the *mandatory* sentences of death were, by a majority, found to be unconstitutional. Re-sentencing in both cases was therefore remitted to the jurisdiction of the Barbados High Court (Superior Court) by the CCJ. In all of this, however, the CCJ was vigilant to emphasize that the case was not about the constitutionality of the death penalty in itself, but rather its *mandatory* nature, such that *shall* in section 2 of the OAPA was to be modified to read *may* instead.⁴⁹⁶

At the Court of Appeal, the Crown had accepted that the *mandatory* nature of the penalty of death made it unconstitutional. This was because Barbados had previously accepted rulings on that issue in decisions of the IACtHR in *Boyce et. al v. Barbados*⁴⁹⁷ and *DaCosta Cadogan v. Barbados*⁴⁹⁸. In the *Boyce* case, for example, the IACtHR had ruled that through the imposition of the *mandatory* penalty of death for murder, Barbados was in violation of the ACHR. The CCJ was plainly influenced by this background, and used it to set the stage in considering the contention that section 2 of OAPA violated various provisions of the Barbados Constitution.

Notwithstanding Barbados' position at the Court of Appeal that the mandatory nature of the death penalty was unconstitutional (based on rulings from the IACtHR), that Court had nevertheless found that based on the *Savings Clause* and the OAPA predating independence, the mandatory death penalty was not unconstitutional. The Court of Appeal explained itself, stating that "despite the fact that the mandatory death penalty [was] inconsistent with and in violation of

⁴⁹⁶ Section 2 of the OAPA read – "*Any person convicted of murder shall be sentenced to, and suffer, death.*"

⁴⁹⁷ *Boyce et. al. v. Barbados*, Inter-American Court of Human Rights, (Preliminary Objection, Merits, Reparations and Costs), November 20, 2007.

⁴⁹⁸ *Dacosta Cadogan v. Barbados*, Inter-American Court of Human Rights, (Preliminary Objections, Merits, Reparations, and Costs), September 24, 2009.

the international human rights law ratified by Barbados[,] because...the mandatory death penalty [was] inhuman and degrading punishment within the meaning of the Constitution, it [was] nevertheless] provided for in a law that predated the Constitution and [was] thereby afforded immunity from judicial challenge”⁴⁹⁹. With this view from the Court of Appeal, the intractable *Savings Clause* was again centre-court. Of course, that outcome was rejected by the CCJ when it heard the appeal.

Having set the stage with *Boyce* and *Dacosta Cadogan* from the Inter-American human rights bodies, the CCJ then turned its focus to section 11 of the Barbados Constitution. The Appellants had argued that they were entitled to rely on the right to the protection of law guaranteed by section 11 of the Constitution of Barbados. The Crown contested this, countering that section 11 was a Preamble, and to that extent, it could not convey enforceable constitutional rights. The CCJ rejected this proposition, reasoning that “[t]he language of section 11 is not aspirational...It declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous terms. It is the only place in the Constitution that declares the rights to which every person is entitled”.⁵⁰⁰

The Court then attempted a bit of “indigenizing” of its own and referenced the scholarship of well-known Caribbean legal scholar, Tracy Robinson⁵⁰¹, who had explained that that there was an irrationality to attributing a significance to the word “whereas” which would make section 11 of the Barbados Constitution impotent. The CCJ was thereby emboldened to take the position that

⁴⁹⁹ *Nervais and Severin*, supra, note 495, at para. 6.

⁵⁰⁰ *Ibid*, at para. 25.

⁵⁰¹ Tracy Robinson and Arif Bulkan, “Constitutional Comparisons by A Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights”, (2017) 80(3) *Modern L. Rev.* 379, at pp. 387 & 407.

there was no need for “linguistic finessing”⁵⁰², to conclude that section 11 of the Constitution was enforceable, notwithstanding the use of the word “whereas”, since, in that very same section 11, it referred to “those rights and freedoms” and “said rights and freedoms” (meaning those listed at 11(a) to 11 (d)), to which “every person...is entitled”, subject only to the limitations in “the following provisions” (sections 12-23).⁵⁰³

Having laid out the foundation for its approach in *Nervais and Severin* using international human rights law from the Inter-American human rights system, and having decided that section 11 of the Barbados Constitution contained enforceable rights, the CCJ then set out to determine whether section 26 of the Constitution, the troublesome *Savings Clause*, impeded the application of section 11. As we can recall, while the Court of Appeal had concluded that the mandatory nature of the death penalty constituted cruel, inhuman, and degrading punishment, because of the *Savings Clause*, it had no choice but to find that section 2 was immune from constitutional challenge.

In dealing with this *Savings Clause* issue, which prevented a court from holding that a pre-independence law violated the fundamental rights and freedoms in section 11 of the Barbados Constitution, the CCJ was unequivocal that such a constitutional provision cannot accord with the protection of fundamental rights. In a doubtless rebuke of colonialism and the historical appendages left to the Caribbean from slavery, the Court had this remarkable rendering:

The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status... The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who

⁵⁰² Supra, note 495, at para. 31 (*Nervais and Severin v The Queen*).

⁵⁰³ Ibid, at paras. 24 & 31.

*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. ... It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments 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.*⁵⁰⁴

The Court was rightfully attuned to the significance of protecting fundamental human rights. For the CCJ, *Nervais and Severin* presented a powerful opportunity to engage in a thorough excoriation of colonialism and its legacies in the law. This, the Court did, pinnacling the fundamental rights of the citizen over the interest of colonialists who had ring-fenced the abrogation of fundamental rights, before handing newly independent states, constitutions that were bankrupt in actually protecting the people from the tyranny of their governments. This demonstrated the CCJ's confidence in asserting its own vision and independence and served as a lesson in how the law must be seen to work for the people it governs, rather than restraining them with shackles of constitutional subjugation. In other words, a tool such as the *Savings Cause* should not be deployed to discipline the fundamental human rights and freedoms in the Constitution. The CCJ's decision to silence the encumbrance of the *Savings Clause* in the circumstances, was therefore an act of singular judicial progress by the Court. Clearly, the Savings clause created insuperable historical, jurisprudential, and practical challenges.

⁵⁰⁴ *Nervais and Severin*, supra, note 495, at paras. 53, 58 & 59.

While CCJ's approach to the *Savings Clause* in *Nervais and Severin* might appear to contravene the separation of powers doctrine, as proffered by Anderson JCCJ⁵⁰⁵, I argue that the remainder of the Court acted properly and judiciously in finding that section 11 of the Barbados Constitution on which the Appellants relied, was justiciable and immune from the *Savings Clause*. I contend that this finding did not impair the constitutional separation of powers.

In the first place, as Justice Anderson himself rightly pointed out in his concurring opinion, having arrived at the majority outcome by a separate route, “[t]he courts have exclusivity of judicial power to sentence. The separation of powers protects the independence of the courts in carrying out this function. ...[T]he court is not obliged, and cannot be obliged, to obey [the] dictate [of the OAPA] and thus to mandatorily impose the death penalty. The court is protected from this legislative edict by the separation of powers”⁵⁰⁶. As such, while the route to the same outcome might have been different, this logic of the separation of powers, rather than limiting the Court, ultimately bolsters the permissibility of its determination on the *Savings Clause*.

Secondly, in light of my discussion on the decolonizing trajectory of the Court, as part of the indigenization that this study described in Chapter 1, I proffer that untangling and

⁵⁰⁵ The view of the Anderson JCCJ was that “The courts are, of course, themselves subservient to the Constitution from which they derive their legitimacy and authority. They cannot properly trench on the constitutional powers and responsibilities of the other branches of the Government. Amendment of the Constitution, a law-making function, is reserved for the Legislature. Neither can the courts interpret the Constitution according to their own predilections and prejudices and thus undermine the Constitution and the rule of law. No matter how imperfect or inconvenient the constitutional wording may be, or how slowly the Legislature may be perceived to be in carrying out its responsibility to amend the Constitution, the courts have no license to usurp the legislative function...It follows that it is not permissible for the courts to interpret the savings law clause in section 26 so as to strip it of its obvious meaning and intent. The task of revising and amending the savings law clause is exclusively reserved for the Parliament of Barbados as and when that institution thinks it fit and proper to do so...” [*Nervais and Severin*, supra, note 495, at paras. 106-107.

⁵⁰⁶ Ibid, at para. 109.

deconstructing a colonial legal relic such as the centuries-old mandatory death penalty, in light of the fundamental rights provisions of the Barbados constitution, was a perfectly legitimate deployment of judicial power. Indeed, part of the complexity of the work of the CCJ in putting IHRLN to work, is that it must build a Caribbean law that liberates and leads to norm-accretion of respect for human dignity, rather than *hegemonization* from dehumanizing, barbaric laws which emanated from slavery and colonization.

It is little wonder, therefore, that one practical outcome of *Nervais and Severin* was that Barbados amended its Constitution in 2019 to respond to the CCJ's decision. This Constitutional Amendment⁵⁰⁷ repealed and replaced section 15⁵⁰⁸ of the Constitution which had made the mandatory death penalty constitutional, and substituted it with a *non-mandatory* death penalty. The Constitutional Amendment then repealed the *old* section 26, the "savings clause", declaring in a new section 26(1), that "The existing law shall continue to be in force but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with sections 12 to 23 [the fundamental rights provisions] of this Constitution".

⁵⁰⁷ *Constitution (Amendment) Act, 2019–15.*

⁵⁰⁸ The section reads in material part:

15.(1)...

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.

(3) The following shall not be held to be inconsistent with or in contravention of this section:

(a) the imposition of a *mandatory* sentence of death or the execution of such a sentence...

The *Offences Against the Person Act* was also earlier amended in 2018⁵⁰⁹ as a result of *Nervais and Severin*, making the sentence of death “optional”, liable for use only in certain circumstances.

5.5. Democracy and the Rule of Law

5.5.1. *Belize International v. Attorney General of Belize*⁵¹⁰

As much as the CCJ, through its human rights jurisprudence, has shown a remarkable interest in the fundamental right to a fair trial in a variety of dimensions, it has likewise rendered constitutional justice in other contexts as well. As we are often aware, constitutional justice is not always reduced to codified values and nomenclatures of equality, non-discrimination, and protection of the law, among others. It is also about unwritten constitutional principles such as the rule of law and democracy. In these latter regards, the CCJ has been consistent in its sourcing of international human rights laws and norms, as vessels through which to either mediate domestic law, or amplify and enrich these unwritten domestic constitutional principles. Importantly, while the context itself within which such principles may have been relied upon by the Court might be domestic, what must be understood, and what has been underscored by the Court, is that such principles have international resonance and acceptance. Such resonance and acceptance are not only located within classic international law norms, but also in the domestic constitutional norms of courts and legal systems all across the globe.

In *Belize International v. Attorney General of Belize*, the appellant was a private company whose commercial contract with the government was cancelled for no good cause after a change

⁵⁰⁹ *Offences Against the Person (Amendment) Act*, Cap. 141 (2018).

⁵¹⁰ *Belize International Services Limited v. Attorney General of Belize* [2020] CCJ 9 (AJ) BZ, at para. 299.

of government. The company had been extremely successful in earning revenues for the State. The CCJ illustrated in this case that the Court sees human rights as being part of the wider fabric of democracy in Caribbean societies, which implicated values such as accountability and integrity in the exercise of political power.⁵¹¹ Such political accountability and integrity, suggested the Court, must be underpinned by the human rights values of equality and dignity.⁵¹² This was made plain by Jamadar JCCJ, who pointed out that whenever the Court sought to address cases of any kind that raised issues of the responsibility and accountability of the state to its citizens, the underpinning value must be the protection of “democratic participatory constitutionalism”⁵¹³. This is because “the State...is constituted by its Peoples [and] [i]t is their consent to be governed, and to be governed in a particular context and way, that brings into being what is agreed to, accepted, and recognised nationally and internationally, internally and externally... It is this consent that bestows integrity, legitimacy, and identity to what is understood to be [the State]”⁵¹⁴. In this process of determining accountability and responsibility, within the framework of a constitutional democracy, Jamadar JCCJ sign-posts what he refers to as the fundamental principles that must undergird any inquiry or analysis, these including “human rights, freedom, dignity, and equality”⁵¹⁵.

One of the ways in which Jamadar JCCJ framed the democracy architecture which protected human rights and other democratic, constitutional norms, was through the scope of the unwritten constitution principle of the rule of law. To do this, the learned judge waded through

⁵¹¹ Ibid, at paras. 300 & 340.

⁵¹² Ibid, at paras. 302, 303 & 340.

⁵¹³ Ibid, at para. 299.

⁵¹⁴ Ibid, at para. 300.

⁵¹⁵ Ibid, at para. 302.

approaches from a variety of jurisdictions, including Canada, relying for example on *Reference re Secession of Quebec* [1998] 2 SCR 217⁵¹⁶, and stating that “in relation to certain unwritten core principles (in this case ... democracy, constitutionalism and the rule of law), ‘it would be impossible to conceive of our written structure without them’, and that these ‘fundamental and organising principles of the Constitution’ are ‘not merely descriptive, but ... also invested with a powerful normative force, and are binding upon both courts and governments.’”⁵¹⁷ In this connection thus, the Court, in defining its role, declared that it was “using the rule of law as ‘a tool for building Caribbean constitutional faith and identity’ , and in so doing forging a truly Caribbean jurisprudence, one that is relevant to the needs and fulfils the aspirations of Caribbean peoples. Indeed, ... the CCJ in its rule of law jurisprudence is functioning as a ‘decolonizing Instrument’, a role judged to be necessary”⁵¹⁸. Here we see the CCJ expressly mentioning its “decolonizing” role, which is a fundamental part of the mission that it assigns itself, and which the governments of the region appear to expect, bearing mind the regional context of the creation of the Court.

When one considers the political economy discussions in Chapter 3, we can see how important this role is, when placed against the backdrop of the plantation or dependency dynamic of Caribbean post-colonial society. To that extent, the Court is declaring an activist role for itself, signaling that its voice would, and ought to be heard, in the broader process of advancing the identity and development of the region. In other words, by seeing itself as an “instrument”, the Court clearly envisages being a vehicle of redefinition, or a conduit for transformation, in so far as the indigenous evolution of regional law is concerned. This role would therefore reflect what

⁵¹⁶ *Reference re Secession of Quebec* [1998] 2 SCR 217.

⁵¹⁷ *Belize International v. A.G.*, supra, note 510, at para. 336.

⁵¹⁸ *Ibid*, at para. 351.

Nettleford is said to have seen as the “reclaiming”, “mainstreaming”, and “overcoming of marginalization” that was necessary to unravel the choke-hold that post-colonialism had on the region, even with political independence attained. The Court, thus, seen in this light, was obviously reflecting – in *Belize International* – an approach to the concept of the rule of law that held political misbehaviour and abuse of power up to high account. As the Court explained, this was part of the high importance of the values of a sacred constitutional democracy, in which accountability was vital, and the rule of law was a “powerful normative force”.

5.6. Breaking New Frontiers

This section of the study looks at *McEwan v. Attorney General*, *Maya Leaders Alliance v. Attorney General of Belize*, *Tomlinson v. Belize and Tomlinson v. Trinidad and Tobago*, *Myrie v. Barbados*, and *Attorney General v. Cedric Richardson*. The importance of this quintet of cases is that they illustrate the CCJ’s intention to forge ahead and break new frontiers, using both constitutional and international human rights instruments and strategies. While my overall assessment of the Court’s work in this regard is positive, it is useful to note that the journey has been an incremental one for the Court. As the following discussion and analyses of the cases show, the results of treading new paths and breaking barriers have been a mixed bag.

5.6.1. McEwan and Others v. Attorney General of Guyana⁵¹⁹

In terms of breaking new frontiers, *McEwan v. Attorney General* was a seminal decision for the CCJ. One of the valuable things it did, was to engage in transformation of Caribbean law

⁵¹⁹ *Quincy McEwan, Seon Clarke, Joseph Fraser, Seyon Persaud, Society Against Sexual Orientation Discrimination (SASOD) v. The Attorney General of Guyana*, [2018] CCJ 30 (AJ).

on the autonomy of gender minorities, in a region that has been heavily transfixed with discrimination against LGBTQ persons. Recalling my discussion on this subject in Chapter 3, when one considers what the CCJ was up against, relative to transphobic Caribbean attitudes, *McEwan* was a landmark decision that the Court made in delegitimizing certain specific provisions of a law that was obviously on a collision course with basic fundamental constitutional and human rights principles of human dignity and equality.

This case involved a group of transgender women who were charged under section 153(1) of the Guyana *Summary Jurisdiction (Offences) Act*⁵²⁰, *inter alia*, with the wearing of female attire, (being anatomically male), in a public place, for an “improper purpose”. In effect, the Appellants were arrested for “cross-dressing” in public. They claimed that the provision in issue was *ultra vires* the Constitution of Guyana. The violations proffered by the Appellants were their right to equality and non-discrimination guaranteed under Article 149 of the Constitution and their right to freedom of expression pursuant to Article 146. The Appellants further claimed that the statutory provision in question violated Article 40 of the Constitution (protection of the law) because of the vagueness of the term “improper purpose” which made it impossible for individuals to guide themselves; and Article 144 (fair hearing) based on the presiding Magistrate admonishing them to “go to church and give their lives to Jesus Christ”, as “they were confused about their sexuality; [and] that they were men, not women”.⁵²¹

⁵²⁰ Laws of Guyana, Cap. 8:02, s. 153(1)(xlvii). Section reads – “153(1). Every person who does any of the following acts shall, in each case, be liable to a fine of not less than seven thousand dollars...(i)...(ii)...(xlvii) being a man, in any public way or public place, for any improper purpose, appears in female attire, or being a woman, in any public way or public place, for an improper purpose, appears in male attire; or (xlviii)...”.

⁵²¹ *McEwan and others v. Attorney General*, supra, note 519, at para. 10.

When the Appellants were brought before Court, without the benefit of legal counsel, they pleaded guilty and were convicted. They appealed their convictions unsuccessfully in the local courts and the matter eventually ended up in the CCJ. The case became a defining moment for the CCJ and the Caribbean region as a whole. In the lead opinion of the Court, the President delivered a very poignant affirmation of the importance of recognizing and respecting differences in our societies. Finding the provision to be unconstitutional, Saunders PCCJ had this to say, cutting to the very heart of the matter:

*Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised. [The Defendants] are perceived to be, different. They are transgendered persons. Their sense of personal identity and gender does not correspond with their birth sex. As a result, their appearance, mannerisms and other outward characteristics are not consistent with society's expectations of gender-normative behaviour. That is their reality. It is a reality that is different from the one experienced by most persons. Unfortunately, it is a reality that, for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against those who are different. It is for courts to afford the protection of the law to those who experience the brunt of such behaviour.*⁵²²

The first hurdle that the Court had to confront was the *Savings Clause*. Much as in *Nervais and Severin*, the Court was equally uncompromising in *McEwan*. Until *Nervais and Severin*, the Savings Clause had completely immunized pre-independence laws from being held in contravention of the fundamental human rights found in Caribbean Constitutions. This reality, the CCJ recognized in *McEwan*, posed “severe challenges both for courts and for constitutionalism”, as “[t]he hallowed concept of constitutional supremacy [was] severely undermined by the notion

⁵²² Ibid, at paras. 1 & 2.

that a court should be precluded from finding a pre-independence law, indeed *any* law, to be inconsistent with a fundamental human right”⁵²³. In the Court’s words, the clause “was at odds with the court’s constitutionally given power of judicial review”.⁵²⁴ The rationale for the Court’s view was that “Law and society [are] not static”, and that “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”.⁵²⁵

In addressing the Savings Clause issue, the Court highlighted the fact that international human rights bodies had repeatedly frowned on these clauses. It cited several examples such as the IACtHR in *Case of Hillaire, Constantine and Benjamin et al v. Trinidad and Tobago*⁵²⁶; *Case of Caesar V. Trinidad and Tobago*⁵²⁷ and *Case of Boyce et. al. v. Barbados*⁵²⁸. The Court also noted that Article 39(2) of the Guyana Constitution expressly mandated courts “to ‘pay due regard to international law, international conventions, covenants and charters bearing on human rights’ when interpreting the fundamental rights provisions of the Constitution”.⁵²⁹ To that extent, Guyana had even placed a greater implicit responsibility on courts to interpret the Savings Clause “as narrowly as possible to place the law in compliance with the country’s international law obligations”⁵³⁰.

⁵²³ Ibid, at para. 39.

⁵²⁴ Ibid.

⁵²⁵ Ibid, at para. 41.

⁵²⁶ *Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago*, IACHR Series C, no. 9, IHRL 1477. Judgment dated 21 June 2002, para. 152(c).

⁵²⁷ *Case of Caesar v. Trinidad and Tobago*, Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123, paras. 115- 117.

⁵²⁸ *Case of Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007, paras. 75-80.

⁵²⁹ *McEwan*, supra, note 519, at para. 55.

⁵³⁰ Ibid, at para. 55.

With all of the foregoing in mind, the CCJ determined that section 153, which grounded the “dress for improper purpose” charge violated the Guyana Constitution. As the Court eloquently explained:

*At the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal...[This] signifies a commitment to recognising each person’s dignity and equal worth as a human being despite individual differences...The constitutional promise of equality prohibits the State from prescribing legislative distinctions or other measures that treat a group of persons as second-class citizens or in any way that otherwise offends their dignity as human beings. To safeguard equality rights, courts must adopt a substantive approach. Ensuring substantive equality might require equal treatment for those equally circumstanced, different treatment for those who are differently situated, and special treatment for those who merit special treatment. Paying regard to mere formal equality could lead to grave injustice and defeat the spirit of the equality provisions...*⁵³¹

In finding section 153 to be a violation of the rights to be protected from discrimination and to free expression, the Court relied on the relationship between equality and dignity, drawn from the Inter-American Court of Human Rights.⁵³² The Court also referenced the principles of equality and non-discrimination from the CEDAW⁵³³ Committee,⁵³⁴ in addition to jurisprudence

⁵³¹ Ibid, at paras. 64 and 66.

⁵³² One example of this was the *Advisory Opinion on Proposed Amendment to the Political Constitution of Costa Rica related to Naturalization* [Advisory Opinion OC-4/84, January 19, 1984, Series A No. 4.], where it explained that - “The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified” [McEwan, at para. 65].

⁵³³ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol.1249, p.13.

⁵³⁴ General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, at para. 22.

from several jurisdictions, including Canada,⁵³⁵ India⁵³⁶ and Belize.⁵³⁷ In finding that there was a violation of the right to be free from discrimination, the CCJ concluded that section 153(1)(xlvii) had a “disproportionately adverse impact on transgendered persons...[as it] infringes on their personal autonomy which includes both the negative right not to be subjected to unjustifiable interference by others and the positive right to make decisions about one’s life...[The section also] reinforces stereotyping...[and] conduces to the stigmatization of those who do not conform to traditional gender clothing...thus enabling the State to unleash its full might against them...[This] cannot...be reasonably justified.”⁵³⁸

What was striking for the Court to do as well, with patent clarity, was to recognize and embed the socio-cultural reality of LGBTQ discrimination in the Caribbean in its reasoning, in order to challenge it. The Court stated:

*A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual. The hostility and discrimination that members of the LGBTI community face in Caribbean societies are well-documented. They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services...[The Appellants], by choosing to dress in clothing and accessories traditionally associated with women, are in effect expressing their identification with the female gender. And the expression of a person’s gender identity forms a fundamental part of their right to dignity.*⁵³⁹

⁵³⁵ *Law v. Canada* [1999] 1 SCR 497; *R. v. Oakes* [1986] 1 SCR 103; *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143.

⁵³⁶ *National Legal Services Authority v. Union of India and Others* [2014] 4 LRC 629; Writ Petition (Civil) No. 400 of 2012.

⁵³⁷ *Roches v. Wade* Action No. 132 of 2004, The Supreme Court of Belize (delivered April 30, 2004).

⁵³⁸ *McEwan*, supra, note 519, at para. 72.

⁵³⁹ *Ibid*, at paras. 70 & 71.

In attacking the *problem* in this way, the Court confronted a social taboo, and immediately challenged it with compelling logic. The Court signified by its reasoning that it would not be constrained by such skepticisms, but instead, was willing to clearly scrutinize such attitudes, challenging them with the fundamental imperatives of dignity, autonomy, and fairness. In this regard, the Court adopted the view of Iacobucci J, of the Supreme Court of Canada, in *Law v. Canada*, that human dignity was harmed “by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits”.⁵⁴⁰ The Court was equally forward-looking in its protection of the right to free expression, and asserted that it was “essential to human progress that contrary ideas and opinions peacefully contend”⁵⁴¹. The Court went further, and also highlighted that tolerance was a critical part of enjoying the free expression right.⁵⁴²

One of the criticisms that could likely be levelled against the CCJ in this case, is that in dealing with the Savings Clause in the way that it did, in order to achieve the outcome arrived at, the Court might have somewhat compromised the separation of powers doctrine, to the extent that

⁵⁴⁰ *Law v. Canada* [1999] 1 SCR 497 at [53].

