



The University of the West Indies
FACULTY OF LAW
CAVE HILL CAMPUS

STUDENT LAW REVIEW

Volume 27 • April-May 2017



Chancery Chambers
congratulates the Editorial Team
and Law Society Executive
on your recent publication of the
UWI Cave Hill *Student Law Review*.

CHANCERY

CHAMBERS
— ATTORNEYS AT LAW —

Chancery House, High Street, Bridgetown, BB1128, Barbados, W. I.

Tel: (246) 431-0070 • Fax: (246) 431-0076

Email: chancery@chancerychambers.com

Web: www.chancerychambers.com

CHANCERY HOUSE

STUDENT LAW Volume 27 • April-May 2017 REVIEW

The University of the West Indies

**FACULTY OF LAW
CAVE HILL CAMPUS
BARBADOS**

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*The 27th edition of the **Student Law Review** is dedicated to Wendy Wallace, our colleague and friend in the Faculty of Law who experienced a terrible accident. You are missed by us all. We wish you a speedy recovery and that you will be back on your feet much quicker to join us*

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Dr. David S. Berry
 Dean of Law
 UWI Cave Hill Campus

Foreword

by Dr. David S. Berry

The UWI LL.B. programme, pioneered by the Faculty of Law, Cave Hill Campus in 1970, laid the foundation for legal education in the Caribbean. We continue this fine academic tradition today both through our highly qualified academic staff, including some of the Caribbean's most eminent scholars, and our excellent and diverse student body. Amongst our students we find persons hailing from almost every state and territory in the Caribbean. These students perform well under our rigorous system of multiple assessments, and yet also miraculously find the time to engage in a number of extra-curricular activities. The present *Student Law Review* is an example of our students' continued quest for excellence.

The *Student Law Review* serves a number of valuable roles in the student experience. It provides an academic platform for dissemination of ideas, and encourages students to push their own writing and academic development to ever more advanced stages. Although there have been some gaps in the publication, the 2016-2017 Law Society Publications Committee has worked very hard to ensure that this year's edition maintains past standards of excellence.

Since 1973, the Faculty of Law Library's collection has steadily grown. It is the foremost legal resource in the Commonwealth Caribbean and employs some of the best technology in our region. It is with great pleasure that I can also announce that parallel to the paper launch of this 27th edition of the *Student Law Review*, we will be launching an electronic version, which will be accessible via the UWI Law Library website. This publication joins other legal scholarly, peer-

reviewed journals and academic resources, such as the *Caribbean Law Review*, the *West Indian Law Journal*, *Harvard Law Review* and many others.

I anticipate that the *Student Law Review* will continue to grow in strength. I hope that its articles will continue to reflect the rich history of our Faculty and give voice to diverse opinions emanating from our regionally-representative student body.



Michelle Gibson
BA, MA; Dip Ed
Publications Chairperson
2nd Year Student

Editor's Note

by Michelle Gibson

Producing a *Student Law Review*, or any publication for that matter, is a long process of covering minor details. Even though it has been a challenge to resume production and activate students' editorial submissions, the task was facilitated by a sedulous Editorial Board. This coupled with assistance from the Law Society Executive, and support of our Dean Dr. Berry, the 27th edition has finally been realised.

The 27th edition of the *Student Law Review* is an attractive one with an improved layout. The design was in fact one of the considerations taken into account when producing it this year – the last being in 2009. It was thought that a strong visual appeal could persuade students to revisit the *Student Law Review* and appreciate it as another source of information made accessible to them in the law library (and online).

We hope that you the students enjoy these articles and use all editions of the *Review* to your advantage.

Some of the *Review's* contributors would have graduated before its publishing date. Nonetheless, we remain appreciative of their choice to publish their work and inspire other students to engage in academic discourse as they pursue the LLB.

To the future Publication Committees, we wish you every success in keeping the *Review* alive while upholding its excellence in scholarship.

We especially thank Dr. Corlita Babb-Schaeffer who was instrumental throughout the entire process. Additionally, Major Browne for his work

in formulating the library's online platform and *Student Law Review* database; Michael Grant for designing the publication; and Jeff Cumberbatch for his submission on Liability of Prisons.



Matthew Walker
3rd Year Student

The University Visitor: An Anachronistic Absurdity?

by Matthew Walker

The quote by Morrison JA in the case of *Foote v University of Technology*¹, in that ‘the UWI took a preliminary point that the court had no jurisdiction to hear the application, because its charter provided for a visitor to whom the claimant ought to have applied for relief’, was gleaned from the case of *Myrie v The University of the West Indies*². In other words, the position of the University of the West Indies in that case was that the court was ousted of its role to hear the matter due to the imposition of the ‘visitor’, whom served as the final arbiter of internal matters concerning the institution. This statement calls for a critical examination of the ambit of judicial review and whether the courts can be duly ousted of jurisdiction as it pertains to university matters where there are provisions for a ‘visitor’. This analytical research paper will endeavour to fully critique this statement as well as to critically examine the approach of the court in dealing with this issue of its jurisdiction in such instances. A greater understanding of the position of the courts of the Commonwealth Caribbean will be gleaned through the in-depth analysis of the treatment of this issue as it arose in several cases relating to universities in the region. It is further endeavoured to assess the contemporary relevancy of the jurisdiction of the visitor, in hopes of asserting a position on whether it should be retained. It is therefore the assertion of this paper that whilst there is value in the office of the visitor, the courts should relax its approach as to the exclusivity of the visitor’s jurisdiction in certain circumstances.

