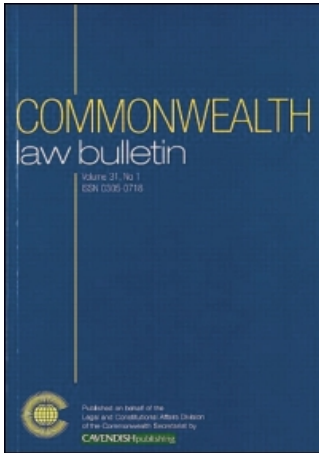


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Unincorporated Treaties and Small States

DUKE E.E. POLLARD

Caribbean Court of Justice

For small, developing, common law dualist jurisdictions aspiring to good governance based on the rule of law, their written constitutions are normally expressed to be their supreme law which regulates the allocation of governmental powers and accords their citizens a measure of predictability in the evaluation of their civil rights and determining their civic responsibilities. Predictably, therefore, competent decision-makers of such states are extremely wary of international developments in treaty-making and judicial decision-making which, unwittingly or by design, operate to subject the interpretation and application of their supreme law to external determinants hostile or indifferent to their indigenous value systems. In the premises, dualism as historically understood and practiced by small, weak, sovereignties is seen as a normative prophylactic device for safeguarding and sustaining their preferred values. Drawing on a wealth of case law and legal literature, this article undertakes an in-depth evaluation of the legal ramifications of unincorporated treaties on dualist jurisdictions, with particular emphasis on small Caricom Member States. Reference is made to the Caribbean Court of Justice (CCJ), which has been called upon to examine and pronounce on recent innovative determinations of the Judicial Committee of the Privy Council (JCPC) and which have been expressed by competent regional decision-makers to introduce unacceptable levels of uncertainty into the administration of criminal justice in the Caribbean Community. It is submitted that the determinations of the JCPC reached in **Thomas v Baptiste** and reaffirmed in **Neville Lewis v Attorney-General of Jamaica**, which ratified unincorporated treaties concluded by the executive, appear to have far-reaching negative implications for the Member States of the Caribbean Community.

1. Introduction

1.1 For developing, common law, dualist jurisdictions the implications of assimilating, or effecting a convergence of, dualism and monism are considerably more intractable than some commentators appear to appreciate. One critical issue to be resolved in the current discourse is not the most efficacious means of ensuring compliance by such states at the municipal level with obligations assumed at the international level; it is rather the manner of ensuring for such states autonomy of decision in identifying and legitimising the dominant values informing their normative social ethos. For small, developing, common law, dualist jurisdictions aspiring to good governance based on the rule of law, their written constitutions are normally expressed to be their supreme law which regulates the allocation of governmental powers and accords their citizens a measure of predictability in the evaluation of their civil rights and determination of their civic responsibilities. Predictably, therefore, competent decision-makers of such states are extremely wary of international developments in treaty-making and judicial decision-making which, unwittingly or by design, operate to subject the interpretation and application of their supreme law to external determinants hostile or indifferent to their indigenous value systems. In the premises, dualism as historically understood and

practised by small, weak, sovereignties is seen as a normative prophylactic device for safeguarding and sustaining their preferred values.

- 1.2 Professor Melissa Waters of Washington & Lee University School of Law has discerned a tendency in some dualist, common law, courts to lean towards monism when evaluating the relationship between international and municipal law.¹ Such a tendency was a cause of grave concern to Barbados, which, like many small, dualist, common law states is required to conclude several multilateral treaties as a condition for economic and various forms of technical assistance. The dilemma facing small, dualist, states by this development was eloquently expressed by Pollard [JCC] in a recent judgment of the Caribbean Court of Justice:²

As the executive arm of what is indisputably a mini state subscribing to the dualist system of international law and, *ipso facto*, vulnerable to informal coercion or the blandishments of considerably more powerful actors in the community of nations, due in large measure to an irreversible deficit in relevant capabilities, the appellants must be assumed to entertain a visceral concern about the innovative juridical postulate relating to the ability of unincorporated ratified treaties to alter the constitutional provisions of an independent state. Such a postulate would also operate, somewhat unwittingly, to facilitate third state intervention in the domestic affairs of weak sovereignties. In addressing this issue in both his written and oral submissions to this Court, counsel for the appellant was adamant that small states ratified treaties for various reasons and that unincorporated treaties were incapable of conferring rights on private persons in municipal law.

- 1.3 Within recent times the JCPC, consistently with its belated sensitivity to developing human rights norms set out in relevant conventions, has made determinations expressed to reflect evolving superior international standards in the administration of criminal justice.³ In this context the JCPC, in a sudden and remarkable reversal of historical judicial understanding of dualism expressive of the interface of international law and municipal law, has determined that ratified unincorporated human rights treaties have direct, determinative legal incidence on the supreme law of Caribbean Community Member States, notwithstanding authoritative Commonwealth case law to the contrary (which will be addressed later in this article) and the dualistic doctrine subscribed to by such States, not unlike other Commonwealth States.⁴ In the present context it is important to bear in mind that competent decision-makers in the

1 Waters, M. (2007) Creeping Monism: the judicial trend toward interpretive incorporation of human rights treaties, *Columbia Law Review*, 107, p. 628.

2 *The Attorney General & Ors v Jeffrey Joseph & Anor* [2006] CV 3 (AJ) at para 39.

3 Consider in this context the line of cases commencing with *Pratt & Morgan v AG of Jamaica* (1993) 30 JLR 473; 1994 2 AC 1. Contrast in this context the *dictum* of Lord Bridge '... the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field' in *ex p. Brind* (1991) 1 AC at p. 748.

4 See *Thomas v Baptiste* (1979) 54 WIR 387 and *Neville Lewis & AG of Jamaica* (2000) 57 WIR 275. For the position in British law see *The Parlement Belge* (1879) 4 PD 129; *Garland v British Engineering Ltd* (1981) WL 291643; *Regina v Secretary of State for the Home Department ex p. Brind and others* (1990) 2WLR 787 CA; *Chung Chi Cheung v the King* (1939) AC 160; *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* (1990) 2AC; *Higgs v Minister of National Security* (2000) 2 AC 228; *R v SS for Foreign and Com. Affairs ex p. Rees-Mogg* [1994] QB 552.

Caribbean Community have not so far indicated a willingness to make authoritative concessions to monism.⁵

- 1.4 Since in its basic conceptualisation this novel juridical postulate articulated by the JCPC appears to be at large, it does have far-reaching implications for good governance and structured, social and economic development of the political entities of the Commonwealth Caribbean region. First, given the peculiar attributes of Westminster-type constitutions prevalent in the region,⁶ this determination boldly challenges the validity of hallowed constitutional principles generally regarded as indispensable for parliamentary democracy based on the rule of law as this system of government is understood and practised in the region. Second, this innovative judicial determination provides, in my respectful opinion, a juridical vehicle for unwarranted third-country interference in the domestic affairs of effete sovereignties like Caricom States with probable far-reaching negative implications for the national interest. In effect, the relevant determination of the JCPC must be seen to erode the prophylactic operation of dualism which is often employed to ensure the autonomy of decision-making of Caricom states in respect of important internal issues of governance.
- 1.5 Despite some authoritative reservations to the contrary, the status of an unincorporated treaty set out in an international human rights instrument may not be perceived to justify so fundamental a change in the applicable law.⁷ A similar stance may be inferred from the judgment of Sir Robert Megarry in *Malone v Metropolitan Police Commissioner*.⁸ In this case, Sir Robert Megarry in addressing the obligation assumed by the United Kingdom in Art I of the European Convention for the Protection of Human Rights and Fundamental Freedoms opined: 'The United Kingdom as a High Contracting Party which ratified the Convention on March 8, 1951, has thus long been under an obligation to secure these rights and freedoms to every one. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country.'⁹
- 1.6 Indeed, it may be apposite to observe that Lord Denning by authoritatively opining that the principle precluding unincorporated treaties from having legal incidence in municipal law, is a general principle applying to all treaties,¹⁰ emphatically confirmed the legitimacy of dualism as a doctrine. In the premises, it is proposed to examine the current and

5 In this context it is important to bear in mind the actors influencing the substantive norms of international law especially in the case of human rights. In one submission:

The international normative order has been significantly expanded over the last years; international law now governs issues some of which would have been considered domestic affairs up to the middle of the 20th century. But the international normative order has not only expanded as far as its scope is concerned. What is even more relevant in the context to be dealt with here is that this order influences much more deeply and more directly national law than before. Additional thereto new actors have become involved in the shaping of the international normative order apart from states; these are international organization, non-governmental organizations and sometimes groups of individuals. Their influence on the development of the international normative order cannot always adequately be described by reference to traditional mechanisms of international norm development.

Wolfrun Rudiger, (2005) *Developments of International Law in Treaty-Making*, Berlin Heidelberg (New York: Springer), p. 1.

6 Consider the analysis of such constitutions by Lord Diplock in *Moses Hinds v the Queen* (1977) AC 195, pp. 211–13.

7 Consider in this context the dictum of Laskin JA in *Ahani v Canada (Attorney General)* 58 OR (3d) 107 at para 63.

8 (1979) Ch. 344.

9 *Ibid*, p. 378.

10 *Blackburn v Attorney General* (1971) 1 WLR 1037 at 1040.

developing Commonwealth case law on the legal incidence of unincorporated treaties in municipal law, as well as some applicable norms of international law, in an attempt to evaluate the legal legitimacy of this novel juridical postulate of the JCPC.

2. Nature of Caricom Constitutions

- 2.1 An instructive, persuasive and authoritative judicial determination of the legal incidence of ratified unincorporated treaties on municipal legislation in Caricom Member States, comprising as they do both common law and civil law jurisdictions, must not only address the differential impact of treaties in the monist and dualist systems of law¹¹, but, even more importantly, the peculiar vulnerability of small states in the unorganised international community and the critical importance of constitutional provisions reflecting the foundational commitments of these States designed to promote generally accepted principles of good governance. Such constitutional provisions, in the peculiar historical context of the Caribbean Community, mirror the politically consensual, institutional imperatives of good governance in a pluralist society, as well as the distinctive, virtually immutable, procedural requirements for modification of the institutional arrangements consensually devised for the allocation of powers among the principal arms of government, all of which operate to endow the constitution – the supreme law – with its exemplary attributes.
- 2.2 It is in this context that the CCJ had been called upon to examine and pronounce on recent innovative determinations of the JCPC which had been expressed by competent regional decision-makers to introduce unacceptable levels of uncertainty into the administration of criminal justice in the Caribbean Community with probable far-reaching negative consequences for good governance and structured, sustainable political, social and economic development in the sub-region. An informed perception of the probable destabilising social impact of these determinations requires an appreciation of the constitutions of Caricom Member States and understanding of the social and political dynamics that informed their configuration, not to mention the peculiar vulnerabilities of Caricom States as small states in the wider international community. It is also important to bear in mind the apparently exiguous judicial legitimacy of *stare decisis* as a constraining developmental influence on the JCPC and the uncompromising requirement of legal certainty in informing the stability of expectations posited by third-country economic actors as a *sine qua non* of foreign direct-investment decisions and, consequently, for sustained national economic and social development.¹²
- 2.3 Constitutions of Member States of the Caribbean Community invariably incorporate provisions designating these instruments as the supreme law,¹³ which, in the informed

11 See Shearer, I. A. (1994) *Starke's International Law*, 11th edn, Chapt 4. For the position in Australia, see *Minister for Immigration & Ethnic Affairs v Teoh* (1995) ALJ 423; in New Zealand, *Tavita v Minister of Immigration* (1994) 2 NZLR 257 and *Ashby v Minister of Immigration* 1 NZLR 222; in India, *Vishaka v State of Rajasthan* AIR 1997 SC 3011 and *Peoples Union for Civil Liberties Union v Union of India* AIR 1997 SC 1203.

