

THE ROLE OF THE CARIBBEAN COURT OF JUSTICE IN HUMAN RIGHTS  
ADJUDICATION:  
INTERNATIONAL TREATY LAW DIMENSIONS



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## INTRODUCTION

In this lecture I propose to consider the role of the Caribbean Court of Justice (“CCJ”)<sup>1</sup> in human rights adjudication placing particular emphasis on the possible influence of international human rights treaties in such adjudication. I do not propose to consider in any depth the origin or theoretical aspects of human rights.<sup>2</sup> Suffice it to say I will be speaking primarily against the background of first-generation rights which

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<sup>1</sup> The Agreement Establishing the Caribbean Court of Justice 2001 (the “CCJ Agreement”) was adopted in Bridgetown, Barbados on 14<sup>th</sup> February 2001, text in Duke Pollard, (ed.), *The CARICOM System: Basic Instruments* (Caribbean Law Publishing Company, 2003), at p. 435.

<sup>2</sup> These aspects are covered in several books on the subject, see e.g., *Rethinking Human Rights: Law, Ethics and Public Affairs* (Brian Galligan and Charles Sampford, eds, 1997); A.H. Robertson (revised by J.G. Merrills, *Human Rights in the World* (Manchester University Press, 1992).

concerns basic civil and political entitlements such as the right to life, the right to due process and protection of law, protection of private property, right to privacy and family life, and freedom of association. These civil and political rights constitute the most widely accepted category of human rights and are enshrined in a number of global and regional agreements;<sup>3</sup> and they are protected in Bill of Rights provisions in Caribbean constitutions. Constitutional reform in some countries have given rise to some second and third generation rights (prominent among these the right to a clean and health environment<sup>4</sup>) but these categories of rights are yet to engage the courts in a sustained or meaningful way.<sup>5</sup>

A number of factors accentuate the challenge of deciding upon the posture most appropriately taken by the CCJ with regard to international treaty statements of human rights. First, the Court is a recently established institution<sup>6</sup> and is still in the initial stages of delivering decisions from which its judicial philosophy may be studied and identified. Secondly, the Court must pay due regard to relevant decisions of the Judicial Committee of the Privy Council (“JCPC” or “Privy Council”) which, for largely historical reasons, have shaped adjudication in common law countries, including those in the Caribbean. Thirdly, there may be conflicting judicial objectives in human rights adjudication which the CCJ must somehow reconcile. The Court will naturally strive to uphold international treaty obligations undertaken by Caribbean States in human rights treaties adopted by those states; but, equally, it is bound to uphold the Constitution as the supreme law of the land. Extreme difficulty arises where the treaty and the Constitution conflict or appear to come into conflict with each other and the CCJ is then called upon to navigate between the conflicting edicts of constitutional supremacy and international responsibility. Recent decisions of Inter-American Court on Human Rights (“IACHR” or “Inter-American Court”) create special problems in this regard and are considered later.

In order to provide some background to the CCJ and the Caribbean region, I propose to first say a few words about the Caribbean Community, the origin and nature of the CCJ and how the two jurisdictions of the Court relate to human rights litigation. With regard to that relationship, an essential point of departure must be consideration of the general principles which control the competence of the CCJ to take account of international human rights treaties and the advances which the Court has made on

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<sup>3</sup> Ibid.

<sup>4</sup> See e.g., Guyana (Constitution of the Cooperative Republic of Guyana, Act No. 2 of 1980), and Jamaica (Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 (No. 12-2011)).

<sup>5</sup> Cf. *Attorney General v. Mohamed Alli* (1987) Vol. 41 WIR 176 (Guyana).

<sup>6</sup> The CCJ was inaugurated on 16 April 2005 (Queen’s Hall, Port of Spain, Trinidad and Tobago) and has, therefore, been operational for just under 6 years.

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traditional law in this field. Application of these general principles requires acknowledgment of the linkages between the Bill of Rights in Caribbean constitutions and international declarations and treaties on human rights. It will be seen that there are two points of connection: first, the Bills of Rights were inspired by developments in international human rights law; second, many Caribbean states have actively accepted international human rights agreements, although in recent times two Caribbean States have actually denounced human rights treaties in order to preserve their domestic law on the death penalty.<sup>7</sup> There appears to be different contexts in which application of international human rights norms might surface in litigation: (1) interpretation of the extent of existing civil and political rights; (2) creation of new rights not contemplated by the Constitution; and (3) recognition of rights which are or appear to be in conflict with the constitutional provisions. In regard to the latter category some recent decisions of the IACHR carry critical implications for the role of the CCJ in decision-making in human rights litigation and will be considered in fair detail.

#### THE CARIBBEAN COMMUNITY

The establishment of the Court is to be understood against the background of a largely dysfunctional regional integration movement which was itself a product of 500 years of British colonial rule.<sup>8</sup> After WW II, when British colonial territories asserted the right to self-determination and won political independence from the United Kingdom, it was thought that the then 10 Caribbean territories would become independent as one nation, hence the formation of the West Indian Federation in 1958.<sup>9</sup> For various reasons the Federation failed.<sup>10</sup> The departure of Jamaica in 1962 to pursue political

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<sup>7</sup> Note: Jamaica (withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights in 1998); and Trinidad and Tobago (withdrew from the Inter-American Convention on Human Rights and the Inter-American Court on Human Rights in 1998).

<sup>8</sup> From the 15<sup>th</sup> to the 20<sup>th</sup> century: see e.g., Eric Williams, *Capitalism and Slavery* (University of North Carolina, 1944).

<sup>9</sup> Hugh Springer, *Reflections on the Failure of the first West Indian Federation: Occasional Papers in International Affairs No. 4* (1962).

<sup>10</sup> *Ibid.*

independence on its own marked the collapse of the regional enterprise and the individual territories then gained independence on a national basis.<sup>11</sup>

The signing of the Treaty of Chaguaramas Establishing the Caribbean Community in 1973,<sup>12</sup> including an Annex which created the Common Market<sup>13</sup> was an attempt to resurrect the regional project but to limit it to functional and economic co-operation between politically independent states. The Revised Treaty of Chaguaramas adopted in 2001,<sup>14</sup> sought to deepen regional integration by creating a CARICOM Single Market and Economy (“CSME”) among the 15 member states of the Community.

At first the community was a “closed club” of common law countries. There were no civil law members in 1973 but just over twenty years later, in 1995, Suriname joined CARICOM and is now a full participant in the CSME. Haiti became a member of the Community in 2003 but is not yet a participant in the agreements on economic integration. Accordingly, although CARICOM has both civil law and common law members it remains true that the 13 Commonwealth members continue to form the core and backbone of the Community. The regional grouping is characterized by the presence of small states that are adherents of the Westminster system of government which emphasizes the allocation of governmental power in the Executive, Legislative and Judicial branches of government and which protects that allocation of power by the constitutional doctrine of the separation of powers.<sup>15</sup>

Adoption of the Westminster system is not the only indication of the continuation of the colonial influence on Caribbean governance arrangements. At the time of political independence the countries retain the British Monarch as the Head of State, and the

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<sup>11</sup> Jamaica, (6 August 1962); Trinidad and Tobago, (31 August 1962); Guyana, (26 May 1966);

Barbados, (30 November 1966); The Bahamas, (10 July 1973); Grenada, (7 February 1974); Dominica, (3 November 1978); St. Kitts and Nevis, (19 September 1983); Saint Lucia, (22 February 1979); St. Vincent and the Grenadines, (27 October 1979), Belize, (21 September 1981); Antigua and Barbuda, (1 November 1981).