⁵⁴¹ *McEwan*, supra, note 519, at para 76.

⁵⁴² As the Court explained – “A person’s choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression. These conclusions are not novel...No one should have to live under the constant threat that, at any moment, for an unconventional form of expression that poses no risk to society, s/he may suffer such treatment. ... This is at complete variance with the aspirations and values laid out in the Guyana Constitution...” [paras. 76 & 79]. In support of this perspective, the CCJ relied on the Indian Supreme Court’s decision in *National Legal Services Authority v. Union of India and Others* ([2014] 4 LRC 629; Writ Petition (Civil) No. 400 of 2012), where that court allowed a petition on behalf of the country’s transgender community, holding that the right to express one’s identity in a non-binary gender was an essential part of freedom of expression. The Court found that it was important and necessary, for India to follow international human rights conventions and non-binding principles, as there was no “suitable legislation protecting the rights of the members of the transgender community”. domestically. To find otherwise, the Indian Court explained, would be to avoid protecting third-gender persons which would be a violation of the Indian Constitution. It was with similar juridical logic that the CCJ placed a constitutional ozone around the rights of the Appellants in *McEwan* to dress as they pleased.

it would be for Parliament to use constitutional means to address the impact of the Savings Clause on the constitutional law violations raised by the Appellants, rather than the Court. The basic thrust of this argument would be that by formulating a legal reasoning that effectually ousted or circumvented the letter of the law found in the Clause, the Court, through its justificatory analysis, was assuming an authority that it ought properly did not to have. I disagree with this argument, as it would be contradictory to very important norms such as constitutional supremacy and the power of judicial review, especially when I contend that an obvious abuse of governmental power was afoot. Further, at another level, the rule law, a fundamental unwritten constitutional principle, would be severely endangered, if a Court could not enforce constitutional rights that were found in a constitution, where, as in this case, there was a distinct need to ameliorate the harsh consequences of the Clause's application. Moreover, I argue that it would be derelict of such an apex court to rule itself precluded from holding a pre-independence law to be invalid, if in fact that law runs contrary to core constitutional values such as the rule of law, judicial independence, protection of the law, and equality before the law. Even going further, the Court itself has reinforced that the legal interpretation of domestic law ought properly to be consistent with a State's international obligations. In any event, however, I proffer that a claim of abuse by the Court of the separation of powers doctrine would practically be unsustainable in this particular case, as the legislation in question had been amended in parts since Guyana's political independence, and to that extent, was not the same law that existed pre-independence. This of course was highlighted by the CCJ.

Bearing all of this in mind, it is little wonder therefore that the Court also took the time to address the argument that the course it adopted in protecting the Appellants was judicial legislating

or engineering. In a clear rejection of this view from learned counsel, who had cautioned the Court not to trespass into the prerogative of the Executive and the Legislature, Barrow JCCJ declared – “[W]hat [counsel’s] caution against ‘judicial legislating’ fails to comprehend is that challenges to existing legislation, which seek to achieve reform that is properly the business of the legislature, are not challenges created or initiated by the judiciary; they are challenges that the Constitution gives aggrieved persons the right to make and they are challenges that the courts must (not may) hear and determine, once satisfied that they are justiciable”⁵⁴³. As far as Barrow JCCJ was concerned, the sure way for the State to avoid such challenges, was to do the proper thing and make change where change was right and just. Indeed, as the learned Judge saw it, “it is not every law that the executive must feel obliged to defend against challenge. It is proper for a government to acknowledge that a law is long past its ‘sell-by date’ and serves no social or legal purpose”⁵⁴⁴.

By deciding *McEwan* in the way that it did, the signal of the CCJ was clear, that the Court would attempt to do right by all, including gender minorities, in the best way that it could, and with fidelity to fundamental human and constitutional rights principles. Indeed, what was also significant for the CCJ as well in this case, was that it was lending a helping hand of sorts, to courts in the wider Caribbean judicial diaspora, where there was a growing momentum on matters of sexual and gender minority rights, shortly before *McEwan*. In other words, the CCJ’s prestige as a regional apex and international court, was lending legitimacy to the new progressive LGBTQ judicial trajectory of the region, adding a broader regional resonance to the issues involved. What was also remarkable with the other “domestic” cases, was that those domestic courts also relied on IHRLN, in much the same way that the CCJ did in deciding *McEwan*. These cases had by then

⁵⁴³ *McEwan*, supra, note 519, at para. 143.

⁵⁴⁴ *Ibid*, at para. 144.

started a pattern in the Caribbean that the CCJ was helpfully extending and solidifying, demonstrating a Caribbean IHRLN arc on LGBTQ human rights. In the CCJ deciding *McEwan* the way that it did, it was aligning itself with these earlier LGBTQ cases, *Jones v Attorney General*⁵⁴⁵, *Orozco v Attorney General*⁵⁴⁶, *Godwin and Deroche v. Registrar General and Attorney General*⁵⁴⁷, and *Attorney General v. Ferguson*⁵⁴⁸.

In *Jones* and *Orozco*, (cases from Trinidad and Tobago, and Belize, respectively), laws criminalizing anal intercourse between consenting adults were found to be unconstitutional on account of the right to privacy, of which the Court found sexual orientation was a part. In Bermuda, in *Godwin and Deroche v. Registrar General and Attorney General*, the Court ruled that excluding same-sex couples from marriage was unconstitutional and inconsistent with basic international human rights norms. In *Attorney General v. Ferguson*, also in Bermuda, a statutory provision which outlawed same-sex marriage was voided after the Court found that it was enacted for a religious purpose, in violation of the Constitution.

⁵⁴⁵ *Jones v Attorney General of Trinidad and Tobago (and The Equal Opportunity Commission, The Trinidad and Tobago Council of Evangelical Churches, The Sanatan Dharma Maha Sabha of Trinidad and Tobago – Interested Parties)*, Claim No CV2017-00720, The High Court of Justice of the Republic of Trinidad and Tobago, delivered 12 April 2018 (unreported) [*Jones v Attorney General*].

⁵⁴⁶ *Caleb Orozco v The Attorney General of Belize (and The Commonwealth Lawyers Association, The Human Dignity Trust, The International Commission of Jurists, The Roman Catholic Church of Belize, The Belize Church of England Corporate Body, The Belize Evangelical Association of Churches and United Belize Advocacy Movement – Interested Parties)*, Claim No 668 of 2010, The Supreme Court of Belize, delivered 10 August 2016 (unreported).

⁵⁴⁷ *Winston Godwin and Greg Deroche v The Registrar General and The Attorney General and The Minister of Home Affairs (and the Human Rights Commission and the Preserve Marriage Bermuda Limited – Intervenors)*, 2017 SC (Bda) 36 Civ (5 May 2017) (unreported).

⁵⁴⁸ *The Attorney General for Bermuda v Roderick Ferguson, OUTBermuda, Maryellen Jackson, Gordon Campbell, Sylvia Hayward-Harris and The Parlor Tabernacle of the Vision Church of Bermuda*, Civil Appeal Nos 11 and 12 of 2018, The Court of Appeal of Bermuda, delivered 23 November 2018 (unreported) [*Ferguson v Attorney General*].

What these cases on sexual and gender minority rights from the wider Caribbean illustrate is that when the CCJ decided *McEwan*, it was reinforcing a judicial trend which had started in the region. As a result of this, there was the distinct potential for a greater impact and increased credibility for any growth in this area of Caribbean law. *McEwan* was also a symbol of progress and growth for the CCJ, considering that it had handled the question of sexuality and the law for LGBTQ individuals very differently in the earlier twin cases of *Tomlinson*, which I next discuss.

5.6.2. *Tomlinson v. Belize and Tomlinson v. Trinidad and Tobago*⁵⁴⁹

Tomlinson v. Belize and *Tomlinson v. Trinidad and Tobago* were two cases consolidated and heard under the Original Jurisdiction of the CCJ. Tomlinson's claim was that his treaty right to free movement was being interfered with, on account of (a) his being a homosexual, and (b) certain provisions of the immigration laws of both Trinidad and Tobago and Belize which excluded homosexuals from entry, subject to certain other provisions. Section 5(1)(e) of the Belize *Immigration Act* made "a homosexual" a "prohibited immigrant," subject to an exemption based on the discretion of the Minister⁵⁵⁰. Section 8(1)(e) of Trinidad and Tobago's *Immigration Act* declared that entry into that country was "prohibited" to "homosexuals," although the Minister had the discretion to allow a homosexual to enter as a person "passing through...under guard to another country"⁵⁵¹. Tomlinson's grouse was a fairly straightforward one - that the provisions, in their

⁵⁴⁹ *Maurice Tomlinson v The State of Belize and Maurice Tomlinson v The State of Trinidad and Tobago* (consolidated), 2016 CCJ 1 (OJ) [*Tomlinson*].

⁵⁵⁰ Section 5, in relevant part reads: " 5.-(1) Subject to section 2 (3), the following persons are prohibited immigrants....(e) any prostitute or homosexual or any person who may be living on or receiving or may have been living on or receiving the proceeds of prostitution or homosexual behaviour...". [Section 2(3) speaks to persons who shall be deemed to belong to Belize.]

⁵⁵¹ Section 8 in material part reads: "8. (1) Except as provided in subsection (2), entry into Trinidad and Tobago of the persons described in this subsection, other than citizens and, subject to section 7(2), residents, is prohibited, namely...(e) prostitutes, homosexuals or persons living on the earnings of prostitutes or homosexuals, or persons

plain meaning, in principle, could prevent him from using his Treaty right to free movement within CARICOM, in so far as both countries were concerned. (Tomlinson had previously visited both countries without the respective law being used to exclude him.)

The CCJ rejected Tomlinson's claim that the immigration provisions at issue impaired his treaty right to free movement. This was a most puzzling outcome. Basically, the Court relied partly on the *act of state* doctrine in international law to conclude that because both States had not actively enforced the challenged statutory provisions, there was no violation of the RTC. In my view, this was an unacceptable and incorrect use of the law, which ultimately resulted in a highly regrettable and wasted opportunity for the CCJ. The way that the Court tackled the issue, I argue, did not justly and effectively determine the core of Tomlinson's contention. It was unquestionable that the provisions in question declared that "homosexuals" were *prima facie*, prohibited immigrants. The Court, therefore, in my view, simply needed to interpret a plain piece of legislation on the basis of its obvious literal meaning, relying on the words used in the statute, followed by a straightforward analysis of how, if at all, this would infringe the Treaty right of free movement.

The Court instead retreated from concluding that a violation had occurred, explaining that it was "[u]ltimately...in the practical application of the legislation that...liability [was] grounded."⁵⁵² The Court further obfuscated, in my view, when it explained that that a separate

reasonably suspected as coming to Trinidad and Tobago for these or any other immoral purposes...". Section 8(2) provides: "(2) The Minister may authorise in writing under his hand or under the hand of a person designated by him, entry into Trinidad and Tobago of persons passing through Trinidad and Tobago under guard to another country".

⁵⁵² *Tomlinson*, supra, note 549, at para. 46.

statute in Trinidad and Tobago concerning the movement of skilled CARCOM nationals between Member States required an immigration officer “to permit entry...of skilled CARICOM nationals who present a skills certificate”, “notwithstanding any other written law.”⁵⁵³ Significantly, however, Tomlinson was not asserting that he was denied, or was likely to be denied entry on this basis. His contention was simply about immigration laws that contained a provision that could exclude him from the relevant CARICOM states, although the RTC gave him a right of free movement. At its core, his claim was a principled legal objection.⁵⁵⁴

The *Tomlinson* case gave the CCJ an opportunity to further develop the constitutional and institutional nuances of Community law. It also offered up a juridically feasible way to make plain that homophobic laws that reinforce stigmas and discrimination must be voided, but it tactfully obfuscated. Within the context of the right to free movement in Community law, this was a moment to seize the mantle of becoming the guardian of individual Community rights that were being retarded and soiled by discrimination, but the Court, in my view, squandered the chance. While the *Tomlinson* case addressed many of the same issues on general Community Law dealt with by the *Myrie* case, in relation to the reach of international human rights law into the practice of the CCJ, the outcome suggested that the Court was not yet ready to incorporate an international human rights rubric, especially on as socially sensitive a matter for the region as homosexuality. (This

⁵⁵³ Ibid, at para 49. The Act in question is the *Immigration (Caribbean Community Skilled Nationals) Act*, 1996.

⁵⁵⁴ In fact, the Court pointed out in its judgment, “Tomlinson’s complaint was not based on any factual refusal of entry or otherwise wrongful treatment by Belize or Trinidad and Tobago. Rather it centres on the allegation that the Immigration Acts of these States prohibit the entry of homosexuals. Tomlinson argues that the mere existence of these laws is sufficient to prejudice the enjoyment of his Community rights” (at para. 3).

clearly was to change later, however, with the *McEwan* case, two years after *Tomlinson*, as discussed above in this Chapter.) This show of equivocation on the part of the Court was curious, as the Court had earlier indicated in Tomlinson's application for special leave, that international law bodies had found violations of non-discrimination and privacy, based on the mere existence of contrary municipal law. Notwithstanding, in its ultimate judgement on the merits, the Court instead insisted, it appears, on latching on to a focus on state practice, and not the actual and formal literal meaning of the impugned provisions, from which the discrimination derived.

In my view, the Court would have been on solid ground to invalidate the provisions in question, bearing in mind that there was jurisprudence from international bodies such as the UNHRC and the ECtHR that could easily have grounded a different approach to the matter. That approach would be one that reinforces that discriminatory laws of the kind challenged here, based on one's sexuality, were not permissible. The fact that a topic or a potential outcome of a case could throw up a socio-cultural problematic should not be a basis for engaging in judicial artistry. Indeed, when the Court took the view in *Myrie* that the 2007 Conference Decision, which was not incorporated in Barbados law, still protected Community rights, it arguably took even more of a leap than would have been required to arrive at the expected outcome here - rightfully condemning and extricating sexuality discrimination from the enjoyment of a Community right to free movement. Granted, the nature of what was at stake here was different, socio-culturally, and of course, wider implications for social contestations were at stake. Notwithstanding, I argue, judicial fidelity to the cause of rectifying wrong-doing ought to have triumphed over not ruffling socio-cultural norms that are plainly wrong and inconsistent with the enjoyment of internationally approved and guaranteed human rights. Just as how the Court held in *Trinidad Cement* and *Myrie*

that Community law was directly applicable to protected rights under the RTC, it should have been equally sanguine about the applicability of Community law here, where, on its bare face, domestic legislation expressly interfered with one such Community right.

What I suggest here is that the Court, at that stage of its development, might have perceived that *Tomlinson* involved too highly a sensitive subject, and that might well have played a role in the way the case was resolved. The fact that Tomlinson, as the Court noted, was “an LGBTI activist”⁵⁵⁵, and that internationally, the case was perceived as being important to the journey for Caribbean queer rights⁵⁵⁶, may also have impacted the result of the case. At the very least, the reasoning and decision of the Court, were, in my view, curious. Even accepting that both Belize and Trinidad and Tobago were not *enforcing* the provisions of the statutes in question, the fact remained that because the laws were plainly on the books, any immigration officer could inquire into a CARICOM national’s sexuality at a port of entry in those countries. Were they to learn of such individual being a homosexual, they would be entirely on solid legal footing to deny landing to that CARICOM national. Assuming that that were to happen, how then would that national who is a homosexual be able to assert and demand the enforcement of the 2007 Conference Decision on free movement (as a result of the *Myrie* decision), when the CCJ had not declared the laws which prohibited entry of homosexuals in these States as inconsistent with Community law? That is the dilemma created by the Court’s decision. In this instance therefore, the CCJ modulated its

⁵⁵⁵ *Tomlinson v. Belize*, supra, note 549, at para. 6.

⁵⁵⁶ Salvatore Caserta & Mikael Rask Madsen, “*Tomlinson v. Belize; Tomlinson v. Trinidad and Tobago*”, (2016) 110:3 *Am. J. Int’l. L.* 533.

judicial power and restrained itself from establishing a new frontier (which it later did on rights to gender expression in *McEwan*, above).

While the Applicant was not successful in *Tomlinson*, *Maya Leaders Alliance* was a much different story. There, sexual minority rights were not the issue, but instead, ethnic, and cultural minority rights. As the ensuing discussion and analysis illustrate, the CCJ broke barriers in several ways with this case, both in terms of enforcing a new constitutional right to a cultural and historical legacy in land belonging to an Indigenous People, and in restoring accountability against governmental policies that perpetuated post-colonial and imperialist exploitation and governmental abuse.

5.6.3. *Maya Leaders Alliance and others v. Attorney General of Belize*⁵⁵⁷

This case involved the customary rights of certain Indigenous Peoples of Belize over ancestral lands and their resources. These lands, in Belizean law, were legally the property of the Crown. As a result, over the objections of the affected Maya Indigenous population, the government granted permits and financial concessions to corporations, to log and drill for oil. At the outset of the litigation, the Government of Belize contested whether the Maya Peoples had an ancestral right to the lands in question. By the time the litigation got to the CCJ, however, a settlement had been negotiated between the parties on the discreet issue of ownership of the land in question. This was affirmed in a Consent Order by the Court stating that the Appellants had customary land tenure over Maya lands, and these constituted property that was protected by

⁵⁵⁷ *Maya Leaders Alliance v. Attorney General*, [2015] CCJ 15 (AJ).

sections 3(d) and 17 of the Constitution of Belize. What was left to be determined by the CCJ was whether the Appellants were entitled to damages for breach of their constitutional rights.

In this case, the Appellants claimed three violations - arbitrary deprivation of property, equality and non-discrimination, and protection of the law. The Court ruled that the first violation could not be made out.⁵⁵⁸ This was because a precise legislative and regulatory framework had not yet been established, which would formalize Maya ownership and tenure over the lands in question. That ownership and tenure had only been agreed to in principle between the parties, as a result of the property rights recommendations from the *Maya Community* case which was decided earlier in the Inter-American human rights system. The details of ownership and tenure were “still to be precisely defined”⁵⁵⁹. On the question of the Appellants’ *equality and non-discrimination* claim, the CCJ found that there was no evidence of discriminatory treatment of the Maya, but felt also that any disadvantages that the Appellants experienced were better dealt with under the third violation claimed, that relating to *protection of the law*.⁵⁶⁰

In dealing with this third aspect of the claim, the Court expanded the perimeters of the constitutional concept of protection. After beginning by articulating that the concept was “multi-dimensional, broad and pervasive”⁵⁶¹, and that it encompassed “the right of the citizen to be afforded ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power’”, the Court turned to the international human rights law space, asserting that:

⁵⁵⁸ Ibid, at para. 35.

⁵⁵⁹ Ibid, at para. 35.

⁵⁶⁰ Ibid, at para. 37.

⁵⁶¹ Ibid, at para. 47.

*...the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people. A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments...*⁵⁶²

In adopting the guidance of the international human rights jurisprudence and treaty provisions, the CCJ gave the Belize Constitution a broadened basis for the “protection of the law” principle, explaining that the Preamble to the Constitution expressly contemplated consideration of international law. In this regard, the Court gave itself licence to incorporate a broader scope for constitutional protection of the right, as claimed by the Maya Indigenous Peoples. In this approach, the Court gave credence to the “normative functions”⁵⁶³ of the Preamble to the Constitution, thereby allowing it to “fill the Constitution with meaning”⁵⁶⁴.

As part of rationalizing its approach of pouring meaning into the Constitution in the way it did, the engaged the unwritten constitutional principle of the *rule of law*, which in this instance, the Court noted, “imports an obligation to adhere to international commitments”⁵⁶⁵. In this way, although the case was located in the domestic constitutional law of Belize, the construct of the rule of law would be deliberately *internationalized*. The Court gave this unwritten constitutional principle an international law dynamic, such that it felt *licensed* to evoke a rationale from the application of international human rights norms, that of “dignity [for] all human beings”.⁵⁶⁶ This was being done, although Belizean land law had not yet extended protection to the collective or individual land rights that arose under the indigenous Maya customary system of land tenure. By resorting to such instruments as the UDHR, ICCPR, CPPCG, ICEFRD, UNDRIP⁵⁶⁷, the Court

⁵⁶² Ibid, at paras. 52.

⁵⁶³ Ibid, at para. 54.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid, at para. 59.

⁵⁶⁶ Ibid, at para. 53.

⁵⁶⁷ Supra, notes 14-20.

gained the platform it felt it needed to force the State to deal with the wider socio-political issue of Indigenous land rights for the Maya Peoples. This, of course, was based on the Court's ultimate finding that the "deprivation" of "property rights" could properly contemplate land to which the Maya People had an ancestral, spiritual, and cultural connection. This was determined to be the case, in spite of the absence of any settled, structured, legal regime that was approved by the State.

By bringing IHRLN to bear on the case in this way, the Court ensured that a resolution was not just simply based on a mere technical discussion of legal ownership of land, and constitutional violation thereof, but also about a bigger notion of the restoration of dignity to an Indigenous People; the correction of historical, colonial wrongs; and the elevation of an economically dispossessed segment of Belizean society, through the conduit of constitutional law. Indeed, I suggest that the way the Court handled the case was even wider than these, and was also about re-establishment of Maya *sovereignty* over its own *territory*, which had been stripped bare by the brutality of colonial disenfranchisement, and perpetuated by the modern Belizean State. As the Court itself explained - "This judgment, and the Consent Order ... undoubtedly represent a form of reparation and satisfaction in the recognition of the customary land tenure rights of the Maya people in southern Belize... It also is a form of redress for the centuries of oppression endured by the Maya people since the arrival of the European colonizers".⁵⁶⁸

In relation to the discreet issue of damages, where this is determined to be the appropriate remedy by the Court, the CCJ also turned its gaze to international human rights jurisprudence on moral and vindictory damages. It examined the *Case of Kichwa Indigenous People of Sarayaku*

⁵⁶⁸ Supra, note 557 (*Maya Leaders Alliance*), at para. 75.

*v. Ecuador*⁵⁶⁹, for example, where compensation was awarded by the IACtHR as non-pecuniary damages to an indigenous community of 1200 persons who had been the victims of the activities of logging and seismic testing. In considering the award of non-pecuniary damages in that case, the IACtHR explained that:

*w]hen declaring the violations of the rights to communal property and consultation, the Court [takes] into account the serious impacts suffered by the People owing to their profound social and spiritual relationship with their territory and, in particular, the destruction of...places of great symbolic value. [The Court also bears] in mind...the suffering caused to the People and to their cultural identity, the impact on their territory...as well as the changes caused in their living conditions and way of life...*⁵⁷⁰

The CCJ also considered the Caribbean case of *Saramaka People v Suriname*⁵⁷¹, also from the IACtHR. In that case the IACtHR relied on an earlier decision⁵⁷², *Case of Cantoral Benavides v. Perú*⁵⁷³. The *Benavides* decision indicated that “[n]on-pecuniary damages might include the pain and suffering caused to the direct victims and to their loved ones, discredit to things that are very important for persons, other adverse consequences that cannot be measured in monetary terms, and disruption of the lifestyle of the victim or his family”⁵⁷⁴.

The CCJ was obviously persuaded by *Sarayaku*, *Saramaka* and other similar decisions from the IACtHR and decided to be “innovative”⁵⁷⁵ in its interpretation of the powers conferred on the Court by section 20 of the Belize Constitution. That section speaks to the power of the Court to make any orders and declarations or give any directions that the Court deemed to be appropriate.

⁵⁶⁹ *Case of Kichwa Indigenous People of Sarayaku v. Ecuador* (2012) Ser. C. no. 245, at paras. 322-323.

⁵⁷⁰ *Ibid*, at paras. 322-323.

⁵⁷¹ *Saramaka People v. Suriname* (2007) Ser. C. no. 172.

⁵⁷² *Ibid*, at footnote 212.

⁵⁷³ *Case of Cantoral Benavides v. Perú* (2001) Series C. No. 88.

⁵⁷⁴ *Ibid*, at para. 53.

⁵⁷⁵ *Maya Leaders Alliance*, *supra*, note 557, at para. 77.

It was obvious that the CCJ felt that the prescriptions on non-pecuniary damages from the international human rights cases that it considered, were apposite in the instant case.⁵⁷⁶ The Court's perspective on the issue evinced a sense of compassion and empathy. It stated:

*The judicial conscience cannot but be moved by these expressions of indigenous concern for the damage to and the marginalization of Maya culture. We remind ourselves of the solemn pledge in the preamble to the Constitution to ensure that State policies protect the identity, dignity, and social and cultural values of Belize's indigenous peoples. This judgment...undoubtedly represent[s] a form of reparation and satisfaction in the recognition of the customary land tenure rights of the Maya people in southern Belize, and in the judicial finding that those rights have been contravened by the Government of Belize. It also is a form of redress for the centuries of oppression endured by the Maya people since the arrival of the European colonizers.*⁵⁷⁷

What we learn from this aspect of the CCJ's handling of the case is that the Court quite often resorts to IHRL to fill gaps, and to find strategies to assist it to get to where it wants to go. Likewise, when the domestic law appears thin, or is limiting, in securing certain value-oriented outcomes, IHRLN becomes handy for the Court to use. In this case for instance, nothing in Belizean constitutional law, without more, would likely have taken the Court to making a land case one about protecting dignity, and awarding money to a group of Indigenous citizens for wrongs done to the "profound social and spiritual relationship with their territory"⁵⁷⁸, or for damage done to places that are of "great symbolic value"⁵⁷⁹ to this particular group of citizens. It is hardly likely that domestic law alone could have transported the Court to this very solid and justified reparatory place. So, while the Constitution of Belize authorized a Court to make compensatory orders for the violation of constitutional rights, for example, the Court looked to

⁵⁷⁶ In this case, the CCJ made an award of three hundred thousand Belize dollars (BZ\$300,000.00), the equivalent of approximately US\$145,000.00. The Court described this award of non-pecuniary loss as a "first step towards...[protecting] Maya customary land tenure", at para. 77.