12 See Pollard, D. E. E. (2004) *Caribbean Court of Justice: Closing the Circle of Independence* (Kingston: The Caribbean Law Publishing Co Ltd), pp.103–10.

13 Consider in this context: s 2 of the Constitution of Antigua and Barbuda 1981; s 2 of the Constitution of The Bahamas 1973; s 1 of the Barbados Constitution 1966; s 2 of the Belize Constitution 1981; s 117 of the Dominica Constitution 1978; s 106 of the Grenada Constitution 1973; s 8 of the Guyana Constitution 1980; s 120 of the St. Lucia Constitution 1978; s 2 of the St. Kitts and Nevis Constitution 1983; s 101 of the S. Vincent and the Grenadines Constitution 1979; and s 2 of the Trinidad and Tobago Constitution 1976.

opinion of authoritative constitutional lawyers, differs fundamentally from ordinary enactments passed by their national legislatures. In the erudite, perceptive, judicial opinion of Lord Diplock:

They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.¹⁴

- 2.4 Such constitutions, given the extremely volatile political environment in which they were elaborated and are required to operate, axiomatically assume that the cherished constitutional principle of the separation of powers that provides the basis of good governance according to conventional wisdom would inform the responsible exercise of governmental authority.¹⁵ This is the politically irreversible abiding expectation of the peoples of the Member States of the Caribbean Community. In the majority opinion of their Lordships:

To say that a constitution is based upon the principle of the separation of powers is a pithy description of how the constitution works. But different constitutions apply this principle in their own ways and a court can concern itself only with the actual constitution and not with what it thinks might have been an ideal one.¹⁶

However, it is a common feature of Westminster-type constitutions to allocate legislative powers to the legislature even though it is very often the case that members of the executive are required to constitute a significant part of the legislature and take the initiative in the introduction of legislation. But even in such situations, ministers of government are perceived to be quintessentially engaged in performing a legislative function.

- 2.5 These constitutions also accord to the judges of superior courts, normally considered the guardians of agreed institutional arrangements, security of tenure; and even though the legislature may establish new courts pursuant to its power to make laws for the peace, order and good government of the state, the judges of the superior courts must enjoy the same security of tenure as judges of the superior courts existing at the time of framing the constitution in order to ensure the integrity and independence of the judiciary: *Moses Hinds v the Queen*.¹⁷

- 2.6 The later Westminster-type constitutions, in the *dictum* of Lord Diplock:

include a Chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure as laid down in the Constitution for this purpose, *impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers* (emphasis supplied).¹⁸

14 *Moses Hinds v The Queen* (1977) AC 195 at 212.

15 But consider in this context the dictum of Lord Hoffman: 'As their Lordships observed in *Boyce and Joseph v R*, the principle of separation of powers is not any overriding supra-constitutional principle but a description of how the powers under a real constitution are divided. Most constitutions have some overlap between legislative, executive and judicial functions.' *Matthew v The State* (2004) 3 WLR 812 at para 28.

16 Per Lord Hoffman, *Boyce and Anor v R* (2004) UK PC 32 at p.17.

17 (1977) AC 915: 'What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and in the terms laid down in the Chapter dealing with the judicature ...' Per Lord Diplock at p. 213.

18 *Ibid*, per Lord Diplock at p. 213. (emphasis supplied)

Westminster-type constitutions, as mentioned above, also contain definitive and settled procedures whereby the provisions relating to the allocation of governmental powers and other institutional arrangements may be amended. And it does appear to follow, *a fortiori*, from relevant determinations of the JCPC, that it is not open to any one branch of government to take any action the legal effect of which would be tantamount to an amendment of the constitution except in the manner provided for such an amendment in the constitution.¹⁹

2.7 In making the relevant determination the test is whether the action under consideration is in substance different; 'for if it is different ... the effect is to alter the regime'²⁰ established by the constitution, be it by introducing new institutional arrangements,²¹ or enlarging the scope of existing constitutional provisions.²² The JCPC, in an apparent fit of judicial activism, determined that the scope of due process and protection of the law provisions of national constitutions of Trinidad and Tobago and Jamaica, respectively, may be enlarged by unilateral executive action taken at the international level.

2.7 In the unqualified opinion of the JCPC:

... the Constitution and not, as in the United Kingdom, Parliament is (save in respect of Chapter III of the Constitution) to be sovereign. It was of course foreseen that with the passage of time and the benefit of experience alteration of the constitution would on occasion be necessary, and the framers of the constitution took care to grade the provisions so as to require differing levels of popular support depending on the structural significance of the provision to be altered (emphasis supplied).²³

And it is of particular importance to note in this context the acknowledged materiality of the democratic principle in the amending procedure which must be perceived as providing the required basis for constitutional legitimacy.

2.8 Determinations of the JCPC regarding the power of the executive to affect, directly, rights accorded citizens in national constitutions within the contemplation of this article must be appreciated against this background. *Aequo vigore*, determinations of the courts, as guardians of the constitution, in authoritatively sanctioning change either by enlarging or reinforcing fundamental rights protected by the constitution must respect the 'fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers'.²⁴ Postulated in other terms, the courts, as guardians of the constitutions, must not presume to arrogate the right to effect modifications in the agreed allocation of governmental powers contrary to politically determined and constitutionally sanctioned amendment procedures. Where the constitution excludes specified questions from curial scrutiny, 'the Courts lose their

19 *Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett & The Attorney-General of Jamaica* (2005) LIICPC 3.

20 *Ibid*, per Lord Bingham of Cornhill, at p. 14.

21 *Op cit*, fn 19.

22 *Darrin Roger Thomas and Another v Cipriani Baptiste and Others* [2000] 2 A.C. 1 [1999], 3 W.L.R. 249 PC; *Neville Lewis v Attorney-General of Jamaica* (2001) 2 AC 50 PC.

23 *Op cit*, fn 19, per Lord Bingham of Cornhill.

24 Per Lord Diplock in *Moses Hinds v The Queen* (1977) AC 195 at p. 213.

jurisdiction to entertain those questions altogether because they have no power to override the Constitution and the questions, accordingly, become non-justiciable'.²⁵

- 2.9 This caveat assumes inordinate significance for amendments to Westminster-type constitutions whose language of commitment accord them the status of the supreme law of the state and which may only be effected by special voting procedures. These amendment procedures are designed to ensure that the delicate balance of divergent, competing claims encapsulated in these instruments is not easily disturbed and that, in the final analysis, respect for the democratic principle, an indispensable, visceral ingredient of good governance, is not compromised. It does appear to be the subject of an ineluctable inference from the institutional arrangements devised for Westminster-type constitutions that prominent among the immutable imperatives guiding their elaboration are sanctity of the separation of powers principle, the inviolability of the democratic principle and unqualified adherence to the amendment procedures governing the realignment of the powers of government. Indeed, respect for these primordial constitutional principles appears to have provided the essential rationale of the decision of the JCPC in *Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett and the Attorney-General of Jamaica*.²⁶
- 2.10 In the premises, Lord Diplock's authoritative and elucidating *dicta* on Caricom Westminster-type constitutions provides a peremptory point of departure for an analysis of judicial determinations as they relate to unincorporated treaties in the Member States of the Caribbean Community. Such an analysis would appear to require candid recognition of the balance of factors – political, cultural, economic, moral and psychological among others – that informed the institutional parameters of the constitutions of these complex, vulnerable, culturally-multifaceted societies of the Anglophone Caribbean States. And even though such constitutions may be perceived as being amenable to timely modification in order to reflect fundamental changes in their operational environment or in the alignment of forces occurring since their adoption, legitimate alteration of consensually agreed institutional arrangements must respect the required constitutional amendment procedures in order to ground a claim to constitutional validity. Depending on the nature of the alteration, a special vote of the legislature may be required and, in exceptional circumstances, popular endorsement by the electorate consistently with respect for the democratic principle is an axiomatic correlate.
- 2.11 In one informed submission:

... in a (d)emocracy, the judge is in fact required to give expression to the values and principles of his legal system. The values and principles referred to are not those that may be deemed to be the 'mood of the day'. They represent the values, principles and social consensus which reflects the deeply imbedded convictions of the democratic society; rather than succumbing to the hysteria of recent events, the judge should reflect his people's history. It is precisely the judge's very independence which endows him with the unique capacity to reflect the democratic system's basic values, even when those do not correspond to the 'shifting winds' of public opinion.²⁷

25 Basu, Durga Das (1965) *Commentary on the Constitution of India*, 5th edn (Calcutta: SC Sankar & Sons (Ltd)), at p. 338. The Caribbean Court of Justice did not have an opportunity to consider this position in *Attorney General & Ors v Jeffrey Joseph & Anor.* [2006] CV3 (AJ). Although it was forcibly argued by the Hon. Attorney General of Barbados in the court below, it was not submitted before the Caribbean Court of Justice. In the premises, this important issue might not have been definitively and finally resolved.

26 (2005) LII CPC 3.

27 Barak, A (2006) *The Role of the Judge in a Democracy*, *Justice in the World Magazine*. Available at: www.justiceintheworld.org/info/nj at p. 2.

2.12 In no circumstance has the judiciary, as the guardian of these constitutions, been expressly accorded the competence to effect required change; however, where the legislature is lethargic in responding to a perceived social need, interstitial adjustments of the applicable legal regime by the judiciary in the process of interpreting and applying the law may be accommodated in exceptional circumstances.²⁸ Consider in this context the determination of the House of Lords that overturned a longstanding rule of the common law that a husband could not be guilty of raping his wife.²⁹ Judicial intervention to amend constitutions reflective of the supreme law, however, is not ordinarily entertained by competent decision-makers in the Caribbean Community with political aplomb even to avoid 'the austerity of tabulated legalism'.³⁰ And the JCPC has recently determined that where the legislature legitimately undertakes to effect such modification, applicable constitutional procedures are to be followed.³¹

3. Customary International Law and Municipal Law

3.1 By way of prefacing the present analysis, it is submitted that the legal incidence of treaties, both at the international and municipal levels, may be meaningfully determined only by appreciating the differences in relevant treaty provisions comprising *lex lata* norms and provisions which indulge a measure of progressive development of international law as reflected in *de lege ferenda* norms. And it does appear to follow, *a fortiori*, that a credible analysis of the legal incidence of unincorporated treaties is required to address the relationship between customary international law and municipal law as well as the legality of synallagmatic commitments set out in treaties and having an existence outside of customary international law. For, in the final analysis, not all treaty commitments may withstand legal scrutiny. Consider, for example, commitments that are contrary to a peremptory norm of international law addressed in Art 53 of the Vienna Convention on the Law of Treaties or commitments in conflict with emerging norms of *ius cogens* (Art 64). In this connection it may be useful to bear in mind that general multilateral treaties from the United Nations and elaborated initially by the International Law Commission combine both elements of codification of customary international law (*lex lata*) and progressive development of international law (*de lege ferenda*).