¹ [2015] JMCA App 27

² JM 2009 SC 5

In order to glean a conceptual understanding of the issue at hand, it is imperative to define key terms and concepts pertinent to the discourse. Firstly, what is judicial review? Professor Eddy Ventose³ defines judicial review proceedings in the context of administrative law as ‘proceedings [which] are brought against bodies which exercise public law functions.’ He further expounds that ‘they need not form part of the government, or be a ‘public authority’ as traditionally understood. Subsequently, there must exist a breach of a common law right of the individual in order for a body to be held liable in a judicial review action. The nomenclature of *locus standi* refers to standing as it pertains to an action for judicial review. However Ventose notes that ‘although the applicant may have *locus standi*, the court may, nonetheless, decide that the matter does not fall within the purview of the courts.’⁴ This notion is known as exclusion of jurisdiction. There are various factors which may impair the courts ability to adjudicate on certain issues, such as the existence of an ouster clause or also in instances where the court may exercise its discretion in electing not to allow judicial review to proceed in a wide array of cases.

One such instance in which the courts have withdrawn from hearing matters is where there are provisions for a ‘visitor’. This office has its geneses in the law pertaining to corporations. It finds applicability as it regards eleemosynary corporation. According to Tudor⁵, ‘eleemosynary corporations are those established for the perpetual distribution of the free alms or bounty of the founder to such persons as he is directed.’ In layman’s terms, it is a corporation created for the continuous dissemination of charity. The existence of the office of the visitor is rationalized by the principle which connotes that the individual who is the founder of such a corporation is permitted to establish the body of law by which his charitable endeavour is discharged. Subsequently, he is further entitled to appoint a person to act as sole arbiter of the internal laws and regulations of the corporation. This arbitrator is known as the visitor. As it pertains to the jurisdiction of the visitor, Brooks J⁶ in the Halsbury’s Laws of England identifies the scope of the jurisdictional reach of the office of the visitor in that:

³ *Commonwealth Caribbean Administrative Law* (Routledge 2013) 1

⁴ *Ibid.* at p 87

⁵ Jean Warburton and Debra Morris, *Tudor on Charities* (8th edn, Thomson Professional Publications 1995) 371

⁶ Quintin Hogg, *Halsbury’s Laws of England* (4th edn, Reissue Volume 15(1), Butterworth 1990) para. 495

'... the visitor has untrammelled power to investigate and right wrongs done in the administration of the internal laws of the foundation. A dispute as to the correct interpretation and fair administration of the domestic laws of the university, its statutes and its ordinances falls within the jurisdiction of the visitor, subject to the supervisory jurisdiction of the High Court, and therefore the court usually lacks jurisdiction in the first instance to intervene. However a decision of the university visitor may be amenable to judicial review.'

In essence, the visitor is charged with the ostensibly unfettered undertaking of adjudicating on all matters pertaining to internal issues which may arise in the interpretation and application of the internal statutes and ordinances of the eleemosynary corporation, which may also be an educational institution. However, it is to be noted that this capacity of the visitor is still subject to the supervision of the High Court. Therefore, this has the effect of essentially *prima facie* depriving the court of its jurisdiction to interfere. However, it is conclusive that a verdict pronounced by the visitor may very well be amenable to the ambit of judicial review. However, it appears that the jurisdiction of the visitor may very well be 'exclusive' as in *de facto* the courts have elected time and time again not to intervene in the decisions of the visitor or to trample on the notion of the sanctity of his domain. One of the primary reasoning for this approach was enunciated by Megarry VC in the case of *Patel v University of Bradford Senate*⁷ where it was expounded upon as to why university students should not be allowed to access the courts as it pertains to university matters. He retorted that the office of the visitor represented an adequate domestic tribunal to adjudicate the issue 'informally, privately, cheaply and speedily' and render a decision that is final and will not be tampered with by the courts.

Now that a conceptual understanding of the subject matter at hand has been gleaned, it is subsequently imperative to discuss key cases emanating from the Commonwealth Caribbean on this issue of the jurisdiction of the visitor and the bases of their ratio. Firstly, the case of *Foote v University of Technology (Jamaica)*⁸ provides the most recent adjudication upon this issue. The critical facts of the case were such that the applicant was delisted from the roll of students at the university with the subsequent effect of not being allowed to sit the final exams for the semester. This was due to technicalities as to the payment of tuition fees

⁷ [1978] 3 All ER 841, p 851-852

⁸ [2015] JMCA App 27

in accordance with the university's payment plan options. The university argued that the applicant's failure to pay 80% of tuition by a certain date, in accordance with its stipulations, equated to the incompleteness of the enrolment process and the applicant was therefore not a student properly enrolled at the institution. A major legal issue was the jurisdiction of the visitor. The court referenced *Thomas v University of Bradford*⁹ as the modern authority on this point, which enunciated that as the jurisdiction of the visitor is substantiated upon his position as sole judge of the domestic laws of the university, his jurisdiction is exclusive and not concurrent with the court's jurisdiction. It was further posited that the scope of the jurisdiction encompassed the interpretation and enforcement of the domestic laws as well as the internal powers and discretions derived there from¹⁰. Thus Lord Griffiths¹¹ found no qualm in declaring that 'the exclusivity of the jurisdiction of the visitor is in English law beyond doubt and established by an unbroken line of authority'. In assessing the jurisdiction of the visitor it is imperative to look at the source of the power. In the instant case, the university was established by section 3 (1) of the University of Technology, Jamaica Act¹², and its charter was set out in the first schedule of the Act. Article 11(2) of the charter¹³ vested the council with 'general control over the conduct of the affairs of the University'. Section 5¹⁴ further provided that the Governor General shall be 'the visitor' who can hear 'matters referred to him by council'. To the layman, due to the statutory underpinning of the creation of this institution, one may be led to believe that the decisions of such a body ipso facto fall under the jurisdiction of the courts. However, as Wade and Forsyth¹⁵ rightly notes, 'the mere fact that the university is established by statute does not necessarily make its powers statutory'. The nature of the power is also to be assessed as the visitor's powers concern the interpretation and administration of the internal regulations, therefore not a public function. To this end, Wade and Forsyth adds that 'a visitor is subject to quashing and prohibiting orders if he had no power to adjudicate or if he abused his power or violated the rules of natural justice'¹⁶. In any event, it is established that the courts would be quite hesitant to enter