<sup>12</sup> See Treaty Establishing the Caribbean Community and Common Market, adopted at Chaguaramas,

Trinidad and Tobago on 4<sup>th</sup> July 1973, text in Duke Pollard, (ed.), *The CARICOM System: Basic Instruments* (Caribbean Law Publishing Company, 2003), at p. 186.

<sup>13</sup> *Ibid.*

<sup>14</sup> The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM

Single Market and Economy, adopted at Nassau on 5<sup>th</sup> July 2001, text in Duke Pollard, (ed.), *The*

*CARICOM System: Basic Instruments* (Caribbean Law Publishing Company, 2003), at p. 472.

<sup>15</sup> *Hinds v R* [1977] AC 276.

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Monarch's Privy Council as the final Court of Appeal. Several efforts to replace these British institutions with local institutions were defeated largely because, in the view of some, the 500 years of British rule has cemented the idea of psychological subservience to colonial institutions.<sup>16</sup> Even so, three states (Guyana, Trinidad and Tobago, and Dominica) have removed the Queen as their Head of State and have a national as President. Discussions aimed at severing the links with the Privy Council are longstanding and echo the hostility of colonial courts and legislatures in the United States of America to having appeals to His Majesty in Council which were finally abolished for that country with the establishment of the United States Supreme Court in 1783.<sup>17</sup>

#### ESTABLISHMENT OF THE CCJ

The earliest record of Caribbean revolt against the Privy Council is an Editorial published in *The Jamaica Gleaner*, on March 6, 1901, opined that: "Thinking men believe that the Judicial Committee of the Privy Council has served its turn and is now out of joint with the condition of the times". In 1947, at a meeting of colonial governors in Barbados, all Englishmen, the view was expressed that the Privy Council was far too removed from the social realities of the colonies to be effective as a court of last resort. This was followed by the recommendation by the Organization of Commonwealth Caribbean Bar Associations in 1970 that the region should establish a Court to replace the Privy Council as the final court of appeal in both civil and criminal matters. Also in 1970, Jamaica placed the matter on the agenda of the Sixth

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<sup>16</sup> The most pessimistic and uncompromising of this analysis is presented by the Trinidadian novelist, V.S. Naipaul: "These Caribbean territories are not like those in Africa, with their own internal references that have been returned to themselves after a period of colonial rule. They are manufactured societies, labour camps and creations of empire and for long they are dependent on empire for language, institutions, culture, even officials. Nothing [is] generated locally. Dependence [has] become a habit." As quoted in Sidney w. Mintz, "Caribbean Region" in (1974) vol. 102 No. 2 *Slavery, Colonialism, Racism* at p. 45; Simeon McIntosh, *Constitutional Reform and Caribbean Political Identity* (Caribbean Law Publishers) at p. 264.

<sup>17</sup> Article III, section 1 of the United States Constitution (1783) provides for the vesting of the judicial power of the United States. The first Congress enacted the Judiciary Act of 1789 (Ch. 20, 1 Stat. 73-93) which established the Supreme Court to comprise a Chief Justice and five Associate Justices. Since 1869 the number of justices has been fixed at nine.

Conference of Heads of Government of the Caribbean Community. At the Eighth Meeting of the Conference in 1989, the Heads of Government agreed in principle to establish a Caribbean Court of Appeal. The idea was emphatically endorsed in 1992 by the West Indian Commission, in their Report: “*Time for Action*”.<sup>18</sup> Just under ten years later, in 2001, the Treaty establishing the Caribbean Court of Justice was adopted in Barbados,<sup>19</sup> and entered into force in 2003<sup>20</sup>. The Court became fully operational in 2005 and since then has heard and decided over fifty (50) cases.<sup>21</sup>

The Court was established with two jurisdictions. Part II provides for the original jurisdiction of the Court with regard to treaty disputes between the States and Part III contains provisions on appellate jurisdiction whereby the Court would replace the Privy Council as the final court of appeal for Caribbean countries. That the primary driver for establishment of the Court was the need to provide for binding judicial determination of disputes under the Revised Treaty of Chaguaramas is reflected in the fact that all Member States of CARICOM participating in the CSME are obliged to accept the original jurisdiction of the Court.

By contrast, acceptance of the appellate jurisdiction is optional; states may choose to replace the Privy Council with the CCJ or may keep the JCPC as their final court of appeal. For reasons still plaguing Caribbean cultural identity only three Member States have so far opted to replace the Privy Council with the CCJ: Barbados (2005); Guyana (2005); and Belize (2010). However, it is probably true to say that the decisions of the CCJ will have persuasive value even in other jurisdictions in the region which have not yet accepted the appellate jurisdiction of the Court.<sup>22</sup>

The twin jurisdictions of the CCJ make for interesting comparison with the United States Supreme Court (“USSC”).<sup>23</sup> The establishment of the USSC with final appellate jurisdiction in cases involving important questions about the constitution or federal law appears to have ended the controversial system of appeals from the American colonies to the Privy Council in London. The USSC also has original jurisdiction to hear disputes affecting relations between states, and cases affecting, for instance,

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<sup>18</sup> West Indian Commission, *Time For Action: Report of the West Indian Commission* (1992).

<sup>19</sup> The Agreement Establishing the Caribbean Court of Justice 2001, (“CCJ Agreement”) was adopted in Bridgetown, Barbados on 14<sup>th</sup> February 2001 and entered into force on 23 July 2003; text in Duke Pollard, (ed.), *The CARICOM System: Basic Instruments* (Caribbean Law Publishing Company, 2003), at p. 441.

<sup>20</sup> In accordance with Article XXXV, the CCJ Agreement entered into force on ratification by three Member States on 23<sup>rd</sup> July, 2003.

<sup>21</sup> See: <http://www.caribbeancourtsofjustice.org/>

<sup>22</sup> Winston Anderson, “Influence of the Caribbean Court of Justice in developing an indigenous Caribbean jurisprudence” (forthcoming).

<sup>23</sup> Supra, note 14.

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diplomats and ambassadors. The landmark *Marbury v Maddison*<sup>24</sup> which established the doctrine of judicial review of the constitutionality of acts of the legislature was brought and decided in the original jurisdiction.