3.2 Article 13(1)a of the United Nations Charter requires the General Assembly to encourage 'the progressive development of international law and its codification'. This task has largely been assigned to the International Law Commission (ILC) and, more recently, the United Nations Commission on International Trade Law (UNCITRAL) which consist of highly qualified international lawyers representing the principal legal systems of the world. The first-mentioned Commission has elaborated several important

28 See Lester, Anthony (1993) English Judges as Law Makers, *Public Law*, Summer, p.11; also *Malone v Metropolitan Police Commissioner* (1979) Ch. 344 p.372.

29 *R v R* (1991) 4 All ER 481.

30 *Per Lord Wilberforce in Minister of Home Affairs and Anor. v Collins Mac Donald Fisher and Anor.* (1980) AC 319 at p. 328.

31 *Independent Jamaica Council for Human Rights Limited vs Honourable Syringa Marshall-Burnett & The Attorney-General of Jamaica* (2005) L11 CPC 3.

instruments among which are the Geneva Conventions on the Law of the Sea 1958,³² the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1963 and the Vienna Convention on the Law of Treaties 1969. The last-mentioned instrument is a classic example of a nice balance of norms reflecting both codification and progressive development of international law, but embodying values emanating from older sovereignties. Consistent with the practice developed by the Commission, several multilateral treaties, both universal and regional, reflect elements of customary international law, norms *de lege ferenda*, as well as norms peculiar to one or another geographical region of the world. In the result the legal incidence of such instruments tends to vary depending on the geography of state participation. For example, the Calvo doctrine on diplomatic protection is now generally associated with the Latin American region and is reflected in several treaties concluded by Latin American states. But the applicability of this doctrine to other geographical regions of the world is not to be easily assumed.

3.3 As concerns the relationship between the common law and customary international law, the position was authoritatively stated by Lord Denning in *Trendtex Trading Corporation v Central Bank of Nigeria*³³ where he opined that customary international law, unless in conflict with statute, constitutes part of the common law without the need for transformation by the legislature or the courts:

(s)eeing that the rules of international law have changed – and do change – and that the Courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this Court – as to what was the ruling of international law 50 or 60 years ago, is not binding on this Court today. International law knows no rule of *stare decisis*. If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it.³⁴

3.4 This statement of the position by Lord Denning has attracted some critical comments, although it is supported by internationally recognised publicists like R. Y. Jennings, president of the International Court of Justice who submitted that:

(i)it has always been held that general customary international law is a part of the law of England and, therefore, will be applied 'as such'. Thus international law is a matter of judicial notice, and there is no question of having to prove it by evidence. It is argued and applied in the same way as any other part of the common law. On the other hand, for constitutional reasons, a treaty which requires for its carrying into effect an alteration of English Law, or a charge on public funds, requires an act or other instrument making the needful changes in English Law if the Courts are to give effect to it.³⁵

3.5 Similarly, Professor Rosalyn Higgins, currently president of the International Court of Justice, has stated:

32 These four conventions were largely superseded by the United Nations Convention on the Law of the Sea (UNCLOS) which was signed in Kingston, Jamaica, in 1982 and has now entered into force. Paradoxically, enough, this Convention was not elaborated by ILC, but was initiated by Ambassador Pardo of Malta and supported by the developing countries, whose participation in the drafting process extended over 10 years constituted a strain on the financial resources of developing countries and is, therefore, unlikely to be replicated in other international treaty-making conferences.

33 (1977) QB 529.

34 *op cit*, fn 10 per Lord Denning; see also *The Parlement Belge* (1879) WL 15471 (PDAD).

35 See Jennings, R. Y. (1990) *An International Lawyer Takes Stock*, ICLQ, 39, July, at p. 523.

Equally, in today's world, no domestic judge can afford to be unfamiliar with the requirements of international law, whether international law generally or that special branch known as human rights law ... There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law.³⁶

But such customary rules of international law must not conflict with statute which always prevails.³⁷ However, the aforementioned *dictum* of Lord Denning does little more than address the terminal dimension of the problem while avoiding an analysis of the processes involved in reaching an acceptable determination of the issues.

3.6 One such issue relates to the authoritative determination of the emergence of a customary norm of international law as *lex lata*. But allied to this issue are other intractable issues like the criteria to be employed in making the determination, and the forum competent to make the determination – the municipal courts or recognised international tribunals? And if the latter, which international tribunals possess the required competence – the International Court of Justice or one or another regional judicial organisations representing a well-conceived balance of relevant factors including the principal legal systems, different political and economic systems, different cultures, various levels of economic development and concentrations of economic and military power coupled with varying degrees of scientific, technological and educational attainment?

3.7 Where a domestic tribunal is required to make a determination based on an alleged rule of international law, the tribunal has to be satisfied that the alleged rule is in fact a generally agreed rule of international law accepted as such by the principal actors in the international community. It is not for the courts to create the required rule of international law. In the characterisation of Lord Oliver:

A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilized nations and it is for those who assent the rule to demonstrate it if necessary before the International Court of Justice. **It is certainly not for a domestic tribunal to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate.**³⁸

And since at the municipal level there is no universally recognised judicial institution like the International Court of Justice, which municipal court in the international community is to be regarded as sufficiently qualified to deliver an authoritative determination on the emergence of a customary norm of international law?³⁹ Another issue of relevance must relate to the practice of states. How is such practice to be ascertained and authoritatively determined? How representative must such a practice be among which classes of states in order to validate its status as an indispensable factual element of customary international law? How is the existence of the required psychological element or *opinio juris* to be definitively determined?

3.8 In addition to some of the intractable issues identified above, it appears that not all norms of customary international law are automatically received into the common law.

36 Higgins, Rosalyn (1992) The Relationship between International and Regional Human Rights Norms and Domestic Law, *Commonwealth Law Bulletin*, October, at p. 1268.

37 *Mortenson v Peters* (1906) 8F93.

38 Quoted by R. Y. Jennings, *op cit*, fn 35, at p. 524.

39 See Pollard, *op cit*, fn 12, pp. 92–94.

For example, it has been authoritatively maintained that only prescriptive and proscriptive customary international law norms are received in the common law. Relevant prescriptive norms would include those relating to diplomatic immunity, and relevant proscriptive norms would include those relating to genocide, piracy and the slave trade.⁴⁰ In this context, reference was made to *Re Piracy Jure Gentium*.⁴¹

3.9 In the learned submission of Professor Rosalyn Higgins:

Some countries can give internal effect to treaties without incorporation [while] others cannot. Some countries have incorporated the various human rights treaties, others have not. But a further variable also requires discussion – namely, the legal consequence in domestic law of non-incorporation in those jurisdictions where incorporation is required to make a treaty part of domestic law. Put differently, does non-incorporation in such a circumstance mean that the treaty is to be treated as without any legal significance whatever on the domestic plane?⁴²

4. Impact of Unincorporated Treaties on Caricom Municipal Law

4.1 As concerns the legal incidence of unincorporated treaties on national legislation in Caricom Member States, the dualist position was eruditely and persuasively stated by Lord Hoffman in *John Junior Higgs v Minister of National Security and Others*.⁴³ In the informed opinion of Lord Hoffman:

(i)n the law of England and the Bahamas (whose constitution is representative of those in the Caribbean Community), the right to enter into treaties is one of the surviving prerogative powers of the Crown ... the Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. *But the corollary of this unrestricted treaty-making power is that treaties form no part of the domestic law unless enacted by the legislature.* This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: See *J.H. Rayner (Mincing Lane) Ltd. v Department of Trade and Industry (1990) 2 AC ...*⁴⁴ The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law; see the classic judgment of Sir Robert Phillimore in *The Parlement Belge (1879) 4 PD 129*. They may, however, have indirect effect

40 See (1992) *Oppenheim's International Law*, 9th edn, pp. 457 ff.

41 (1954) AC 586.

42 *Op cit*, fn 36, at p. 1271.

43 [2000] 2 A.C. 228.

44 Consider in this context the dictum of Lord Oliver who, at p. 500, opined:

[A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because as a source of rights and obligations, it is irrelevant.

upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 C.L.R. 273... *The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th Century.*⁴⁵ (emphasis added)

This statement of the law with appropriate qualifications does appear to provide reliable and authoritative guidance for any court of competent jurisdiction and ought to be carefully noted by the judges of the Member States of the Caribbean Community. Consider in this context the decision of the Supreme Court of Canada in *Gosselin v Quebec (Attorney-General)*⁴⁶ where it was held that an unincorporated treaty did not form part of Canadian law. The qualifications referred to above relate in the first instance to the status of relevant instruments which need to be ratified by the executive. Second, it is questionable whether in dualist jurisdictions prerogative acts at the international level may *ipso facto* create legitimate expectations at the municipal level. Consider in this context the concept of treaty-derived legitimate expectations which was addressed in the judgment of Pollard JCCJ in *The Attorney General & Ors v Jeffrey Joseph & Anor.*⁴⁷

4.2 Indeed, the position was more forcefully expressed by Laskin JA in commenting on the relevant *dictum* of Lord Millett in *Thomas v Baptiste* relating to the legal incidence of ratified treaties:

I confess to having difficulty understanding the reasoning in this paragraph, and especially in the last sentence. On the face of it Lord Millett's reasoning conflicts directly with well-established Canadian law. To repeat, Lord Millett says that '[by] ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.' That is not our law. In Canada, mere ratification of a treaty, without incorporating legislation, cannot make the international process part of our criminal justice system.⁴⁸

4.3 Furthermore, as Lord Diplock stated, it was a well-established principle of construction that:

the words of a statute *passed after the Treaty has been signed* and dealing with the subject matter of the international obligation ... are to be construed if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it (emphasis supplied).⁴⁹

45 *Op cit*, fn 43, at para. 13.

46 (2002) 4 S.C.R. 429; also *Blackburn v AG* (1971) 1 W.L.R. 1037; *Pan-American World Airways Inc v Department of Trade* (1976) 1 Lloyd's Report 257 C.A.; *Laker Airways v Dept. of Trade* (1977) 1 Q.B. 717-18.

47 [2006] CV 3 (A.J.).

48 *Ahani v Canada (Attorney General)* 58 O.R. (3d) 107 at para 63.

49 *Garland v British Rail Engineering Limited* (1981) W.L.R. 291 643 at p. 771; see also *Regina v Secretary of State for the Home Department ex p. Brind and Others* (1990) 2 W.L.R. 787 CA.