⁹ [1987] 1 All ER 834

¹⁰ *Ibid.*

¹¹ *Ibid.*, pg. 839

¹² The University of Technology, Jamaica Act 1995 s 3 (1)

¹³ *Ibid.*, Art. 11(2)

¹⁴ *Ibid.*, s 5

¹⁵ *Administrative Law* (11th edn, Oxford University Press 2014)

¹⁶ *Ibid.*

into 'issues of academic or pastoral judgment which the university was equipped to consider in breadth and in depth but on which any judgment of the court would be jejune and inappropriate¹⁷.' In submission, counsel for the appellant relied on authorities which suggested that the jurisdiction of the visitor was not exclusive. However, the cases of *Pearce et al v University of Aston in Birmingham and another*¹⁸ and *Clark v University of Lincolnshire and Humberside*¹⁹ are distinguishable as the cases turned on the imposition of new statutory provisions in the Education Reform Act²⁰ and on the fact that there was no provision for a visitor respectively. Therefore these authorities effected no change in the position of the common law as to this matter.

In the case of *Myrie v The University of the West Indies*²¹ the issue arose as to whether the jurisdiction given to the visitor in the UWI's charter could oust the jurisdiction of the court. The critical facts of the case were that a medical doctor studying in the graduate programme at the university was denied entrance to sit an examination for which he was deemed ineligible. The jurisdiction of the visitor was provided for by Clause 6 within both Royal Charters²² which established the full university status of the institution as a legal corporate entity. Retorting on the jurisdiction of the visitor, the court reaffirmed the pronouncement of Lord Browne-Wilkinson in *Regina v Lord President of the Privy Council ex parte Page*²³ in that *Thomas v University of Bradford* does not decide that the visitor's jurisdiction excludes the supervisory jurisdiction of the courts by way of judicial review. Rather, Thomas case is instructive on whether the visitor and the courts have concurrent jurisdictions over university disputes. Therefore, it was subsequently asserted that in that context alone it was decided that the visitor's jurisdiction is 'exclusive'. A subsequent issue that arose in *Myrie* was that whilst there were expressed provisions for the existence of a visitor in the charter, there existed an absence of provisions which clearly demarcated the scope of the duties and authority of the visitor's jurisdiction. Counsel for the appellant rejected the ideology of the UWI's preliminary point that the scope of the jurisdiction of the visitor was to be gleaned from the common law. He did not believe that the role of

¹⁷ *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (Sedley LJ.)

¹⁸ [1991] 2 All ER 461.

¹⁹ *Ibid* at 17.

²⁰ Education Reform Act (UK) 1988

²¹ *Ibid* at 2

²² The Royal Charter establishing the University of the West Indies 1972

²³ [1933] AC 682 as per lord Browne- Wilkinson 695G- 696B

visitors within other jurisdictions and universities should be transposed to the Commonwealth Caribbean context. He added that it was the express intention of the framers of the charter and the founders of the UWI to deliberately draft the charter in such a manner which restricted the visitor's jurisdiction to inspect, rather than to enquire into and resolves disputes. Essentially, he wished that the charter be construed narrowly in adherence to the indisputable language of the charter. However, the question then is where else to look but to the common law? This, in essence, was the retort of the court in quoting *Clark*²⁴ as authority for the notion the role and authority of the visitor resides squarely in the domain of the common law. Counsel for the applicant further criticized the lack of local cases in support of the UWI's preliminary objection. To this contention, *Clark* proved once again instructive to the issue as per Sedley LJ²⁵. Speaking to contractual relationships between fee-paying students and universities, he exclaimed:

'Like many other contracts, it contains its own binding procedures for dispute resolution, principally in the form of the student regulations. Unlike other contracts, however, disputes suitable for adjudication under its procedures may be unsuitable for adjudication in the courts.'

The rationale for this, as previously discussed in examination of Foote, revolves around the view that the university is best competent to resolves matters of academic or pastoral judgement as the institution is better able to appreciate the dynamics of the issue as opposed to the courts of law whose ruling may be ill-conceived. Whilst finding no rulings on the case in point emanating from the Jamaican courts, the court in Myrie Case looked towards persuasive precedent emanating from the Commonwealth Caribbean jurisdiction of Trinidad & Tobago in the dictum of *Wadinambiaratchi v Hakeem Ahmad and others*²⁶. In this case, the Court of Appeal of Trinidad & Tobago, as it pertained to the authority of the visitor of the UWI, established that the authority of its visitor was not be construed narrowly but rather it was of a general nature. The court also joined the litany of precedent which asserts that matters relating to the internal management of the institution fell without jurisdiction of the courts and appropriately within the scope of the visitor. Thus, based on this reasoning, Bernard JA²⁷ arrived at the

²⁴ Ibid at 17

²⁵ Ibid at para. 12

²⁶ (1985) 35 WIR 325.

²⁷ Ibid at page 346.

conclusion that ‘having regard to the broad terms of section 6 of the charter, Her Majesty’s appointment was not ceremonial but one of general visitatorial jurisdiction’. Based on the common law and persuasive precedent from the Trinbagonian courts, the Jamaican courts in *Myrie* subsequently concluded that the visitor under the UWI charter has the jurisdiction to decide disputes pertaining to the internal or domestic regulations of the institution. That jurisdiction is duly defined in the framework of the common law and the courts decline jurisdiction in such instances. Therefore, Mr. Myrie as an associate of the UWI should have followed the internal procedure of the institution by exhausting all remedies and subsequently culminating in a decision by the visitor.