#### THE ORIGINAL JURISDICTION AND HUMAN RIGHTS

The original jurisdiction would appear to be the natural home for the application of international treaty law on human rights. In the exercise of its original jurisdiction, the Court has “compulsory and exclusive” jurisdiction to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community and the CSME. Exercise of the original jurisdiction must be based on the application of such rules of international law as may be applicable to the case before it<sup>25</sup>; these rules are derived from treaties accepted by the contesting states, international custom as evidence of a general practice accepted as law, and general principles of law recognized by the States of the Community.<sup>26</sup> The CCJ has applied these sources in rendering the seven judgments that it has given to date in the original jurisdiction.<sup>27</sup> Furthermore, individuals, upon satisfaction of certain pre-conditions, may make applications to the Court in its original jurisdiction in order to protect their rights enshrined in the Revised Treaty.<sup>28</sup>

Whether an applicant could in fact bring a claim for protection of first generation human rights under the original jurisdiction is extremely doubtful. The fact is that the regime of human rights is conspicuous by its absence from the Revised Treaty of Chaguaramas which is overwhelmingly preoccupied with regional economic

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<sup>24</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>25</sup> See: Article XVII, CCJ Agreement; Article 237 the Revised Treaty.

<sup>26</sup> Article 38 (1), Statute of the ICJ

<sup>27</sup> Website; see esp. *TCL and Another v The Co-operative Republic of Guyana* (2009) 74 WIR 302; *TCL and Another v The Co-operative Republic of Guyana (No. 2)* (2009) 75 WIR 327 - See: CCJ Agreement, Article XXIV; RTC, Article 222. Such applications must satisfy certain pre-conditions: (1) The applicant must be a “community national” or a natural or juridical person of a member state; (2) The State parties must have intended that the right in the Revised Treaty should ensure to the benefit of the applicant directly; (3) The applicant must prove that he was prejudiced in the enjoyment of the right; (4) The contracting party entitled to espouse the claim must have “omitted or declined” to do so; or must have “expressly agreed” that the applicant can proceed with the claim; and (5) The interest of justice must require that the applicant be allowed to bring the proceedings.

integration and development. The rights conferred are all economic or financial in nature. Thus the Court had ruled<sup>29</sup> that the individual applicant may be entitled to “*core rights*” in Chapter 3 of the Treaty which are the right to migrate to seek employment, to establish business and provide services, and to move capital and goods freely throughout the territories of Member States. The Court has also recognized that applicants may enjoy “*ancillary rights*” i.e., rights not expressly spelt out as such in the treaty but which could be inferred from obligations assumed by member states, such as the right to have the common external tariff imposed on goods imported from outside the region. Additionally, certain rights under the WTO/GATT regime may be applicable.<sup>30</sup>

There is a passing reference in the Revised Treaty to the Charter of Civil Society adopted by the Heads of Government in 1997 but it is questionable whether this provides any real opportunity for protection of civil and political rights. The Charter is not legally binding and the reference to it was made in the preamble of the Revised Treaty. In fact it is now recognized that a human rights deficit exists in the regional integration movement and there have been proposals for adoption of a CARICOM Human Rights Treaty to correspond with the European Convention on Human Rights.<sup>31</sup>

## APPELLATE JURISDICTION AND HUMAN RIGHTS

The appellate jurisdiction is probably a more fertile area for human rights adjudication simply because here the CCJ acts as the final court of appeal overseeing the interpretation of the Constitution and laws of the State. A primary feature of Caribbean constitutions is the Bill of Rights which catalogues certain fundamental rights and freedoms enjoyed by persons on the territory of the State.

Litigation on the Bill of Rights began shortly after independence in the early 1960s and a preliminary issue therefore concerns the appropriate attitude which the CCJ

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<sup>29</sup> See: *Trinidad Cement Ltd. and TCL Guyana v Guyana* [2009] CCJ 1 (OJ); 74 WIR 302; *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ); 74 WIR 319.

<sup>30</sup> See Article 116, RTC.

<sup>31</sup> See: Sheldon McDonald, “Draft Final Report – Consultancy to Conduct and Formulate the most suitable arrangements to provide for the protection of Human Rights in the Caribbean (CARICOM)” 16 September 2005 (on file with CARICOM Secretariat); Winston Anderson, “The Inter-American System and its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ” (2010) vol. 35 No. 2 *West Indian Law Journal* 27.

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should take towards previous decisions of English courts and the Privy Council regarding these rights and freedoms. The Court has opted to adopt a pragmatic approach by recognizing the English influence and the continuing validity of previous Privy Council decisions but also indicating that it will depart from those decisions in the future where there are good reasons for doing so. In the leading judgment in *Attorney-General of Barbados v Joseph and Boyce*<sup>32</sup> the following was said<sup>33</sup>:

“The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such jurisprudence we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court.”

### **General law on int'l human rights**

The relationship between international and domestic law has been conceptualized under two principal schools of thought; monism, whereby international law is *per se* part of domestic law without need to legislate it into law; and dualism which requires actual enactment of international treaties into domestic law.<sup>34</sup> The two theories were reviewed in English Court of Appeal decision in *Trendtex Trading Corporation v Central Bank of Nigeria*<sup>35</sup> which held that as regards international custom the monist approach was to be adopted; that is to say, the custom automatically formed part of the common law and was applicable in domestic law except where the custom

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<sup>32</sup> [2006] CCJ 3 (AJ).

<sup>33</sup> *Ibid.*, at para. 18. See also Justice Anderson, delivering the judgment of the Court in *Garraway v. Williams & Rambarran* [2011] CCJ 12 (AJ) at paragraph 26.

<sup>34</sup> Margaret Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992) at p. 109.

<sup>35</sup> [1977] 1 All E.R. 881

conflicted with statute law<sup>36</sup> or established precedent of common law.<sup>37</sup> However, as regards international treaties, strict dualism applied on the basis of the separation of powers doctrine; even if the treaty had been accepted by the Executive it could not form part of local law unless and until incorporated by act of the Legislature.

The uncompromising dualist approach to treaties may be traced back to *The Parlement Belge*<sup>38</sup> and the rationale was explained by Lord Atkin in *Attorney-General for Canada v. Attorney-General for Ontario*<sup>39</sup>: “within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic law, requires legislative action.” More recently, Lord Oliver reaffirmed in *Maclaine Watson v. Department of Trade*<sup>40</sup> that, “as a matter of constitutional law . . . 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 intervention of Parliament.”

A further development that is relevant was confirmed *R v Secretary of State ex p. Brind*.<sup>41</sup> Whilst the unincorporated treaty cannot be applied as such the courts could take notice of a treaty accepted by the Executive where provisions in legislation are ambiguous. In these circumstances the courts operate under the presumption that parliament did not intend to breach treaty obligations undertaken by the Executive. Ambiguous provisions will then be interpreted to conform rather than conflict with the treaty.

In *Attorney-General v Joseph and Boyce*<sup>42</sup> the CCJ affirmed that Barbados and the other Commonwealth Caribbean Member States of CARICOM are dualistic states in the British tradition<sup>43</sup> and there are, indeed, several reported decisions in which treaties have been discarded precisely because there was no statute incorporating them into domestic law.<sup>44</sup>

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<sup>36</sup> See e.g., *Mortesen v Peters* (1906) 14 Sc.L.T.R. 227.