A similar approach to the interpretation of treaties appears to have been taken by Canadian courts.⁵⁰ Application of this rule of construction to the relevant law of the Caricom Member States, however, has to take into account the date of enactment of relevant instruments, including their constitutions, and the date of entry into force of the applicable treaty for the State in question. Consider in this context *Fisher v Minister of Public Safety and Immigration No. 2*.⁵¹ It is also important to bear in mind that this rule of construction cannot prevail against a clear statement of the statute to the contrary: *The Zamora*.⁵² The position adopted by the New Zealand courts in *Tavita v Minister of Immigration*,⁵³ however, appears to erode the foundation of dualism which was expressly recognised by the Court of Appeal in *Ashby v Minister of Immigration* where it was affirmed that 'international treaty obligations are not binding in domestic law until they have become incorporated' by statute.⁵⁴ In *Tavita*, the court relied heavily on the accession of New Zealand to the optional Protocol of the International Covenant for Civil & Political Rights (ICPR) which made the United Nations Human Rights Committee 'in a sense part of this country's judicial structure, in that individuals subject to New Zealand's jurisdiction have direct right of recourse to it'.⁵⁵

4.4 Adverting to the case of *Fisher v Minister of Public Safety and Immigration No. 2*,⁵⁶ Lord Hoffman in the *Higgs* case pertinently observed that the JCPC was unanimous in its determination that 'the legality of an execution as a matter of domestic law could not be affected by the terms of an international treaty, otherwise it could mean that the government could introduce new rights into domestic law by entering into a treaty obligation'.⁵⁷ This *dictum* in *Fisher No. 2* has not been expressly overruled by the JCPC and may not be ignored by the tribunals of competent jurisdiction without compromising the constitutional principle of separation of powers which provides the foundation of Westminster-type constitutions common to the region. It must be accorded the status of a sound juridical principle worthy of internalisation by judges of the Caribbean Community, given its applicability to extremely sensitive areas of governance outside the administration of criminal justice, and which is likely to impact very importantly on national economic and social development.

4.5 In the characterisation of one renowned publicist :

the negotiation, signature and ratification of treaties are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliamentary approval.⁵⁸

50 See *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 2 S.C.R. 812; Porter, Bruce (2000) Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights, 15 *J.L. & Soc. Policy* 117; *Pfizer Canada v Canada (Attorney General)* (2003) 224 D.L.R. (4th) 178; *Reference Re Public Service Employer Relations Act (Alberta)* (1987) 1 S.C.R. 513; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* (2004) SCC 4; and 114 957 *Canada Lté e. (Spraytech Société d'arrosage) et al v Town of Hudson* (2001) 2 S.C.R. 241.

51 (2000) 1 AC 434.

52 (1916) 2AC 77.

53 [1994] 2 NZLR 259.

54 [1981] 1 NZLR at 224.

55 *Ibid* at p. 266.

56 (2000) 1 AC 44.

57 *Op cit*, fn 43 per Lord Hoffman at p. 242.

58 Shearer, I. A. (1994) *Starke's International Law*, 11th edn (Butterworths), Chapter 4.

This consideration drives the dualist orientation of competent decision-makers in the Caribbean Community.

4.6 Though the JCPC arrived at a conspicuously different conclusion in *Thomas v Baptiste*,⁵⁹ the latter decision has to be distinguished from *Fisher No. 2*. In the former case it was determined that the appellants were entitled, under the constitution of Trinidad and Tobago, to the right not to be deprived of life 'except by due process of law'. This was expressed by the JCPC to guarantee the appellants constitutional protection for the principle of procedural fairness and, in particular, included the right of the appellants to complete any legal process capable of reducing or commutating their sentences without executive interference. What the appellants were expressed to be entitled to vindicate was their common law right to procedural fairness which was affirmed in the due process provision set out in s 4a of the constitution of Trinidad and Tobago.

4.7 In the determination of the majority of the JCPC in *Thomas v Baptiste*:

The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. *By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.*⁶⁰ (emphasis added)

This determination appears to exhibit all the attributes of a quantum leap in judicial ratiocination. In a clear reference to similar judicial pronouncements, Lord Hoffman in his dissenting judgment in the *Neville Lewis* case was constrained to opine, wryly, that the majority had 'found in the ancient concept of due process of law a philosopher's stone undetected by generations of judges which can convert the base metal of executive action into the gold of legislative power'.⁶¹

4.8 In an earlier determination of Lord Millett handed down in *Thomas v Baptiste*, he averred:

The due process clause must therefore be broadly interpreted. It does not guarantee the particular forms of legal procedure existing when the constitution came into force; the content of the clause is not immutably fixed at that date. But the right to be allowed to complete current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process.⁶²

But, by way of entering a caveat to a clear example of judicial activism, Lord Goff in his dissenting opinion pertinently maintained that although the widest adoption of human standards is to be desired, it should not be achieved by subverting the constitutions of states or by the misuse of legal concepts and terminology. Where, however, the emergence of a new norm of customary international law or *ius cogens* incorporating advanced human rights standards could be authoritatively established, there would be ample justification for a finding that it has been automatically received in the common law of Member States of the

59 (2000) 2 AC 1.

60 Per Lord Millett (1999) 2 LRC at p. 745 e.

61 See *Neville Lewis v AG of Jamaica* (2001) 1 AC 50 at p. 88.

62 (1999) 2 L.R.C. at p. 746 c.

Commonwealth Caribbean so as to affect the rights of citizens. Consider in this context Arts 53 and 64 of the Vienna Convention on the Law of Treaties.⁶³

4.9 Given the nature of Westminster-type constitutions as perceptively described and analysed by Lord Diplock in the ground-breaking case of *Moses Hinds v the Queen*, it was certainly not open to the JCPC to rule that the executive could in effect usurp the powers of the legislature by a mere executive act conducted at the international level. This ruling of the JCPC calls to mind a ground-breaking decision of the United States Supreme Court which provoked the following comment:

It might be objected that by forging a new constitutional norm, the Court offended principles governing the fair allocation of political power: the Court should leave the implementation of constitutional change to political majorities acting through the Article V amendment process, not arrogate a power of innovation to itself.⁶⁴

But in this case, the US Supreme Court instinctively accepted that the American Constitution was approved by political processes which, at the material time, ignored the interests of minorities. The JCPC had no similar plausible justification!

4.10 The JCPC, in its commendable attempt to mould the law to reflect evolving superior international standards in the administration of criminal justice, could have achieved the same result by affirming that the treaty-compliant act of allowing death row prisoners to access the UN Human Rights Committee and awaiting reports of that body before considering the exercise of the prerogative of mercy created a legitimate expectation on the part of the appellant that he would be allowed to have access to the report by the human rights body and to have the same examined by the relevant mercy committee as a basis for possible extenuation of his predicament. For, as is generally accepted, a legitimate expectation is not a principle of law possessing the faculty to amend an ordinary legislative enactment, much less the supreme law of the state. Consider in this context the *dictum* of Stephen J. where he opined that since Australia had not incorporated the Convention on the Status of Refugees 1991, the defendant only had a legitimate expectation to be heard by the Committee for Determination of Refugee Status, but not to be accorded refugee status in Australia.⁶⁵ Similarly, the *dictum* of Mason CJ in *Teoh's* case where he said:

"[A]part from influencing the construction of a statute or subordinate legislation an international convention may play a part in the development by the courts of the common law ... But the courts should act in this fashion with due circumspection when Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law ... The critical questions to be resolved are

63 Article 53 of the Vienna Convention reads as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 64 reads as follows: 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.'

64 Submitted by one commentator on the famous case of *Bolling v Sharpe* 347 US 497 (1974). See Fallon Jr, R. H. (2001) Legitimacy and the Constitution, *Harvard Law Review*, 118(6) April, p. 1835.

65 *Simsek v Macphee* (1982) 56 ALJR 277 at p. 644.

whether the provisions of the Convention are relevant to the exercise of the statutory discretion and, if so, whether Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the Convention.⁶⁶

Although the High Court of Australia did determine that the ratification of a treaty did create a legitimate expectation that a statutory discretion would be exercised in conformity with the instrument, the court was careful to point out that such an expectation was not to be equated with a rule or principle of law and could be defeated by a change of policy. Unfortunately reliance by the JCPC on the *ratio* in *Teoh's* case does not appear to support the far-reaching conclusions of their Lordships.

4.11 In any event there can be no doubt that the determination in *Teoh's* case was not consistent with established case law. The statutory discretion sought to be influenced by Australia's ratification of the Convention on the Rights of the Child (CRC) was set out in the Migration Act 1958 which had been enacted some years before the CRC; but this enactment was not in the contemplation of the CRC. In the premises this legislative enactment was not required to be construed so as to bring Australia in compliance with the CRC as mentioned below.

4.12 In support of this position, reference is made to the *dictum* of Lord Millet:

Even if a legitimate expectation founded on the provisions of an unincorporated treaty may give procedural protection, it cannot by itself, that is to say, unsupported by other constitutional safeguards, give substantive protection, for this would be tantamount to the indirect enforcement of the treaty (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 3 LRC 1). In this sense legitimate expectations do not create binding rules of law (see *Fisher v Minister of Public Safety and Immigration (No. 2)* (1998) 3 LRC 451 at 461). The result is that a decision-maker is free to act inconsistently with the expectation in any particular case provided that he acts fairly towards those likely to be affected.⁶⁷

Consequently, since the Court of Appeal had ruled in the *Neville Lewis* case that the instructions of the Governor General were unlawful, a ruling which the JCPC upheld in rejecting the cross-appeal by the Attorney-General of Jamaica, the appellants would have been entitled to procedural protection and to have their petition heard within the reasonable time of 18 months established by the JCPC in the *Earl Pratt and Anor. v Attorney-General for Jamaica and Anor.*⁶⁸

4.13 In effect, the JCPC in overruling *de Freitas v Benny*⁶⁹ and *Thomas Reckley v Minister of Public Safety and Immigration and Others (No. 2)*,⁷⁰ on the basis of a novel legal principle contrary to historical judicial understanding, must be perceived as unnecessarily transgressing the permissible parameters of judicial activism in ruling as it did with probable far-reaching negative consequences for good and stable governance in the small, fragile, states of the Caribbean Community. Addressing the issue of judicial interventions in the United Kingdom, one commentator observed: 'Relevant cases show how difficult judges find it to mark and maintain the boundary between what is the legitimate development of the law by the courts and what is an impermissible

66 *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 128 ALR paras. 28–29.

67 *Thomas v Baptiste* (1999) 2 LRC at p. 747f.

68 (1994) 2 AC.

69 (1976) AC 239.

70 (1996) AC 527.

encroachment upon the legislative functions of Parliament ...⁷¹ It is clear that the problem is not restricted to the United Kingdom.

- 4.14 Would it were that their Lordships had ended their authoritative statement of the law at the first sentence identified above.⁷² For the JCPC had earlier asseverated that:

Whether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that the state's obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.⁷³

In effect, the JCPC did not have to resort to the treaty-making prerogative powers of the state to justify the determination that the prerogative of mercy was subject to judicial review. The basis for such a finding had already been stated in English case law: *Council of Civil Service Unions et al v Minister for the Civil Service*.⁷⁴ The justification required by the JCPC for sanctioning judicial review of the exercise of the prerogative of mercy, in my respectful opinion, must be perceived to have been established before the utterance of the second sentence. Further, as the JCPC determined in a later case: 'Even without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result.'⁷⁵ This *dictum*, it may be pertinently observed, ominously presaged the abolition of the mandatory death penalty by judicial fiat!