The case of *Vanessa Mason v The University of the West Indies*²⁸ is also instructive on the quote propounded by Morrison JA in Foote. The critical facts of the case revolved around a student of the UWI who sought to challenge the decision of the university’s authority to expel her from the hall of residence in which she had resided as a contractual licensee. Subsequently, the applicant brought proceedings before the courts. Again, the UWI took a preliminary point that the court had no jurisdiction to hear the application, because its charter provided for a visitor to whom the claimant ought to have applied for relief. Subsequently it held the view that the decision neither the process by which the university came to the decision to revoke the license was subject to judicial review. Once more, the court was left to consider whether the university was amenable to judicial review. In its reasoning, the court found it necessary to quote from Holt CJ in *Philips v Bury*²⁹ for a dichotomy between private charitable entities and public corporations. He stated that ‘corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and therefore if there be no visitor appointed by the founder, I am of the opinion that the law doth appoint the founder and his heirs to be visitors.’ It furthered that ‘such corporations are, as to their own affairs, to be governed by the particular laws and constitutions assigned by the founder’. This essentially means that the courts are willing to infer the imposition of a visitor even where there is no provision of the office. Therefore, his case is illustrative of the deep rooted and enduring treatment of the visitor by the common law courts spanning several centuries. Further argument by the defendant was that the claimant’s cause of action did not rely on the status of the

²⁸ JM 2009 SC 5.

²⁹ (1694) Holt KB 715

disciplinary process as a basis for terminating the contract and therefore rests on whether the letter received could terminate the contract. The UWI was of the view that there was a contractual relationship between itself and the claimant, but that there was a separate contractual arrangement as it pertained to the governance of her residency on the halls of residence. The court in this case subsequently held that there was a separate contractual agreement created as between the party and the UWI regarding disciplinary recourse and resolution of disputes on the Halls. The courts found that a dispute concerning both parties was to be characterized as falling into the domestic sphere of the UWI. It further enunciated that the provision of on campus student accommodation is as much of a university activity as the administration of examinations. Therefore, the court declined jurisdiction on the basis that the matter fell within the internal framework of the university. Thus, this case is illustrative of the fact that even separate contractual agreement may come under the purview of the visitor and is removed from the jurisdiction of the courts.

The final case to be assessed, as to the jurisdiction of the visitor, is that of *Okuonghae v University of Technology (Jamaica)*³⁰. The critical facts of the case were that the claimant was employed by the defendant as a Laboratory Technologist. It was an expressed provision of the terms of service contract which provided that the contract was subject to termination without cause on behalf of either party, the caveat being a grant of one month's written notice. The university later severed ties with the claimant, whom subsequently brought a claim seeking relief for wrongful dismissal. The defendant in rebuttal to such a claim relied on the section 5 of the University of Technology Act (the Act)³¹ which provided that the Governor General shall be the visitor of the institution and therefore had exclusive jurisdiction pertaining to disputes relating to the internal regulations of the university. Therefore the court would have no jurisdiction to hear the matter as it pertained to internal policies. The claimant submitted assertions against the visitorial jurisdiction in that it was 'an old creature associated with seventeenth and eighteenth century eleemosynary organizations... and the universities themselves which are civil corporations did not fall under the visitor's jurisdiction.'³² Whilst 'the Act' makes provisions for a visitor, the claimant contended that by section 3(2) the university was a

³⁰ [2014] JMSC Civ 138

³¹ *Ibid* at 12

³² *Ibid* at 30.

corporate body which has to be construed in line with section 28 of the Interpretation Act that provided a corporate entity can sue and therefore be sued. As a result, it would follow that the matter would be appropriately before the courts. On this point, the courts noted that the mere fact the institution is deemed a corporate entity does not ipso facto negate the jurisdiction of the visitor. It is therefore necessary to look towards the intention of Parliament in legislating on the matter. The court concluded that 'Parliament had not only seen it fit to accord corporate status to the defendant but also saw it equally fit to appoint the Governor General as its visitor'.³³ Therefore the two factors are not mutually exclusive considerations. Goddard CJ in the case of *Meredith*³⁴ speaks to the irrelevancy of the corporate nature of the institution as it pertains to the visitor's jurisdiction. There he propounded that 'the principles of exclusivity of the visitors jurisdiction apply equally to corporation set up by Act of Parliament as to corporations established by charter and that it applies equally to a college as to a university.' The claimant sought to rely on the case of *Varma*³⁵ which declared that the visitor has exclusive jurisdiction to adjudicate on matters falling within the purview of the domestic domain of the institution but that his decision, even though final, can be made amenable to judicial review proceedings. However the court found this case to be distinguishable from the instant case on the facts, as *Varma* dealt with the adjudication of the actual decision made by the visitor as opposed to a domestic matter which fell within the scope of the visitor's jurisdiction. Therefore the court still maintained the principle which dictates that the decision of the visitor is final and has wide discretion in electing the most appropriate proceedings. Council for the claimant wished to rely on *The University of Technology, Jamaica v Collin Davis & Sharon Hall ("Utech v Davis")*³⁶ in order to substantiate the defendant's argument that the cessation of the claimant's contractual agreement fell within the purview of the domestic policies of the defendant and under the jurisdiction of the visitor was inconsistent with the defendant's claim of damages in *Utech v Davis*. In this case, a claim was brought by the defendant against a lecturer and his guarantor for a failure to repay a loan granted for continued study. Counsel argued that the terms of the contract fell within the domain of the internal policies of the defendant as the lecturer was still an employee of the university when the issue

³³ Ibid.

³⁴ Ex parte Meredith [1950] 2 ALL ER 741

³⁵ R (on application of Varma) v HRH The Duke of Kent ("Varma") [2004] EWHC 1705 (Admin)

³⁶ [2012] JMISC Civ 5

was placed before the courts in ostensible contravention of the visitor's jurisdiction. Counsel further asserted that the claim put forth defendant was contradictory to the concept of the role of visitor as she states that the simply demonstrates the defendant's irresolute stance on the role of the visitor at its pleasure. However, it is quite evident that *Utech v Davis* was distinguishable as it fell solely within the scope of contract law and thus correctly subject to the jurisdiction of the courts. Based on this discussion it is apparent, that the determining factor as to jurisdiction turns on the specific nature and characteristics of the matter complained of which will ultimately determine whether a matter falls outside visitorial jurisdiction. A subsequent issue as to jurisdiction arose where it was to be considered whether the claimant properly fell under the jurisdiction of the visitor as his contract obligations had already been severed. The courts took the view that the visitor is not constrained to matters between its memberships but stretches to encompass all issues of membership in dispute. Again, there is a very generous interpretation and great leeway given to the jurisdiction of the visitor.