<sup>37</sup> See e.g., *R v Chung Chi Chueng* [1939] AC 160 at p. 168.

<sup>38</sup> (1878-79) 4 P.D. 129; [1874-80] All E.R. Rep. 104

<sup>39</sup> [1937] AC 326.

<sup>40</sup> [1989] 3 All ER 523; [1989] Ch 72.

<sup>41</sup> [1991] 1 AC 696.

<sup>42</sup> [2006] CCJ 3 (AJ).

<sup>43</sup> *Ibid.*, note that Justice Wit dissented on this point.

<sup>44</sup> See generally, Winston Anderson, “Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation” (1998) Vol. 8 No. 1 *Caribbean Law Review* 75-115; “Treaty Implementation in Caribbean Law and Practice” (1998) Vol. 8 No.2 *Caribbean Law Review* 1-27.

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### **Contexts for consideration of human rights treaties**

There are at least three contexts in which the CCJ may be called upon to consider the impact of treaty rights not incorporated into domestic law.

#### ***Int'l Human Rights and Purposive Interpretation of Bill of Rights***

In *Attorney-General v Joseph and Boyce*, the CCJ did not consider and therefore did not rule on a line of Caribbean cases which have considered the interpretation of Caribbean Bill of Rights in light of the relationship between these Bills and international human rights treaties. It is generally accepted that the statements of human rights in Caribbean constitutions are based largely on the European Convention on Human Rights 1950 which in turn was inspired by the United Nations Declaration on Human Rights 1948 (UDHR). The UDHR and the International Convention on Civil and Political Rights 1966 ("ICCPR"); and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), together known as the International Bill of Rights, have attracted widespread participation by Caribbean States. All 15 CARICOM Member States are signatories to the UDHR; 12 of the 15 have adopted the ICCPR; 11 of the 15 have accepted the ICESCR. At the regional level all 15 States are members of the OAS and therefore adherents to the American Declaration of the Rights and Duties of Man. Also, by virtue of that membership they agree to accept the jurisdiction of the Inter-American Committee on Human Rights to recommendations and issue reports regarding alleged violations of human rights on their territories. Six of the 15 have accepted the American Convention on Human Rights and three (Barbados, Suriname, and Haiti) have opted to accept the binding jurisdiction of the Inter-American Court on Human Rights.

The point worthy of emphasis is that even though these treaties and declarations have been accepted by the Executive, they have not been incorporated into domestic law by legislation as required under the dualist theory.

#### *Early cases*

One of the earliest Caribbean cases to consider the impact of an international human rights document accepted by the Executive but not implemented by parliament was

*Trinidad Island-Wide Cane Farmers' Association Inc and Attorney-General v Seereeram*.<sup>45</sup> In deciding that the right of freedom of association in the Trinidad and Tobago Constitution included the right *not* to join (or, indeed, to resign from) the Cane Farmers Association, Phillips JA referred to Article 20 of the UDHR of which, he noted, Trinidad and Tobago was a member. Paragraph 1 recognized the right to freedom of peaceful assembly and association and Paragraph 2 provided that “no one may be compelled to belong to an association. The judge opined that clause 2 paragraph 2 “is a necessary concomitant of clause (1) and was inserted *ex abundante cautela*”.<sup>46</sup> Basing himself on Article 20 of the UDHR Rees JA thought that freedom to associate and assemble and the freedom not to associate and assemble were so inextricably bound up together that they ought to be considered as one integral freedom guaranteed by the constitution.

*Bata Shoe Co. (Guyana) Ltd v Commissioner of Inland Revenue*<sup>47</sup> considered and condemned legislation creating retrospective criminal offences as being contrary to the Bill of Rights in the then extant Guyana constitution. Article 10 (4) which prohibited retrospective criminal legislation was said to modeled on Article 11 (2) of the Declaration of Human Rights of the United Nations and also Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Guyanese courts thereby showed that the domestic law reflected recognized rules in international law and therefore added further credence to the domestic provision.

The issue before the Privy Council in *Attorney-General v Antigua Times*<sup>48</sup> was whether artificial persons could claim the protection of the Bills of Rights. In affirming that they could, the Court drew support from the importance that corporate bodies play in the economic life of society. However, the foremost reason for its decision appears to have been the international lineage of the Antiguan bill. The court noted that the protection by the Antigua constitution of fundamental rights and freedoms owed much to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 which was itself largely based on the Universal Declaration of Human Rights 1948. The Court stated:

“The Universal Declaration, as its title suggests, is concerned mainly, if not exclusively, with *human* rights, that is with the rights of individual human beings, but the European Convention appears to apply to artificial persons, at least in some of its articles... With that ancestry it would not be

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<sup>45</sup> (1975) 27 WIR 329.

<sup>46</sup> *Ibid.*, at p. 356.

<sup>47</sup> (1976) 24 WIR 172 at 208.

<sup>48</sup> [1976] AC 16, at 24-24.

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surprising if chapter I of the Constitution of Antigua were to apply as well to natural persons...”<sup>49</sup>

In the unsatisfactory case of *Abbott v The Attorney-General*<sup>50</sup> the applicant argued that Trinidad and Tobago, as an adherent to the Universal Declaration of Human Rights, should have outlawed capital punishment in order to conform to Article 5 of the Declaration which prohibited “cruel, inhuman or degrading treatment or punishment.” The Court puzzlingly, treated the Declaration as a treaty and cited the authority of *A-G for Canada v A-G for Ontario*<sup>51</sup> to hold that legislation would be required to alter existing domestic law. As Margaret DeMerieux points out, however, *Abbott* might have been more wisely argued and judicially considered *not* as to the binding force of the UDHR on the courts of the country but “as to whether, being a body of principles or even aspirations in the area of fundamental rights, it should be seen as being reflected in the State’s Bill of Rights.”<sup>52</sup> In short, the international customary law status of the UDHR should have been considered.

*Minister of Home Affairs v Fisher*

The case of *Minister of Home Affairs v Fisher*<sup>53</sup> represents a high point in the use of international human rights instruments to determine the appropriate judicial attitude towards interpretation of the fundamental rights in the Constitution. The issue before the Privy Council was whether the word “child” in section 11 (5) (d) of the Bermuda Constitution included illegitimate children of a Jamaican mother who had married a Bermudan. The decision was important in relation to preventing the deportation of the children from Bermuda and securing their reinstatement in schools there.

In deciding that illegitimate children were included the Court ignored decisions to the contrary which had emphasized presumptions as to legitimacy arising in a line of statutes dealing property, succession or citizenship. Instead it was emphasized that the Constitution was to be interpreted on broader principles recognizing the protection of the family and rights of the child expressed in the UDHR, Article 8 of the ECHR and ECJ decisions on this article, the Universal Declaration of the Rights of the Child and Article 24 of the International Covenant on Civil and Political Rights. Speaking for the

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<sup>49</sup> Ibid.