- 4.15 Despite the immediately foregoing, the JCPC felt constrained to find that due process was a common law right, which, by being given clear, unequivocal expression in a national constitution, enabled the executive arm of government to extend the scope of due process provisions of the constitution by ratifying treaties which make the right of appeal to international human rights bodies part of the domestic criminal justice system. In the present submission, however, the JCPC in making such a determination, transgressed the permissible parameters of dynamic processing of legislation vindicated by Bennion.⁷⁶
- 4.16 In arriving at their determination in the *Neville Lewis* case, the JCPC distinguished *Fisher No. 2* while noting that a majority of the JCPC in *Thomas v Baptiste* 'again stressed the constitutional importance of the principle that international conventions do not alter domestic law unless they are incorporated into domestic law by legislation'.⁷⁷ In distinguishing *Fisher No. 2*, the JCPC opined in that case:

71 *Op cit*, fn 28, Anthony Lester, p. 8.

72 *Op cit*, fn 60, at p. 745.

73 *Neville Lewis v Attorney General of Jamaica* (2001) 2 AC 50 P.C. at p. 79.

74 (1985) AC 374. Consider in this context the *dictum* of Lord Scarman who, at p. 407, opined:

Like my noble and learned friend Lord Diplock, I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.

75 *Per* Lord Slynn in *Neville Lewis v Attorney General of Jamaica* (2001) 2 AC 50 at p. 84.

76 See Bennion, Francis (2002) *Statutory Interpretation*, 4th edn, Butterworths: London, p. 129–38.

77 *Per* Lord Millet, *Thomas v Baptiste* (1999) 2 LRC at p. 745.

the majority held that the provisions of Article 16 of the Bahamas Constitution did not expressly provide that a person had a right to life pending a determination of a petition to the Inter American Commission and that no such right was to be implied since the Bahamas was not a member of the Organization of American States at the time the Constitution was adopted.⁷⁸

This interpretation of the JCPC's position in *Fisher No. 2* is consistent with the constitutional principle of interpretation that legislation enacted after the acceptance of a treaty should, unless the contrary intention is clearly established, be construed so as not to put the state in breach of an international obligation.

4.17 It is of some considerable significance that their Lordships in the *Neville Lewis* case adduced the fact in support of their ruling that:

Jamaica ratified the American Convention on Human Rights 1969 on 7 August 1978 and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty: *Mattadeen v Pointu* (1999) 1 AC 98, 113 g–h.

The determination of the JCPC was delivered by Lord Hoffman who opined that:

Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well recognized canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instrument.⁷⁹

But what, in my respectful opinion, their Lordships omitted to consider is that principle of construction may only be applied to legislation enacted after the conclusion of relevant international instruments. For, as Lord Hoffman opined in *Higgs v Minister of National Security and Others*, 'unincorporated treaties ... may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations'.⁸⁰ Clearly, the required conformity of the legislation with the international obligation necessarily presupposed the existence of such an obligation at the material time and suggests that the JCPC misdirected themselves in holding that the ratification of the Convention could extend the scope of pre-existing supreme law set out in a national constitution.

4.18 Consider in this context the authoritative *dictum* of Lord Diplock who opined that:

it is a principle of construction of United Kingdom statutes ... that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed if they are reasonably capable of bearing such a meaning as intended to carry out the obligation, and not to be inconsistent with it.⁸¹

This statement of the law was approved by the House of Lords in an earlier decision in *Regina v Miah*⁸² and reaffirmed more recently in *Regina v Secretary of State for the Home Department ex p. Brind*.⁸³

78 Per Lord Slynn, (2001) 2 AC 50 at p. 83.

79 *Mattadeen v Pointu* (1999) 1 AC 98 at 114g–h.

80 (2000) 2 AC 228 at p. 241.

81 *Garland v British Rail Engineering Ltd* (1983) 2 A.C. 751.

82 (1974) 1 W.L.R. 683.

83 (1991) 1 A.C. 696.

4.19 As opined by Lord Bridge:

... like any other treaty obligations which have not been embodied in the law by statute, the Convention (for the Protection of Human Rights and Fundamental Freedoms) is not a part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it ... When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.⁸⁴

4.20 However, it did not augur well for the administration of criminal justice that in a remarkably short period of time the JCPC failed to assimilate the constitution of The Bahamas providing for 'protection of law' set out in s 16 in *Fisher No. 2* to the constitution of Trinidad and Tobago providing for 'due process of law' set out in s 4a in *Thomas v Baptiste*, but rushed to make the assimilation in the *Neville Lewis* case⁸⁵ to s 13 of the Jamaican Constitution. The JCPC, in addressing the decision in *Higgs v Minister of National Security*,⁸⁶ appeared to have approved the determination 'that domestic courts have no jurisdiction to construe or apply a treaty ... [and] ... that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens at common law or statute law.'⁸⁷

4.21 The JCPC, presented with the choice in *Higgs v Minister of National Security* of opting for the judgment in *Fisher No. 2* or that in *Thomas v Baptiste*, followed *Fisher No. 2* since the Bahamas Constitution did not expressly provide for due process of law and it was difficult to regard 'this common law concept as having the power (absent specific language in the Constitution) to incorporate procedures having an existence only under international law into the domestic criminal justice system'.⁸⁸ The JCPC, however, inexplicably and timidly omitted to determine 'whether this was right or wrong'. Yet, within one year of the judgment in *Higgs v Minister of National Security*, the JCPC declined to follow *Fisher No. 2* and *Higgs v Minister of National Security* and ruled that 'the protection of the law' covered the same ground as an entitlement to 'due process' thereby affording the appellant constitutional protection of procedural fairness. Consequently, the appellant was entitled to sufficient notice of the meeting of the Jamaica Privy Council, to be given copies of the papers before the Jamaica Privy Council, and to make representations thereto in order to support commutation of his sentence: *Neville Lewis v A.G. of Jamaica*.⁸⁹

4.22 Viewed in the context of the peculiar and enduring attributes of Westminster-type constitutions of Caricom Member States analysed by Lord Diplock in *Moses Hinds v The Queen*,⁹⁰ the second sentence attributed to their Lordships⁹¹ must be perceived as an effete juridical postulate vulnerable to invalidation by serious legal analysis. Standing alone, the sentence postulates, by ineluctable inference, that the supreme law of

84 *Regina v Secretary of State for the Home Department ex p. Brind* (1991) 1 AC at p. 747.

85 (2000) 2 AC 50 p.85.

86 (2000) 2 AC 228.

87 *Ibid.*, at p. 241.

88 *Per* Lord Hoffman, *Higgs v Minister of National Security* (2000) 2 AC 228 at pp. 245–46.

89 (2001) 2 AC.

90 (1977) AC 195.

91 See paragraph 4. 7 herein, lines 15–20.

the state could be amended by unilateral executive action without participation of the democratically elected organ of government; that such an amendment of the supreme law need not be attended by any measure of permanence; and that the executive in its absolute discretion, and in complete defiance of the hallowed principle of separation of powers inherent in Westminster-type constitutions, was competent to determine unilaterally the administration of criminal justice in the state.

- 4.23 However, their Lordships appeared to have distinguished *Fisher No. 2* and the *Higgs* cases on the grounds that the constitution of Bahamas did not contain any 'due process' provisions similar to s 4a of the Trinidad and Tobago constitution and that unincorporated treaties could not affect the statutory or common law rights of citizens. But this reasoning appears to be nonchalantly swallowing the camel while strenuously straining at the gnat. The provision of s 4a of the Trinidad and Tobago constitution was expressed to reflect the common law right 'accorded to all litigants not to have the outcome of any pending appellate or other legal process pre-empted by executive action'.⁹² In the opinion of the JPC this right was only 'affirmed by section 4(a) of the Constitution'⁹³ and, by compelling inference, s 13 of the Jamaican constitution. Put another way, this primordial right to procedural fairness existed independently of the constitution as a common law right and was available to all litigants.
- 4.24 In the premises, and as a matter of law and logic, it would also have been available to the appellants in *Fisher v Minister of Public Safety & Immigration No. 2*⁹⁴ and *Higgs v Minister of National Security*,⁹⁵ even if at the material time the JPC had not assimilated 'protection of the law' and 'due process of law' as juridical postulates. Such assimilation was belatedly made by the Jamaican Court of Appeal under the presidency of Justice Forte and concurred with by the other appellate justices.⁹⁶ The assimilation which was adopted with undiscerning alacrity by the JPC enabled the Board to hold, contrary to authoritative learning on the issue, that the executive was required to extend the scope of the due process provisions of the constitution by incorporating procedures agreed by the executive at the international level without reference to legitimate constitutional procedures for amendment!
- 4.25 Proponents of the rule of law in the Caricom region are entitled to a more intellectually satisfying, logically compelling and juridically feasible basis for their convictions. Such a basis cannot simultaneously admit the reprobation and approbation of applicable normative principles. If the appellants were not expressed to be invoking the provisions of an unincorporated treaty to justify their entitlement in municipal law to procedural fair play, it is difficult, if not impossible, to appreciate how a prerogative act of the executive in relation to the conclusion of the said treaty at the international level could be adduced to extend the scope of their constitutional rights at the municipal level as reflected in the supreme law. In the present submission, the executive 'cannot, merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth'.⁹⁷ Given the pace of technological development in the modern world and its far-reaching impact on

92 Per Lord Millett in *Thomas v Baptiste* (1999) 2 LRC at p. 745d.

93 *Ibid.*

94 (2000) 1 AC 434.

95 (2000) 2 AC 228.

96 See *Lewis v Attorney General of Jamaica* (2001) 2 AC 50 p. 81.

97 Per AG of Canada v AG of Ontario (1977) AC 326 at p. 352.

various areas of human interaction, it is to be expected that laws would tend to obsolescence and that the legislature would be hard pressed to keep legislation current with social and economic developments. In such a scenario, the courts may be perceived as justified in employing interstitial articulation to keep the law current with dynamic changes in society. But where the discrepancy between social reality and legal fact is large, the courts must decline to usurp the competence of the legislature.⁹⁸

4.26 In effect, the decision of the JCPC flies in the face of the overwhelming weight of judicial authority as expressed in settled case law commencing with the landmark decisions in *The Parlement Belge* and *Rustomjee v the Queen*,⁹⁹ affirmed by the Court of Appeal in *J. H. Rayner v the Board of Trade*, validated by the Supreme Court of Canada in *Ahani v Canada (Attorney General)* and the Supreme Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh*, and *Simsek v Macphee*,¹⁰⁰ approved by the Judicial Committee of the Privy Council in *Fisher v Minister of Public Safety & Immigration*, reaffirmed by the JCPC in *Higgs v Minister of National Security* and followed by the Supreme Court of Trinidad and Tobago in *Ismay Holder v Council of Legal Education*.¹⁰¹ To the extent, therefore, that the JCPC in *Thomas v Baptiste* asseverated that the 'appellants were not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution ...',¹⁰² it must be seen to follow *aequo vigore* and as a matter of compelling inference that the law regarding unincorporated treaties as set out in the cases mentioned above remains good law and the relevant determinations of the Judicial Committee of the Privy Council in *Thomas v Baptiste* and *Neville Lewis v Attorney General of Jamaica* must be considered *per incuriam*.¹⁰³ In fact, in *Thomas v Baptiste*:

Their Lordships recognize[ed] the constitutional importance of the principle that international Conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a Treaty in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alteration to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic by or under the authority of the legislature.¹⁰⁴

This principle was reaffirmed by the House of Lords in *Regina v Lyons and Others*.¹⁰⁵

98 Consider the *dictum* of Sir Robert Megarry in *Malone v Metropolitan Police Commissioner* (1979) 1 Ch. 344 at 372 F, where he cited Holmes with approval regarding the role of the court in developing the law interstitially and with molecular rather than molar motions.