⁵⁷⁷ *Maya Leaders*, supra, note 557, at para. 75.

⁵⁷⁸ Supra, note 570.

⁵⁷⁹ Ibid.

IHRLN to frame and define how it would establish compensation in a case of this nature. Likewise, even though earlier litigation in this case had effectively forced the State to consent to the claim that Maya land tenure was a recognized species of land rights, the CCJ still resorted to IHRLN to determine what the interpretation of a violation of that right should look like in constitutional human rights terms.

In all of this creative and international transplantation law-making, however, the CCJ was cautious in not seeming to appear to be gerrymandering the political dynamic on the ground in Belize. The Court demonstrated a cognizance of the limits of its own power, which, from what it said towards the end of its decision, was uppermost in its mind:

We feel obliged to add a note of caution. The contributors to Reparations for Indigenous Peoples assert that moral damages or reparations for historical injustices to indigenous peoples are emerging as a centrally important aspect of international human rights and humanitarian law and that the term 'reparations' is deliberately used to recall the status of indigenous peoples as original sovereign entities over their ancestral land that never totally lost their sovereignty. Whatever may be the purport of these developments in international jurisprudence, our award in this case is not to be taken as encouraging or providing implicit support for Maya communities to operate as a state within the state of Belize...[T]he constitutional authority of the Government of Belize over all lands in Belize is not affected by [this decision].⁵⁸⁰

Its only goal, therefore, as it was strenuously prepared to make clear, was a vindication of constitutional rights that emerged from Belize's domestic Constitution. That is why the Court indicated at various points, in various ways, that its judgement must be "mediated through the peculiar legal traditions and constitutional arrangements which this Court is sworn to uphold"⁵⁸¹. As the Court studiously conveyed, it was *simply* safeguarding the "identity, dignity, and social and

⁵⁸⁰ *Maya Leaders Alliance*, supra, note 557, at para. 78.

⁵⁸¹ *Ibid*, at para. 8.

cultural values of Belize's indigenous peoples"⁵⁸², and not "encouraging or providing implicit support for Maya communities to operate as a state within the state of Belize"⁵⁸³.

While *Maya Leaders Alliance* was an indisputable accomplishment for the Court in transforming collective, tribal land rights in Belize, the Court was not so similarly disposed in the *Myrie* case dealt with next, a case that I argue, was a missed opportunity for the CCJ. This was a case decided in 2013, two years prior to *Maya Leaders Alliance* in 2015.

5.6.4. *Shanique Myrie v. Barbados*⁵⁸⁴

The *Shanique Myrie v. Barbados* case was one decided by the CCJ in its Original Jurisdiction. In this case, Myrie, a Jamaican national, was detained at the airport on a visit to Barbados, held overnight, and then repatriated to Jamaica the following day. Myrie claimed that this was a violation of her CARICOM Treaty right to free movement, and that the overall circumstances and conditions of her detention breached international human rights law.

For purposes of this study, I deal with only the human rights component of *Myrie*. In a surprising rejection of Myrie's claim to compensation for breaches of her fundamental human rights, as a result of the shocking violation of her privacy and sexual dignity, the Court declared that it had no jurisdiction to consider the human rights claims in its Original Jurisdiction, and that the rights alleged to be breached could be pursued in other fora that were established under the international treaties that created those human rights.⁵⁸⁵ This was the Court's finding on this aspect

⁵⁸² Ibid, at para. 75.

⁵⁸³ Ibid, at para. 78.

⁵⁸⁴ *Shanique Myrie*, supra, note 106.

⁵⁸⁵ Ibid, at para. 10.

of the claim, although it had made factual findings that the human rights violations alleged by Myrie were proven. I contend that this was an implausible outcome for the Court.

This contention is premised on two key points. The first of these is that the matter, as a whole, was in fact properly brought within the correct jurisdiction of the Court. The Court itself made that declaration when it stated that Myrie was a Community national, she had an arguable case of her right to enter Barbados, and that Myrie was prejudiced in this right.⁵⁸⁶ Secondly, as the Court itself acknowledged, the RTC permitted it to rely on principles of international law (which includes international human rights law) to determine matters before the Court. This is expressly provided for in Article 217 of the RTC. The provision reads:

ARTICLE 217

Law to be Applied by the Court in the Exercise of its Original Jurisdiction

1. The Court, in exercising its original jurisdiction under Article 211, shall apply such rules of international law as may be applicable.

2. The Court may not bring in a finding of non liquet on the ground of silence or obscurity of the law.

3. The provisions of paragraphs 1 and 2 shall not prejudice the power of the Court to decide a dispute ex aequo et bono if the parties so agree.

So, it is indeed clear from the text at Article 217(1) in particular, that there was a basis for utilizing international human rights law to adjudicate the concerns that the Court obviously had regarding the conditions of Myrie's detention; the discrimination based on her nationality; and the violation of her privacy and person for the conduct of the cavity search.

⁵⁸⁶ Ibid, at para. 7. Pursuant to Article 222 of the RTC, with special leave, Ms. Myrie could be a proper litigant before the Court in its Original Jurisdiction.

I submit, therefore, that when the Court suggested that it was not a “human rights court”, while this was technically correct, it was fundamentally flawed in logic and principle. With the grounding in the RTC that I have offered and that which the Court itself accepted, there was a myriad of ways for the CCJ to have employed international human rights laws to protect and vindicate the human rights violations of which Myrie complained, and which the Court found as facts. Under the ICCPR for example, discrimination based on nationality is forbidden under Article 2; cruel, inhuman, or degrading treatment is covered in Article 7; protection from arbitrary deprivation of liberty and protection of the security of the person in Article 9; the protection of one’s inherent dignity when detained – Article 10; and protection against unlawful interference with privacy – Article 17. Similarly, in the UDHR, protection against cruel, inhuman or degrading treatment is found in Article 5; arbitrary detention – Article 9; arbitrary interference with privacy – Article 12; and discrimination based on national origin – Article 2. To that extent, the attitude of the Court to resist engagement was another lost opportunity, especially in the context of Article 217 and the Court’s earlier positive ruling on *correlative rights*.

Moreover, international human rights law had enough maneuvering space to ground engagement by the Court with Myrie’s human rights claims. For example, the ECtHR has found strip searches to constitute degrading treatment when not justified by compelling security reasons and/or due to the way they were conducted. In a similar vein, in *Miguel Castro-Castro Prison v. Peru*⁵⁸⁷, the IACtHR considered that a vaginal inspection constituted rape, and even torture, due to the effect it had on the subject. With this kind of international human rights jurisprudential

⁵⁸⁷ *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, 25 November 2006.

support, therefore, the perspective taken by the CCJ on the human rights issues in *Myrie* was wholly unsatisfactory.

Emerging from *Myrie* (a 2013 decision) was the sense that even though the CCJ was fundamentally keen on relying heavily on IHRLN to enrich and *legitimize* its jurisprudence generally, it did not wish itself to be seen as a “human rights” court in its Original Jurisdiction, simpliciter. This, not in the sense that it had no other adjudicatory functions that were meaningful (as it clearly did as a trade court, in this Original Jurisdiction), but in the sense that it would leave a perception that it was making a *trade* dispute before the Court in that jurisdiction, about *human rights*, at the least *opportunity* arising. Clearly, from its heavy reliance on IHRLN in its wider work, the Court wants to be seen as cosmopolitan and *universal* in its human rights values. It also wants to be seen as being consistent with core principles of fundamental justice rooted in human rights considerations that had been built into the fabric of jurisprudence from other esteemed international judicial institutions such as the IACtHR and the ECtHR. Notwithstanding these, however, it appears that there might have been a concern or *fear* from the Court not to be type-cast as one without more than human rights to offer, or as one that was sort of human rights “bandwagon-ing” at the least occasion. This appears discernable not only from the judgement itself in *Myrie*, but also from later extrajudicial comment by Anderson JCCJ, that the Court “did not take the bait”, that the human rights aspect of *Myrie*’s claim was “misconceived” as the CCJ “was not a human rights court per se”, and that “[i]t [was] therefore apparent that whilst a claim regarding a breach of a right under the RTC may involve a human rights dimension, the Court in

its original jurisdiction is not to be understood as constituting a tribunal within the scheme of international human rights law”.⁵⁸⁸

Suffice it to say, however, what Myrie’s case sought, were remedies for breach of a treaty right of free movement, with an additional claim for compensation for how she was treated. To that extent, I argue that her intent was not to make the CCJ a human rights tribunal “within the scheme of international human rights law”, but rather to seek affirmation that her free movement right under a treaty was violated, and that she was physically, mentally and emotionally impacted in that process of denying her treaty right. Just as the Court employed very detailed analyses of “human dignity” and the “rule of law” in *McEwan* and *Maya Leaders Alliance*, or “legitimate expectation” in *Joseph and Boyce*, as examples, the perfect opportunity arose here as well for the Court to have articulated standards of treatment, grounded in IHRLN, in any process that involved the violation of a Treaty right. Even though this case was not a constitutional law litigation, as those other mentioned cases were, I argue that the Court should be equally systematically keen on vindicating fundamental human dignity in any circumstance over which it has jurisdiction. The Treaty clearly mandates the Court to apply international law, and to that extent, it should not equivocate when claims of the nature advanced by Ms. Myrie about physical and emotional abuse are placed under its scrutiny, in the context of litigation on substantive Treaty rights. The danger of any such equivocation, I suggest is that the jurisprudence of the Court could become lopsided and inconsistent, giving cause for concern on the rationality of championing human rights in its Appellate Jurisdiction (albeit through constitutional law conduits), but not in its Original

⁵⁸⁸ Winston Anderson, “Free Movement With CARICOM: Deconstructing *Myrie v. Barbados*”, lecture to the Organisation of Eastern Caribbean States Bar Association, Grenada, at p. 14, found at: <file:///C:/Users/HPW/Documents/Winston%20Anderson%20-%20FREE-MOVEMENT-WITHIN-CARICOM-DECONSTRUCTING-MYRIE-v-BARBADOS.pdf>

Jurisdiction. As I have explored earlier, transformative courts tend to be incrementalistic in approach, but it appears that such incrementalism has to be practiced on both sides of the Court's jurisdiction in order for it to maintain its credibility, predictability, and transparency. (The positive thing, however, is that this may yet occur, bearing in mind the relative infancy of the Court at this point.)

In light of the foregoing discussion, therefore, the CCJ's dismissal of Myrie's human rights claim was misconceived and entirely unwarranted in my view. To that extent, this was an early missed opportunity to broaden its adjudicatory human rights frontier.

5.6.5. Attorney General of Guyana v. Cedric Richardson⁵⁸⁹

In this case, Richardson, a Guyanese national, complained that his right to choose whomever he wanted to be President of Guyana, which was impliedly conferred by Articles 1 and 9 of the Constitution⁵⁹⁰ had been diluted, as a result of an alteration to Article 90 of the Constitution, which disqualified a person who had already served two terms as President from seeking that office again.

In terms of broadening new frontiers in "Caribbean" law by its use of IHRLN, this case from the CCJ presents as a bit of an anomaly. The interesting thing about this case, which makes

⁵⁸⁹ *Attorney General of Guyana v. Cedric Richardson* [2018] CCJ 17 (AJ).

⁵⁹⁰ Article 1 reads, *inter alia*:

Guyana is an indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism.

Article 9 states:

Sovereignty belongs to the people, who exercise it through their representatives and democratic organs established by or under this Constitution.

it anomalous, I suggest, is that while international human rights law figured importantly in certain aspects of the Court's reasoning across the board, its use was deployed to both arrive at the majority outcome as well as to contest the outcome by the dissent. On the one hand, IHRLN were used by the majority of the Court to justify the democratic and constitutional legitimacy of the actions of the State complained about, while on the other hand, it was utilized as a tool of rebuke in the minority opinion of the Court, to undermine the validity of the actions of the State as being undemocratic. As I show shortly, in deciding the case the way it did, the Court raises for me, questions about the methodology of the majority in the specific set of circumstances. These questions involve the heavy reliance by the majority on American jurisprudence and legal literature, which contrasted with the inclination of the Court when deciding other fundamental constitutional and human rights issues, particularly for a State like Guyana, which regarded itself as a "Co-operative Socialist Republic". The implications of this for the de-colonizing goal of the Court, at the very least was ironic, particularly set against the theology of the sovereignty of the people over their democracy, presented in the dissent of Anderson JCCJ. The outcome, therefore, I proffer, was not consistent with the manner in which the Court had previously used international human rights law to advance the cause against governmental and legislative overreach (eg. in *McEwan*).

Richardson's objective in this case was to obtain orders from the High Court in Guyana that would nullify the alteration to the Constitution that he complained about. The trial judge ruled in Richardson's favour, and this, by a majority, was upheld by the Guyana Court of Appeal. The State then pursued an appeal with the CCJ.

The case produced four different opinions at the CCJ, Byron PCCJ, Saunders JCCJ, and Wit JCCJ (with Hayton JCCJ, Rajnauth-Lee JCCJ, and Barrow JCCJ concurring), and Anderson JCCJ giving a stinging dissent that I will address later. By a majority, albeit through various routes, the CCJ sided with the Government of Guyana in the outcome, ruling that the Constitutional Amendment was valid and was duly enacted. Both the opinions of Byron PCCJ and Saunders JCCJ relied primarily on Guyana's democratic and constitutional history, a line of United States cases, and an article by American philosopher Johnathan Mansfield, *Choice Approach to Constitutionality of Term Limits*, to find that the Constitutional Amendment "did not dilute democracy in, nor undermine the sovereignty of the people"⁵⁹¹, or "impair"⁵⁹² it. Saunders JCCJ, justified the reaching out into the wider world for *assistance*, explaining that:

*a court may wish to draw on 'the collective wisdom and experience of courts the world over.' Transnational constitutionalism may provide guidance as to whether a particular constitutional amendment is abusive or consistent with what should obtain in a sovereign and democratic state....*⁵⁹³

Interestingly, Wit JCCJ, also adopted a similar *reaching out* as well, but firmly located his analysis in international human rights law. This, he considered, was important and necessary "for a proper analysis...[focusing] on objective, international standards of what a democratic state entails"⁵⁹⁴. With this settled, Wit JCCJ turned to a series of international human rights instruments. Starting with Article 3 of the *Inter-American Charter*, he highlighted the fact that representative democracy includes respect for human rights and fundamental freedoms, access to and exercise of power according to the rule of law, holding free and fair elections periodically, and a pluralistic system of political parties. His Honour then pivoted to the ICCPR, Article 25, foregrounding

⁵⁹¹ *Cedric Richardson*, supra, note 589, at para. 45.

⁵⁹² *Ibid*, at para. 106.

⁵⁹³ *Ibid*, at paras. 95, 99 & 100.

⁵⁹⁴ *Ibid*, at para. 112.

considerations such as a free vote, participation in public affairs and public life, and access to public service, irrespective of differences of religion, gender, race, and other key characteristics. Finally, the learned Judge adverted to Article 23 of the ACHR, focusing on similar matters such as the right to vote in periodic elections, engagement in public affairs and the exclusion of discrimination, much like Article 25 of the ICCPR does. Wit JCCJ went further to draw support from the IACtHR which articulated the test for whether a restriction on the exercise of an individual's political rights comported with international human rights standards. His Honour summarized the test in this way, from the IACtHR jurisprudence:

*...the conditions and requirements that must be fulfilled when regulating or restricting these rights are (a) the restrictive measure must be lawful, meaning that the restriction must be clearly established by law, (b) the cause invoked to justify the restriction should be among those permitted, for example to protect the public order, the rights of others or the just demands of the general welfare in a democratic society, and (c) the restriction should be necessary in a democratic society and it should be proportional.*⁵⁹⁵

All of this considered, Wit JCCJ determined that “limitations on access to the ballot or re-election cannot be seen as an obstruction to exercise...[democratic] rights and to participate in politics”⁵⁹⁶. This was the majority outcome of the case.

Turning to the strident dissent of Anderson JCCJ, he contended that “Parliament was not supreme. The Constitution is”⁵⁹⁷, and reasoned that in relation to Articles 1 and 9 of the Guyana Constitution which Richardson complained were being violated, those provisions must be given a “generous, liberal and purposeful” interpretation, as they were “akin to human rights

⁵⁹⁵ Ibid, at para. 115.

⁵⁹⁶ Ibid, at para. 121.

⁵⁹⁷ Ibid, at para. 131.

provisions”⁵⁹⁸. To reinforce this view, Anderson JCCJ, drew attention to the fact that among the treaties listed in the Fourth Schedule to the Guyana Constitution, was the ICCPR. On this account, like Wit JCCJ, Anderson JCCJ turned to international human rights law, asserting and concluding that:

A sovereign democratic state in which sovereignty belongs to the people describes a state in which the people have supreme power or authority to govern themselves... A core feature of a sovereign democratic state in which sovereignty belongs to the people is that the people must be free to choose the persons who will govern and represent them, especially as their President. Free, that is, of any constraints that they themselves have not approved at the founding of their Constitution or by the processes specified for their involvement in defining such constraints. There is an irrebuttable presumption that the people know who would best represent their interests in government. They are the ones to decide upon the suitability and categories of qualifications of persons to stand for office. The imposition of restrictions that disqualify large numbers of persons from standing for election as President, which restrictions are not sanctioned by the people in the constitutionally authorized manner, necessarily trenches on their freedom to choose their representatives and is concomitantly a fetter upon their sovereignty.⁵⁹⁹

Anderson JCCJ’s view was that Articles 1 and 9 were *deeply entrenched* in the Guyana Constitution, which emphasized their “normative character and centrality...[in] the Constitution as the supreme law of the land”⁶⁰⁰. On this rationale, thus, in dissent, his ruling was that the amendment to Article 90 of the Constitution was null and void.

So here, while IHRLN was differently deployed on either side of the argument, the takeaway was the essential role that IHRLN plays in the broader dynamic of the CCJ’s decision-making.

⁵⁹⁸ Ibid, at para. 145.

⁵⁹⁹ Ibid, at paras. 147-148, 159 & 150.

⁶⁰⁰ Ibid, at para. 144.

5.7. Conclusion

As this chapter has shown, the CCJ's human rights jurisprudence has made some important incursions into Caribbean law, relying on international human rights principles, laws, and norms. The Court has tackled thorny issues such as the mandatory nature of death penalty, legitimate expectation in the protection of constitutional rights, dualism in Caribbean law and legal systems, the Savings Clause, the insulation of public bodies and authorities from unwarranted claims of partiality, equality of arms in criminal trials, the duty to give reasons as a human right, among others.

What this tells us is that the Court is keen to make IHRLN a core part of its judicial approach to interpreting the law, wherever such laws and norms add value to the adjudicative output of the Court. In other words, the CCJ is making the use of IHRLN a part of the ethos of the Court, such that these norms and laws imbricate the spectrum of matters dealt with by the Court. This speaks to a certain philosophical and practical understanding that the Court has, that irrespective of the underlying legal question that is proffered for resolution, wherever useful or relevant, a human rights discourse must be engaged.

CHAPTER SIX

UNIVERSALISM AND TRANSFORMATION THROUGH THE CCJ

6.1. Introduction

[I]t behoves all of us... to prepare, present and succeeding generations, to rally around eternal core human values. Truth, Compassion, Cooperation, Caring, Courtesy, Peace, Empathy... These are values we must safeguard and promote... But there is another value to which I must call attention. One that is vital for us in the Caribbean with our fractured experiences over the past four centuries. That other value is Self-belief. A clear sense of ourselves. An understanding of our worth as human beings and of our ability to forge our own destiny... It is perplexing to me, for example, that so many people in the region contrive to find excuse upon excuse to justify the anomaly that, after 50 years of political independence, the laws that we proudly make should ultimately be interpreted and applied by a British institution, staffed with British judges all of whom reside in Britain. This, after [CARICOM] states, over 15 years ago, established their own Court, precisely to serve that purpose... This, after the Court, has successfully been operating for well over 10 years serving the needs of some States. When I try to explain this to my colleagues from Asia, Africa and Latin America... [i]n the face of the incredulity expressed by my colleagues, it becomes an embarrassment linked directly to our perception of ourselves and the level of confidence we have in our capacity to take full responsibility for our own governance... I temper my perplexity, I look to the future and I remain confident. I remain confident that, as is the case with, for example, The Caribbean Development Bank, the Caribbean Examinations Council, and of course The University of the West Indies (to name just a few), the time will come when the CCJ also will be recognised as another of those Caribbean institutions whose vital contribution to the region can almost be taken for granted. I remain confident that our institutions of learning, and UWI in particular, will rise to the challenge of inspiring our students with the notion that Caribbean people are inferior to no one; that we do have the capacity to govern ourselves, to build and maintain worthy institutions; that we are able to and that we do produce the human resources effectively to manage such bodies; that these institutions, when locally established, work for us in ways in which no others can; and that if we observe carefully, objectively, we will see these truths demonstrated over and over again. Yes, I remain confident.

These solemn words were spoken on October 20, 2018, by the Honourable President of the CCJ, Mr. Justice Adrian Saunders, on the occasion of the conferring of an honorary degree of Doctor of Laws on him, by the University of the West Indies, the Caribbean's premier institution of higher

learning, for his distinguished career in the law. These words about the CCJ capture a range of things, including:

- (a) a recognition of the essential human values that the Court must safeguard and protect;
- (b) a historical recall of our social and political evolution, from slavery and colonialism to post-colonial political independence, into which we must fit the significance of the Court's existence;
- (c) a sense of pride and accomplishment of what the Court has so far achieved;
- (d) confidence in the rightful place of the Court in the progress and development of the region;
- (e) hope for a great future for the Court; but
- (f) disappointment and frustration about the doubts that are still harboured in parts of the psychology of the region, about the efficacy of an indigenous, successful and *transformative* Caribbean institution as the Court.

These things have also been the story of this thesis. From the early hesitations about the Court explained in Chapter 2, to the remarkable work of the Court through its human rights and other jurisprudence, to the elevation of fundamental human rights and the proper administration of justice and accountability of the State, and to the transformative outcomes and new approaches and doctrines advanced by the Court, the study has mirrored and represented the misgivings about, and successes of the CCJ, noted by the President in his address.

In this chapter, the study brings together the contextual and theoretical on the one hand, and the results of the mapping of the CCJ's human rights jurisprudence on the other, in aid of the main argument of the study. As I demonstrated in Chapter 5, the CCJ has spoken in universalist terms about the enjoyment of core international human rights laws and norms. In that regard, it can be discerned that the Court's theology of rights is not founded on narrow, culturally relativist thinking, but rather, on broader globalist interpretations of domestic law. The Court's engagement with the universalist notions embedded in IHRLN is typically explicit in the Court's reasoning, with the Court speaking consistently in terms that invoke the "the promotion of universal standards of human rights, accepted both at the domestic and on the international level"⁶⁰¹. In articulating such a universalist course and a vision for itself, rather than becoming a regional tabernacle to insular, unevolved, and narrow culturally contained jurisprudence, the CCJ has instead deployed IHRLN in its adjudicative work in such a manner that it has started to become a beacon of legal transformation and progressiveness in regional jurisprudence. This coincides with much of what I discussed in Chapter 4, in terms of universalism and *transformation*. As a result, I argue that the Court is on its way to changing legal cultures, and formulating doctrines, principles, and approaches that will for future generations be the start of an enlightened Caribbean legal thinking.