<sup>50</sup> (1970-79) Vol. XX Trinidad and Tobago Law Reports (part 1), 200.

<sup>51</sup> [1937] AC 326.

<sup>52</sup> Ibid., at p. 114.

<sup>53</sup> [1979] 3 All ER 21.

Court, Lord Wilberforce offered that these antecedents call for a generous interpretation of the constitution avoiding what has been called “the austerity of tabulated legalism.”<sup>54</sup>

### *Post-Fisher*

Much of the case-law after *Fisher* has been concerned with the impact of human rights decision-making on provisions in the Constitutions dealing with the death penalty. It will be recalled that *Fisher* allowed a place of influence to decisions of the ECJ under the European Convention on Human Rights. Similarly, the decisions of international human rights bodies were accepted as aids in deciding whether the mandatory death sentence was contrary to the constitutional prohibition against inhuman and degrading treatment in the land-mark cases of *Spence v The Queen*<sup>55</sup> and *Hughes v The Queen*.<sup>56</sup> Departing from established assumptions in the case-law, the Eastern Caribbean Court of Appeal (“ECCA”) decided that the imposition of a mandatory death sentence for murder was, indeed, unconstitutional. In coming to this conclusion, the ECCA studied and adopted findings in complaints that had come before the Inter-American Commission and in which the Commission had found the mandatory death penalty to be unlawful because it proscribed individualized sentencing and did not take into account the personal culpability of the accused.

Delivering the landmark leading judgment, Sir Dennis Byron CJ accepted that human rights agreements such as the American Convention could not have the effect of overriding the domestic law or the constitution of the sovereign independent states of the Caribbean. However, the learned Chief Justice also accepted that these agreements, in the absence of clear legislative enactment to the contrary, could be used to interpret domestic provisions, whether in the constitution or statute law, so as to conform to the state’s obligations under international law. Accordingly, he felt able to rely on the jurisprudence developed in the Inter-American Human Rights System to decide the meaning of section 5 of the Constitution of St. Vincent and the Grenadines dealing with inhuman and degrading treatment.

The Chief Justice said:<sup>57</sup>

Over the past two years the Inter-American Human Rights Commission has been considering the meaning of [the provision against inhuman and degrading treatment] and its impact on the mandatory death penalty in relation to cases coming from the Caribbean. The cases that are relevant to this issue have been

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<sup>54</sup> Ibid at p. 25.

<sup>55</sup> (1999) 59 WIR 216 (CA), upheld in [2001] UKPC 35 (PC).

<sup>56</sup> (2002) 60 WIR 156 (CA). The appeal was dismissed in [2002] UKPC 12 (PC).

<sup>57</sup> *Ibid*, at p. 172, para 41 (CA).

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*Downer and Tracy v Jamaica* (2000) (unreported), *Baptiste v Grenada* (2000) (unreported), and *Thompson v St Vincent and the Grenadines* (2000) (unreported). I have studied these judgments and conclude that the principles they espouse are consistent with the provisions of s 5 of the Constitution. The principles that have emerged from these cases may be summarised by saying that the death penalty is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. The imposition or application of the death penalty must be subject to certain procedural requirements. It must be limited to the most serious crimes. Consideration of the character and record of the defendant and the circumstances of the offence which may bar the imposition of the penalty should be taken into account.<sup>58</sup>

In the context of traditional land rights, the Belize Supreme Court decided, in *Cal v Attorney-General of Belize*<sup>59</sup> in favour of Mayan traditional title because of the findings for the Mayas by the Inter-American Commission, and also because of Belizean obligations to indigenous peoples under the OAS Charter. According to Chief Justice Conteh the Inter-American norms “resonated with certain provisions of the Belize Constitution.”<sup>60</sup> There is expectation that Inter-American Human Rights standards expounded in *Gleaner Co Ltd v Abrahams*<sup>61</sup> are also influential in constitutional disputes concerned with whether the award of enormous sums in defamation suits could unreasonably stifle the fundamental right of freedom of expression.

### ***Treaty creation of domestic rights***

A different and more difficult situation arises when international human rights treaties are not being adduced to interpret and inspire provisions in the Bill of Rights but rather to create rights that were never contemplated by the Constitution. Such attempts are most easily identified where the applicant alleges rights to petition international human rights bodies. These rights are often enshrined in conventions adopted by the State after independence and which have not been incorporated into

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<sup>58</sup> The approach taken by the ECCA in *Spence* and *Hughes* was expressly approved by the Privy Council which, referred with approval to developments in the Inter-American Human Rights System.

<sup>59</sup> (2007) 71 WIR 110.

<sup>60</sup> *Ibid.* at p. 150, para 118.

<sup>61</sup> (2003) 63 WIR 197, at p. 219, para 64; *See also* IACHR Report No. 23/08, Case 12.468, Dudley Stokes (Jamaica) March 14, 2008.

domestic law. The domestic court is being asked to engraft international law rights on domestic legal instruments without the benefit of parliamentary intervention.

Not surprisingly, the earliest decisions denied that the applicant had any such right and concomitantly that the State needed to await the report of international human rights tribunals before imposing the penalty decreed by the domestic court. Two Bahamian cases illustrated this approach. In the 1998 case of *Fisher v Minister of Public Safety and Immigration (No 2)*<sup>62</sup> the Privy Council (by majority of 3 to 2) denied that the carrying out of the death sentence while a petition was pending before the Inter-American Committee on Human Rights meant that the sentence became inhuman or degrading treatment. This decision was affirmed the following year by a similar majority in *Higgs and Mitchell v Minister of National Security*<sup>63</sup> when the Privy Council restated the traditional law governing the application of international law in domestic court, relying upon the venerable *Parlement Belge* for the proposition that an unincorporated treaty could not change the law of the land.

These decisions were reversed within a year, by a 3-2 majority by differently constituted Privy Council. The reasoning of the majority in *Thomas v Baptiste*<sup>64</sup> which was applied by the majority in *Lewis v Attorney-General of Jamaica*<sup>65</sup> was that rights conferred on individuals by ratification of American Convention on Human Rights became a part of the domestic criminal justice system respectively of Trinidad and Tobago (under the “due process of law” clause in section 4 (a) of its Constitution) and of Jamaica (under the protection of law clause in section 13 of its Constitution). These terms in the constitution were a compendious expression invoking the concept of the rule of law and universally accepted standards of justice accepted by civilized nations and were as applicable to appellate processes as to trial proceedings. Accordingly these constitutional provisions entitled a condemned man to be allowed to complete any appellate or analogous legal process that was capable of reducing his sentence before the sentence was carried out by executive action.<sup>66</sup>

A Minority of 2 entered a vigorous dissent in *Thomas*. Lords Goff and Hobhouse, starting from the premise that the due process clause was part of Constitution and therefore of municipal law, affirmed that the Executive lacked the competence to make

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<sup>62</sup> (1998) 53 WIR 27 at 35.