99 2 QBB 69.

100 (1982) 56 ALJR 277.

101 The Supreme Court of Trinidad and Tobago in *Ismay Holder* H.C.A No. 732 of 1997 cited with approval *J. H. Rayner v the Board of Trade* (1990) 2AC.

102 *Per* Lord Millet, *Thomas v Baptiste* (1999) 2 LRC at p. 745 e.

103 'A court gives a decision *per incuriam* not only when that decision is given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on it but also [where] the decision involves a manifest slip or error': *Rickards v Rickards* (1990) Fam. 194 at 203.

104 *Op cit*, fn 77, *per* Lord Millet, at p. 745.

105 (2002) 3 WLR 1502.

5. Implications of JCPC Determinations Beyond Criminal Justice

- 5.1 In light of the foregoing, overriding considerations of good governance in Caricom Member States appeared to argue persuasively for a careful re-examination of the scope and legal incidence of the decisions of the JCPC in *Thomas v Baptiste* and *Neville Lewis v AG of Jamaica* and a careful analysis of the decision of the Court of Appeal of Barbados in *Jeffrey Joseph and Lennox Boyce v AG of Barbados & Ors*¹⁰⁶ and their implications for the developing law impacting on the administration of criminal justice and other extremely important areas of governance in Member States of the Caribbean Community. It does appear to be the subject of a compelling inference from the decision of the JCPC in the *Independent Jamaica Council for Human Rights*, however, that the well-established constitutional principle that executive action in relation to a treaty cannot affect substantive municipal law rules without appropriate procedural intervention of the legislature has been re-affirmed since neither *Fisher v Minister of National security No. 2* nor *Higgs v Minister of Public Safety & Immigration No. 2* was overruled on this ground.
- 5.2 In fact, the JCPC in the *Neville Lewis* case, in expressly approving *Thomas v Baptiste*, re-emphasised the fact that the appellants were not 'seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law' contained in s 13 of the Jamaica Constitution relating to 'protection of the law'. The next succeeding sentence addressing ratification of treaties by the executive must be assimilated to an uncharacteristic lapse in judicial acumen on the part of the JCPC or, in the alternative, judiciously ignored as a juridical *non sequitur* that was manifestly otiose.
- 5.3 The determination of the JCPC in *Thomas v Baptiste* bears an uncanny similarity to some watershed decisions of the US Supreme Court on the due process provisions of the Constitution. Indeed, in arriving at their determination in *Thomas v Baptiste* and *Neville Lewis v The Attorney-General of Jamaica*, the JCPC appears to have been aspiring, unwittingly, to the dizzy heights of untrammelled judicial activism attained by the US Supreme Court in *Brown v Board of Education*,¹⁰⁷ *Bolling v Sharpe*¹⁰⁸ and *Roe v Wade*,¹⁰⁹ two of which turned on judicial interpretation of due process clauses and one on the equal protection provision of the United States Constitution.
- 5.4 In *Brown's* case, the Supreme Court, in an extremely agonizing determination which departed from a historic understanding of the equal protection clause, held that that clause prohibited states of the union from maintaining segregated schools. In *Bolling v Sharpe*, the Supreme Court held that the due process provision of the Fifth Amendment prohibited the federal government from sanctioning racial discrimination in schools, and this despite the fact that the relevant provision was ratified in 1791 when the Constitution sanctioned chattel slavery. Paradoxically, too, the Supreme Court in *Roe v Wade* held that the due process clause of the Fourteenth Amendment gave constitutional protection to the 'liberty' of persons which afforded women the fundamental right to terminate pregnancies subject to the legitimate interests of the state in protecting women's health and the potentiality of human life, which was judicially

106 C.A. No. 29 of 2004.

107 347 US 483 (1954).

108 347 US 497 (1954).

109 410 US 113 (1973).

restricted to the time when the foetus became viable and capable of life outside the womb.

- 5.5 Similarly, in *Thomas v Baptiste* the JCPC, in a benevolent fit of judicial activism, sought to depart from the historical understanding of the exercise of the prerogative of mercy established by Lord Diplock in *de Freitas v Benny* and reaffirmed in *Reckley No. 2*, *Fisher No. 2* and other cases to the effect that its exercise was non-justiciable since legal rights terminated where mercy commenced. However, the material difference in the judicial policies of these superior courts on opposite sides of the Atlantic ocean is to be discerned in the fact that whereas the judicial policy of the Supreme Court in the cases mentioned appears to have been eminently justified on the basis of moral legitimacy, given the context of their pronouncement, the judicial policy of the JCPC as expressed in *Thomas v Baptiste* and *Neville Lewis v AG of Jamaica* would be hard put to escape the charge of a brazen sortie into doctrinal expediency which, contrary to historic judicial understanding, gratuitously and peremptorily traversed two discrete, non-convergent normative regimes.
- 5.6 In my respectful opinion, the jury is still out in respect of the relevant determinations of the JCPC satisfying the generally accepted requirements of judicial legitimacy in terms of consistency with both historical and current understandings of relevant constitutional terminology and respect for the permissible limits of judicial activism. The determination of the JCPC in the *Lewis* case, which was expressly followed by the Barbados Court of Appeal in the *Joseph* case, relied for its legitimacy on the earlier case of *Thomas v Baptiste*, the validity of which cannot be reasonably construed to rest on the clear language of the constitution of Trinidad and Tobago or on a compelling inference from relevant provisions of that instrument supportive of a legislative competence for the executive. In this connection it is important to note that:

*Although the Constitution presupposes the existence of the interpretive norms that will define and limit judicial power, the most fundamental of those cannot be derived from the Constitution ... but owe their status to facts of acceptance that are as much sociological as legal (emphasis supplied).*¹¹⁰

- 5.7 As intimated above, the JCPC, in *Independent Jamaica Council for Human Rights v Hon. Syringa Marshall-Burnett and Attorney-General of Jamaica*, must be seen as calling into question the decision in *Lewis v Attorney-General of Jamaica* by ineluctable inference in affirming the constitutional principle that the executive may not legitimately undertake any action pursuant to the exercise of the treaty-making power the effect of which would be to amend national legislation and, in particular, the supreme law, through the employment of procedures not provided for in the constitution. Similarly, as regards judicial interpretation of constitutional provisions in order to relieve the 'austerity of tabulated legalism', the caveat of Lord Hoffman when delivering the majority opinion of the full bench of the JCPC concerning the living instrument principle appearing in *Boyce and Another v R (2004)*¹¹¹ does assume particular relevance. He opined:

The 'living instrument' principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with 'international obligations', 'generous construction' and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean

¹¹⁰ Fallon Jr, R. H. (2005) Legitimacy and the Constitution, *Harvard Law Review*, 118(6), p. 823.

¹¹¹ 4 WLR 786.

something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.

Boyce's case paved the way for *Matthew v The State*¹¹² which expressly overruled the earlier determinations of the JCPC in *Roodal v The State* and *Khan v The State* which outlawed the mandatory death sentence in Trinidad and Tobago.

- 5.8 The JCPC in the *Neville Lewis* case accepted that it was 'of course well-established that a ratified but unincorporated treaty, though it creates obligations for the state under international law, does not in the ordinary way create rights for individuals enforceable in domestic courts ...'.¹¹³ Since, however, the JCPC like the Court of Appeal of Jamaica assimilated 'protection of the law' set out in s 13 of the Jamaican constitution to 'due process of law' contained in s 4a of the constitution of Trinidad and Tobago, an assimilation which was not made in the *Fisher No. 2*, *Reckley No. 2* and *Higgs* cases, their Lordships felt constrained to apply the reasoning in *Thomas v Baptiste*:

mutatis mutandis to the constitution like the one in Jamaica which provides for the protection of the law. In their Lordships view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered.¹¹⁴

- 5.9 Their Lordships, regrettably, omitted to consider that the constitution of Jamaica was enacted before the country's accession to relevant human rights instruments thereby rendering inapplicable the relevant rule of constitutional construction. Therefore, even though it may be argued that the determination of the JCPC in the *Neville Lewis* case lacked constitutional legitimacy, it may be perceived to have been eminently justified on the ground of moral legitimacy. Nevertheless, consequences of a political and constitutional nature must be taken into account when ascribing moral legitimacy to judicial action as will be seen below. Furthermore, the JCPC inexplicably ensnared itself in the egregious contradiction of denying legal effects in municipal law to unincorporated treaties while, paradoxically, accepting that unincorporated ratified treaties can enlarge the scope of the protection of the law provisions of Jamaica's supreme law.
- 5.10 The flawed reasoning of the JCPC was rejected by Pollard JCCJ in the *Attorney General of Barbados & Ors v Jeffrey Joseph & Anor* and who was able to reach the identical outcome in *Neville Lewis* by more compelling reasoning. In this connection it was averred that the executive had implemented the relevant instrument at the municipal level by executive conduct which, in all the circumstances, triggered an indefeasible legitimate expectation entitling the condemned men to protection of the law at least for a period coterminous with an efficient international appeals procedure. And since the legitimate expectation was triggered by executive conduct at the municipal level, namely, treaty-compliant conduct, which expectation was not assimilated to a legal principle or a rule of law, the prophylactic attribute of dualism was not compromised and the integrity of the principle of separation of powers was preserved.¹¹⁵

¹¹² (2004) 3 WLR 812.

¹¹³ *Op cit*, fn, p. 84.

¹¹⁴ *Per* Lord Slynn, (2001) 2 AC 50 at p. 85.

¹¹⁵ See *The Attorney General of Barbados & Ors v Jeffrey Joseph & Anor* [2007] CV 3 paras. 40–50.

5.11 Predictably, the JCPC determined that the instructions of the Governor General imposing time limits of six months for the consideration of petitions by human rights bodies were not only contrary to the decision in *Pratt & Morgan*, which established a period of 18 months for the purpose, but that the instructions were also an attempt by the executive to interrupt the appeals process contrary to the rules of natural justice and were therefore unlawful. The JCPC chose not to terminate its *ratio decidendi* at this point, but gratuitously and unnecessarily went on to rule that by ratifying the relevant convention or treaty the government of Jamaica had extended the scope of the protection of the law provisions set out in the Constitution of Jamaica – a conclusion similar to the one reached by the JCPC in respect of Trinidad and Tobago in *Thomas & Baptiste*. This determination of the Privy Council, as intimated above, goes against a settled rule of the common law established by English courts, concurred with by other Commonwealth courts, received in the common law of Caricom countries, and followed by their courts.

5.12 It is not without considerable significance that the mandatory death penalty was adduced by the JCPC in the *Neville Lewis* case to vindicate the right of condemned criminals to be supplied with copies of the trial judge's report and other relevant papers before the Jamaica Privy Council and to make representations to this body. In the opinion of the JCPC: 'The importance of the consideration of petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases.'¹¹⁶ This observation may only be construed as a clear reference to the mandatory death penalty the constitutionality of which was not open to doubt at the material time, but which was determined in an embarrassingly short time thereafter by the same judicial forum to be unconstitutional only to have its pristine constitutional status restored by a full bench of the JCPC. Consider in this context *Roodal v The State*,¹¹⁷ *Khan v The State*,¹¹⁸ *Matthew v the State*¹¹⁹ and *Boyce & Another v R*.¹²⁰ The resulting instability in the administration of criminal justice in Trinidad & Tobago occasioned by these somersaults in judicial determinations is depressingly evident today.