A contention which is imperative to critically analyse is the question as to whether this impediment to the jurisdiction of the courts should be done away with? In assessing the case law, several courts have contemplated the anachronistic nature of the jurisdiction of the visitor, meaning that it is a concept that does not fit with modernity. In an article entitled '*The University Visitor – an Unwanted Legacy of Empire or a Model of University governance for the future?*³⁷' it is highlighted that 'modern universities in England, and elsewhere, have changed greatly since medieval times and are now manifestly different in character and structure.' One such change is that newer universities are now established by Acts of Parliament as opposed to Royal Charter and have become in essence publicly funded entities. Notwithstanding these changes amongst others, the status quo of the maintenance of the visitorial jurisdiction has been retained because it is a facet of the structure of the older universities. In Foote and Myrie the case of *Norrie v Senate of the University of Auckland*³⁸ was discussed as being illustrative of a departure from the common law stance on the jurisdiction of the visitor. This case dealt with a medical student who had failed his final exams and subsequently was denied enrolment for the following semester by the respondent. At the level of the high court,

³⁷ Pelegrine Whalley and Gillian Evans, 'The University Visitor- an Unwanted Legacy of Empire or a Model of University governance for the future?' [1998] 6 MacArthur Law Review 109

³⁸ [1984] 1 NZLR 129

his application for judicial review was denied as the matter was deemed to be under the jurisdiction of the visitor. On appeal, it was stated that the jurisdiction of the visitor was not to be regarded as exclusive, but as subordinate to the courts. Cooke JA³⁹ elaborated on this pronouncement, retorting that:

'When any question of law or natural justice is concerned the Courts retain, I think, their full jurisdiction, notwithstanding that the dispute arises in University affairs. Currently the English Courts appear to favour the concept that there are questions of natural justice and questions of law (such as may arise under internal statutes or contracts) over which the Visitor has an exclusive jurisdiction. With respect, I regard such an approach as inappropriate in New Zealand. The mere existence of the Visitor's jurisdiction does not seem an adequate reason for treating as ousted the ordinary and prima facie all-embracing authority of the Courts of general jurisdiction over justiciable disputes. Especially so in a society such as ours, where the Universities are large publicly-funded institutions, constituted by Acts of Parliament and discharging by delegation an acknowledged responsibility of the State.'

Indeed such arguments propounded by Cooke JA seem highly applicable to the Commonwealth Caribbean as it pertains to the UWI. In our contemporary Caribbean society, the UWI is conceived as benefitting from significant public funding from the various jurisdictions of the region. Whilst established by Royal Charter, there is a great deal of acknowledgment of state involvement and responsibility to the UWI. Based on the consolidation of these factors, one may arrive at the conclusion that the UWI is essentially a public institution and any issue pertaining to it should not be precluded from review by the courts. On the other hand, there are proponents who argue this assertion is absolutely absurd. One may argue that the perception of the UWI being publicly funded is misleading. This is as substantiated on the fact that Caribbean states do not give freely to the UWI but are actually paying for the economic costs of the quota of students each jurisdiction sends. The degree of state involvement and responsibility may therefore be confined to a feeling of pride through the acknowledgment of the value the UWI has to our Caribbean society. The Mason case also speaks to the argument that the exclusive jurisdiction of the visitor is no longer relevant. It was argued there that it is an issue for Parliament to consider as the courts quoted Lord Scarman in *Duport Sales Ltd and Others v Sirs*

³⁹ Ibid at 38

*and Others*⁴⁰ where it was stated that as it pertains to statute law ‘the judge’s duty is to interpret and to apply the law, not to change it to meet the judge’s idea of what justice requires. It is therefore apparent how this might prove difficult in the context of the UWI which is a singular regional institution with three different campuses in separate jurisdictions.

In summation, this paper reaffirms the belief that the visitor’s exclusive jurisdiction is a double-edged sword, and the courts should be less hesitant to intervene. It is also the belief that the concept of the visitor is an anachronistic concept. Whilst there are undeniable benefits of the visitor; in that the courts are not clogged with student matters and also that the visitor is able to dispose of matters cheaply and efficiently, there still arise instances where the nature and the characteristics of the matter necessitates an adjudication by the courts. Whilst there is the perceived notion that the visitor is most learned on issues pertaining to the internal regulations, there is a lack of consideration as to whether the visitor is legally trained, thus in his ignorance of principles of administrative law he may be more inclined to defend the decisions of subordinate decision makers. Such breaches of principles of administrative law, such as natural justice, cannot be allowed to go without adjudicated by the courts. It is the belief that the courts are the paramount representation of fairness and justice with the necessary mechanisms to allow for appeal to a higher jurisdiction. Therefore, this is a further limitation of the office of the visitor who is seen, in essence, as a ‘one man show’. Thus, from the examination of the case law it is believed that whilst the visitor is beneficial, changes over centuries has made this office outdated. A move in the direction of *Norrie* case represents a model of modernity to be followed.

⁴⁰ [1980] 1 All ER 529 at pg. 551.

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TITLE OF ASSIGNMENT

“[49] The UWI took a preliminary point that the court had no jurisdiction to hear the application, because its charter provided for a visitor to whom the claimant ought to have applied for relief.” (per Morrison JA in *Foote v University of Technology (Jamaica)* [2015] JMCA App27).

Analyze this statement, and critically examine the approach of the court in THREE other Commonwealth Caribbean cases (relating to Universities) of your choice in answering the point.