<sup>63</sup> (1999) 55 WIR 10.

<sup>64</sup> (1999) 54 WIR 387.

<sup>65</sup> (1999) 57 WIR 275.

<sup>66</sup> The majority appears to have taken an interpretative approach but the logic of this is difficult to accept where the effect is clearly to create a right that does not exist in the constitution and was never contemplated by the Constitution. This point is brought home by the fact that in several instances CARICOM countries joined the international conventions decades *after* adoption of their constitutions.

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or change that law by virtue of its power to enter into international human rights treaties. It followed that the terms of these treaties were not capable of conferring upon the appellants any rights which domestic courts of the Republic were obliged or at liberty to enforce at the suit of the appellants.<sup>67</sup> For similar reasons unincorporated treaties that declared certain conduct to be criminal wherever committed could not form the basis of criminal prosecutions in the State; such prosecutions would be a clear breach of constitutional rights.<sup>68</sup>

Lord Hoffman similarly dissented in *Lewis*. He first noted that there was an obligation on members of the Board to discharge their duty as enforcers of the laws and constitutions of the countries from which the appeals emanate without regard to their personal opinion on the death penalty. He then pointed out that the majority had found in the ancient concept of ‘due process of law’ a philosopher’s stone, undetected by generations of judges, which could convert the base metal of executive action into the fold of legislative power, adding that they did not, however, explain how the trick is done without violation of dualist foundation of the legal system.<sup>69</sup>

“...the majority have 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. It does not, however explain how the trick is done. *Fisher* and *Higgs* are overruled, but the arguments [in those cases] are brushed aside rather than confronted...

If the Board feels able to depart from a previous decision simply because its members on a given occasion have a ‘doctrinal disposition to come out differently’, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.”

*CCJ in Boyce and Joseph v Attorney-General of Barbados*

The most authoritative decision on the use of unincorporated human rights treaties to create new rights in domestic law is now the CCJ decision in *Joseph and Boyce v Attorney-General of Barbados*.<sup>70</sup> In this case, the Court upheld the treaty right of the applicants to have their petition to the Inter-American Human Rights System heard before their death sentence could be carried out but rejected the reasoning of the Privy Council in *Thomas* and *Lewis* as infringing the rules of dualism and vulnerable to the

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<sup>67</sup> (1999) 54 WIR 387 at p. 431.

<sup>68</sup> *Ibid.* at p. 433.

<sup>69</sup> *Lewis v Attorney-General* (1999) 57 WIR 275 at 307.

<sup>70</sup> [2006] CCJ 3 (AJ).

criticism leveled against them by Lords Hoffman, Goff and Hobhouse. Delivering the leading judgment, President de la Bastide and Justice Saunders said<sup>71</sup>:

“Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty.”

Instead, following a wide-ranging review of the authorities and placing significant reliance on the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh*,<sup>72</sup> the CCJ found that these protections were justified on the basis that the treaty-compliant behavior of the Government of Barbados had given rise to an infeasible legitimate expectation of the condemned men that they would not be executed until a reasonable time has been allowed for the Inter-American Human Rights system to run its course and the results thereof considered by the Barbados Mercy Committee under s 78 of the Barbados Constitution. Such an expectation was in keeping with the increasing grant by treaties to individuals of “rights” and the corresponding promotion of universal standards of human rights.

The *Joseph and Boyce* decision was a seminal development in Caribbean law in that it seemingly placed the human rights adjudication on a clear and firm footing. On the other hand, the decision also raised fundamental questions. In *Thomas v Baptiste* the Privy Council had cited also *Teoh* in emphasizing that legitimate expectation was incapable of creating binding rules of substantive law, the about the only point on which the five Law Lords agreed.<sup>73</sup> In their view to employ legitimate expectation to create substantive protections “would be tantamount to the indirect enforcement of the treaty.”<sup>74</sup>

The CCJ in *Joseph and Boyce* was careful to limit the application of legitimate expectation to the issue of the death penalty and the specific acts of the Government of Barbados. Whether the doctrine applies to other human rights issues or in contexts of other type conduct was not decided. However the emphasis placed on Government treaty-compliant behavior suggests that conduct to the contrary would defeat such an expectation; a circumstance that would naturally limit the utility of the decision.

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<sup>71</sup> Ibid., at para. 76.

<sup>72</sup> (1995) 183 CLR 273.

<sup>73</sup> See also Lord Hoffman in *Lewis v Attorney-General* (1999) 57 WIR 275 at p. 307.

<sup>74</sup> *Thomas v Baptiste* (1999) 54 WIR 387 at p. 425.

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‘Adoptionist’ approach

Another approach to the creation of rights by unincorporated treaties was adopted by Justice Wit in *Joseph and Boyce* who disagreed with the majority for basing their decision on “legitimate expectation” primarily because, “The weakness of this construction is of course that it is highly artificial and that it might easily be made ineffective by the Executive.”<sup>75</sup> Justice Wit advocated a departure from the traditional dualistic thinking on the subject so as to recognize that treaties adopted by the State could confer rights on individuals. Relying upon certain ambiguous provisions in the Constitution for the notion that “law” as used in the Constitution did not exclude international law<sup>76</sup> the Justice who hails from a monist tradition, found authority for suggesting the Legislature was not the sole creator of law, albeit it was the most important and had competence to curtail the law-making activity of the other branches.<sup>77</sup> For him adoption of treaties by the Executive gave rise to domestic rights in the individual *per se* subject to any contrary provisions in constitution or legislation.

This seemingly radical approach may yet win broad judicial acceptance. The notion of customary international law being applicable as common law has been accepted for centuries as was illustrated in *Trendtex*. Generally speaking, it is the habitual practice and *opinio juris* of the Executive that participates in the making of international customs. Treaties accepted by the Executive may generate rules of customary law.<sup>78</sup> And *Thomas v Baptiste*<sup>79</sup> recognized that domestic law could be made by the Executive albeit under delegated powers.

It is therefore clear that the law is evolving in this area and awaits a further definitive ruling by the CCJ. As much was foreshadowed in the comment of Justice Hayden in *Joseph and Boyce* when he said:

“[N]o argument was heard on the possibility of ... a broad principle that rights conferred by international human rights treaties are part of domestic law, irrespective of any alleged “mediation” provided by “due process” or “protection

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<sup>75</sup> [2006] CCJ 3 (AJ) at para. 33.

<sup>76</sup> [2006] CCJ 3 (AJ) at para. 40, citing section 117 of the Barbados constitution which defines law to **include** (and therefore not necessarily limited to): (1) any instrument having the force of law and (2) any unwritten Law.

<sup>77</sup> [2006] CCJ 3 (AJ) at para. 42.

<sup>78</sup> *North Sea Continental Shelf Cases* I.C.J. Rep. 1969, p. 3.