6.2. Discussion

6.2.1. IHRLN and the CCJ's Emancipatory Trajectory

From the mapping and discussion of the cases in Chapter 5, it is apparent that the CCJ's approach to IHRLN does not mirror the anti-neocolonial and anti-imperialist essences reflected in the Caribbean political economy discourse. To the contrary, what emerges from the CCJ's human

⁶⁰¹ *Joseph and Boyce*, supra, note 471, at para. 106.

rights cases is a decisive embrace of globalist, universalized international human rights laws and norms, diligently and artfully brought to bear on an evolving Caribbean articulation of human rights. This speaks to the *functional universality* of IHRLN that I explored through Donnelly in Chapter 4, wherein a court such as the CCJ joins in protecting Caribbean peoples against all kinds of threats to their human dignity, and securing their moral equality, through *consensual universality*, thereby protecting their human rights irrespective of culture, geography, or politics. To this extent, we see the Court consistently infusing human rights into its work, although occasionally independently generating an *indigenous* application or perspective. Such infusion occurred again quite recently, when the Court, in interpreting a provision in the *Sexual Offences Act* of Barbados, on whether a male could be charged with raping another male in Barbadian law, pointed out that even in as basic a task as statutory interpretation, domestic constitutional law must be infused with international law on fundamental rights. In the concurring opinion of Jamadar JCCJ:

*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...In addition, and consistent with the principle of sovereignty, the task of statutory interpretation ... includes attending to the state's declared international undertakings through signed and subscribed international treaties and legal instruments...The result is a constitutional impetus to interpret all domestic laws in alignment with state undertaken international obligations and commitments, an approach recognised and endorsed by this Court...In this case the... principles [engaged] are the right to protection of the law regardless of sex, and the prohibition against discriminatory laws ... [a]nd based on international law commitments, equality before the law regardless of gender and the enjoyment of fundamental rights and freedoms without restrictions based on sex. These values, principles, and commitments all support a gender-neutral reading, interpretation, and application of the provisions[in question]....*⁶⁰²

⁶⁰² *Commissioner of Police v. Alleyne* [2022] CCJ 2 (AJ) BB, at paras 23-26.

The manner and degree to which this study has demonstrated that the CCJ has relied on IHRLN in its human rights decision-making, do not, on the evidence presented, undercut the Court's Caribbean or indigenous identity. To the contrary, they demonstrate the creative aspirations of the Court to craft principled jurisprudential human rights approaches, particularly through its constitutional law work, that positively impact people's lives. This impact arises in the sense that having laws interpreted in the way that this thesis demonstrates that the CCJ does, to reflect IHRLN, is a positive development in itself, and is constructive for the jurisprudential and actual progress of CARICOM communities at large.

Indeed, I argue that rather than hiding itself under the burdens of *dependency* and the *plantation economy* discussed in Chapter 3, the Court has taken on a de-colonizing, emancipatory role for itself, deploying the very universal international human rights norms that cultural relativism sometimes challenges, in order to uplift the peoples of the Caribbean. This is part of what transformative constitutionalism discussed in Chapter 4 contemplates, a court, acting not in aid of any political agenda, but for the protection of those whom it serves. Likewise, we see a court that is embarking on a journey that is fundamentally about *emancipatory commitments* through its jurisprudential discourse. There, the goal becomes broadening the impact of constitutional rights in the wider society, steering action towards change, and facilitating meaningful improvement, as Brickhill⁶⁰³ explains it. That is why, as Bhagwandi⁶⁰⁴ indicates, such transformational courts are seen as *activist*, again, not because of any classic *political* agenda, but because of their work as vehicles for transformation and evolution in the law, and in the lives of the court's constituencies.

⁶⁰³ Supra, note 360 and 361.

⁶⁰⁴ Supra, note 236.

From the evidence presented in Chapter 5, what the CCJ appears to oftentimes do, is to construct a framework for its analysis that is grounded in the already-existing emancipatory provisions of the domestic Constitutions concerned, but from which it formulates principled patterns of reasoning, which are supported by both domestic and regional jurisprudence, as well as extra-regional and international law. This illustrates a proclivity by the Court to indigenize, and to be creative. This strategy creates a sustainable, credible, blended enunciation of an indigenous way to protect human rights in the region, in spite of the usual anti-colonialist, socio-cultural and political hesitations towards some international human rights norms and laws.

What I also see happening with the CCJ's human rights output is an incorporation of acceptable and sensible *universalized* and *transformational* international human rights laws, norms, and principles, operating alongside an appreciation of local circumstances. This is much like what Woessner describes as a charting out of "a different conception of human rights... that looks not just at the clean centres of cosmopolitan power, but at the messier margins of provincial suffering."⁶⁰⁵ Put differently, it is not that the Court is indiscriminately avoiding or rejecting domestic norms and cultures without reason, where domestic "provincial suffering" arises, but it is instead inculcating, where it considers it useful, necessary and prudent, norms that promote equality, liberty and human dignity, regardless of any contestations of cosmopolitan power that there might be behind those norms. To that end, the Court is not dogmatically or philosophically casting out such universalized norms as products of Eurocentrism and imperialism, but is instead justifying and applying these laws and norms based on the context presented, and in support of the

⁶⁰⁵ Martin Woessner, "Provincializing Human Rights? The Heideggerian Legacy from Charles Malik to Dipesh Chakrabarty," in Josel-Manuel Barreto, ed, *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge: Cambridge Scholars Publishing, 2013) at 68.

values of fairness, the rule of law, and democracy. This was highlighted in commanding form by Jamadar JCCJ in *Belize International*⁶⁰⁶, for example. This is important, because, as I discussed in Chapter 4, much of what grounds the *universalism* of international human rights law, according to Glensy, is human dignity, aimed at safeguarding the autonomy of self and human self-worth. Equally important to that universalism in dignity, as Glensy also reminded us, is the preservation of democracy, not in the context of party political enfranchisement, but rather conceptually, in terms of the values of equality and fairness in society.

In that context, it is clear that the CCJ does not appear motivated by the properties systemic to the *plantation* and *dependency* theorizations in Chapter 3, notwithstanding the political economy sensibilities and human-rights-fearing environment that the Court is operating within, which trigger and reinforce historical and international political economy considerations of colonial “capture”. The evidence tells us a different story, that instead, the Court is adopting an expansive, pragmatic approach, based on objective reality and fundamental notions of human equality and dignity, with the aim of emancipating the Caribbean region from the very “colonial” and “neo-colonial” “capture” that the political economy literature implicitly cautions against. This is heightened by the Court’s domestication of these wider universalized and more fundamental inscriptions of the *rule of law* and *democracy*, applied to the factual circumstances with which it is confronted. This is wholly consistent with my discussion in Chapter 4, relying on the universalism of IHRLN articulated through Donnelly, particularly considering that, as Donnelly

⁶⁰⁶ *Belize International*, *supra*, note 510, at para. 337.

explains, such norms and laws are “entrenched in systems of justification”, and are of “morally weighty” significance.

Reflecting on the example of *McEwan*, someone in Guyana was potentially subject to arrest and penal sanctions for merely attiring themselves in a manner deemed to be inconsistent with their biological sex. This was possible by virtue of a law that permitted law enforcement to determine that this was dressing for an “improper purpose”. The response of the CCJ was an unambiguous objection to such an example of obvious abuse by the State, on account of the objectionable arbitrariness and discrimination inhering in such a statutory provision. The unequivocal statement that the Court made by its decision in that case, I suggest, was that such a law was an anathema to the universalized fundamental right to dignity and self-determination, thereby establishing a normative expectation in the law, that was not previously in existence on this issue, in the region. The fact that this decision could emerge from a Caribbean court, was therefore profound, even for persons who had nothing to do with the actual litigation. Much in the same way as Brickhill⁶⁰⁷ contemplates, hence, the transformation from *McEwan*, in my view, arises from the CCJ’s “enterprise of inducing social change” which was “grounded in the law”, with the clear intent of shifting a social and “legal culture”. Here, the CCJ was not only satisfied to understand what the law was but beamed a light into the unnecessary misery and disenfranchisement of the Appellants, and then determined, upon the facts they found, what the law *ought* to be, and what *justice* demanded. To this extent, I suggest that the Court was also attempting to induce social change.

⁶⁰⁷ *Supra*, note 360 & 361.

What the CCJ embarked on in *McEwan*, as one example, was an “emancipatory interpretation” of how gender minorities ought to be allowed to express themselves in public, in so far as what they wore was concerned, and how this ought to be dealt with in Caribbean law. This was what the Court’s decision communicated, in spite of the hegemonic, historical, philosophical, and religious detainments that have inspired resentment to such expressions of self by persons of such gender minority in the region. In addressing the matter in the manner that it did, the priority for the Court, I argue, was to embed a discourse of emancipation. The Court was securing an equality narrative for at least this aspect of LGBTQ rights in the jurisprudence of the region, by abandoning a legal relic of our colonial past. The task that the Court was engaging in was a disarmament of a cultural, political, and social view that had its ignoble origins in British colonialism in the region.⁶⁰⁸ This was a substantive act of emancipation through an instrumental and universalizing use of international human rights laws and norms. In this regard, by refusing to countenance an abasing piece of legislation which undermined human dignity, autonomy, and self-worth, the CCJ, was on an anti-colonial, *de-colonizing* path of its own to change something that, for centuries in the region, had been a basis for discrimination and degradation of a segment of Caribbean peoples. In other words, the Court was attempting progress, undoing a colonial legal legacy that was burdensome to gender minorities in a modern, evolving Guyanese society.

What the CCJ accomplished here, therefore, was in harmony with the role that such young courts can play in the transformation of society and the reshaping of the legal culture within which they operate. As discussed in Chapter 4, through Klare’s perspective⁶⁰⁹, the fundamental aim of

⁶⁰⁸ For a historical summary of the connection between “buggery” and British colonialism in the Caribbean, see the Belizean case of *Caleb Orozco v. Attorney General*, *supra*, note 529, at paras. 7-12.

⁶⁰⁹ *Supra*, note 362.

transformation is to change social institutions and power relations towards a more *egalitarian* direction. It is also, as Teitel reminded us, about achieving outcomes that deal with past injustices, “disentrenching” past wrongs that have undermined the rule of law, and remaking unfair and inequitable laws in the image of egalitarianism. In deciding *McEwan* the way that it did, I suggest that the CCJ empowered persons positively impacted by the decision, relative to the limitations and burdens placed upon them by the discriminatory attitudes of most in the societies within which they function. This, decidedly so, on account of the empowerment and validation embodied in the decision of the Court, and the prospects and promise that it bore. It is little wonder therefore that the United Nations hailed the *McEwan* decision as “[a] legal milestone for LGBTIQ+ rights in Guyana”, and has documented that “[a]t the conclusion of Guyana’s Third Universal Periodic Review (UPR) Cycle in 2020, the Government of Guyana supported several recommendations in relation to LGBTIQ+ persons...[including] making efforts to combat acts of violence and discrimination, to ensure inclusion in economic activities, and integrate sensitisation training into curriculum to improve responses to discriminatory acts against people based on sexual orientation, gender identity/expression, and sex characteristics...”.⁶¹⁰

What the Court did in *McEwan* was important, as the attitude of Caribbean peoples on the issue of sexual minority rights, as I have illustrated in Chapter 3, is largely that LGBTQ rights are fundamentally norms that are *foreign*, and are being imposed by Northern, Western cultures upon *Christian* Caribbean peoples, whose norms of gender and sexuality flow from a hetero-normative

⁶¹⁰ “Advocating for the rights and protection of LGBTQ+ Community”, 27 June 2021, United Nations Guyana, found at <https://guyana.un.org/en/133425-advocating-rights-and-protection-lgbtiq-community>

agenda. In my view, this is exactly what was needed to altered by the Court, from an equality and equal protection standpoint, such that universal norms of dignity and self-determination could prevail. In this regard, a Court such as the CCJ has a poignancy that is inescapable. This is particularly so, in the context of subject-matter challenges such as those found in *McEwan*. If intervention by courts such as the CCJ does not engage in some kind of transformation, through the use of “universalized”, “egalitarian” and “normative” interpretations of our laws, using IHRLN as well as internal constitutional provisions, then harmless social conduct such as choosing to dress in female attire as a transgender citizen who has all the attendant rights of equality and dignity, will elicit both unwarranted social and legal consequences. These consequences would be on account of simple acts of self-expression and autonomy. The law in question was clearly unsustainable and redundant in the modern context of universalized fundamental human rights protection, and to that extent, the Court, I argue, was on solid ground.

This “correction” of the law carried out by the Court can be understood in the context of my Chapter 4 discussion on transformative courts as well, especially bearing in mind van Huyssteen’s work on the Constitutional Court of South Africa. As we saw, the author highlighted that that Court used judicial review in ways that were compatible with conventional liberal notions of constitutionalism, and employed a notion of democracy that emphasized protection of the weak, vulnerable, and marginalized. The author went further to point out that the strength of that Court was in its “articulation and mobilization of a particular vision of democratic practice”⁶¹¹. Viewing the CCJ through this prism allows us to understand both the value of the *universalism* themes in the CCJ’s human rights jurisprudence, as well as what I view as its implicit rejection of an agenda

⁶¹¹ *Supra*, note 394. [Huyssteen]

that denotes *plantation*-like counter-hegemonic inclinations. What the Court telegraphed was that core, universalized, transformative norms and laws, induce a stronger, richer, more potent Caribbean constitutionalism, which is far more capable and effective of offering the protection that those who need it in our society deserve, including persons like the Appellants in *McEwan*.

It is important to underline here too, that part of the significance of the CCJ using IHRLN in the *McEwan* case to vindicate a constitutionally premised right to privacy, equality before the law, equal protection of the law, and free expression, is that this was being addressed in a liberal constitutional manner *in the Caribbean*, in a distinctly Caribbean *voice*, by a *Caribbean* court of *justice*. This pivotal and valuable use of the Caribbean *voice* by the CCJ, through its deployment of IHRLN, is an important part of the Court's broader credibility and legitimacy. It signifies, I suggest, one manifestation of the liberating of judicial authority from inside the region, in the face of the dominant role that the UK Privy Council has played historically, from outside, as the Caribbean's apex court in civil and criminal law. This burgeoning opportunity for the CCJ brings instrumentality to its Caribbean *voice*, even though, in this instance, it gave way to a groundbreaking outcome in *McEwan*, which was antithetical to Caribbean majority views on queer rights.

What the outcome in *McEwan* denotes, in the context of the empowerment of the CCJ's *voice* in challenging attitudes that are rooted in suspicions of hegemonic cultural imposition, is that it took its responsibility seriously. The Court was also prepared to make important incursions where it had to, especially where it saw the necessity to domesticate certain core human rights values, for the benefit of Caribbean peoples. This, of course, reflects the indigenization

mandate claimed by the Court. In this connection, as Wheatle has proffered, the CCJ is providing “a blueprint for a creolised model of Caribbean constitutional interpretation and implementation, [showing that] ... Caribbean constitutions can be understood and applied in a manner reflective of, and sensitive to the history and dynamics of Caribbean societies...crafting a constitutional approach...grounded in domestic rights, but deeply aware of international standards”⁶¹². In this way, I argue, the CCJ reinforces, through its Caribbean *voice*, its own legitimacy as an international court, firmly elevating and utilizing profoundly normative goals from IHRLN to achieve the ends of justice. This is precisely why, as the Constitutional Court of South Africa has pointed out in *Fourie*, transformational courts, (including the CCJ, which I argue that it is), need to develop societies of acceptance, equality, and respect for all; set the tone for the society to accept people for who they are; guide societies towards more “universalistic”, “democratic” and “caring” values; prevent the elimination or suppression of difference; and ensure that difference is not the basis for exclusion and stigma, but is rather a value to be celebrated for its validity in human society.

The transformative, progressive, independent thinking displayed by the CCJ in *McEwan*, might also be said to be present in *Maya Leaders Alliance*, where the CCJ brought the unconstitutional abuse of ancestral property rights to account, shifting boundaries that had hitherto not been addressed by an apex Caribbean Court, all in the name of defending a people’s right to

⁶¹² *Wheatle et. al.*, supra, note 240, at pp 358-359. Wheatle explains “creolisation” as “a creative process of transculturation, involving a blending of different cultures, languages and systems”, representing “a means by which political and legal actors in the region can recognise and grapple with a colonial past while creating norms that speak to the needs of its citizens in a modern constitutional world...Creolisation has the potential not only to make the constitutions of the Caribbean more indigenous, but to also position Caribbean constitutional development within an increasingly globalised legal world” [at p. 345]. Wheatle continues that creolisation “seeks to protect the rights of marginalised peoples within the context of domestic constitutional norms and international human rights standards” [at p. 360].

claim over land that was their spiritual, ancestral, and historical heritage. The government's abuse, exploitation and expropriation were a wrong that had to be made right, and this was what the Court categorically did, notwithstanding the political implications for the Belizean State. The Court did this in part by relying on international human rights law. Moreover, the Court subjected domestic constitutional adjudication to scrutiny from universalized international law obligations and commitments undertaken by the State, and determined that constitutional interpretation domestically was not exclusively done to the disregard of such obligations and commitments. That in itself was highly impactful and meaningful for the Court to have done.

In this regard, the CCJ was doing exactly one of the things that *young* transformative courts such as itself, are expected to do, as discussed in Chapter 4, which Teitel describes as *premising* domestic law on international law. As I explored in that chapter, an important aspect of what transformative courts do, is to build a bridge to international law in order to shift understandings of what constitutes legality. They also facilitate continuity in international legal norms in a way that transcends domestic law; use international law to mediate the rule of law in the domestic context; and utilize international law as a “source of transcendence”. It is this *mediation* and *utilization* to transcend bigotry and injustice, in the case of *McEwan*, and economic exploitation, in the case of *Maya Leaders Alliance*, that led the CCJ to the outcomes it achieved in both cases, as examples. In each of these instances, the *universalist, egalitarian* might of IHRLN was being deployed, in order to transcend abuse by the State, against the very citizens that its Executive and Legislature are sworn to protect. Such a deployment was not necessary because domestic constitutional principles might not have been adequate or capable of forming the basis for the enforcement of protection against the respective abuse in each case, but rather, was necessary

because the legal culture and other domestic realities that existed, could not be transcended by the State on its own. This makes the intervention of the Court an imperative, so that the domestic detainments, whether residing in cultural reticence, strategic political expediencies or prioritizations, or unjustified historical and political misgivings, can be made to give way to a more liberating use of the law, for the enforcement of equality and justice. By implicitly relying on the *international legal universality*⁶¹³ that Donnelly spoke to in Chapter 4, the CCJ was assured in applying the widespread active endorsement of human rights, and drawing on the *consensus universality* that flows with it. This was of course to achieve moral equality in both sets of circumstances, thus respecting the moral values spoken to earlier by Sidorsky⁶¹⁴, which are built into the order of things.

While, in the case of the CCJ, the largest underpinning motivation for its creation was regional integration and development, and for the CCSA in South Africa it was to create a much fairer and more inclusive post-apartheid South Africa, the practical and objective effects of the outcomes attained by both institutions for transformative constitutionalism are not dissimilar. What is common to both courts particularly, is the fundamental underpinning of securing democratic values that ultimately protect all citizens, but more especially, the weak, vulnerable and the marginalized. In the CCJ's context, much of this vulnerability and marginalization can be found among the majority black Caribbean population, as in South Africa. Critically, this can be traced to the region's history of colonization and slavery, and the consequential maladies of direct and indirect social, economic, and political disenfranchisement over the hundreds of years since colonial contact with the region. Notwithstanding this contextual difference between both

⁶¹³ Supra, note 291.

⁶¹⁴ Supra, note 247.

institutions, however, what this thesis has shown, is that the CCJ, through its consistent embrace of IHRLN, and its constant articulation and domestication of certain universal norms and principles, has established itself as an institution that is highly motivated by the potential for justice that is embedded in the egalitarianism of transformative constitutionalism. What this signals is that even in a socio-political construct, such as that of the Caribbean's, that presumes colonial and imperialist sensitivities, international law in general, and IHRLN in particular, can have a redemptive outcome.

6.2.2 Elevating, and Fashioning New Norms

Much like the way in which the CCJ utilized IHRLN in a transformative manner in *McEwan* and *Maya Leaders Alliance*, it also did an important thing with IHRLN in the *Guyana Sugar Corporation (GUYSUCO)* case⁶¹⁵. In that case we recall, the CCJ elevated the duty to give reasons by a court to the status of a human right, to be rendered to someone before a court, asserting that there was a “constitutional” dimension to that obligation of judicial decision-makers. In producing such a determination, the Court had relied on jurisprudence from the ECtHR particularly, resolving that failure to give reasons was inconsistent with the right to a fair hearing, and was conflictual with the proper administration of justice. By using IHRLN as it did, the CCJ strengthened the rule of law, as a direct result of its endeavour to broaden the scope of the individual's entitlement to justice. This justice is being realized through the accountability of a judicial decision-maker to explain and rationalize their decisions. It cannot be gainsaid that this must be a part of fundamental justice, when any litigant goes before any tribunal for a hearing, however insignificant a case may be. In my view, this was a an eminently justified foregrounding

⁶¹⁵ *Guyana Sugar Corp. (GUYSUCO)*, supra, note 437.

of a core principle of fairness and accountability in how judicial proceedings and systems are to operate, and it represents an ample illustration of how the CCJ sets out to reinforce new norms into Caribbean law. In taking the view that it did therefore, the Court elevated the responsibility of judicial decision-makers to be more transparent, considered, accountable and responsive to the people that they and the judicial and legal system serve. Bearing in mind that judges in the Caribbean are not elected by the people, wherein they can be removed intermittently by the exercise of the people's electoral prerogative, developments in the law such as we have here, are sage.

Using IHRLN in this way, to generate new Caribbean legal norms, demonstrates that the CCJ is not at all ambivalent about the how it leans into international law to develop regional law. As it pointed out in the *Child Care Board* case⁶¹⁶, “the international jurisprudence that has developed in construing...rights is of inestimable value to domestic judges interpreting and applying like constitutional provisions”⁶¹⁷. This suggests an unambiguously confident approval of such a strategy, hence, the high commendation given to the trial court by the CCJ in this case, for the heavy absorption of international human rights law in its reasons. On the CCJ's part, as I see it, such a course reflects a beneficial amplification and enrichment of domestic constitutional provisions, in so far as these can be infused by the norms and values prevailing in universalist international human rights law discourse.

⁶¹⁶ Supra, note 414.

⁶¹⁷ Ibid, at para. 32.

The CCJ's propensity to pursue intersectionality between domestic Caribbean constitutional law and IHRLN was also evident in the *Lewis*⁶¹⁸ case. There, the Court grappled with what constituted fair hearing, ultimately declaring that the concept was not a narrow constitutional entity, but was rather something to be understood in its wider universal context, with reference to international law. This was precisely what the Court therefore did, noting that "...the United Nations Human Rights Committee determined that ...the concept of a fair hearing... should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings...and expeditious procedure"⁶¹⁹. This overt reaching out of the proverbial Caribbean tool kit by the CCJ is solidly characteristic of its wider philosophical responsiveness to the essential *universal* role of IHRLN in its judicial norm-accretion. Observably, for the benefit of those that the Court serves, this runs wholly coherent with the goal of patriating the "egalitarian" and emancipatory traditions and values of IHRLN.

From my perspective, this is culturally enhancing for the building of norms in Caribbean human rights law. This is so to the extent that it pushes the boundaries of legal insularity and domestic relativism, through a process of cascading wider, universal, normative interpretations and manifestations of core human rights values. This does not, in my view, reveal a subtext of arrogance in the law. Much to the opposite, it fosters a deeper, richer, use of the law, which strengthens human rights law, even in the regionally parochial context.

The CCJ's approach, therefore, is to build an architecture of empowerment and clarity in how human rights law ought to develop in the region, for the benefit of peoples within its

⁶¹⁸ *The Queen v. Lewis*, supra, note 420.

⁶¹⁹ *Ibid*, at paras. 87-88.

jurisdiction. It does this quite often by fashioning somewhat re-imaged perspectives of how human rights are to be nuanced and deployed to preserve fundamental freedoms and values. This, to my mind, instills confidence, builds credibility, and enhances legitimacy in the stewardship of the Court.

6.2.3. IHRLN in Defence of the Domestic

The CCJ has also used IHRNL to defend the domestic as well, such as in the Parole Board in Belize, that was dealt with in *August and Gabb*⁶²⁰. As discussed in Chapter 5, some of the arguments in this case surrounded concerns about the independence of the new Parole Board, potentially, from political Ministerial interference, in light of its statutory composition under a new piece of legislation. The irony in the Court's approach was that it used, among other things, IHRLN from the *outside*, to protect an indigenously created institution on the *inside*, which was under attack from the Appellants. Here we see the Court *rescuing* the Board, by drawing on IHRNL to establish that it would be “grossly improper” to impeach the impartiality of potential members of the Board, as professionals who were properly “involved in the due administration of justice”⁶²¹.

It is remarkable that even in relation to a domestic institution as the Parole Board, the CCJ sought and harnessed judicial justification for that domestic institution's existence, in international human rights legal discourse. One might be tempted to counter, that this was not necessary on the CCJ's part, and that it could have made the determination it did, on its own, that the Parole Board was not automatically non-independent by virtue of the high presence of officials from the Executive arm of government. My response, however, is that in engaging the learning of the

⁶²⁰ *August and Gabb*, supra, note 455.

⁶²¹ *Ibid*, at para. 98.

ECtHR on this issue, the CCJ demonstrated the significance of making that kind of delicate decision about “political influence”, not by its own random calculation, but rather, by calling into aid the external judicial landscape on the issue. This had the potential effect of (a) showing broader integrity and rationality in the decision the Court ultimately made, and (b) legitimizing the perception of the Parole Board that it wanted to disseminate, thereby “transcending” domestic law by highlighting a parity with *universal* international law. In other words, there would not be the appearance that the CCJ was being motivated by self-serving national or regional considerations. To a certain extent, hence, the Court was “branding” its reasoning, by incorporating the *impartial*, *respectable* and “*currencied*” norms that exist in *universal* law.