Jorge Manuel Matus
3rd Year Student

Moving Towards a Modern Law of Corporate Insolvency in the Commonwealth Caribbean

by Jorge Manuel Matus

The law of corporate insolvency comes as a result of the concomitant risk of doing business.¹ Not all businesses are successful and there are plenty of business that fracas. The word Corporate addresses the company, that has its own separate legal personality from its members/shareholders, directors, officers, etcetera and has limited liability that insulates the abovementioned individuals as opposed to the company.² Insolvency can best be defined as persons or businesses that are incapable of paying their debts as they fall due.³

Therefore, the law applicable to companies or businesses that find themselves incapable of paying their debts as they fall due (whether cash flow insolvent or balance sheet insolvent) is known as Corporate Insolvency.⁴ Historically, the law looked to the person, that is the debtor, and his conduct for him to surrender his remaining property to creditors and also be subjected to imprisonment.⁵ Thomas H. Jackson suggests that Bankruptcy law, at its core, is debt collection law.⁶

¹ Vanessa Finch, *Corporate Insolvency Law Perspectives and Principles* (2nd edn, Cambridge University Press 2009)

² *Salomon v A. Salomon & Co Ltd* [1897] AC 22 13

³ Belize Bankruptcy Act, Chapter 244, RE 2000, s 3

⁴ Insolvency Act of Jamaica, Act 14 of 2014, s 2(1)

⁵ Axel Flessner "Philosophies of Business Bankruptcy Law: An International Overview" in: Jacob S. Ziegel (edn), *Current Developments in International and Comparative Corporate Insolvency Law* (Oxford 1994) p 23

⁶ Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, Cambridge, Massachusetts, and London, England 1986)

Insolvency law aims to avert the ‘grab for assets’ or ‘race to collect’ when a company becomes insolvent; this leads to inefficiencies and unfairness to allow for the free for all asset grabbing or collecting.⁷ Desenio states that it prevents creditor action and thereby affords the enterprise and all its creditors the ability to resolve financial difficulties more equitably.⁸ As Vanessa Finch puts it, the main aim of the law is to replace this free for all with a legal regime in which creditors rights and remedies are suspended and a process established for the orderly collection and realisation of the debtor’s assets and the fair distribution of these according to creditors’ claims.⁹

We shall examine the aims of insolvency and also the key theories and by applying legislation and best practices to demonstrate that the law must recognize not only the creditor’s private interests but also societal interests and other groups whose interests are affected as a consequence of insolvency and what remedies might be proposed to ensure that these public interests are duly recognized and safeguarded.

The simplest way to point out the aims of corporate insolvency is by restating the ten principles established by law and legislation as outlined by Professor Goode.

1. Corporate insolvency law recognises rights accrued under the general law prior to liquidation.
2. Only the assets of the debtor company are available for its creditors.
3. Security interests and other real rights created prior to insolvency proceeding are unaffected by winding up.
4. The liquidator takes the assets subject to all limitation and defences.
5. The pursuit of personal rights against the company is converted into a right to prove for a dividend in the liquidation.
6. On liquidation the company ceases to be the beneficial owner of its assets.

⁷ Ibid n (1)

⁸ Timothy B. Desenio “The Development of Insolvency Law in the Commonwealth Caribbean: A brief survey of potential approaches” (Spring 1994) Vol 3 Journal of Transnational Law & Policy 1

⁹ Ibid n (1)

7. No creditor has any interest in specie in the company's assets or realisations.
8. Liquidations accelerates creditors' right to payment
9. Unsecured creditors rank *pari passu*.
10. Members of a company are not as such liable for its debts.¹⁰

The Cork Committee, also, mentioned a set of aims of a good insolvency law as being: to underpin the credit system and cope with its casualties; to diagnose and treat an imminent insolvency at an early, rather than later, stage; to prevent conflicts between creditors; to realise the assets of the insolvent which should properly be taken to satisfy debts with the minimum of delay and expenses; to ascertain the causes of the insolvent's failure and, if conduct merits criticism or punishment, to decide what measures require to be taken; to recognise and safeguard the interests not merely of insolvents and their creditors but of society and other groups in society who are affected by the insolvency, for instance not only the interests of directors, shareholders and employees but also those of suppliers, those whose livelihood depend on the enterprise and the community; to preserve viable commercial enterprises capable of contributing usefully to national economic life; inter alia, to offer a framework of insolvency law commanding respect and observance, yet flexible to cope with change, and which produces practical solutions, that it be simple and easily understood and capable of being administered efficiently and economically.¹¹

Generally, from the foregoing, it seems that the aims of insolvency law are the maximisation of value to creditors of the debtor's assets¹², the establishing of a framework for the process by which insolvency procedures are undertaken¹³, providing a fair and equitable system for ranking of claims¹⁴, identifying causes of business failure and imposing

¹⁰ R M Goode, *Principles of Corporate Law* (3rd edn, Sweet & Maxwell, London, 2005) ch 3, where Goode sets out ten principles of corporate insolvency and the general law.

¹¹ HMSO, *Report of the Review Committee on Insolvency Law and Practice* (Cmd 8558, 1982, Great Britain, Parliament); to be used in this document as 'The Cork Committee Report'

¹² *Ibid* n (1); *ibid* n (11); *ibid* n (10); *ibid* n (6); *ibid* n (8)

¹³ Cork Committee Report as evinced by the Bankruptcy and Insolvency Act of Trinidad and Tobago, Insolvency Act of Jamaica and the Barbados Bankruptcy and Insolvency Act.