5.13 In this context the *dictum* of Lord Browne-Wilkinson appears to be seminally relevant:

Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all-embracing principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues ... [I]t seems to be imperative that the moral, social and legal issues raised by this case be considered by Parliament. The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises.¹²¹

5.14 However, it is important to bear in mind that the *Lewis* case was decided by the JCPC before *Independent Jamaica Council for Human Rights Limited v The Hon. Syringa Marshall-Burnett and The Attorney-General of Jamaica* which determined, in effect, that

¹¹⁶ Per Lord Slynn (2001) 2 AC 50 at p. 78.

¹¹⁷ (2005) 1 A.C. 328.

¹¹⁸ (2005) 1 A.C. 374.

¹¹⁹ (2004) 3 WLR 512.

¹²⁰ (2004) 4 WLR 786.

¹²¹ *Airedale NHS Trust v Bland* (1993) 2 All ER 821 at p. 879 f-j.

the government of Jamaica could not, pursuant to the exercise of the prerogative exemplified in its treaty-making power establishing a prerogative court, to wit, the Caribbean Court of Justice, enact legislation by a procedure not sanctioned by the constitution of Jamaica in order to emplace such a court as a final appellate court whose judges allegedly did not enjoy the same quality of security of tenure as superior municipal courts. In effect, the JCPC determined that the rights of citizens protected under the Jamaican constitution may not, pursuant to a treaty, be altered by a legislative procedure not sanctioned by the constitution – a determination which, in the present submissions, is logically compelling and juridically unassailable. Such reasoning applied to an executive act in exercise of the prerogative sanctioned by the Jamaican constitution is likely to yield a similar outcome.

- 5.15 Postulated in other terms, the institutional arrangements for the allocation of governmental powers may not be legitimately modified except by procedures sanctioned by the constitution. To the extent, therefore, that the extension of the scope of the due process or protection of law clauses of the constitution was in effect an executive act securing a modification of such institutional arrangements embodied in the constitution, it may not be achieved by the mere ratification of a treaty at the international level which was an amending procedure not contemplated or sanctioned by the constitution. And it does appear to follow, as a matter of ineluctable juridical inference, that by the mere executive act of ratifying a treaty which remains unincorporated through validly enacted national legislation, the executive is not competent to extend the scope of the due process provisions of the Jamaican constitution.
- 5.16 By way of prefacing the cautious indulgence of a measure of judicial activism, Lord Hoffman opined that the principle requiring legislation to be construed so as to make the state compliant with international obligations freely assumed, as an attribute of sovereignty is:

obviously at its strongest when it appears that the domestic law was passed to give effect to an international obligation or may otherwise be assumed to have been drafted with the treaty in mind. *Its application to laws which existed before the treaty is more difficult to justify as an exercise in construction but their Lordships are willing to proceed on the hypothesis that the principle requires one to construe the Constitution and other contemporary legislation in the light of treaties which the government afterwards concluded.*¹²²

This statement of the law is to be found in the *dicta* of Lord Hoffman in *Regina v Lyons and Others*¹²³ and Lord Goff in *Attorney General v Guardian Newspapers Ltd (No. 2)*.¹²⁴ It stands in stark contrast to the determination of the High Court of Australia in *Teoh's* case when it was determined that the competent decision-maker was required to exercise a discretion conferred by the Migration Act 1958 consistently with obligations assumed by Australia in the Convention on the Rights of the Child which was ratified by that country some considerable years after the legislation under scrutiny. However, it is important to note in this context that the same members of the Board in another case contemporaneously opined that: if existing laws are found to be inconsistent with obligations binding ... in the international law, it will be – as it always has been – for

¹²² *Boyce & Anor v The Queen* (2005) 1 AC 400.

¹²³ (2003) 1 AC 976.

¹²⁴ 1990 1 AC 109.

the Parliament to provide the remedy' (*per* Lord Hope of Craighead in *Watson v The Queen*).¹²⁵

- 5.17 For the JCPC to determine otherwise would be to accept that the executive, through the employment of its prerogative powers, could affect not only ordinary legislation but even the supreme law of the state – the constitution – an untenable juridical proposition at best, and, at worst, a manifestly unacceptable sortie into judicial activism by the JCPC in its allegedly unrelenting vindication of an externally perceived doctrinal position on the ultimate sanction. The danger in all of this, of course, is the ominous implications of such a determination in other important areas of governance unrelated to the administration of criminal justice. And this brings us to the operational international environment of small, fragile, economic and political entities.

6. Vulnerability of Caricom Member States

- 6.1 In making determinations about the legal incidence of the exercise by the executive of its treaty-making power, the judiciary, as a branch of government, has to be sensitive about the relevant capabilities of small states, both in terms of their professional expertise to negotiate complex international agreements and their insignificant economic leverage as fragile sovereignties in the international community where powerful sovereignties, non-state actors like non-governmental organisations (NGOs) or corporate transnational economic agglomerations, as determinative actors, are not unknown to inveigle or coerce, as the case may require, weak political entities into engaging their international responsibility in ways prejudicial to the national interest.¹²⁶ Consider in this context the Treaty establishing the World Trade Organization, culminating, in the words of Council of the European Union, the 'most complex negotiations in world history' and largely a product of transnational corporate enterprise, whereby many weak sovereignties were effectively duped at Marrakesh by the advanced economies into alienating many of their sovereign rights in the areas of trade, taxation, resource management, services, investments, intellectual property and such like. No Caricom Member State is known to have studied or been advised on the legal implications of this instrument which was ratified in haste and bemoaned at leisure. In fact, the relevant institutional capabilities do not exist in these economically unviable states.

- 6.2 Indeed, it has been pertinently observed that:

Humanitarian assistance at times is seen to threaten to make substantial inroads into developing countries' political, territorial and economic sovereignty. Taken together with various incursions such as the 'conditionalities' associated with external financial assistance

¹²⁵ (2005) 1 AC 472 at p. 497.

¹²⁶ International conventions in whose elaboration NGOs have been alleged to play an important if not determinative role include the CRC, the UN Convention on Long Range Transboundary Air Pollution, the Convention on International Trade in Endangered Species of Wild Fauna & Flora (CITES), the Vienna Convention on the Protection of the Ozone Layer, the UN Convention on Substances that Deplete the Ozone Layer, the Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, the Rome Statute for the International Criminal Court, the UN Convention Against Torture and other Cruel, Inhumane and Degrading Treatment or Punishment, the Landmines Convention, the Kyoto Convention on Climate Change, and the Biodiversity Convention.

and international trade, this raises the spectacle of 'post-colonialism' in the minds of some analysts.¹²⁷

Continuing her submissions which, *mutatis mutandis*, are extremely relevant in the treaty-making process of Caricom Member States, the candidate observed:

Economic intimidation, although more usually associated with the Security Council, the practice of Permanent Members silencing or forcing the votes of economically weak members has also occurred in the General Assembly. As more countries are placed under the tutelage of the Bretton Woods institutions, they have become more vulnerable to external economic pressures and retaliation. Recent examples include pressures exerted on individual members of the Non-Aligned Movement (NAM) in relation to NAM efforts to get the General Assembly to refer to the International Court of Justice (ICJ) the issue of the legality of nuclear weapons, and the NAM platform at the Non-Proliferation Treaty Conference.¹²⁸

- 6.3 Mention might also have been made of United States' pressure on small states of the Caribbean and elsewhere in respect of according exemption to its nationals committing offences within the contemplation of the International Criminal Court Convention. Similarly, the fragile sovereignties of the Caribbean Community are oftentimes coerced at the international level into making concessions which impact negatively on their national welfare, or to commit to actions which run contrary to their national constitutions. An excellent example is the anti-terrorism legislation being proposed by developed countries for Caricom Member States pursuant to relevant Security Council resolutions. And the recent developments associated with the Petro Caribe Agreement speak volumes about the treaty-making practice of Caricom States.¹²⁹ In this context mention must also be made of the so-called shiprider agreements concluded by unsuspecting Caricom governments with the United States and which, on close examination, appeared to have compromised their national sovereignty.¹³⁰ These were all standard form instruments which most Caricom Member States were inveigled into signing without relevant input from their competent ministries, assuming the existence of relevant capabilities. Only Barbados and Jamaica subjected these instruments to careful scrutiny and insisted on modifications which protected their perceived national interests. In the premises, it would be to indulge an unwarranted juridical solecism for a court of competent jurisdiction to hold, without more, that the exercise by the executive of its prerogative treaty-making power may directly affect the rights of citizens set out in national constitutions. Such a determination, contrary to historical judicial understanding, would not only compromise the hallowed constitutional principle of the separation of powers, but would also provide, in the guise of

127 Scobie, Michelle (2005) *Changing Multilateral Governance in Contemporary Globalisation: the Cases of the World Bank and the United Nations*, unpublished PhD thesis at the Institute of International Relations School of Graduate Studies, St Augustine, University of the West Indies.

128 *Ibid.*

129 This Agreement was initiated by Venezuela in order to accord Caribbean states concessional terms for the purchase of crude petroleum. The heads of government of most Caricom States journeyed to Caracas to conclude this instrument without being accorded the courtesy of seeing it in advance to discuss its implications with members of their national cabinets.

130 See, eg, US/Barbados Agreement re Cooperation in Suppressing Illicit Maritime Drug Trafficking 1997; US/Jamaica Agreement re Cooperation in Suppressing Illicit Maritime Drug Trafficking 1996; US/Trinidad and Tobago Agreement re Counter-Drug Operations 1996. Similar agreements were signed by the US with Antigua and Barbuda, Belize, Dominica, Grenada, Guyana, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Suriname.

a legal principle, a convenient vehicle for intrusive foreign intervention in the domestic affairs of small states in ways inimical to their national interests.

- 6.4 Before concluding this examination of the legal incidence of unincorporated treaties on municipal law of Caricom Member States, it does appear to be apposite to quote Rosalyn Higgins comments on the relevant expertise of the Judicial Committee of the Privy Council:

The Judicial Committee of the Privy Council was surprised to learn that some of the cases it has rejected from Jamaica and Trinidadian applicants then came on to the Committee on Human Rights. Of course the Privy Council was sitting as the final determinant of Jamaican or Trinidad law; and the Committee was determining the different issue of whether Jamaican or Trinidad and Tobago had – through their law, or through the acts of their public officials – violated their obligations under the Covenant. But, in essence, the issue of fair trial has been in front of both the Privy Council and the Committee on Human Rights. *The Privy Council knew virtually nothing of the fair trial obligations undertaken by these countries by virtue of their acceptance of the Covenant nor indeed of the existence of the Committee and its role under the Optional Protocol* (emphasis supplied).¹³¹

This observation speaks volumes about the juridical omniscience of the JCPC, the unqualified infallibility of its determinations concerning the treaty-making practice of Caricom Member States, and the legal incidence of unincorporated treaties on their supreme law. In all of this it cannot be easily ignored that thousands of lives were lost in a civil war in the metropolis to establish the principle that the prerogative may not be employed to usurp the legitimate power of the legislature to make or amend the law. What lessons does this noble expenditure of national blood and treasure have for judicial determinations on the legal incidence of unincorporated treaties on legislation of Caricom States, especially the supreme law of the land?