This is a distinct indication of the Court’s desire and willingness to associate its views with the discourse of broader international legal narratives. This is critical for the reliability, trustworthiness, and respectability of the Court’s decisions, particularly bearing in mind the *youth* of the Court, and its history of mistrust with Caribbean peoples, captured in Chapter 2. Though this mistrust has certainly decreased with the passing years, due to the maturing presence of the Court, and the tone and texture of some of its more groundbreaking decisions, the Court still has a way to go. Notwithstanding this, as the Court develops a steady practice of intersecting and imbuing its decisions with international laws and norms, it enhances its cosmopolitan essence and identity, and establishes its credential of modernity and internationalism. This is a far more uplifting outcome jurisprudentially, compared to an alternative of projecting insularity and introversion. All of this ultimately augurs positively for the legitimacy, transparency, accountability, and credibility of the Court.

It is also noteworthy that in drawing on the ECtHR jurisprudence in the *August and Gabb* decision, the CCJ highlighted the similarity between Article 5(4) of the ECHR and Article 5(1) of the Belize Constitution. This of course related to the obligation of the state not to arbitrarily deprive persons of their liberty, and for there to be a process that allows and enables the citizen to challenge such deprivation promptly, where it occurs. This kind of alignment in the approach of the Court underscores a certain consistency of values and norms between both the local and wider international human rights regulatory regimes. This, I suggest, also enables the Court to gain the confidence and implicit *permission* it needs to consider the jurisprudence that emerges from the international human rights sphere, where it concerns a connected matter in the domestic sphere. Such an approach undercuts some Caribbean socio-cultural and political perceptions of international law, that it does not adequately reflect cultural differences between the North and South. Implicit in the CCJ's reliance on the ECtHR authorities that it used in this case, is a view that the entitlement to liberty, unless there is just cause for detention by the state, is a universal *cultural* value, expectation, and imperative. It is precisely for that reason why Constitutions the world over, have similar provisions for the protection of individual physical freedom. In utilizing the ECtHR jurisprudence in the way that it did, therefore, the CCJ, intentionally or otherwise, transmits a clear approval of the universality of the underlying fundamental right, such that it feels comfortable to draw on the judicial views of other forums where democratic values, including the one in issue, are litigated. Of course, the CCJ would not be bound by such external judicial pronouncements in law, but evidently, by its actions, it nevertheless opens itself to being *persuaded* and *assisted* by such decisions. The use of international human rights in the way that the CCJ does, is definitely part of not only of the approach of a *young* transformative court to try to mediate

domestic law, but also to use it as a means or source of the “normative transcendence” spoken to earlier by Teitel⁶²².

In much the same way that the universality of certain norms was forefront in the CCJ’s approach in *August and Gabb*, it similarly resorted to IHRLN with regard to the concept of “equality of arms” for criminal law defendants at their trial, in *Gibson v. Attorney General*⁶²³. This was of course within the broader spectrum of the entitlement to a fair trial. Just as it did with underscoring the similarity between Article 5(4) of the ECHR and Article 5(1) of the Belize Constitution on the independence of the Parole Board and the liberty of the convict issue in *August and Gabb*, the CCJ again underlined the similarity between Article 6(3) of the ECHR and Article 18 of the Barbados Constitution in *Gibson*, in addressing the entitlement of Gibson to “facilities”, in order to have “equality of arms” and a fair trial.

In implicit dissonance with any posture of “capture”, which undermines sovereignty and independence and stymies political power, by its conduct in this case the CCJ also challenges that proposition. Understood in its proper context, sovereignty includes not only territorial borders, political independence and political authority, and institutional political and governmental integrity, but by necessity, in a functional democracy, independent courts and judges as well. As Grimm tells us, “[e]ven a single power of final decision making [lends] its possessor the characteristic of being sovereign”⁶²⁴. This doubtlessly is because “[j]udicial exposition of the

⁶²² Supra, note 384.

⁶²³ Supra, note 442.

⁶²⁴ Dieter Grimm, “Bodin’s Significance for the Concept of Sovereignty”, in ed., Dieter Grim, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press, 2015), 13, at p. 15.

national ethos flourishes in the interstices of popular sovereignty”⁶²⁵. In that regard, as a co-equal branch of government in Caribbean constitutional arrangement, I ascribe part of that sovereignty to the judicial branch of government, and in this instance, to the CCJ. In that framework, I submit that the manner in which the CCJ exercised independent judgement in *Gibson*, for instance, destabilizes any notion of denuded sovereignty, independence and political power held by the Court.

Instead, the Court signaled yet again, that the exercise of its own judicial decision-making was best done intersectionally with IHRLN, or where useful, external human rights jurisprudence from other national courts. This demonstrates that the resort to international or external human rights law by the Court, does not impliedly amount to a weaponizing of international law against the interests, independence, or sovereignty of Caribbean states. I suggest that what is clear, is that the Court fashioned an outcome that landed it safely on the *right side* of the peril faced by the accused, contrary to the subjugation instincts in *plantation economy* and *dependency* discourses about IHRLN. By doing this, an impoverished criminal defendant was saved from not being thrown to the wind, with no meaningful way of refuting the only piece of tangible evidence against him at his trial. This was rightly what justice ought to have properly resembled.

Ultimately, however, in not adjudging that “facilities” definitively included the State paying for experts sought by criminal defendants, it appears that the Court was hesitant to establish a binding precedent which could potentially open the flood gates for a host of criminal defendants to indiscriminately request experts at the expense of the State, causing a tremendous burden to

⁶²⁵ Robert Post, "Democracy, Popular Sovereignty, and Judicial Review" (1998) 86:3 *Cal. L. Rev.* 429, at p. 440.

public financial resources. The Court might have considered this to be an implicit encroachment on, or interference with, governmental fiscal policy, hence its reluctance. This reluctance would be consistent with what van Huyssteen⁶²⁶ found in her study of the Constitutional Court of South Africa as a transformative court, that that Court had exhibited a “reluctance” to encroach on the legislature and entangle with state power over the spending of resources. Here, the CCJ appears to have had a similar reticence to that addressed by van Huyssteen, preferring instead to get to the same outcome of fairness (ending the case), on the basis of the strategically used “search for the truth” and the “presumption of innocence” nomenclatures.

This tells us that the Court, in exercising its law-making function, is not only dexterous and sophisticated in its judicial strategies but is also mindful of not declaring judicial fiats that have the potential to impact public treasuries in the region. This is important in a region such as the Caribbean, where fiscal prudence and balance of payment deficits are a staple reality. The Court might even also have been alert to the negative public discourse that could have potentially ensued, were there to have been an outcome of the kind sought by the Appellant, in the manner he had requested. This reveals a certain judicial cognizance and circumspection in the Court’s thinking, in respect of the interplay between outcomes; public policy and administration; and pragmatism. In a practical way also, it exemplifies *political* intelligence in the sensibilities of the Court, such that it employs its creativity to achieve the ultimate ends of justice, without creating unnecessary systemic economic havoc or conundrums for the constitutional “separation of power”.

⁶²⁶ Supra, note 394.

6.2.4. Indigenizing and Fashioning “Caribbean Law” through IHRLN

As we saw in Chapter 5, one of the critical things for which the CCJ has also used its IHRLN adjudication, is to deploy these in ways that “indigenize” and “fashion” discrete local legal outcomes. This it did in *Nervais and Severin*⁶²⁷, in order to dismantle the mandatory nature of the penalty of death for the offence of murder. In my view, the decision in this case was an indication of the Court’s self-confidence in recalibrating some aspects of certain broadly held Caribbean sensibilities. Such sensibilities would revolve around “importing” international law to circumvent some of the most basic social, political, and cultural consensuses of the region. Considering that on this subject, such a shift would be antithetical to the passions of a vast swathe of Caribbean public opinion, upending the mandatory imposition of the death penalty was a feat in bravery by the Court. This was particularly so, considering the *Pratt and Morgan* ruling by the JCPC that I discussed in Chapter 2, which many saw as the primary motivation for the eventual push to finally establish the CCJ. As we recall, that Court – the JCPC, in 1995, had ruled that carrying out the death penalty after five years on death row, was cruel, inhuman, and degrading punishment, contrary to international human rights law.

For the CCJ to have gone against the domestic regional grain on a matter such as the mandatory nature of the death penalty, especially in reliance on IHRLN, it could be viewed as an implicit rejection of any concern of Caribbean cultural legitimacy of international human rights law. I say this, as it was the very IHRLN that are seen as hegemonic and Eurocentric that the Court used to *emancipate* the Appellants from the “discretionless” certainty of death, left in a colonial law that was part of the legal machinery of slavery. Importantly, in this *Nervais and Severin*

⁶²⁷ *Nervais and Severin*, *supra*, note 495.

decision, the CCJ demonstrated that it was prepared to undo what colonial white privilege had done to Caribbean Constitutions, locking in barbaric colonial laws such as the mandatory death penalty for murder, with use of the pervasive and irrational *Savings Clause*.

In this regard, the Court seemed prepared to expose the nonsense of the *Savings Clause*, pointing out that “[t]he inescapable irony [was] that in most cases, the rules [to] which [the savings clause]... [was] bound to apply here in the Caribbean have long since been changed in England, while, on the view that has until now prevailed, we must remain trapped in the colonial past”⁶²⁸. The case for change was therefore tangible and intense, as far as the CCJ was concerned, as it clearly indicated in its assertion that “[t]he coming into being of the Barbados Constitution was... an act of juridical singularity which [now] created a new legal order unchallengeable by any colonial legislation not saved or otherwise accommodated by the Constitution. Such colonial law simply does not have a jurisprudential ‘leg to stand on’”⁶²⁹. Emerging from this view from the Court was a distinctly discernable degree of judicial impatience at the impudence of a savings clause that was going to fetter the unleashing of the vast human rights protection potential of independent Caribbean States and their independent Constitutions. The Court was obviously determined to interrogate the incredulity of such a constitutional clause that would prevent it from institutionalizing and upholding basic constitutional rights that were grounded in the simple preservation of human rights. What must be clearly understood, however, was that the Court was definitely not yet prepared to charge into a debate of the constitutionality of the death penalty itself, and therefore restricted itself to a consideration of the mandatory nature of the penalty. Notwithstanding this, as I contend, and as Wheatle and Campbell agree, what was remarkably

⁶²⁸ Ibid, at para. 65.

⁶²⁹ Ibid, at para. 97.

significant on the part of the Court, was that it was “confronting the savings clause and charting a course for progressive Caribbean rights development”⁶³⁰.

The remarkable task of blunting the *Savings Clause* through the use of IHRLN, although it was still a part of the Constitution, was also accomplished by the Court in *McEwan*. By somewhat stymieing the Savings Clause in Commonwealth Caribbean Constitutions, the CCJ unlocked a wealth of potential for IHRLN to impact domestic legal statutory instruments that were violative of the rights of citizens, but which were effectively ring-fenced from scrutiny by the clause. It also unleashed a stream of power to courts that fell under its Appellate Jurisdiction, to cauterize certain instances of abuse of power by the State and its agents, using laws that were protected by the Savings Clause.

With the manner in which the Court’s new, reformative approach to the *savings clause* was applied in *McEwan*, the CCJ was able to address one very critical aspect of LGBTQ rights in the region. What the CCJ corrected was an unfortunate legalizing of gendering in Guyana’s vagrancy laws, which had placed a particular group of Guyanese citizens in jeopardy, but which was part of a larger problem in both Guyana and the wider Caribbean. As Matthews and Robinson explain it, “[i]n mainstreaming gender in the law, the regendered postcolonial Caribbean state also reifies categories of gender and ‘recognizes explicitly that some citizens are male and others are female’... The gender non-conformity of the [Appellants in *McEwan*]... troubled binary understandings of ‘male’ and ‘female’”⁶³¹. It is these “binary understandings” that the CCJ

⁶³⁰ Se-Shauna Wheatle & Yonique Campbell, “Constitutional faith and identity in the Caribbean: tradition, politics and the creolisation of Caribbean constitutional law” (2020) 58:3 *Commonwealth & Comp. Pol.* 344, at p. 353.

⁶³¹ Janeille Matthews & Tracy Robinson, “Modern Vagrancy in the Anglophone Caribbean” (2019) 1:4 *Carib. J. Crim.* 123, at p. 138.

grappled with here, and which it ultimately defended, through constitutional and *universalized* human rights laws and norms.

In that regard, hence, the outcome of *McEwan* was a considerable first step in LGBTQ rights in the jurisprudence of the CCJ, and it indicated an openness to listen, and to be persuaded on an issue that was so intensely culturally, socially, and politically divisive. By rationalizing circumvention of the *Savings Clause* in the way it did, the CCJ also took a stand on the question of political independence and sovereignty of Caribbean states, in a not-so-subtle way. The Court did this, as part of its strategy to accomplish the outcome that it rendered, in that, much of the Court's conviction was located in the right of an independent nation to chart its own constitutional path, without being hobbled and constrained by antiquated constitutional provisions that were bequeathed by colonial empires, upon their departure from the region. The Court, therefore, vindicated not only a legal, constitutional right, but also a discreetly political one as well. This posture clearly reflects part of the mandate of the Court, even as the Court itself has articulated it, of indigenization, fashioning a "Caribbean law", and reclaiming legal and judicial sovereignty over ourselves as a region. As Mr. Justice Anderson of the CCJ has noted extra-judicially, this argument of sovereignty is one for:

*taking into our own hands of the responsibility for defining, shaping, writing, and ultimately re-writing the forensic relationships between Caribbean citizens and their states, and between members of the Caribbean citizenry. The fostering of a Caribbean jurisprudence might not be more than this: the exercise of the right to self-definition; but it is assuredly no less. For we err, and we err greatly, if we underestimate the power bestowed upon the custodians of adjudication.*⁶³²

⁶³² Winston Anderson, "The Caribbean Court of Justice and the Development of Caribbean Jurisprudence", Distinguished Lecture, Jamaica, (March 2013), at pp. 7-8, found online at <https://ccj.org/wp-content/uploads/2013/03/CCJCJDISTLECTURE.pdf>.

One of the noteworthy things about the approach that the Court took in diminishing the *Savings Clause* in *Nervais and Severin*, was the invocation of scholarly Caribbean learning, to justify its determination to scale over the solid barrier that was the *Savings Clause*. This was a considerable and determined effort by the Court to deliberately elevate the role of distinguished Caribbean legal opinion, and to domesticate, validate and indigenize its rationale for its actions in this case. In other words, separate and apart from the fundamental legal point that the Court wanted to make about the mandatory nature of the death penalty for murder, it was also engaging in a legitimization process of its discourse on the issue. As I explained in Chapter 5, for example, the Court relied on distinguished Caribbean professor, Tracy Robinson, for the proposition that section 11 of the Barbados Constitution conferred a substantive right of “protection of the law”, and was not a mere Preamble, simply because it started with the word “Whereas”. To that extent, it could therefore be relied upon to assist in defeating the *Savings Clause*, which the Court did, with the proclamation that “every person in Barbados [was] entitled to the fundamental rights and freedoms of the individual...subject to respect for the individual rights and freedoms of others and for the public interest...”⁶³³.

In approaching its analysis with such a *local* resource, the CCJ showed that it was partial not only to IHRLN, but was also mindful of Caribbean legal perspectives. I view this as an endeavour to not only project IHRLN into its human rights adjudication, but also relevant resources closer to home as well. Such a strategy not only enriches the normative pedigree of the CCJ’s analyses and conclusions based on international human rights principles, laws, and norms, but also on domestic, regional scholarship as well. As former Supreme Court of Canada Puisne

⁶³³ *Nervais and Severin*, supra, note 495, at para. 59.

Judge Michel Bastarache has explained: "... The work of academics serves to provide a contextual social background for legal disputes, helps to make judges aware of the underlying reasons for the decision that they make and offers useful suggestions for reform. No principled approach to decisionmaking can ignore the contribution of academics..."⁶³⁴. In the instant case, the Court relied on Robinson to better gauge and frame the social context of the legal point in issue, gaining the benefit of assistance from this extrinsic, independently vetted expert, who had already clearly sifted through the authorities and coalesced them around readily understood principles about the impact of the Preamble to section 11 of the Barbados Constitution.

The CCJ's justification in *Nervais and Severin* for attempting to somewhat blunt the *Savings Clause* was also done using regional case law. The Court co-mingled this regional domestic jurisprudence with IHRLN, explaining that:

The mandatory death penalty has been found by international human rights bodies such as the International Covenant and Civil and Political Rights Committee... and the Inter-American Commission on Human Rights... to be arbitrary and to have deprived individuals of the most fundamental human rights... In (Eversley) Thompson v. St. Vincent and the Grenadines, ...the UN Human Rights Committee held that a mandatory death sentence violated the "most fundamental of the rights, the right to life" as guaranteed by the ICCPR. The Committee majority found that the implementation of a mandatory death sentence with no judicial consideration of the particular circumstances of either the offender or the offence was an arbitrary and therefore illegal deprivation of the right to life... The mandatory death penalty was considered in the Eastern Caribbean case of Spence and Hughes v. The Queen where it was found that:

*"...a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process..."*⁶³⁵

⁶³⁴ Cited from Robert J Sharpe & Vincent-Joel Proulx, "The Use of Academic Writing in Appellate Judicial Decision-Making" (2011) 50 Can Bus LJ 550, at p. 563.

⁶³⁵ *Nervais and Severin*, supra, note 495, at para. 47.

Here we see the CCJ doing two key things. Firstly, it is setting up an alignment between international human rights law on the subject of the mandatory nature of the death penalty, before neatly pulling in the voice of another appellate Caribbean Court, the Eastern Caribbean Court of Appeal. That Court had uttered similar sentiments. Secondly, it is explicitly invoking the reasoning of judicial “family”, to suggest that the CCJ does not stand alone in the Caribbean space, on the position it took on the matter. This one may refer to as “legitimacy by association”. This, I see also, as a way of neatly patriating IHRLN intentionally, and building a synergy of discourse with regional and domestic judicial intuition on the matter.

This kind of intersectionality, I argue, denotes an attempt by the CCJ, when it sees fit, to frame its human rights adjudication in such a manner to lessen the likelihood of potential credibility gaps with its outcomes. This reflects an accretion of norms, through reasoning and association.

Ultimately, therefore, the Court’s approach was entirely coherent with the transformative strategies of *young* courts in their use of *transformative constitutionalism* to broaden and vindicate rights. As Risteska et. al. reminded us in Chapter 4, in relation to studying the work of the Constitutional Court of South Africa, two key components of the discourse favoured by such courts, are developing new concepts and doctrines, and giving novel interpretations to established legal standards. To this extent, argued Risteska et. al., transformative courts become *activists*, selecting from competing rules, and acting where there is an absence of clearly articulated legislative, executive, or judicial rules. In this sense, they are “policy makers”, limiting the misuse of State power.

The CCJ adopted a somewhat similar approach when it devised and employed the *legitimate expectation* “doctrine” in *Joseph and Boyce*, compelling Caribbean States to honour international human rights obligations, where the citizen rightfully and legitimately had that expectation, even where such international human rights obligations had not been incorporated into domestic law. The result, of course, was that through an analysis that the international human rights obligations taken on by States must feature in the concept of “due process of law”, the local Barbados Privy Council was told by the Court that it ought properly to await the outcome of the petition of the Respondents pending before the IACtHR.

This outcome of *reform* from the Court was not without serious contemplation. The Court considered a string of authorities on the matter of legitimate expectation in the context of overseas domestic law and against the backdrop of international human rights, accepting that “Judges all over the world [were] struggling to give form and coherence to ideas” on this question, and that the judgements considered, revealed “a divergence of opinion and approach, not only as between different courts but as between judges of the same court”.⁶³⁶ The Court was ultimately persuaded that installing the *doctrine* was the justified position to take in light of the moving trend towards the assertion of individual rights in international law.⁶³⁷ As far as the CCJ was concerned, “this legitimate expectation of the Respondents [to get the rights to which their government commits] should produce a substantive benefit”.⁶³⁸ With this compelling approach that the CCJ proffered, it was little wonder, therefore, that the Court applied its law-making power in the way that it did,

⁶³⁶ *Joseph and Boyce*, supra, note 471, at para. 103.

⁶³⁷ *Ibid*, at paras. 104-105.

⁶³⁸ *Ibid*, at para. 119.

reaffirming the *universalist* normative relevance of IHRLN to the understanding of domestic constitutional law. As Ventose summarizes it:

The CCJ's decision in Joseph and Boyce attempted to emancipate Commonwealth Caribbean jurisprudence from the strained legal analysis of the Privy Council... [T]he rule of law dictates that the courts, as guardians of the Constitution and the rights of citizens, should not be impotent to provide a remedy where there has been an abuse of power by the executive. Where the executive has distinctly promised to preserve existing policy (that condemned prisoners will not be executed before the final determination of the international process) for a specific person or group (condemned prisoners) who would be substantially affected by the change (suffer death), then...it must keep its promise. This is the substantive legitimate expectation – [T]o frustrate that expectation where there is no significant public interest consideration militating against it is an abuse of power. The CCJ's decision in Joseph clearly shows that the courts will not countenance such, and where appropriate will not hesitate to act.⁶³⁹

What we learn from this is that in adopting international and extra-regional domestic human rights jurisprudence, the Court's mission is to patriate reasonable and compelling norms and standards that exist in IHRLN. It does this, notwithstanding any alternative political, social, or cultural impediment, so as to *uplift*, expand, and transform Caribbean law. Likewise, it allows an intersectionality that places the Court on an axis with what is compelling, acceptable, and standard, globally. It also elevates the pedigree of the work of the Court beyond the narrow myopic confines of itself, embracing, or at least exploring and considering perspectives on the law from the international sphere. Relying on extra-regional domestic jurisprudence also places the Court on a path of engagement with a series of apex courts in other jurisdictions that are respected, and which share similar wider normative rules, practices, procedures, and legal systems. This is part of what I view as the continuing solidifying of the Court's *universalist* credentials. The Court, through this engagement, then shares a space of legitimacy with states that uphold similar values

⁶³⁹ Eddy D. Ventose, "Legitimate Expectations, International Treaties and the Caribbean Court of Justice", in eds., David S. Berry & Tracy Robinson, *Transitions in Caribbean Law: Law-Making, Constitutionalism and the Convergence of National and International Law*, (Caribbean Law Publishing Company, 2013), 128, at pp. 146-147.

of democracy, the rule of law, and the proper administration of justice, anchoring itself within mainstream and relevant judicial philosophies and rationalities from elsewhere. This clearly, for the Court, I argue, fortifies its credibility and legitimacy.

The significance of this for my evaluation of the Court's deployment of IHRLN is that it demonstrates how the CCJ uses IHRLN in a sustaining way, such that the propositions that international law is oppressive, culturally deficient, and demagogic over Third World States, are not borne out here. What this study reflects instead are the positive outcomes of what can be better, when both domestic and international law are constructively intertwined. The CCJ showed how this could be done in a successful way with *Joseph and Boyce*, for instance.

As the CCJ rightly explained in this case, to separate key fundamental rights, which are premised on universal norms, standards and values of human dignity, prosperity, and equality, from domestic law, for the simple reason that that State does not practice *direct effect*, diminishes and makes vacuous any claims that the citizen has to the promise of these basic rights to which the state has committed internationally. This is the anomaly that Vasciannie⁶⁴⁰ reflected on, in relation to the fact that in the Caribbean, while states sign up to a host of international law commitments, they do not meticulously honour them in reality. In fashioning this synthesis between international and domestic law, in the way that the CCJ did in *Joseph and Boyce*, the Court emphasized the earnest potentialities of domestic fundamental rights being undergirded by IHRLN. Here, the Court carved out an international law-informed space for a fresh *legitimate expectation* approach to the constitutional right of due process.

⁶⁴⁰ Supra, note 166.

Based on the various directions that the CCJ has taken in the cases adjudicated on the basis of IHRLN - cases such as *Nervais and Severin*, *Joseph and Boyce*, *McEwan*, and *Maya Leaders Alliance*, among others – there has in fact been convergence on human rights. This has been exemplified, for example, through the results of the gaze that courts such as CCJ, the ECtHR, the ACtHPR, the IACtHR, and bodies such as the UNHRC, have placed on the protection and preservation of individual rights, all across the globe, using common standards and norms. These courts and bodies, based on this convergence on human rights, have not only protected individuals, but equally, group rights as well. Case in point is the *Maya Leaders Alliance* case. Even where individual rights are being litigated, as opposed to group rights, such as in *Lewis* or *Gibson* - to get a fair hearing, or in *Joseph and Boyce* - not to be hung from the gallows while they had a petition against the State before an international body to which their government had freely and legally committed itself, the victories that might be attained through IHRLN are ultimately for all who may find themselves in such positions in the future, in their pursuit of fundamental justice.