¹⁴ *Ibid* n (11)

sanctions where conduct of the debtor warrants it¹⁵, and restoring the company to profitability through rehabilitation¹⁶ or restructuring¹⁷. These aims are found written in legislation, even Commonwealth Caribbean legislation, and general guiding principles such as that of the Cork Committee Report, and also from renowned academics, such as Desenio, Professor Goode, Vanessa Finch, Jackson & Baird, Karen Gross, etcetera. The aims, at least, of corporate insolvency are settled in that it is really for the fair and equitable distribution of assets amongst creditors, a system of rehabilitation or rescue of the company, the imposition of liability upon directors where due, and to take into account societal interests other than just that of the creditors or debtors. The Jamaican Insolvency Act¹⁸ recognizes not only the private contractarian interests of the insolvent but also that of the Jamaican economy to preserve a viable company and protect other stakeholders. The Cork Committee Report also recommended that other societal interest be taken into consideration in the development of a good corporate insolvency law. The UNCITRAL advises that insolvency law aim should achieve a balance between the debtor and the interests of various parties concerned, creditors and persons with interest in the debtor's business as well as public policy.¹⁹ Thus even at the international level the proposition is such that the basic fundamental aim of the law giving effect to the private interests between debtors and creditors and persons having interest in the debtors business be

¹⁵ Ibid; also the Insolvency Act of Jamaica, s 25: "(1) A trustee with whom a proposal has been lodged under section 17, shall make or cause to be made an appraisal and carry out an investigation of the affairs and property of the debtor as to enable the trustee to estimate with reasonable accuracy the financial situation of the debtor and the cause of the debtor's financial difficulties or insolvency, and the trustee shall report the result of such appraisal and investigation to the meeting of the creditor. (2) ... a trustee may recommend to the creditors that ... the debtor shall undertake to receive counselling."; see also section 90 of the Bankruptcy and Insolvency Act of Trinidad and Tobago where liability may be imposed on directors for dividend payments at a time when the company was insolvent except if they did it in good faith and were not aware that they were insolvent at the time.

¹⁶ Insolvency Act of Jamaica 2014, s 3: "This Act seeks to create an environment which aids in – (a) the rehabilitation of debtors and the preservation of viable companies, having due regard to the protection of the rights of creditors and other stakeholders; and (b) fair allocation of the costs of insolvencies with the overriding interest of strengthening and protecting Jamaica's economic and financial system and the availability and flow of credit within the economy."

¹⁷ Ibid n (8)

¹⁸ Ibid n (16)

¹⁹ The 2005 United National Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* (UN, New York, 2005) para. 2

fulfilled; but also, that public policy or public interests be taken into consideration and thus the law much recognize such.

There are various visions or theories that in effect try to provide a rationale for the aims of corporate insolvency and each has its own advantages and disadvantages and each criticises the other. There is the law and economics theory or the creditor's bargaining theory; the communitarian theory; the forum theory; the ethical vision; and the eclectic approach theory. We will examine these and see how they interact and how it is that we may use them to come up with a proposition that encapsulates all interests inclusive of public or societal interests and see where legislation has already gone ahead and done so.

The forum theory merely looks at the insolvency process and its essence is to establish a forum within which all interests affected by business failure, whether directly monetary or not, can be voiced.²⁰ The enterprise and forum philosophy argues the interests of owners and creditors must, in the event of insolvency, be tempered with the interests of others, whether employees, suppliers, customers, neighbours, and government.²¹ Flessner suggests that forum and enterprise philosophy asserts that secured creditors basically belong to the same universe as unsecured creditors.²² This allows for more experts to be part of the process, such as accountants. However, this theory falls short of addressing substantive matters in corporate insolvency.

Philip Schuchman leads the argument for looking at insolvency laws from an ethical theory utilizing a utilitarian approach.²³ He argues that a distinction should be drawn between debts that have arisen out of contracts that personally benefit the creditor and debts flowing from involuntary acts or loans between friends.²⁴ This approach is criticized by relying too heavily on the judiciary's moral judgement leading to inconsistencies.²⁵

The notion that insolvency law serves a series of values that cannot be organised into neat priorities²⁶ and described by Warren as a dirty,

²⁰ Ibid n (1) page 43

²¹ Ibid n (5) Axel Flessner, 'Philosophies of Business Bankruptcy Law: An International Overview'

²² Ibid n (21)

²³ Ibid n (1) page 44

²⁴ ibid

²⁵ Ibid n (1) page 45

²⁶ Ibid

complex, elastic, interconnected view of bankruptcy.²⁷ She accedes that her method neither predicts outcomes nor even fully articulates all the factors relevant to a policy decision.²⁸ However, it does provide a very wide net wherein all matters related to corporate insolvency law may be captured but there is no one main theme or aim, thus suffering from the same deficiencies as those made by critics of the Cork Committee Report. It seeks to take a wide ambit of interests not just those with monetary interests but also the wider societal interests, looking to reorganisation and rehabilitation and distribution of the consequences of financial failure among a range of actors.²⁹

The Communitarian theory sees the insolvency processes as weighing the interests of a broad range of different constituents³⁰, it looks to the redistribution of losses³¹; also that it recognizes that we live in an interconnected and interrelated world³² noting the altruistic nature of individuals and that insolvency law should look to the survival of the organisations³³, thus the welfare of the community should be very much a part of corporate bankruptcy³⁴. As Finch expresses it countenances the redistributions of values so that high priority claimants may to some extent give way to others, including the community at large.³⁵ It does accept that the basis of insolvency law is to have the debtor repay the creditor; however, that is to the extent that community interests are to be included and because by way of analogy, he who benefits from the business should also share in its burdens, and as such, in distribution of the costs and values one must look to the relative ability to bear the costs

²⁷ Elizabeth Warren, "Bankruptcy Policy" in J S Baharadri and others, *Corporate Bankruptcy* (Cambridge University Press 1996) ch 7 pp 73 - 94

²⁸ *Ibid* n (27)

²⁹ *Ibid* n (1) p 46: This dirty, complex, elastic, interconnected view "attempts to achieve such ends as distributing the consequences of financial failure among a wide range of actors; establishing priorities between creditors; protecting interests of future claimants; offering opportunities for continuation, reorganisation, rehabilitation; providing time for adjustments; serving the interests of those who are not technically creditors but who have an interest in the continuation of the business; and protecting the investing public, jobs, the public and community interests."