7. Conclusion

- 7.1 To conclude, the determinations of the JCPC reached in *Thomas v Baptiste* and reaffirmed in *Neville Lewis v Attorney-General of Jamaica*, which ratified unincorporated treaties concluded by the executive, may directly extend the scope of provisions of national constitutions, appear to have far-reaching negative implications for the Member States of the Caribbean Community. Ominously, they challenge two foundational imperatives of good governance reflected in Westminster-type constitutions – the constitutional principle of separation of powers and the cherished democratic principle. Both of these constitutional principles have been perceived historically as viscerally indispensable for good governance constituting axiomatic imperatives of Westminster-type constitutions as analysed by Lord Diplock in *Moses Hinds v The Queen*. Even more importantly, the determinations of the JCPC appear to be depressingly insensitive to the peculiar nature of Westminster-type constitutions of Caricom Member States and the diplomatic negotiating deficit impairing the leverage of small states in international transactions, which, more often than not, impacts negatively on the national welfare.
- 7.2 Constitutions, by their very nature, may not be perceived to be politically immutable or impervious to judicial intervention justified by developments in their operational

¹³¹ *Op cit*, fn 36, p. 1270.

environment. Nevertheless, such modifications as may be legitimate in order to make constitutions current with evolving superior international standards of human interaction must not be disruptive and should be challenged toward the achievement of dynamic stability in national development – economic, social and political. Conscious of these requirements, Westminster-type constitutions do appear to embody appropriate mechanisms to facilitate dynamic stability in the form of different procedural provisions for amendment.

- 7.3 The legislature, reflecting as it does the salience of the democratic principle, compliance with which is generally perceived as underscoring the legitimacy of constitutional change, is the branch of government considered appropriate for initiatives in this area. Disruptive interventions in the normal process of development of national constitutions through unwarranted judicial activism do not only impair the dynamic stability required for their continuing relevance, but irretrievably compromise the stability of expectations ordinarily required by important economic actors, in the absence of which good governance becomes an illusory political *desideratum*. It is in this context that the legal incidence of unincorporated treaties on the municipal law of Caricom Member States must be analysed. These considerations undoubtedly operate to complicate analysis of the interface between international and municipal law addressed in this article; but, more importantly, they also justify the revisiting of the relevant determinations of the JCPC by the CCJ in their recent decision.¹³²
- 7.4 Where a state ratifies a treaty which has entered into force, it secures rights and assumes obligations at the international level. Omission by the state to discharge obligations assumed in or under a treaty normally operates to engage the responsibility of the delinquent state internationally. Assumption by the state at the international level of an obligation to extend the due process rights of accused persons, if not discharged, engages the international responsibility of the delinquent state, but is incapable of having direct effect on persons within its jurisdiction other than in exceptional cases. Such an exceptional circumstance may be the creation of legitimate expectations by treaty-compliant conduct by the executive at the municipal level. Consider, *a contrario*, Arts 27 and 46 of the Vienna Convention on the Law of Treaties.¹³³ In the premises, their Lordships' determinations under examination appear to have yielded sound legal outcomes for the wrong reasons.
- 7.5 Finally, in arriving at their determinations, their Lordships may have misdirected themselves about the applicable norms of international law; nor were they assisted by the submissions of learned counsel in this particular. According to Art 2(1)(b) of the Vienna Convention on the Law of Treaties, ratification is the 'international act' by which 'a state establishes at the international plane its consent to be bound by a treaty'. Ratification of a treaty by the executive of a dualist state cannot *ipso facto* create a legitimate expectation at the municipal plane. As McHugh J pertinently observed in his powerful dissenting opinion in *Teoh's* case:

¹³² *The Attorney General of Barbados & Ors v Jeffrey Joseph & Anor* [2000] CV 3(A).

¹³³ Article 27 reads as follows: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to Article 46.' Article 46 reads as follows: '1. A state may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith.'

Australia's ratification of the Convention is a positive statement to other signatory nations that it intends to fulfill its obligations under the convention ... If the result of ratifying an international convention was to give rise to a legitimate expectation that that convention would be applied in Australia, the Executive government of the Commonwealth would have effectively amended the law of this country.¹³⁴

However, this *dictum* must be seen as an overstatement since it is common ground that a legitimate expectation is not to be assimilated to a legal principle or a rule of law. Furthermore, Mason CJ in his joint judgment with Deane J was careful to point out that even though international conventions may be employed to develop the common law, '[j]udicial development of the common law must not be seen as a back-door means of importing an incorporated convention into Australia law.'¹³⁵

- 7.6 Ratification of a treaty, contrary to the understanding of many municipal lawyers, is not a *municipal act* of the national legislatures of common law countries subscribing to the dualist doctrine. The process of treaty-making at the international level is an executive act involving, *inter alia*, the negotiation, adoption, authentication, signature and ratification of the instrument. Ratification of a treaty by developed countries normally takes place two or three years following its adoption and signature in order to give the executive time to ponder the legal incidence of the instrument, determine whether any modifications are required to existing laws or if new legislation is required for its implementation, and to elaborate such amendments to existing laws, or to draft new legislation, as the case may require. It is only after completion of this process that the executive of dualist common law jurisdictions, like the Member States of Caricom, should normally ratify the instrument. Therefore, ratification should ideally be a considered act of the executive that respects the role of the legislature as occasion demands.
- 7.7 The position is different in states subscribing to monism where the legislature is an active participant in the treaty-making process thereby justifying the self-executing character of such instruments. And it is not to be lightly presumed that in ratifying treaties Caricom Member States, which are woefully deficient in relevant capabilities, have addressed the legal incidence at the municipal level of executive action. In the United Kingdom, which is governed by the Ponsonby Rule, treaties subject to ratification are required by convention to be tabled in both houses of Parliament for a period of 21 days before ratification. And in many developed countries ratification normally follows the enactment of implementing legislation.¹³⁶ However, one may hazard a guess that the vast majority of treaties concluded by Caricom States remain unimplemented.
- 7.8 On a dispassionate analysis of its terms, the determination of the JCPC regarding the legal incidence in the municipal law of Caricom Member States of unincorporated ratified treaties must be assimilated to the doctrine of direct effect enunciated by the European Court of Justice in *Van Gend en Loos* (1963) ECRI and reaffirmed in *Costa v*

¹³⁴ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR at paras 37–38.

¹³⁵ *Ibid*, para 28.

¹³⁶ See *Saloman v Commissioner of Customs and Excise* (1966) QBD 642.

ENEL (1964) ECR 585.¹³⁷ But, unlike municipal legislation, which is invariably elaborated with a view to immediate operability, treaties are drafted in general terms and their provisions are not ordinarily intended for immediate application by domestic courts. For a provision of a treaty to be considered as having direct effect, or be self-executing, the language of commitment must be clear, precise, unconditional and not require any implementing legislation. In the present submission, the applicability of the direct effect principle enunciated by the (ECJ) has relevance only in regimes like the EC whose legislative bodies are endowed with supranational competence or national jurisdictions subscribing to the monist doctrine of international law.

- 7.9 However, it is trite law that the principle of direct effect has no applicability in inter-governmental organisations like the Caribbean Community which is an association of sovereign states whose interactions among participants are governed by the ordinary rules of international law. Unlike the Member States of the European Community, the Member States of the Caribbean Community have not surrendered any attributes of sovereignty to the collectivity and Member States with common law jurisdictions subscribe to the dualist doctrine. Consequently, the provisions of any international instrument to which they are party have to be enacted into national law before rights and obligations are created for private entities. But in addressing the legal incidence of unincorporated treaties on the municipal law of Caribbean countries, Lord Steyn, in advertent to an 'important development', submitted that:

By resort to constitutional due process clauses the Privy Council in two recent cases held that condemned men in Caribbean countries could not be executed until the determination of their appeals to the Inter-American Human rights Committee, the jurisdiction of which depended on an unincorporated treaty.¹³⁸

- 7.10 In my respectful opinion, Lord Steyn's studied representation of the relevant determination of the JPCPC appears to be an understatement of the position both in terms of judicial incorporation of provisions of a treaty and the legal outcome. In effect, the relevant determinations of the JPCPC, denuded of their human rights qualifications, purported to accord the executive the right to alter the supreme law unilaterally, contrary to the historic understanding of the relevant substantive law and the applicable rules of construction, in a political context where third-country decision-makers could have determinative influence on desired outcomes.

137 Consider in this context the determination of Sir Robert Megarry in *Malone v Metropolitan Police Commissioner* (1979) Ch. 544 at p. 378:

Fifth, there is Mr. Ross-Munro's second main head, based on the European Convention for the Protection of Human Rights and Fundamental Freedoms and the *Klass* case. The first limb of this relates to the direct rights conferred by the Convention. Any such right is, as I have said, a direct right in relation to the European Commission of Human Rights and the European Court of Human Rights, and not in relation to the courts of this country; for the Convention is not law here. Article 1 of the Convention provides that the High Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention'; and those rights and freedoms are those which are set out in Articles 1 to 18 inclusive. The United Kingdom as a High Contracting Party which ratified the Convention on March 8, 1951, has thus long been under an obligation to secure these rights and freedoms to everyone. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this country ... All that I do is to hold that the Convention does not, as a matter of English law, confer any direct rights on the Plaintiff that he can enforce in the English Courts.

138 Lord Steyn (2002) *Democracy through Law*, *European Human Rights Law Review*, 6, p. 729.

7.11 In the Caribbean Community Member States, as in all Commonwealth States, it is not open to the courts to usurp the functions of the legislature through judicial activism and to extend the scope of any provision of the supreme law by according legal legitimacy to amendment procedures not sanctioned by the constitution for the purpose. In the characterisation of Sir Robert Megarry VC:

(i) it seems to me that where Parliament has abstained from legislating on a point that is plainly suitable for legislation, it is indeed difficult for the court to lay down new rules of common law or equity that will carry out the Crown's treaty obligations or to discover for the first time that such rules have always existed.¹³⁹

Consequently, considerable tension is likely to exist between relevant determinations of the JCPC and applicable provisions of Westminster-type constitutions. Conceding the moral and even constitutional legitimacy of the JCPC's determinations in *Thomas v Baptiste* and *Neville Lewis* that condemned murderers are entitled to constitutional protection of procedural fairness, it is submitted, nonetheless, that as a matter of law, the JCPC must be perceived to have misdirected itself in determining that ratified unincorporated treaties concluded by the executive of dualist states possess the peculiar faculty to amend national legislation, including pre-existing supreme law.

7.12 In this context, the principled and juridically sound *obiter dicta* of Lord Bingham, delivered, incidentally, sometime after the judgment in the *Neville Lewis* case, appear to be seminally relevant and extremely persuasive:

This does not mean that in interpreting the Constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. **It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies.** But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitutions, that it does.¹⁴⁰

¹³⁹ *Malone v Metropolitan Police Commissioner* (1979) Ch. 344 at p. 379.

¹⁴⁰ *Reyes v The Queen* (2002) 2 A.C. 235.