6.3. Conclusion

Notwithstanding the various arguments and attitudes in the Caribbean that disfavour the robust enforcement and protection of all human rights, based on universalist norms and laws, this study reveals that what is at the core of the adjudication by the CCJ in its human rights jurisprudence, are the objectives of the protection and preservation of democracy and the rule of law in those it governs judicially. The rule of law, as former United Nations Secretary General Kofi Anan explains -

refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms

*and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*⁶⁴¹

Collaterally, democracy contemplates “...a system of justice and equality among people, as a process that recognizes the diversity in society and allows constant criticism of phenomena, relationships and processes. Democracy is at the same time both acquisition and instrument of freedom, justice and equal opportunities in society.”⁶⁴² When both of these are contemplated, what the CCJ is doing, is really just exemplifying universal normative principles in a way that validates and amplifies of these universal human rights norms that are used to make the lives of the people better. This, the CCJ does, primarily by giving greater instrumentality to domestic constitutional provisions, which in a great many instances, are themselves based on or modeled after IHRLN.

In the human rights cases that this study discusses, the various rights which emerged were moored primarily to constitutional instruments. All the rights litigated were as common as rights come, including privacy; freedom of expression; protection of the law; equality before the law; protection from discrimination; fair hearing; and respect for basic human dignity. None of these can ordinarily be disaggregated from respect for democracy and the rule of law. In that regard, hence, the legitimacy offered or attributed by the CCJ when it enforces these rights, cannot be premised on pure cultural and social preferences and idiosyncrasies which are sustained largely by the opinions, preferences and expectations of the public, or by socio-cultural “normalcies”.

⁶⁴¹ The Secretary General, *Report on The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, UNSCOR, 2004 UN Doc S/2004/616 at para 6.

⁶⁴² Milica Kastratovic, “Democracy” (2015) 5 *International Journal of Economics and Law* 27 at 28.

Instead, they should be premised on more authentic, equality-possessing and life-enhancing values. In so far as it is that these values that are being elevated and strengthened by the CCJ, then there ought not to be any feasible space for discrepancy between those equality-seeking goals and the interests of those who defend Caribbean socio-cultural and politic attitudes and expectations.

From the analysis done in this thesis, the CCJ, in relying on IHRLN, has been able to render several ground-breaking decisions that bode well for the protection of human rights in the Caribbean diaspora. From protecting gender identity in Guyana, to virtually paralyzing the savings clause when deployed against constitutional human rights protections, the earth has moved in Caribbean human rights jurisprudence. While these decisions may have unique application in various parts of the region, and may not in some instances have binding application across the entire region as a result of the varying constitutional arrangements that exist, persuasive precedents have nonetheless been set. It would be hard to envision major divergences in other parts of the Caribbean as similar cases are eventually brought to other Caribbean courts.

From this study, it is clearly not in doubt that the CCJ strives to nourish and expand the inculcation of universalized human rights laws and norms into Caribbean law. At the same time, the Court is very open-minded in the pursuit of fairness, by intently engaging, not only with human rights jurisprudence and general human rights perspectives from a variety of regional jurisdictions, but likewise from wider international bodies and institutions. This definitively indicates a focus on streamlining Caribbean law to be harmonious with IHRLN, to the extent possible. The message that emerges from this, is that the rhetoric of counter-hegemony, neo-colonialism, and imperialism which defines many anti-human rights attitudes in the Caribbean, is not resonating with the CCJ

to this point. Likewise, these approaches do not appear to be a part of the path that the Court is constructing, in terms of its human rights adjudication. To the contrary, the CCJ is engaging persuasively and deliberately with these “outside” principles, invigorating basic, core human rights norms and values that are already inherent in Caribbean constitutional regimes and laws. Indeed, it is more than a passing coincidence that all of these Caribbean Constitutions bear heavy resemblance to the very international treaties that inspired them over the years, including the UDHR, ICCPR and the ECHR. In that connection, therefore, what is unfolding is an evolving articulation of these rights in a new, more universalistic, transformative, consciously modernizing, and international human rights-engaging way, in the Caribbean. This not only shows that the Court is not modeling the hesitations about IHRLN held in various quarters in the Caribbean in its decisions, but also that it is acutely aware and alive to the need to move beyond the vestiges of colonialism, by the ways it has acted in cases such as *McEwan* and *Maya Leaders Alliance* for instance.

The upshot of all this, for the peoples of the Caribbean, hence, whom the CCJ is purposed to serve, is that the Court is *maturing* and effervescing basic ideas of the *rule of law* and *democracy*, such that (a) *their* human dignity and other equalities are becoming better preserved and protected, and (b) their democracy is operating more effectively in their respective and collective interests. The Court has accomplished this in a variety of ways such as impliedly “having a talk” with the people and their governments about certain issues, such as LGBTQ rights, the death penalty, the administration of justice, and ethnic minority rights; indigenizing IHRLN to create new principles and doctrines in Caribbean Law; infusing local law with new paradigms and perspectives from the universalized scheme of human rights; and breaking new frontiers on several important matters.

CHAPTER SEVEN

CONCLUSION

The main aims of this dissertation have been to map and analyse the human rights jurisprudence of the Caribbean Court of Justice and identify the extent to which it intersects with international human rights laws and norms, and to evaluate the practical outcomes and impact of this intersection. In doing this mapping, analysis, and evaluation, three main contextual and theoretical considerations served as the backdrop, firstly, universalism in international human rights laws and norms, and cultural relativism; secondly, transformational justice through *young* international or constitutional courts, and thirdly, the nature of the political economy and socio-cultural and political dynamics of the Caribbean, within which the CCJ operates.

In answering the research question posed at the outset, this thesis makes two major findings. My first major finding is that the human rights jurisprudence of the CCJ is heavily and consistently influenced by universal international human rights laws and norms. On repeated occasions, the Court reaches out to the IHRLN space for answers, support, justifications, and guidance. Importantly, this should not be understood to mean that the Court blindly follows IHRLN without discernment. Instead, it does a careful, strategic alliance and intersection, while showing periodic independence, as it adopts and adapts from the work of other judicial bodies. In other words, while the *universalist* reinforcement and legitimacy motive of the Court is easily identifiable, there are likewise, repeated efforts at *indigenizing* and *Caribbeanizing*, where needed. Indeed, the CCJ itself indicates that it would ultimately consider external jurisprudential material, but would respectfully determine for itself how and when to patriate this international law material for the good of the people that the Court serves.

This finding reflects a certain acceptance by the Court of my earlier discussions of Raz's⁶⁴³ view, for instance, that rights have a special place in the moral universe, or Ignatieff's⁶⁴⁴ approach, that all humans are entitled to equal moral consideration, no matter where in the world they find themselves. This "morality", based on the universality of core human rights norms that is applied consistently by the CCJ, highlights the Court's keenness on an approach to Caribbean constitutionalism that embodies what Gewirth⁶⁴⁵ referred to as "moral values" that have "normative force". This projects a certain "decency" of the Court as a "democratic social institution", in the way that Rawls⁶⁴⁶ envisaged it, such that, in spite of its own process of *Caribbeanizing* international human rights laws and norms, nevertheless makes a strenuous effort to abide by its core postulates.

My second major finding is that the CCJ, notwithstanding the dependency, plantation economy reality of the Caribbean, and the human rights shortcomings that there are in the region, does not display the same sensibilities to international human rights law to those canvassed in Chapter 3. This finding emerges, having conducted the mapping and analysis of the CCJ's human rights jurisprudence, and critically considering both the ideas about international human rights law canvassed in the Caribbean political economy literature and the illustrations of Caribbean cultural relativism to some aspects of IHRLN. Bearing in mind that a huge component of these political economy and attitudinal approaches to international law in general (and international human rights law in particular) are grounded in notions of Eurocentrism and cultural encroachment or imposition, there is no evidence from the data of cases examined from the CCJ that these

⁶⁴³ Supra, note 258.

⁶⁴⁴ Supra, note 261.

⁶⁴⁵ Supra, note 271.

⁶⁴⁶ Supra, notes 288 & 289.

sentiments are reflected in the Court's jurisprudential approaches or output, when it comes to the role and impact of IHRLN on the Court. Importantly, however, what has doubtlessly been learnt, is that even though the Court has not been found to view IHRLN as neo-colonial, it is still very alert to, and has a keen sensitivity to the post-colonial dynamic within which it operates.

In this regard, therefore, unlike the view of Bernal et. al.,⁶⁴⁷ for instance, that Caribbean political economy considerations “limit” the “development” of social institutions in the region, the role that the CCJ has carved out for IHRLN in its judicial decision-making does not reflect such a limitation, at least in the sphere of the development of Caribbean law, or in the Court's evolution and growth as an institution. Indeed, the contrary is occurring, in that, the constant reliance on IHRLN by the CCJ, has expanded the capacity of the Court as a social institution to advance the rights and interests of Caribbean peoples as a whole, in very meaningful ways, this being so, notwithstanding that the Court is operating in a wider “dependency” political economy construct. Recalling Nettleford's⁶⁴⁸ thesis of the “battle for space” that occurs in regions such as the Caribbean, as a result of the First World/Third World dynamics of the “superordinate/subordinate” and the “powerful/powerless”⁶⁴⁹ in state relations, what this thesis has revealed is that the CCJ is actually using IHRLN (which is viewed as a tool of the *powerful*), to facilitate and generate “space” for the upliftment of Caribbean peoples and the development of Caribbean law. In other words, rather than reinforcing such claims of hegemonic “powerlessness” and “subordinacy” from international human rights instruments and norms, the CCJ is deploying universalist-oriented laws and norms enrich, strengthen, emancipate, uplift, and in some instances, decolonize important

⁶⁴⁷ Supra, note 147.

⁶⁴⁸ Supra, note 154.

⁶⁴⁹ Ibid.

aspects of Caribbean life and constitutional law. This, I argue, critically impacts and changes aspects of the social relations of plantation society that Nurse and Crichlow⁶⁵⁰ addressed, and likewise bodes well towards achieving the “reclaiming the mainstream, and overcoming [of] marginalization” that Nettleford yearned for⁶⁵¹.

In spite of the two major findings that I have just discussed, however, it is important to indicate that this does not mean that the CCJ operates in a paradigm of complete bliss, or that its uses of international human rights laws and norms in its judicial work reflects jurisprudential nirvana. Far from such an idea, what has emerged is that while the Court has made critically important strides in advancing the development of Caribbean law, there is inherently a greater complexity to the overall picture. This complexity arises from a number of considerations. Firstly, as a *Caribbean* court, tasked with indigenizing Caribbean law, it has been forced to grapple for example, with ways of gently reconciling basic universal human rights norms and standards with very strongly held regional reticences that are embedded in certain aspects of Caribbean political economy and Caribbean socio-cultural norms and values. We see this for example in the cases of *McEwan* and in *Tomlinson*, and even in *Myrie*, where the Court arrived at a range of inconsistent outcomes on human rights questions, even though, as I have argued, more solidly egalitarian outcomes could have been achieved in the latter two of these cases.

A second consideration that makes the overall picture somewhat more complex, relative to the place of the Court in Caribbean society and in developing Caribbean law, is the institutional role of the Court as part of the judicial branch of government, and how it positions itself relative to the other constitutional arms of government, the legislature, and the executive. This arises as

⁶⁵⁰ *Supra*, note 157.

⁶⁵¹ *Supra*, note 156.

part of the complexity of the work of the Court, in the sense that, even in its very constructive, transformative, and uplifting human rights work, it has, at times, appeared to struggle somewhat with where to draw the line of institutional respect and comity, with regard to the practicalities of the constitutional separation of powers. As I demonstrated in the cases of *August and Gabb*, *Gibson*, *Joseph and Boyce*, and *Maya Leaders Alliance*, in various ways, this struggle implicitly emerges. In the first of these cases, it was about a hesitancy to pre-judge and dictate to the legislature about what should be specifically included in anticipated parole regulations, and also about how to draw the line regarding public mistrust of, and suspicious judgements about the powers of the Belizean State, in appointing the Parole Board. In the second case it was in relation to an apparent hesitancy in arriving at an outcome which could place a potentially heavy and relentless financial burden on the State to fund defence-required experts in criminal cases. There, the concern of the Court appeared to be with not opening the floodgates for excessive demands of criminal defendants on the public purse. In *Joseph and Boyce*, the appearance of reluctance on the part of the Court concerned not compelling the government to be bound by the findings of an international human rights tribunal, even though largely compelling that government to await the report of the findings from the tribunal in question. Beyond these, as well in *Joseph and Boyce*, it also appeared that the Court was keen to limit the impact and reach of the “legitimate expectation” doctrine that it formulated, from affecting wider governmental action beyond the scope of the issues in this particular case. In much the same vein, in *Maya Leaders Alliance*, the Court was anxious, I suggest, not to convey the understanding that its findings against the government of Belize should be taken as the Court’s support for political secession by disaffected Indigenous Peoples or other groups in the societies that might have been impacted by the outcome of the case. In all of these examples, the complexity of the Court trying to situate itself in the broader

constitutional dynamic of the separation of powers in the Caribbean constitutional framework, was evident.

A third consideration that makes the picture of the human rights work of the CCJ more complex than the impressively egalitarian instincts that the Court displays, is the simple fact of the “Caribbean-ness” of the Court. This is especially relevant to the reality that unlike the far-removed UK Judicial Privy Council in London, which is still the apex appellate court for a majority of the Commonwealth Caribbean countries in CARICOM, the CCJ is an unquestionable spawn of Caribbean regionalism and identity, from its founding historical-political narratives and antecedents, to its birth, to its mandate, to the near total background of its Bench over the years, and perhaps most importantly, to the peoples that it serves. In these regards, the task of the Court and the expectations of the Court from the region as a whole, are decidedly different. These identifiers are critically important, particularly in terms of the universalist instincts of the Court on human rights issues, bearing in mind the political-economy dynamics and socio-cultural realities explored in Chapter 3. Instinctively, these add to the complexity of how the Court defines itself through its human rights work, to the extent that the Court has to be attuned and alert to, and in some constructive ways, demonstrate a certain level of responsiveness and fidelity to these realities, in order not to, as a Caribbean court, place itself in a universe parallel to its own founding identity. This obviously has the ingredients for creating a tension between the Court’s universalist human rights instincts and inclinations, and its transformative role on the one hand, and the compelling facts of its “Caribbean-ness” as an institution, on the other. Indeed, with a history of the brutalities of slavery and colonization so embedded and manifest in the epistemologies of Caribbean society, there resides an inherent complexity in the Court adopting what more polemic

or intense cultural relativists would identify as the neo-colonial hegemony of human rights universalism, which is quite often brought to bear by the Court in its adjudications.

Notwithstanding these complexities in the realities faced by the Court, however, as my two major findings at the outset of this conclusion indicate, the Court has done enormously well in its efforts to *raise the bar* in several aspects of Caribbean law. This has been the case, in spite of the reticence in the Caribbean towards some aspects of international human rights laws and norms noted earlier in the works of Vasciannie⁶⁵², Holness⁶⁵³, and Smith and Kosobucki⁶⁵⁴. Some of the cases surveyed, through the Court's deployment of IHRLN, brought about distinctly transformative, emancipatory, and redemptive outcomes, and did not enunciate "capture" or cultural oppression against the impacted persons or constituencies. Instead, the results of the cases demonstrate a strident protection of the rights of citizens to hold their government to account and transparency, so as to prevent governmental abusive, tyranny, and capriciousness. These results also entrenched an imperative of basic human existence in any society that pontificates about or claims to hold fundamental democratic credentials and values dear, such as the right to be protected by the law, and the right to be treated fairly and equally before the law. These are the immutable essences of the rule of law, and, in this regard, reliance on international human rights laws and norms by the CCJ, serves as a basis for victories for the rule of law. None of this was about succumbing to Eurocentrism, hegemony, and imperialism. To the contrary, it was about human dignity and decency of treatment through the law, articulated via basic legal truisms and principles of fairness, and human equality. This is entirely consistent with universalism and the universality

⁶⁵² Supra, note 166.

⁶⁵³ Supra, note 168.

⁶⁵⁴ Supra, note 169.

of basic human rights norms discussed in Chapter 4, as the Court, in deciding the vast majority of the cases (*Tomlinson* and *Myrie* excepted) considered in this study, sought to give expression to the understanding that all people are entitled to a certain minimum expectation of dignity, autonomy and equality. This trajectory by the Court also reinforces that it is perfectly possible to draw on both domestic perspectives and local law, as well as on a broader framework of the aspirations of a universalist core of moral norms, when resolving issues. This denotes a recognition by the Court, of an over-arching network of international human rights laws and norms that are relevant and useful to local judicial decision-making, even within a politically and socio-culturally relativist Caribbean context.

In this persistent valuing of IHRLN by the CCJ, we see the Court embedding the “moral values” spoken to earlier by Sidorsky⁶⁵⁵, that are built into the “natural order of things”. Repeatedly, for instance, we witness the Court placing very distinct emphasis on the concept of human dignity, which, as we learnt from Glensy⁶⁵⁶, is what roots the efficacy and universality of IHRLN. This approach by the Court to domestic constitutionalism reinforces its commitment to what Talbott⁶⁵⁷ largely presents as freedom from paternalism, and the entrenchment of outcomes that solidify the fundamental role of human personal autonomy, in the process of enforcing rights. In this regard, we see the Court deploying IHRLN in a manner that Mullender⁶⁵⁸ showed us, can accommodate insights of both universality and relativism. This is what Tharoor⁶⁵⁹ has articulated as a phenomenon of mutual enrichment.

⁶⁵⁵ Supra, note 247.

⁶⁵⁶ Supra, note 249.

⁶⁵⁷ Supra, note 281.

⁶⁵⁸ Supra, note 327.

⁶⁵⁹ Supra, note 342.

Also emerging quite strongly in the human rights jurisprudence of the CCJ, is the Court's keen interest in the administration of justice. We see this for instance in *August and Gabb*, concerning the Court's *defence* of the Parole Board. The significance of this for my analysis is that the Court used IHRLN to instill confidence in the administration of justice and in the administration of public policy, in a way that was respectful of the integrity of the potential public officials that were to comprise the Board, and in a way that did not unreasonably and idealistically undermine public authorities or bodies. Were the Court to have viewed IHRLN in a less than empowering manner, in the context and circumstances of the case, then potentially, confidence in public authorities could be damaged, where specious and unfounded criticisms or grouses are raised in judicial fora about such bodies. The *plantation* economy/*dependency*-inspired counter-argument could of course be that what obtains in that wider global universal human rights space might not be sufficiently culturally aware, in terms of domestic realities, to be appropriately considered by the Court. My response, however, would be that if every state were to determine each and every human right standard for itself, then certain peoples and populations, including in the Caribbean, would be indisputably subject at times to regimes of tyranny, autocracy, and abuse, all based on the fancy of who controls domestic political or judicial power. By using international human rights law in the way that it does, therefore, the CCJ acts as a guarantor for the upholding and preservation of universal, normative standards of rights, rather than applying a "made in the Caribbean" version of basic fundamental human rights which, in my view would be counter-intuitive to the reason for such rights in the first place.

Even with this being the case, and with the CCJ acting in such a progressive way, as I noted earlier in this conclusion, this does not mean that the Court does not have to grapple with important tensions along the way. What has emerged, however, is that even where such tensions might occur, the Court appears to make context-specific adjustments in its analyses and outcomes, while still ultimately referencing and relying on the same *universal* interests that are vital to the preservation of basic moral entitlements noted in the literature from scholars such as Tasioulas⁶⁶⁰, Gewirth⁶⁶¹, Talbott⁶⁶², and Raz⁶⁶³. This demonstrates insight and sophistication by the Court, reinforcing the capacity of IHRLN to function as a moral ideal, while at the same time applying cultural pragmatism. This points to the relativity of international human rights discussed earlier in the work of Donnelly⁶⁶⁴, Dembour⁶⁶⁵, Mullender⁶⁶⁶, and An-Na'im⁶⁶⁷, for instance, and highlights that upholding personal freedoms that bear a *universal* quality or essence is very rarely an affront to any serious or legitimate concern of cultural subordination by basic IHRLN. This therefore signifies that the transformative universality of IHRLN generates spaces for intersectionality and dialogue, even within the sovereignty of the nation-state. To that extent, the CCJ, I argue, is not portending that IHRLN has dominant or unquestionable knowledge, or that it has precedence or hierarchical superiority over domestic or regional law, but rather, is instead telegraphing a kind of de-centring of parochialism and a promotion of the features of IHRLN that are commensurate with domestic constitutional values.

⁶⁶⁰ Supra, notes 264 & 267.

⁶⁶¹ Supra, notes 271 & 274.

⁶⁶² Supra, note 281.

⁶⁶³ Supra, note 258.

⁶⁶⁴ Supra, notes 291 & 318.

⁶⁶⁵ Supra, note 325.

⁶⁶⁶ Supra, note 327.

⁶⁶⁷ Supra, notes 317 & 329.

Another important thing that this study has revealed, is that the way the CCJ approaches its law-making function is not fundamentally “culture-centric” or “Third World-focused”, or “domestic-centred”. The Court, both through its human rights jurisprudence and other decisions, has shown that it has a larger, wider, more globalist perspective and agenda. Further, the court is also clearly keen to build its legitimacy and enhance its role in the life of Caribbean law as a whole. Demonstrated in my analysis throughout, is that from the very outset of its inauguration, the CCJ has been keen to situate itself, not as a parochial cloistered entity, but rather as a proud cosmopolitan Caribbean institution. Likewise, as an institution that is the product of a burgeoning sense of regionalism, internationalism, and universalism, as embodied in the instrument which anchors the Court, the Revised Treaty of Chaguaramas. As the Court explained in its earlier judgments, its agenda was fundamentally about “access to justice”, holding CARICOM governments to account, enhancing the proper administration of justice, safeguarding rights, ending abuse of power, and enforcing public accountability of public officials. It also indicated that it would be guided by a responsibility to do fundamental justice for the peoples of the region, as this was a critical underpinning of the rule of law and the protection of democratic values. Importantly, in those early decisions of the Court as well, it settled that while it would certainly consider the law from across the globe, including its predecessor, the UK Privy Council, it would make its own mind up on how such external law was to be considered and applied, in light of what it saw as its mandate which is the building of an indigenous Caribbean law. This, as the Court has shown repeatedly, is not interpreted to mean irrational and impulsive creativity on its part, but rather, a healthy, mutually reinforcing engagement with universally accepted legal principles and norms, fashioned in a way that accounts for Caribbean aspirations and imperatives, as well as transformation in Caribbean justice.

As I have shown, one of the ways that the Court has done this is with the fashioning of the “correlative rights” doctrine, wherein, rights that are not expressed in the RTC, but which flow inexorably and naturally from those expressed rights, become equally enforceable. In a similar way, in using international law, and universal international human rights law in particular, the Court has also *contained* the dualism tradition of Caribbean legal systems. The Court has severally indicated that though it accepts that Caribbean States do not have direct effect application of international law, it would be impractical and untenable for CARICOM States to sign the RTC and other international treaties which place certain obligations on them, and then conduct themselves in ways inconsistent with obligations under these treaties. As the Court pointed out in *Myrie*, for instance, that would make for a legal nonsense where citizens have gained certain entitlements in Community Law, yet cannot take advantage of such entitlements domestically, on account of the evisceration caused by strict adherence to the dualism doctrine.

Even with such illustrations of the creativity of the CCJ, hinged on its globalist propensities and credentials, this does not mean that the Court has not gotten it *wrong*, on occasions, as well. As my analyses and discussions in disagreement with the human rights outcomes in *Tomlinson* and *Myrie* made clear, the Court may have a need to be more cautious about consistency in its human rights outcomes in both its appellate and original (trade) jurisdictions. Both *Myrie* and *Tomlinson* emerged from the Court’s Original Jurisdiction, and raised important human rights questions which, in my view, were deliberately evaded by the Court. Although the later outcome in *McEwan* redeemed the Court in my view, relative to their earlier *Tomlinson* decision, the fact remains that *McEwan*, (even though it dealt with LGBTQ rights as *Tomlinson* did), arose in the

Court's Appellate Jurisdiction, within the context of constitutional law. What this suggests, is that in going forward, the CCJ, in order to preserve its human rights credentials may want to consider human rights cases in both jurisdictions, on a similar universalist footing, especially bearing in mind that the RTC provides for the use of international law in the Court's decision-making. This would certainly strengthen the legitimacy, credibility, and reliability of the Court as a protector of human rights, particularly bearing in mind some of the social and political issues relating directly to the discriminatory social attitudes towards LGBTQ rights in the Caribbean, exemplified earlier from the works of Senior⁶⁶⁸, Stolzoff⁶⁶⁹, Lazarus⁶⁷⁰, Wheatle and Campbell⁶⁷¹, and Lewis and Carr⁶⁷².

Notwithstanding such a challenge of the need for human rights consistency across its two jurisdictions, however, one of the very vitally important things revealed in the analysis conducted in this thesis, is that the CCJ has been indisputably effective in transformation and reform in certain aspects of law in the Caribbean. Testaments of the Court's transformative, norm-building credentials may easily be found in cases such as *McEwan*, *Maya Leaders Alliance*, *Myrie*, *Joseph and Boyce* and *Nervais and Severin*. This is not to be taken, however, to mean that the Court has been reckless. My appraisal has demonstrated that one of the ways in which the Court has built its legitimacy, is by being careful and considered about the manner in which it uses its power. Examples of this would be in not making an expert, *facilities*, in *August and Gabb*; by restricting its application of the *legitimate expectation* principle in its constitutional law discourse; by

⁶⁶⁸ Supra, note 189.