<sup>79</sup> *Thomas v Baptiste* (1999) 54 WIR 387 at p. 431.

of the law” clauses in Constitutions. It may be that the law will so develop but, before coming to any far-reaching conclusions, I consider that full detailed *inter partes* argument on these specific points is required.”<sup>80</sup>

### ***Treaty Rights In Conflict with the Constitution***

The most difficult context for determining the appropriate judicial attitude to human rights treaties is where the treaty rights are considered to conflict with provisions in the Constitution. Adherence to the doctrine of constitutional supremacy would dictate that the constitutional provisions must prevail but this runs counter to certain decisions of the Inter-American Court on Human Rights (“IACHR”).

#### *Boyce and Joseph*

Following the CCJ decision in *Boyce and Joseph* which confirmed the commutation of their death sentences, the applicants nonetheless pursued further litigation in the IACHR regarding, among other things, the legality of the mandatory death sentence that had been imposed upon them. The IACHR had little difficulty in finding the mandatory death penalty in Barbados was inconsistent with the ratified but unincorporated American Human Rights Convention. Adopting the decision in *Hilaire v Trinidad and Tobago*<sup>81</sup> the Court reasoned<sup>82</sup> that Article 4 (2) of the American Convention allowed for the deprivation of the right to life by the imposition of the death penalty in those countries that have not abolished the death sentence but that it also established strict limitations. First, the death penalty must be limited to the most serious crimes; second, the sentence must be individualized in accordance with the characteristics of the crime as well as the degree of culpability of the accused; and third, the procedural guarantees had to be strictly observed. Obviously, the mandatory death penalty fell well short of these benchmark requirements.

For present purposes, the critical finding was that section 2 of the Offences Against the Person Act (“OAPA”) (which imposed the mandatory death penalty) and section 26 of the Constitution (the “savings clause” which “saved” the Act from being deemed “unconstitutional”) were themselves incompatible with the American Convention. In coming to this conclusion the Court referred<sup>83</sup> to Article 2 of the American Convention

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<sup>80</sup> [2006] CCJ 3 (AJ) at para. 2 of the judgment by Justice Hayton.

<sup>81</sup> *Case of Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, IACHR, June 21, 2002. Series C No. 94.

<sup>82</sup> *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 50.

<sup>83</sup> *Ibid*, at para. 80.

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under which State Parties undertook to adopt “in accordance with their constitutional processes ... such legislative or other measures as may be necessary to give effect to [the] rights or freedoms” enshrined in the Convention. This obligation required adoption “of all measures so that the provisions of the Convention are effectively fulfilled in [the] domestic legal system.”<sup>84</sup> Barbados was ordered<sup>85</sup> to adopt such legislative or other measures as necessary to ensure that its Constitution and laws were brought into compliance with the American Convention including, specifically, the removal of the immunizing effect of saving law clause in section 26 of the Constitution.

*Cadogan v Barbados*

Similar decisions and orders were made in the subsequent case of *Cadogan v Barbados* in which the High Court of Barbados had found the applicant guilty of murder and sentenced him to the mandatory death penalty, under section 2 of the OAPA. His appeal against conviction and sentence were dismissed by the Court of Appeal<sup>86</sup> in what the CCJ described as a “well-researched”<sup>87</sup> and “correct”<sup>88</sup> judgment and an application for special leave to appeal from this decision to the CCJ was dismissed by the CCJ. The applicant next petitioned the Inter-American Commission which filed the matter with the IACHR and that Court then considered whether Barbados had violated the applicant’s right to a fair trial recognized under Article 8 of the American Convention in light of the fact that no detailed evaluation of his mental health had been made during his criminal trial.

In order to properly consider this allegation, the IACHR conducted an examination of the judicial proceedings which had taken place in the courts of Barbados. In doing so, the Inter-American Court made clear that it was not seeking to *review* the judgments of the domestic courts or of the CCJ. However, it was concerned with *whether the state had violated precepts* in the American Convention relating to a fair trial. As the courts were an arm of the state, it followed that in deciding whether the fair trial obligation

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<sup>84</sup> Further, this obligation meant that states “must also refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them”: *ibid*, at para 69, the Court citing the case of *Olmedo-Bustos et al v Chile (“The Last Temptation of Christ”)* IACHR, February 5, 2001. Series C No. 73, at para. 87.

<sup>85</sup> *Ibid*, at para. 138.

<sup>86</sup> *Cadogan v R (No. 1)* (2006) 69 WIR 82.

<sup>87</sup> *Cadogan v R (No. 2)* (2006) 69 WIR 249, at para 4.

<sup>88</sup> *Ibid*.

had been violated that it *was* necessary to examine the respective domestic judicial proceedings to establish their compatibility with the American Convention.<sup>89</sup>

In deciding that Barbados had, in fact, breached Mr. Cadogan’s right under Article 8 of the American Convention, the Court found<sup>90</sup> that “the State failed to order that a psychiatric evaluation be carried out in order to determine, *inter alia*, the existence of a possible alcohol dependency or other ‘personality disorders’ that could have affected Mr. Cadogan at the time of the offense, and it also failed to ensure that Mr. Cadogan and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial.”<sup>91</sup> In its orders,<sup>92</sup> the IACHR repeated that Barbados “shall adopt within a reasonable time” legislative amendment of section 2 of the OAPA and abolition of section 26 of the Constitution.<sup>93</sup>

Perhaps, even more critical than its substantive findings were the observations of the IACHR with regard to the role of Caribbean courts in the enforcement of the American Human Rights Convention. In *Boyce and Joseph* the IACHR chided<sup>94</sup> the Privy Council for finding that the Barbados Act was protected by the savings law clause in the Constitution. The Inter-American Court considered that the Privy Council had conducted too narrow an examination of the validity of Act and the savings law clause. The question was not merely whether the Act was “constitutional” but rather whether it was “conventional,” i.e., whether it was consistent with the American Human Rights Convention.

### *Juridical difficulties*

There are clearly deep-seated difficulties in the view taken by the IACHR. There is no easily identifiable juridical basis upon which the CCJ as the highest domestic court could properly undertake the task assigned by the IACHR; even the weak monist

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<sup>89</sup> *Da Costa Cadogan v Barbados*, IACHR, September 24, 2009. Series C No. 204, at para. 24.

<sup>90</sup> *Ibid*, at para. 90.

<sup>91</sup> *Ibid*, at para. 88.

<sup>92</sup> *Ibid*, at para. 128.

<sup>93</sup> *Ibid*: “the legislative or other measures necessary to ensure that the Constitution and laws of Barbados, particularly section 2 of the Offences against the Person Act and section 26 of the Constitution, are brought into compliance with the American Convention.” Another order required Barbados to “ensure that all persons accused of a crime whose sanction is the mandatory death penalty will be duly informed, at the initiation of the criminal proceedings against them, of their right to obtain a psychiatric evaluation carried out by a state employed psychiatrist.” These prescriptions have now been accepted by Barbados in a consent order in proceedings before the CCJ in *Grazette v The Queen* [2009] CCJ 2 (AJ); CCJ Appeal No. CR 1 of 2009, 4<sup>th</sup> May, 2009 (Consent Order).