⁶⁶⁹ Supra, note 187.

⁶⁷⁰ Supra, notes 200-202.

⁶⁷¹ Supra, note 191.

⁶⁷² Supra, note 190.

limiting its nuancing of the *dualism doctrine*; and artfully blunting the effect of the *savings clause* on the adjudication of fundamental human rights, as it did in *Myrie*. All throughout, hence, the Court has been, through its universalist human rights approach, a judicial institution which is rational, consistent, and credible.

When considered as a whole, all of the accomplishments of the CCJ which have been mentioned briefly in this conclusion, and fully ventilated in the course of the various parts of this dissertation, make it an independent, forward-looking, transformative, and dynamic judicial institution. Clearly, as its human rights and other jurisprudence considered in this study has shown, the CCJ does not appear to be detained by any consideration that seriously mirrors the misgivings of sections of Caribbean society about aspects of IHRLN. This, even though the CCJ is a court located in the “developing world” where there are strong political, economic, social, and cultural ecologies that typically reflect suspicious impulses about IHRLN. This is of course due to histories and experiences of colonialism, imperialism, neo-colonialism, and globalization. At every reasonable and strategic opportunity, the Court has inculcated IHRLN in a myriad of ways, which I contend, has been categorically in the interest of the region as a whole, and the peoples that the Court serves. This attitude and approach on the part of the Court, reaffirms some of the very telling features that define transformative constitutionalism, including as *Brickhill et. al.*⁶⁷³ reminded us, the inducement of social change, equality, and multiculturalism, among other things, or as Klare⁶⁷⁴ explained, the enhancement of democracy in an egalitarian direction. As the thesis has shown, IHRLN have been used by the CCJ in both regards, and as a tool of standard-setting, much in the

⁶⁷³ *Supra*, note 360.

⁶⁷⁴ *Supra*, note 362.

way described by Gerards⁶⁷⁵. As my analyses have shown at various points, much in the way described by Teitel⁶⁷⁶, the CCJ has relied on IHRLN to “dis-entrenched” some understandings of domestic constitutional and human right laws, and has likewise “mediated” aspects of domestic law, in order to achieve, to some degree, a “shift in understandings” in some instances and “normative transcendence” in others.

While the CCJ is not a perfect institution, I nevertheless maintain that in its rejection of the kinds of contentions and sensibilities found in notions of *plantation* and *dependency*, or in the socio-cultural and political reservations about IHRLN in parts of Caribbean society, it is doing right by Caribbean peoples. Thus far, the Court has served as a guarantor and protector of the liberties and freedoms that we are *universally* given and are entitled to, and which accord us with the autonomy, personhood, and dignity that we are supposed to have as human beings.

For the future, based on its human rights work so far, I see that the CCJ continues to have immense potential to deepen and widen protection for fundamental rights in the Caribbean, in spite of the region’s socio-cultural, political, or economic realities. These realities will of course create tensions and challenges for the Court as it continues to define itself and mark its human rights territory in Caribbean law, but the indications thus far are that the Court is skillful and cosmopolitan enough to navigate these, and to arrive at characteristically empowering and transformative outcomes. I also see the potential for greater seamlessness between the way the Court addresses human rights issues raised in its appellate (constitutional law) jurisdiction, and those raised in its “trade” or “treaty” jurisdiction. Indeed, with the two missed opportunities

⁶⁷⁵ Supra, note 378.

⁶⁷⁶ Supra, note 384.

mentioned above in *Tomlinson* and *Myrie*, for instance, there is clearly a need for a commensurability of treatment or approach in the application of universalist human rights norms, in both jurisdictions of the Court. Beyond this, however, I also see space for the Court to be more evolved in terms of the way it defines its perimeters, as regards the separation of powers from the other branches of government.

I also anticipate that greater favour will be found in the Appellate Jurisdiction of the Court, in due course, leading to an eventual and gradual embrace by more CARICOM states of its presence as an apex judicial institution. As I see it, the Court has been steadily building its legitimacy over its short life so far, in a number of ways, a combination of which will likely strengthen its attractiveness to other Commonwealth Caribbean states. This building of legitimacy is to be found for example in its heavy reliance on normative legal principles and ideas found in both international law as well as in the law of other liberal democratic jurisdictions; its achievement of normative goals within a strong framework of justice; its promotion of non-violation of core legal and moral norms; its infusion of IHRLN in building and expanding Caribbean constitutionalism; its respect for the limits of its own power; its disinclination to baldly over-reach in its decision-making; its respect for Caribbean scholarship and other decisions of other senior Caribbean courts; its high regard for the principle of *stare decisis*, which promotes stability and credibility in its work; and its clear independence and self-confidence in its decision-making. Indeed, as a reflection of this legitimacy, already, the judgements of the Court are being cited in other Caribbean courts over which the CCJ does not even have appellate jurisdiction. So indeed, I suggest that a momentum is building.

BIBLIOGRAPHY

al Attar, Mohsen & Rebekah Thompson, “How the Multi-Level Democratisation of International Law-Making Can Effect Popular Aspirations Towards Self-Determination”, (2011) 3(1) *Trade L. & Dev.* 65.

Alter, K.J., L.R. Helfer & M.R. Madsen, “How Context Shapes the Authority of International Courts”, (2016) 79 *Law & Contemporary Problems* 1.

Anderson, Winston, “The Caribbean Court of Justice and the Development of Caribbean Jurisprudence”, Distinguished Lecture, Jamaica, (March 2013), found online at <https://ccj.org/wp-content/uploads/2013/03/CCJCJDistLECTURE.pdf>.

Anderson, Winston, “The Inter-American System and its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the Caribbean Court of Justice”, Special Lecture, Hugh Wooding Law School, Trinidad & Tobago, found online at <https://ccj.org/papersandarticles/5IASCaribbeanLawFINAL.pdf>.

Anderson, Winston, “The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Dimensions”, (2011) 21:1 *J. of Trans. L. & Pol.* 1

Anghie, Antony, “Europe and International Law’s Colonial Present”, (2006) 6:1 *Baltic Y.B. Int’l L.* 79.

Anghie, Antony, “Francisco de Vitoria and the Colonial Origins of International Law”, (1996) 5 *Soc. & L. Stud.* 321.

Anghie, Antony, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge University Press: Cambridge, 2005).

Anghie, Antony, & B. S. Chimni, “Third World Approaches to International Law and Individual Responsibility in Internal Conflict” (2004) 36 *Studies in Trans. Leg. Pol.* 185.

Anghie, Antony, “Time Present and Time Past: Globalization, International Financial Institutions, and the Third World”, (2000) 32 *N.Y.U. J. Int’l L. & Pol.* 243.

Anghie, Antony, “TWAIL: Past and Future”, (2008) 10 *Int’l Comm. L. Rev.* 479.

Anghie, Antony, “What is TWAIL – Comment”, (2000) 94 *Am. Soc’y Int’l L. Proceedings*, 39.

Anghie, T., *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press: Cambridge, 2007).

An-Na'im, Abdullahi, "Problems and Prospects of Universal Cultural Legitimacy for Human Rights", in Abdullahi Ahmed An-Naim & Francis M. Deng, eds., *Human Rights in Africa: Cross Cultural Perspectives*, (Brookings Institution).

An-Na'im, Abdullahi, "State Responsibility Under International Human Rights Law to Change Religious and Customary Law", in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives*, (University of Pennsylvania Press, 1994).

An-Na'im, Abdullahi, "The Rights of Women in International Law in the Muslim Context", (1987) 9 *Whitter L. Rev.* 491.

An-Na'im, Abdullahi, "Toward a Cross Culture Approach to Defining International Standards of Human Right: The Meaning of Cruel, Inhuman or Degrading Treatment", in Abdullahi An-Na'im, ed., *Human Rights in Cross Cultural Perspectives: A Quest for Consensus*, University of Pennsylvania Press, 1995).

Arnall, Anthony, *The European Union and its Court of Justice*, (Oxford University Press: Oxford, 1999).

Arvan, Marcus, "Reconceptualizing Human Rights", (2012) 8 *J. of Global Ethics*, 91.

Beckford, George, *Persistent Poverty: Underdevelopment in the Plantation Economies of the Third World*, (Oxford University Press: New York, 1972).

Bedjaoui, Mohammed, *Towards A New International Economic Order*, (Holmes & Meier Publishers: New York – London, 1979).

Beitz, Charles, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009).

Belle Antoine, Rose-Marie, "Assessing 10 Years of the Caribbean Court of Justice in its Appellate Jurisdiction: Encouraging Signs of a Mature, Relevant Jurisprudence" (2015) 3:2 *Carib. J. Int'l. Rel. & Dipl.* 69.

Belle Antoine, Rose-Marie, *Commonwealth Caribbean Law and Legal Systems* (London & New York: Routledge Taylor & Francis Group, 2008).

Bernal, Richard, Mark Figueroa & Michael Witter, "Caribbean Economic Thought: The Critical Tradition", (1984) 33:2 *Social & Econ. Studies* 5.

Bernard, Desiree, "Fostering a Culture of Respect for Human Rights Within the Judicial System of the Commonwealth Caribbean", Presentation to the Commonwealth Law Conference, Kenya, (September 2007).

https://ccj.org/wp-content/uploads/2011/papers_addresses/Respect_for_Human_Rights.pdf.

Bernard, Desiree P., “The Caribbean Court of Justice: A New Judicial Experience”, (2009) 37:2 *Int’l. J. Leg. Info.* 219.

Benedict, Ruth, *Patterns of Culture*, (Routledge & K. Paul, 1961).

Best, Lloyd, “Reflections on the reflections”, in ed., Selwyn Ryan, *Independent Thought and Caribbean Freedom: Essays in honour of Lloyd Best*, (Sir Arthur Lewis Institute of Social and Economic Studies: St. Augustine, Trinidad, 2003).

Best, Lloyd, “The Mechanisms of Plantation-type Economies: Outlines of a Model of Pure Plantation Economy”, (1968) 17:3 *Social & Econ. Studies* 283.

Bhagwandin, Dutima, “Scaling-up human rights impact in the English-speaking, Commonwealth Caribbean”, Office of the High Commissioner for Human Rights (OHCHR), 30 September 2017.

Birdsong, Leonard, “Formation of the Caribbean Court of Justice: The Sunset of British Colonial Rule in the English-Speaking Caribbean”, (2005) 36 *U. Miami Inter-Am. L. Rev.* 197.

Boas, Franz, *The Mind of Primitive Man*, (Forgotten Books, 2012).

Bourdieu, Pierre, “The Force of Law: Toward a sociology of the Juridical Field” (1987) 38 *Hastings L. J.* 805, (translation by Richard Terdiman).

Boxill, Ian, J. Martin, T Meikle, et. al., “National Survey of Attitudes and Perceptions of Jamaicans Towards Same Sex Relationships”, *Report for Aids- Free World*, (2011), found online at <https://ufdc.ufl.edu/AA00003178/00001/28j>

Braveboy-Wagner, Jacqueline, “The Diplomacy of Caribbean Community States: Searching for resilience”, in eds., Andrew F. Cooper and Timothy Shaw, *The Diplomacies of Small States Between Vulnerability and Resilience*, (Palgrave Macmillan: New York and Hampshire, 2009).

Brewster, Havelock R., “The Report of The West Indian Commission, Time for Action - A Critical Appreciation”, (1993) 39(1) *Caribbean Quarterly* 29.

Brickhill, Jason, & Yana Van Lieve, “Transformative Constitutionalism – Guiding Light or Empty Slogan”, in eds., Alistair Price & Michael Bishop, *A Transformative Justice: Essays in Honour of Pius Langa*, (Juta Juridica: 2015).

Buergenthal, Thomas, “Lawmaking by the ICJ and Other International Courts”, (2009) 103 *Proceedings of the Annual Meeting (American Society of International Law)* 403.

Burstein, Mike, “The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights”, (2006) 24 *Berk. J. Int’l L.* 423.

Byron, Dennis & Maria Dakolias, “The Regional Systems in the Organization of Eastern Caribbean States and the Caribbean”, in ed., Edgardo M. Favaro, *Small States, Smart Solutions: Improving Connectivity and Increasing the Effectiveness of Public Services*, (The World Bank: Washington D.C., 2008).

CARICOM Secretariat, Caribbean Court of Justice Strategic Plan 2013-2017, found online at: <https://ccj.org/wp-content/uploads/2012/12/%e2%80%a2CCJ-Strategic-Plan-2013-2017-2.pdf>

Campbell, Yonique, & Se-Shauna Wheatle, “Contradictions in faith in the Caribbean context: postcolonialism, religion and the constitution”, (2020) 58:3 *Commonwealth & Comp. Politics* 277.

Caserta, Salvatore & Mikael Rask Madsen, "Tomlinson v. Belize; Tomlinson v. Trinidad and Tobago" (2016) 110:3 *Am. J. Int'l. L.* 533.

Cassese, Antonio, “Human Rights in a Challenging World, (Philadelphia: Temple University Press, 1990).

Chadee, Derek, Chezelle Joseph, Claire Peters, Vandana Siew Sankar, Nisha Nair, & Jannel Phillip, “Religiosity, and Attitudes Towards Homosexuals in a Caribbean environment”, (2013) 62:1/2 *Social & Econ. Studies* 1.

Charles, Christopher A. D., “Representations of Homosexuality in Jamaica”, (2011) 60:1 *Social & Econ. Studies* 3.

Chawla, R. L., “Caribbean Economies: Dependency and Beyond”, (2004) *India Quarterly* 218 (Special Issue on the Caribbean).

Chevannes, B., “Gender and Adult Sexuality”, in P. Mohammad, ed., *Gendered Realities: Essays in Caribbean Feminist Thought*, (Kingston, Jamaica: University of the West Indies Press, 2002).

Chimni, B.S., “Law of the Sea: Imperialism All the Way”, (1982) 17:11 *Econ. & Pol. Weekly* 407.

Chimni, B. S., “Marxism and International Law: A Contemporary Analysis”, (1999) 34:6 *Econ. & Pol. Weekly* 337.

Chimni, B. S., “The Past, Present and Future of International Law: A Critical Third World Approach”, (2007) 8:2 *Melb. J. Int'l. L.* 499.

Chimni, B.S., “Third World Approaches to International Law: A Manifesto”, (2006) 8 *Int'l. Comm. L. Rev.* 3.

Christiansen, Eric, “Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice” (2010) *J. Gender, Race & Justice* 575.

Cockrell, A., “Rainbow Jurisprudence”, (1996) 12 *South Afr. J. on Hum. Rts.* 1.

Cooper, Carolyn, *Noises in the Blood: Orality Gender, and the “Vulgar” Body of Jamaican Popular Culture*, (Durham, NC: Duke University Press, 1995).

Cowell, Frederick, “LGBT rights in Commonwealth forums: politics, pitfalls and progress?”, in eds., Corinne Lennox & Matthew Waites, *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth*, (School of Advanced Study, University of London, Institute of Commonwealth Studies, 2013).

Cowell, Noel & Tanzia S. Saunders, “Exploring Heteronormativity in the Public Discourse of Jamaican Legislators”, (2011) 15 *Sexuality & Culture* 315.

Cowell, Noel M., “Public Discourse, Popular Culture and Attitudes Towards Homosexuals in Jamaica”, (2011) 60:1 *Social & Econ. Studies* 31.

Cranston, Maurice, Maurice Cranston, “Are there any Human Rights?”, (1983) 112:4 *Daedalus* 1.

Cranston, Maurice, *What are Human Rights*, (London: The Bodley Head Ltd., 1973).

Curtis, Debra, *Pleasure and Perils: Girl’s Sexuality in a Caribbean Consumer Culture*, (New Brunswick, NJ: Rutgers University Press, 2009).

Dembour, Marie-Benedicte, “Following the movement of a pendulum: between universalism and relativism”, in Jane Cowan, Marie-Benedicte Dembour & Richard Wilson, eds., *Culture and Rights: Anthropological Perspectives*, (Cambridge University Press, 2001) 58.

Dobinson, Ian & Francis Johns, “Qualitative Legal Research”, in Michael McConville & Wing Hong Chui, eds., *Research Methods for Law*, (Edinburgh University Press: Edinburgh, 2007).

Donnelly, Jack, *The Concept of Human Rights*, (Routledge: London & New York, 1985), (e-book edition.).

Donnelly, Jack, “The Relative Universality of Human Rights”, (2006) 29 *Hum. Rts. Q.* 423.

Donoho, Douglas Lee, “Democratic Legitimacy in human Rights: The Future of International Decision-Making”, (2003) 21 *Wis. Int’l L.J.* 1.

Donoho, L., “Relativism versus Universality in Human Rights: The Search for Meaningful Standards”, (1990-1991) 27 *Stan. J. of Int’l. L.* 345.

Douzinias, Costas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Hart Publishers, 2000).

Dugard, Jackie, “Testing the Transformative Premise of the South African Constitutional Court: A Comparison of High Courts, Supreme Court of Appeal and the Constitutional Court socio-economic rights decisions, 1994-2015”, (2016) 20:8 *Int’l J. Hum. Rts.* 1132.

Eslava, Luis, and Sundhya Pahuja, “Between Resistance and Reform: TWAIL and the Universality of International Law”, (2011) 3 *Trade, Law & Dev.* 103.

Falk, Richard, Rajagopal Balakrishnan and Jacqueline Stevens, “Reshaping Justice: International Law and the Third World: An Introduction, 27:5 *Third World Q.* 711.

Figueroa, Mark, “A Critical Essay on Caribbean Political Economy”, (Mimeo - Department of Economics: University of the West Indies, Mona, 1977).

Follesdal, Andreas, “Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights - or Neither”, (2016) 79 *L. & Cont. Probs.* 47.

Franke, Katherine, “Dating the State: The Moral Hazards of Winning Gay Rights”, (2012) 44:1 *Columbia Human Rights Law Review* 1.

Gathii, James Thuo, “Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory”, (2000) 41:2 *Harv. Int’l. L. J.* 263.

Gathii, James Thuo, “Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)”, (2002) 15 *Leiden J. Int’l L.* 581.

Gathii, James Thuo, “Imperialism, Colonialism, and International Law”, (2007) 54:4 *Buff. L. Rev.* 1013.

Gathii, James Thuo, "Rejoinder: Twailing International Law" (2000) 98:6 *Mich. L. Rev.* 2066.

Gathii, James Thuo, “The Agenda of Third World Approaches to International Law (TWAIL)”, in eds., Jeffrey L. Dunoff & Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, (Cambridge University Press: Cambridge, 2019).

Gathii, James Thuo, “Third World Approaches to International Economic Governance”, in eds., Richard Falk, Jacqueline Stevens, & Balakrishnan Rajagopal *International Law and the Third World: Reshaping Justice*, (Routledge, 2008).

Gathii, James Thuo, “TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography”, (2011) 3:1 *Trade, Law & Dev.* 26.

Geertz, C., *Interpretations of Cultures*, (Basic Books, 1973).

Gerards, Janneke, “The Paradox of the European Convention on Human Rights and the European Court of Human Rights’ Transformative Power” (2017) 4:2 *Kutafin Uni. L. Rev.* 315.

Gewirth, Alan, *Human Rights: Essays on Justification and Applications*, (Chicago: Chicago University Press, 1982).

Gewirth, Alan, *Reason and Morality*, (Chicago: University of Chicago Press, 1978).

Girvan, Norman, “Caribbean Dependency Thought Revisited”, (2006) 27:3 *Can. J. Dev. Studies* 328.

Girvan, Norman & Cherita Girvan, “The development of Dependency Economics in the Caribbean and Latin America: Review and Comparison”, (1973) 22:1 *Social & Econ. Studies* 1.

Glensy, Rex D., “The Right to Dignity” (2011) 43:1 *Colum HRLR* 65.

Green, Cecilia, “Caribbean Dependency Theory of the 1970s”, in eds., Brian Meeks & Folke Lindahl, *New Caribbean Thought: A Reader*, (University of the West Indies Press: Kingston, 2001) 40.

Grenade, Wendy C., “Small States and Risky Global Intercourse: The Grenada-Taiwan Dispute”, (2013) 62:3/4 *Social & Econ. Studies* 183.

Griffin, James, *On Human Rights*, (Oxford University Press, 2008).

Grimm, Dieter, “Bodin’s Significance for the Concept of Sovereignty”, in ed. Dieter Grim, *Sovereignty: The Origin and Future of a Political and Legal Concept*, (Columbia University Press, 2015) 13.

Harris, Donald J., *Capital Accumulation and Income Distribution*, (Routledge & Kegan Paul: London, 1978).

Hart, Richard, *Blacks and Bondage*, (Institute of Social and Economic Research [ISER]: Jamaica, 1980).

Hart, Richard, *Origin and Development of the People of Jamaica* (Trade Union Congress Education Department: Kingston, 1955).

Helfer, Laurence & Erik Voeten, “International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe”, (2014) 68:1 *Int’l Org.* 77.

Helfer, Laurence R., “Over-Legalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes”, (2002) 102:7 *Colum. L. R.* 1832.

Helfer, L.R., “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime”, (2008) 19 *Eur. J. Int’l. L.* 125.

Hettne, Bjorn, “Globalization and the New Regionalism: The Second Great Transformation”, in eds., Bjorn Hettne, Andras Inotai and Osvaldo Sunkel, *Globalism and the New Regionalism*, (Macmillan Press Ltd., 1999).

Hettne, Bjorn, & A. Inotai, *The New Regionalism. Implications for Global Development and International Security*, UNU/WIDER, (1994).

Holness, Toni, “Lesbian, Gay, Bisexual, Trans, and Intersex Rights in the Caribbean: Using Regional Bodies to Advance Culturally Charged Rights”, (2013) 38:3 *Brook J. Int’l. L.* 925.

Ibhawoh, Bonny, “Cultural Relativism and Human Rights: Reconsidering the Africanist Discourse”, (2001) 19:1 *Netherlands Q. of Hum. Rts.* 43.

Ignatieff, Michael, *Human Rights as Politics and Idolatry*, (Oxfordshire: Princeton University Press, 2001).

Iovane, Massimo, “The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations” (2007) 14 *Int’l. J. on Minority & Group Rights* 231.

Jacobs, Francis, “The State of International Economic Law: Re-thinking Sovereignty in Europe”, (2008) 11:1 *J. Int’l. Econ. L.* 5.

Jagan, Cheddi, *Forbidden Fruit: The Story of British Guiana*, (Lawrence & Wishart, 1955).

Jain, S. N., “Doctrinal and Non-Doctrinal Legal Research”, in S. K. Verma & M. Afzal Wani, eds., *Legal Research and Methodology*, (Indian Law Institute: India, 2006) 68.

Jarmul, Holly Dawn, “The Effect of Decisions of Regional Human Rights Tribunals on National Courts”, (1995) 28 *N.Y.U. J. Intl L. & Pol.* 311.

Jarvie, I.C., “Rationalism and Relativism”, (1983) 34 *British J. of Soc.* 44.

Joseph, Tennyson S. D., “Reclaiming W. A. Lewis for the Caribbean Political thought Tradition”, (2009) 58:3/4 *Social & Econ. Studies* 29.

Judge, Elizabeth F. & Tenille E. Brown, “Pokemorials: Placing Norms in Augmented Reality,” (2017) 50 *Uni. Brit. Columbia L. Rev.* 971.

Kairys, David, “Law and Politics” (1984) 52:2 *Geo. Wash. L. Rev.* 243.

Kastratovic, Milica, “Democracy,” (2015) 5 *Int’l. J. Econ. & Law* 27.

Kellner, Douglas, “Theorizing Globalization”, (2002) 20:3 *Soc. Theory* 285.

King, Jamilah, “Outing the Center: Homophobia in Jamaica”, (2006), Independent Study Project (ISP) Collection, 380.

Klare, K., “Legal Culture and Transformative Constitutionalism”, (1998) 14 *S. Afr. J. Hum. Rts.* 150.

Klarman, Michael J., *Brown v. Board of Education and the Civil Rights Movement*, (Oxford University Press: 2007), (e-book).

Klarman, Michael J., *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, Oxford University Press: 2013), (e-book).

Kocken, Joris & Gerda van Roozendaal, “Constructing the Caribbean Court of Justice: How ideas Inform Institutional Choices”, (2012) 93 *Eur. Rev. Latin Am. & Carib. Stud.* 95.

Lazarus, Latoya, “Enacting citizenship, debating sex and sexuality: conservative Christians’ participation in legal processes in Jamaica and Belize”, (2020) 58:3 *Commonwealth & Comp. Politics* 366.

Lazarus, Latoya, “Heteronationalism, Human Rights, and the Nation-State: Positioning Sexuality In the Jamaican Constitutional Reform Process”, (2011) 36:71 *Canadian J. of Latin Am. & Carib. Studies* 71.

Lazarus, Latoya, “This is a Christian Nation: Gender and Sexuality in the Processes of Constitutional and Legal Reform in Jamaica”, (2012) 61:3 *Social and Economic Studies* 117.

Lenzerini, Federico, *The Culturalization of Human Rights Law*, (Oxford University Press, 2014), (Apple Books electronic edition).

Lewis, Anthony R. & Robert Carr, “Gender, Sexuality and Exclusion: Sketching the Outlines of the Jamaican Popular Nationalist Project”, (2009) 3 *Caribbean Rev. of Gender Studies* 1.

Li, Xiarong, *Ethics, Human Rights and Culture: Beyond Relativism and Culture*, (Palgrave Macmillan, 2006).

Locke, John, *Second Treatise on Government*, (Hackett Publishing Co, 1987).

Maharaj, Andrew N., “The Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean’s First Independent and Interdependent Court”, (2014) 47 *Cornell Int’l. L. J.* 735.

Marks, Susan & Andrew Clapham, *International human Rights Lexicon*, (Oxford: Oxford University Press, 2005)(electronic version).

Marsh, Christopher & Daniel P. Payne, “The Globalization of Human Rights and the Socialization of Human Rights Norms”, (2007) *Brig. Y. U. L. Rev.* 665.

Massad, Joseph, “Re-orienting Desire: The Gay International and the Arab World”, 14:2 *Pub. Cult.* 361.

Mather, Lynn, “Law and Society”, in ed., Robert E. Goodin, *The Oxford Handbook of Political Science*, (Oxford University Press, 2011).

Matthews, Janeille, & Tracy Robinson, “Modern Vagrancy in the Anglophone Caribbean” (2019) 1:4 *Carib. J. Crim.* 123.

McDonald, Sheldon, “The Caribbean Court of Justice: Enhancing the Law of International Organizations”, (2003) 27:4 *Ford. Int’l. L. J.* 929.

McGrew, Anthony G., *Global Politics: Globalization and the Nation State*, (Polity Press: Oxford, 1992).

McIntyre, Alister, “Some Issues in Trade Policy in the West Indies”, in eds., Norman Girvan and Owen Jefferson, *Readings in the Political Economy of the Caribbean*, (New World Group Limited: Mona, 1971), (First published in 1963).

McKenzie, Rex, “The Caribbean Plantation Economy and Dependency Theory”, in eds., Ushehwedu Kufakurinani, Ingrid Harvold Kvangraven, Frustuoso Santana & Maria Dyveke Styve, *Dialogues in Development*, (2017) Volume 1: Dependency, (Institutes of New Economic Thinking, 2017) 42.

Mendez, Juan E., & Javier Mariezcurrena, “Human Rights in Latin America and the Caribbean: A Regional Perspective”, A paper submitted to the Human Development Report 2000 “Human Rights and Human Development”, (November: 1999).

Merry, Sally Engle, “Human Rights Law and the Demonization of Culture (And Anthropology along the way)”, (2003) 25 *PoLAR* 55.

Meyer, W., “Toward a Global Culture: Human Rights, Group Rights and Cultural Relativism”, (1996) *Int’l J. on Group Rights* 169.

Mistry, Percy S., “New Regionalism: Impediment or Spur to Future Multilateralism?”, in eds., Bjorn Hettne, Andras Inotai and Osvaldo Sunkel, *Globalism and the New Regionalism*, (UNU/WIDER, 1999).

Moore, Fauzya A., “Review Essay: The Report of The West Indian Commission - New Directions for CARICOM?”, (1994) 43(2) *Social and Economic Studies* 149.

Mugwanya, George William, “Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System”, (1999) 10 *Ind. Int’l & Comp. L. Rev.* 35.

Mullender, Richard, “Human Rights: Universalism and Cultural Relativism”, (2003) 6:3 *Critical Rev. of Int’l. Soc. & Pol. Philosophy* 70.

Munroe, Trevor, “Developed Idealism & Early Materialism: Left Caribbean Thought in Transition”, (Mimeo – University of the West Indies, 1976).

Murcott, Melanie, “Transformative Environmental Constitutionalism’s Response to the Setting Aside of South Africa’s Moratorium on Rhino Horn Trade” (2017) 6:4 *Humanities* 84, at p. 10, online: <<http://dx.doi.org/10.3390/h6040084>>.

Mutua, Makau, "Conflicting Conceptions of Human Rights: Rethinking the Post-Colonial State" (1995) 89 *Am. Soc. Int’l. L. Proceedings* 487.

Mutua, Makau, "Critical Race Theory and International Law: The View of an Insider-Outsider" (2000) 45:5 *Vill. L. Rev.* 841.

Mutua, Makau, "From Nuremberg to the Rwanda Tribunal: Justice or Retribution" (2000) 6 *Buff. Hum. Rts. L. Rev.* 77.

Mutua, Makau, "Human Rights and Powerlessness: Pathologies of Choice and Substance" (2008) 56:4 *Buff. L. Rev.* 1027.

Mutua, Makau, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42:1 *Harv. Int’l L. J.* 201.

Mutua, Makau, “Standard Setting in Human Rights: Critique and Prognosis”, (2007) 29:3 *Hum. Rts. Q.* 547.

Mutua, Makau, "Terrorism and Human Rights: Power, Culture, and Subordination" (2002) 8 *Buff. Hum. Rts. L. Rev.* 1.

Mutua, Makau, “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties”, (1995) 35 *Virg. J. Int’l. L.* 338.

Mutua, Makau, “The Ideology of Human Rights”, (1996) 36 *Virg. J. Int’l. L.* 589.

Mutua, Makau, "The International Criminal Court: Promise and Politics" (2015) 109 *Proceedings of the Annual Meeting, published by the American Society of Int’l. L.* 269.

Mutua, Makau, “What is TWAIL?”, (2000) 94 *Proceedings of the Annual Meeting (American Society of International Law* 31.

Mutua, Makau, “Why Redraw the Map of Africa: A Moral and Legal Inquiry”, (1994) 16 *Mich. J. Int’l. L.* 1113.

Myneni, S. R., *Legal Research Methodology*, (Allahabad Law Agency: India, 2006), (1st ed. 4th prtg.).

Nelson, Camille A., “Lyrical Assault: Dancehall versus the Cultural Imperialism of the North-West”, (2008) 17 *South. Calif. Interdis. L. J.* 231.

Nettleford, Rex, *Inward Strength, Outward Reach: A Voice from the Caribbean*, (The Macmillan Press: New York, 1995).

Nurse, Keith, & Michaeline Crichlow, Review of, *Essays on the Theory of Plantation Economy: A Historical and Institutional Approach to Caribbean Economic Development*, eds., Lloyd Best & Kari Polanyi Levitt, (2011) 60:3/4 *Social & Econ. Studies* 203.

Nwobike, Chimugwuanya, "Beyond Conditionally: Human Rights in EU Development Partnership with Developing Countries" (2007) 19:2 *Sri Lanka J. of Int’l. L.* 387.

Ohmae, K., *The End of the Nation State: The Rise of Regional Economies*, (Free Press: New York, 1995).

Okafor, Obiora C., "Attainments, Eclipses and Disciplinary Renewal-in International Human Rights Law: A Critical Overview" in ed., D. Armstrong, (Routledge Handbook of International Law, London: Routledge: 2009).

Okafor, Obiora C., , "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both" (2008) 10:4 *Non-State Actors & Int’l L.* 371.

Okafor, Obiora C., “International Human Rights Fact-Finding Praxis in its Living Forms: A TWAIL Perspective” (2014) 1 *Trans. Hum. Rts. Rev.* 59.

Okafor, Obiora C., “Marxian Embraces (and De-Couplings) in Upendra Baxi’s Human Rights Scholarship: A Case Study”, in ed., S. Marks, *International Law on the Left: Re-examining Marxist Legacies*, (Cambridge UK and New York, Cambridge University Press: 2008) 252.

Okafor, Obiora C., “Newness, Imperialism and International Legal Reform in our Time: A TWAIL Perspective”, (2005) 43 *Osgoode Hall L. J.* 171.

Okafor, Obiora C., *Re-Defining Legitimate Statehood: International Law and State Fragmentation in Africa*, (The Hague: Martinus Nijhoff: 2000).

Okafor, Obiora C., & S. C. Agbakwa: "Re-Imagining International Human Rights Education in Our Time: Beyond Three Constitutive Orthodoxies", (2001) 14 *Leiden J. Int'l. L.* 563.

Okafor, Obiora C., “The Global Process of Legitimation and the Legitimacy of Global Governance”, (1997) 14 *Ariz. J. Int'l. L.* 117.

Pogge, Thomas, “How Should Human Rights be Conceived”, in Patrick Hayden, ed., *The Philosophy of Human Rights: Reading in Context*, (Paragon House, 2001) 187.

Pollard, Duke, *The Caribbean Court of Justice: Closing the Cycle of Independence*, (The Caribbean Law Publishing Company Ltd.: Kingston, 2004).

Post, Ken, *Arise Ye Starvelings: The Jamaican Labour Rebellion of 1938 and its Aftermath*, (Martinus Nijhoff: The Hague, Boston & London, 1978).

Post Ken, *Strike the Iron: A Colony at War: Jamaica 1939-45*, (Humanities Press: New Jersey, 1981).

Post, Robert, "Democracy, Popular Sovereignty, and Judicial Review" (1998) 86:3 *Cal. L. Rev.* 429.

Preis, Ann-Belinda, “Human Rights as a Cultural Practice: An Anthropological Critique”, (1996) 18 *Hum. Rights. Q.* 286.

Puar, Jasbir, “Rethinking Homonationalism”, (2003) 45:2 *Int'l. J. Middle East Studies* 336.

Puar, Jasbir, *Terrorist Assemblages: Homonationalism in Queer Times*, (Duke University Press: Durham, N. C., 2007).

Rajagopal, Balakrishnan, “Counter-Hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy”, (2006) 27:5 *Third World Q.* 767.

Rajagopal, Balakrishnan, "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions" (2000) 41:2 *Harv. Int'l. L. J.* 529.

Rajagopal, Balakrishnan, *International Law from Below: Development, Social Movements and Third World Resistance*, (Cambridge University Press, 2003).

Rajagopal, Balakrishnan, "Right to Development and Global Governance: Old and New Challenges Twenty-Five Years on" (2013) 35:4 *Hum. Rts. Q.* 893.

Rajagopal, Balakrishnan, "The International Human Rights Movement Today" (2009) 24:1 *Md. J. Int'l. L.* 56.

Rawls, John, *Political Liberalism*, (Columbia, 1996).

Rawls, John, *The Law of Peoples*, (Harvard, 1999).

Renteln, A., "Relativism and the Search for Human Rights", (1988) 90 *American Anthropologist* 56.

Renteln, Alison Dundes, *International Human Rights: Universalism versus Cultural Relativism*, (Quid Pro Quo Book, 2013).

Risteska, Marija & Emil Shurkov, "The Transformative Role of the Macedonian Constitutional Court", Working Paper Series, Center for Research and Policy Making & Center for Social Research, Sarajevo, 2016.

Robinson, Tracy & Arif Bulkan, "Constitutional Comparisons by A Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights", (2017) 80(3) *Modern L. Rev.* 379.

Robotham, Don, "Agrarian Relations in Jamaica", in ed., Carl Stone and Aggrey Brown, *Essays on Power and Change*, (Jamaica Publishing House: Kingston, Jamaica, 1977).

Rosamond, Ben, "Babylon and On? Globalization and International Political Economy", (2003) 10:4 *Rev. Int'l. Pol. Economy*, 661.

Rosenberg, Gerald N., *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991).

Rousseau, Jean-Jacques, "Discourse on the Origin of Inequality", in Donald A. Cress, trans. & ed., *The Basic Political Writings*, (Hackett Publishing Co, 1987).

Sanders, Ronald, *Globalisation has left Commonwealth Caribbean Small States Behind*, (The Round Table: The Commonwealth Journal of International Affairs, 2017).

Senior, Olive, *Working Miracles, Women's Lives in the English-Speaking Caribbean*, (Cave Hill, London, Bloomington, ISER: James Currey, Indiana Press, 1991).

Sidorsky, David, "Contemporary Reinterpretation of the Concept of Human Rights", in David Sidorsky, ed., *Essays on Human Rights: Contemporary Issues and Jewish Perspectives*, (Philadelphia: Jewish Publication Society of America, 1979), 91.

Simmons, David, “The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity”, (2005) 29:2 *Nova L. Rev.* 171.

Simons, A. John, “Human Rights and World citizenship: The Universality of Human Rights in Kant and Locke”, in *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge: Cambridge University Press, 2001).

Sloane, Robert D., “Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights”, (2001) 34:3 *Vand. J. Transnational L.* 527.

Smith, Charlene L., and Ryan Kosobucki, “Homophobia in the Caribbean”, (2011) 1 *J. L. & Soc. Deviance* 1.

Spaak, T., “Moral Relativism and Human Rights”, (2007) 13 *Buff. Hum Rights Rev.* 73.

Stolzoff, N., *Wake the Town and Tell the People: Dancehall Culture in Jamaica*, (Durham, NC: Duke University Press, 2000).

Talbott, William, *Which Rights Should be Universal?* (Oxford University Press, 2005), Kindle edition.

Tasioulas, John, “On the Nature of Human Rights”, in Gerhard Ernst & Jan-Christoph Heilinger, eds., *The Philosophy of Human Rights: Contemporary Controversies*, (Berlin: De Gruyter, 2012).

Tasioulas, John, “Taking Rights out of Human Rights”, (2010) 120:4 *Ethics* 656.

Tasioulas, John, “The Moral Reality of Human Rights”, in Thomas Pogge, ed., *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, (Oxford: Oxford University Press, 2007).

Teitel, Ruti, “Transitional Jurisprudence: The Role of Law in Political Transformation”, (1997) 106:7 *Yale L. J.* 2009.

Tesón, Fernando R. “International Human Rights and Cultural Relativism”, (1984-1985) 25 *Virg. J. of Int’l. L.* 869.

Tharoor, Shashi, “The Universality of Human Rights and Their Relevance to Developing Countries” (1990) 59 *Nordic J. Int’l. L.* 139.

Thomas, Clive Y., *Dependence and Transformation: The Economics of the Transition to Socialism*, (Monthly Review Press: New York, 1974).

Thomas, D., *Modern Blackness: Nationalism, Globalization, and the Politics of Culture in Jamaica*, (Durham, NC: Duke University Press, 2004).

Umozurike, U. O., "Freedom from Hunger-a Third World View" (1985) 70:5 *Iowa L Rev* 1329.

Umozurike, U. O., *International Law and Colonialism in Africa*, (Nwamife Publishers: Enugu, Nigeria, 1979).

Underhill, Geoffrey R. D., "Conceptualizing the Changing Global Order", in eds., Richard Stubbs & Geoffrey R. D. Underhill, *Political Economy and the Changing Global Order*, (Oxford University Press, 2006).

Van Alstine, Michael P., "Stare Decisis and Foreign Affairs", (2012) 61:5 *Duke L. J.* 941.

van Huyssteen, Elsa, "The Constitutional Court and the Redistribution of Power in South Africa: Towards a Transformative Constitutionalism", (2000) 59:2 *African Studies* 245.

Vasciannie, Stephen, "Caribbean Perspectives on Human Rights", found online at http://www.oas.org/es/sla/ddi/docs/publicaciones_digital_XXXII_curso_derecho_internacional_2005_Stephen_Vasciannie.pdf

Vasciannie, Stephen, "The Caribbean Court of Justice: Further Reflections on the Debate", (1998) 23:1/2 *West Indian L. J.* 23.

Ventose, Eddy D., "Legitimate Expectations, International Treaties and the Caribbean Court of Justice", in eds., David S. Berry & Tracy Robinson, *Transitions in Caribbean Law: Law-Making, Constitutionalism and the Convergence of National and International Law*, (The Caribbean Law Publishing Company: Kingston, 2013).

Vlcek, William, "Crafting Human Rights in a Constitution: Gay Rights in the Cayman Islands and the Limits to Global Norm Diffusion", (2013) 2:3 *Global Constitutionalism* 345.

Waldron, Jeremy, *Nonsense on Stilts: Bentham, Burke and Marx on the Rights of Man*, (Routledge, 1987).

Weedmark, Vennesa, "Caribbean Dependency Theory and the Case of Jamaican Development", (2013) 6 *Glendon J. Int'l. Studies* 31.

West, Robin, "A Reply to Pierre", (2009) 97 *Georg. L. J.* 865.

Wheatle, Se-Shauna, & Yonique Campbell, "Constitutional Faith and Identity in the Caribbean: Tradition, Politics and the Creolisation of Caribbean Constitutional Law", (2020) 58:3 *Commonwealth & Comp. Pol.* 344.

Witter, Michael, "Race and Class in the Jamaican Social Economy", (Mimeo – Department of Economics, University of the West Indies: Mona, 1982).

Woessner, Martin, “Provincializing Human Rights? The Heideggerian Legacy from Charles Malik to Dipesh Chakrabarty,” in ed., JoseI-Manuel Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars Publishing: Cambridge, 2013).

CCJ CASES

Attorney General v. Joseph and Boyce [2006] CCJ 3 (AJ).

Attorney General of Guyana v. Cedric Richardson [2018] CCJ 17 (AJ).

August et. al. v. The Queen [2018] CCJ 7 (AJ).

Belize International Services Limited v. Attorney General of Belize [2020] CCJ 9 (AJ) BZ

Carlton Junior Hall v. The Queen [2020] CCJ 1 (AJ).

Commissioner of Police v. Alleyne [2022] CCJ 2 (AJ) BB

Frank Gibson v. Attorney General of Barbados [2010] CCJ 3 (AJ).

Gregory August and Alwin Gabb v. The Queen [2018] CCJ 7 (AJ).

Guyana Sugar Corporation v. Tulsieram Dukhi [2016] CCJ 17 (AJ).

Hyles et. al. v. The Director of Public Prosecutions (Consolidated) [2018] CCJ 12 (AJ).

Jabari Sensimania Nervais and Dwayne Omar Severin v. The Queen [2018] CCJ 19 (AJ).

JJ v. Child Care Board [2017] CCJ 6 (AJ).

Mayan Leaders Alliance et. al. v. The Attorney General of Belize [2015] CCJ 15 (AJ).

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

Myrie v. The State of Barbados and the State of Jamaica [2013] CCJ 3 (OJ).

Nervais v. The Queen and Dwayne Omar Severin v. The Queen [2018] CCJ 19 (AJ).

Queen v. Mitchell Lewis [2007] CCJ 3 (AJ).

R. v. Ken O'Neil Lewis [2007] CCJ 3 (AJ).

Shanique Myrie v. The State of Barbados (and the State of Jamaica – Intervenor) [2013] CCJ 3 (OJ).

The Queen (R.) v. Gilbert Henry [2018] CCJ 21 (AJ).

Tomlinson v. The State of Belize and Maurice Tomlinson v. The State of Trinidad & Tobago
[2016] CCJ 1 (OJ).

Trinidad Cement v. Barbados [2018] CCJ 5 (OJ).

Trinidad Cement v. Barbados [2019] CCJ 01 (OJ).

Trinidad Cement v. Barbados [2020] CCJ 02 (OJ).

Trinidad Cement Limited v. The Caribbean Community [2009] CCJ 2 (OJ).

Trinidad Cement v. Trinidad and Tobago and Trinidad Cement v. Barbados, [2019] CCJ 05 OJ
[consolidated judgement].

Trinidad Cement Limited TCL Guyana Incorporated v. Guyana [2009] CCJ 1 (OJ).

NON-CCJ CASES

Ahani v. Regina 208 D.L.R. (4th) 66.

Andrews v. Law Society of British Columbia [1989] 1 SCR 143.

Attorney General for Anguilla and others v. Bernice Lake and others, Civil Appeal No. 4 of 2004, judgement delivered April 4, 2005.

Attorney General for Bermuda v Roderick Ferguson and others Civil Appeal Nos 11 and 12 of 2018, The Court of Appeal of Bermuda, delivered 23 November 2018 (unreported).

Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817.

Boyce et. al. v. Barbados, Inter-American Court of Human Rights, (Preliminary Objection, Merits, Reparations and Costs), November 20, 2007.

Brown v. Board of Education of Topeka 347 U.S. 483 (1954)

Brown v. Stott [2001] 2 WLR 817.

Brumarescu v. Romania, ECtHR No. 28342/95, 28 October 1999.

Caleb Orozco v The Attorney General of Belize and others Claim No 668 of 2010, The Supreme Court of Belize, delivered 10 August 2016 (unreported).

Case of Boyce et al. v. Barbados, Preliminary Objection, Merits, Reparations and Costs. Judgment of November 20, 2007.

Case of Caesar V. Trinidad and Tobago, Merits, Reparations and Costs. Judgment of March 11, 2005. Series C No. 123.

Case of Cantoral Benavides v. Perú (2001) Series C. No. 88.

Case of Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago, Inter-American Court of Human Rights, Judgement of June 21, 2002, Series C 94.

Case of Kichwa Indigenous People of Sarayaku v Ecuador (2012) Ser. C. no. 245, at paras. 322-323.

Dacosta Cadogan v. Barbados, Inter-American Court of Human Rights, (Preliminary Objections, Merits, Reparations, and Costs), September 24, 2009.

Doris Fuller v. Attorney General (1998) 56 WIR 337.

Du Toit v. Minister of Welfare and Population [2002] ZACC 20.

Findlay v. United Kingdom (App. No. 22107/93), 25 February 1997.

Fitt v. United Kingdom, App. No. 29777/96, (16 February 2000).

Godwin and Greg Deroche v. The Registrar General and others 2017 SC (Bda) 36 Civ (5 May 2017) (unreported).

Hilaire, Constantine and Benjamin et al v. Trinidad and Tobago, IACHR Series C, no. 9, IHRIL 1477. Judgment dated 21 June 2002.

Independent Jamaica Council for Human Rights (1998) Ltd and others v. Marshall-Burnett and Attorney General [2005] UKPC 3; [2005] 2 WLR 923.

J and B v. Director General of Department of Home Affairs [2003] ZACC 3.

Jespers v. Belgium (App. No. 8403/78), 14 December 1981.

Jones v. Attorney General of Trinidad and Tobago and others, Claim No. CV2017-00720, in the High Court of Trinidad & Tobago, judgement delivered on 12th April 2018, (unreported).

Law v. Canada [1999] 1 SCR 497.

Maya Indigenous Community of the District of Toledo District v. Belize Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1, (2004).

Mayzit v. Russia (App. No. 63378/00), 20 January 2005.

Miguel Castro-Castro Prison v. Peru, Merits, Reparations and Costs, 25 November 2006.

Minister of Home Affairs and Another v. Fourie and Another 2005 ZACC 19.

Minister of State for Immigration and Ethnic Affairs v. Teoh [1995] 3 LRC 1.

Morael v. France Communication No. 207/1986, U.N. Doc. Supp. No. 40 (A/44/40).

National Coalition for Lesbian & Gay Equality v. Minister of Justice [1998] ZACC 15.

National Coalition for Lesbian & Gay Equality v. Minister of Home Affairs [1999] ZACC 17.

National Legal Services Authority v Union of India and Others [2014] 4 LRC 629.

Nervais v. The Queen and Severin v The Queen [2018] CCJ 19 (AJ).

Occupiers of 51 Olivia Road v. City of Johannesburg [2008]ZACC 1.

Ong Ah Chuan v Public Prosecutor [1981] AC 648.

People's Union for Civil Liberties v. Union of India [1999] 2 LRC 19.

Portugal v. Commission, Case C-88/03, Judgment of the Court (Grand Chamber) of 6 September 2006.

Pratt and Morgan v. Attorney General for Jamaica [1993] 4 All E. R. 769.

Pratt and Morgan v. Jamaica, Communication No. 210/1986 and 225/1987; U.N. Doc. CCPR/C/35/D/225/1987, 6 April 1989.

R. v. Big M Drug Mart, 1985 1 SCR 295.

R. v. Harrer [1995] 3 SCR 562.

R. v. Oakes [1986] 1 SCR 103.

Regina v. Secretary of State for the Home Department, ex parte Brind 3 [1991] 1 A.C. 696.
Reyes v R 2002 UKPC 11.

Roches v. Wade Action No. 132 of 2004, The Supreme Court of Belize (delivered April 30, 2004).

Ryabykh v. Russia, ECtHR No. 52854/99, 24 July 2003.

Saramaka People v Suriname (2007) Ser. C. no. 172.

Satchell v. President of the Republic of South Africa [2003] ZACC 2.

Spence v. The Queen and Hughes v. The Queen, Crim. App. Nos. 20 of 1998 and 14 of 1997, Eastern Caribbean Court of Appeal, delivered April 2, 2001.

Sporrong and Lönnroth v Sweden App. no. 7151/75; 7152/75, 23 September 1982.

Tavita v. Minister of Immigration [1994] 1 LRC 421.

Weeks v. United Kingdom (App. No. 9787/82), 2 March 1987.