<sup>94</sup> *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 78.

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approach of Justice Wit in *Boyce and Joseph* falls far short on providing the requisite a foundation since he acknowledged that rules in the “adopted” convention were subservient to legislation and the Constitution. On one hand the decisions of the IACHR decisions are consistent with the role of that Court as an international tribunal which must of necessity apply international law to the disputes before it; and they are also consistent with accepted international law notions that domestic courts form part of the State and therefore that any failure by these courts to apply the treaty amounts to breach by State. There are already some indications of this in *Cadogan* where the IACHR reviewed the trial procedures in coming to the view that the applicant’s treaty rights had been breached even though no such violation had been found by the High Court, Court of Appeal, or the CCJ.

It is fair to say that the IACHR decisions goes considerably beyond the radical concepts of “legitimate expectation” of the majority and the “weak monism” of Justice wit in *Boyce and Joseph* and so are likely to cause significant shock to the legal system of Westminster model governments.

The IACHR admonitions concerning the primacy of the American convention also raise fundamental questions concerning the constitution in human rights adjudication. Generations of Caribbean law students, attorneys, and judges have been weaned on the trite legal principle that the domestic courts are the guardians of the supremacy of the constitution and must declare that any other law shall, to the extent of the inconsistency, be void.<sup>95</sup> The most famous instance of this assertion is to be found in the case of *Collimore v Attorney-General of Trinidad and Tobago*,<sup>96</sup> where Wooding CJ reiterated that Caribbean courts were the guardians of the constitution and of constitutional supremacy.

As the ultimate interpreters of the Constitution and of the rights and freedoms that it enshrines, Caribbean courts have found and punished violations of the constitution by the executive,<sup>97</sup> by the legislature,<sup>98</sup> and by the courts themselves.<sup>99</sup> In this way, the courts have not only reinforced their role as guardians of the constitution; they have

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<sup>95</sup> See e.g., section 1, Constitution of Barbados, 1967.

<sup>96</sup> (1967) 12 WIR 5, at p. 9.

<sup>97</sup> See *Hochoy v NUGE* (1964) 7 WIR 174; *Hinds v R* (1975) 24 WIR 326; and *C.O. Williams Construction Ltd. v Blackman* (1994) 45 WIR 94.

<sup>98</sup> *Hinds v R* (1975) 24 WIR 326; *Independent Jamaica Council for Human Rights (1998) Ltd. v Marshall- Burnett* (2005) 65 WIR 268.

<sup>99</sup> *Maharaj v Attorney-General of Trinidad and Tobago (No. 1)* [1977] 1 All ER 411.

also emphasized the status of the Constitution, to use Kelsenian terms, as the “grundnorm” of the domestic legal order.<sup>100</sup>

A further consideration relates to the judicial authority of the respective courts in human rights adjudication. The decisions by the IACHR in the *Joseph and Boyce* and in *Cadagon* sit uncomfortably with the traditionally understood role of Caribbean courts as the final arbiters of the jurisdiction conferred by Caribbean law upon international tribunals. In *Briggs v Baptiste*<sup>101</sup> the Privy Council reaffirmed the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. Where the American Convention had not been incorporated, the recommendations of the Inter-American Commission and the orders of the Inter-American Court could not be directly applicable. Where, however, orders of the IAS *do* become directly enforceable, whether by virtue of the doctrine of “legitimate expectation” or by virtue of legislative incorporation, the Privy Council’s position was that it was for the *national* courts to consider whether such orders were made within the limits of the jurisdiction conferred on the Inter-American Court by the American Convention. This is because, in the words of their Lordships:

“The interpretation of the Constitution is a matter for the national courts, and its scope and effect in domestic law cannot be enlarged by orders of an international court made outside the terms of the Convention to which the Government ... assented. In determining such questions their lordships would expect the national courts to give great weight to the jurisprudence of the Inter-American Court, but they would be abdicating their duty if they were to adopt an interpretation of the Convention which they considered to be untenable.”<sup>102</sup>

This statement by the Privy Council of the role of national courts which is consistent, it will be remembered with the traditional understanding of Caribbean courts as guardians of the constitution, but stands in stark contrast with the equally clear statement by the Inter-American Court of the role of those courts. The IACHR decision in *Boyce and Joseph* and *Cadagon* requiring the deletion of section 26 of the Barbados Constitution could provide fertile grounds for conflict on this point given the possible argument that this ruling was far broader than was necessary to remedy the mischief

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<sup>100</sup> *Mitchell v DPP* [1986] LRC 35.

<sup>101</sup> (1999) 55 WIR 460.

<sup>102</sup> *Briggs v Baptiste* (1999) 55 WIR 460 at p. 472.

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of the saving of the mandatory death penalty.<sup>103</sup> Further rationalization of the respective judicial roles seems clearly required.

#### CONCLUDING REMARKS

The CCJ original jurisdiction is of limited relevance to human rights litigation at the present time but in its appellate jurisdiction the Court has the opportunity to engage in human rights adjudication. There are clear indications that CCJ interpretation of rights enshrined in the Bill of Rights will be open to influence by international conventions on human rights, as well as judicial decisions taken under those conventions. In some instances the Constitution mandates Caribbean courts to take into account to consider relevant international human rights norms. For example, Article 39 (2) of the 2003 Amendment to the Guyana Constitution provides that in the interpretation of the fundamental rights provisions in this Constitution a court “shall pay due regard” to international law, international conventions, covenants and charters bearing on human rights.

Difficult questions arise where the rights adopted in the conventions conflict, or appear to conflict, with those provided in the Constitution of the country from which the appeal arises. Adherence to the doctrine of constitutional supremacy would seem to require that the constitutional provisions trump the convention, and this is strengthened by consideration of the legislative deficit that exists in Caribbean treaty-making.<sup>104</sup> With this must be contrasted the judicial instinct not merely to do everything possible to ensure that the State does not act in breach of its international treaty obligations but also to enlarged the rights of the individual at every possible opportunity.

The CCJ has not yet had the opportunity to explicate its philosophy in human rights litigation involving conflicts, or apparent conflicts, between the Bill of Rights and conventions ratified or otherwise accepted by the State. Indeed, even where a human rights convention has been legislated into domestic law by an Act of Parliament, the matter is not necessarily resolved given the inferior status of legislation to the

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<sup>103</sup> An order to amend section 26 so as to remove the “saving” of the mandatory death penalty would seem to have been sufficient to remedy the mischief found by the IACHR.

<sup>104</sup> Winston Anderson, “Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation” (1998) Vol. 8 No. 1 *Caribbean Law Review* 75-115.

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Constitution. Little guidance will be available from the U.S. Supreme Court and the Supreme Court of Canada, given that these countries have not accepted the Inter-American Convention on Human Rights or the jurisdiction of the Inter-American Court of Human Rights. In these circumstances the CCJ is likely to have place disproportionate resort to the views and recommendations of academics such as those here at FSU in better defining its role in human rights litigation.

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