³⁰ *Ibid* n (1) p 40

³¹ *Ibid* n (27) Elizabeth Warren 'Bankruptcy policy': "I see bankruptcy as an attempt to reckon with a debtor's multiple defaults and to distribute the consequences among a number of different actors. Bankruptcy encompasses a number of competing – and sometimes conflicting – values in this distribution."

³² Karen Gross 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) Vol 72 Issue 3 Washington University Law Review 1031

³³ *Ibid* n (1) p 40

³⁴ *Ibid*

³⁵ *Ibid* n (1) p 40 'The communitarian vision'

of default, incentive effects on pre-bankruptcy transactions, similarities among creditors, that is, like creditors to be treated alike, and owners bear the loss when a business fails as posited by Elizabeth Warren.³⁶ This theory seems to encompass all other theories as those expressed above and that of the law and economic theory that will be developed below. It is posited on the same recommendations as expressed in the Cork Committee Report above in taking an approach outside of just the private contractarian environ and infusing community interests into the law of corporate insolvency. It is not without criticisms as it envelops other interests that traditional aims of corporate insolvency law did not delve into namely that it departs from the creditor right of enforcement and also that it is difficult to quantify community interests thus community welfare and wellbeing are not appropriate concerns for bankruptcy.³⁷ The criticisms³⁸ also flow from the communitarians argument that insolvency judges are competent just as any other person in the judiciary to undertake the question of community interests. This theory can be seen in some legislation in the Commonwealth Caribbean³⁹ where the interest of other persons other than just the insolvents and creditors are considered; but the fundamental aim is still the maximisation of value of the debtor's assets to realize the repayment to the creditor.

This brings us to the final and most fundamental theory of corporate insolvency law, that is, the creditor wealth maximisation and the creditor's bargain or law and economics theory. It seeks to maximise the collective return to creditors and it is a collectivized debt collection device in response to the common pool problem created when diverse co-owners assert rights against a common pool of assets.⁴⁰

Furthermore it should be seen as a mirrored system where one can expect creditors to arrive at were they able to negotiate such agreements

³⁶ Ibid n (27)

³⁷ Ibid n (32)

³⁸ Ibid n (32) page 90 says that Baird's criticism 'there is a tendency of bankruptcy judges to under compensate the secured creditor and the only right thinking judges are those who are not immersed on a daily bias in bankruptcy law, and who therefore have some perspective.'

³⁹ Barbados Bankruptcy and Insolvency Act, Trinidad and Tobago Insolvency Act, Jamaica Insolvency Act

⁴⁰ Ibid n (1) page 32, ibid n (6) Thomas H. Jackson 'The Logic and Limits of BANKRUPTCY LAW'; Douglas G. Baird, 'Loss distribution, forum shopping, and bankruptcy: A reply to Warren' in J S. Bahadari and others, *Corporate Bankruptcy* (Cambridge University Press 1996) Ch 8 pp 95 - 108

ex ante.⁴¹ The hypothetical bargain and collectivist approach would increase the aggregate pool of assets to the creditors as opposed to an individual action. This approach seeks not to give any effect to rehabilitation or keeping the business in operation or have any interests other than creditors interest as its aim. It is simply for the maximisation of wealth for the creditors to be able to approximate the same deal that the creditors had outside of bankruptcy and to prevent the grab all by way of individual action. Jackson provides an example of the common pool of assets using fish in a lake and having multiple persons accessing the fishing grounds. If everyone chooses to take their own amount without any sustainability, then there would just be a one catch of all the fishes and then no one else could generate income from the fish. But if everyone came together and limited the catch size so that the stocks keep replenishing then everyone would have a bigger piece of the aggregate pie. This is ideal as it prevents the grab all and it also has a system in place via the hypothetical negotiation for each player to get more than just the initial sum.

The first challenge is to prevent the grab all of assets and that has been accomplished via legislation, common law; it is at the very essence of the aims and theories. The fundamental aim is to ensure that the creditor gets paid. All the theories have this at the base. The situation arises, however, to what extent should the creditors and the insolvent interests be enforced without the taking into consideration other community interests. This is where the theories become divergent. The communitarian, eclectic, forum and ethical all seem to point to having a procedural and substantive process taking into consideration community interests in the development of a corporate insolvency policy. The law and economics theory looks only to those that have bargained and the hypothetical bargain to provide a remedy to creditors in the increase of the value of the asset of the debtor. Taking all the evidence provided from the recommendations of the Cork Committee to the various aims and enveloping all the theories together it would seem that the modern era law of corporate insolvency should reflect a law preventing the free for all grab of assets and to allow for an orderly, fair and equitable process, taking into consideration all interests both those of the private contractarians and also the community or other groups when giving effect to the law.

⁴¹ Ibid n (1) page 32, ibid n (6) Thomas H. Jackson 'The Logic and Limits of BANKRUPTCY LAW'; ibid n (40) Douglas G. Baird 'Loss distribution, forum shopping, and bankruptcy: A reply to Warren'

The matter of community interest is a matter of law for the courts to decide to what extent they should be involved in the process. The French use an egalitarian approach taking into consideration the continuing of the organisation and also the employees⁴²; and to some extent the USA in reorganisation in railroad organisations, where one case involved community interest, that is, commuter interests to keep the organisation viable⁴³. Canada⁴⁴, Barbados⁴⁵, Trinidad and Tobago⁴⁶ and Jamaica⁴⁷ share similar legislation to ensure that community concerns are taken into consideration.

International best practices and advice such as UNCITRAL, the Cork Committee Report, the Canadian Report⁴⁸ all involve the interest of the society other than just that of the insolvents and creditors. They provide for a modern approach to insolvency law. Thus, it is conclusive that the law must not only recognize that the consequences of insolvency affect only the private contractarians but also other societal groups whose interests should be safeguarded by the law.

⁴² Ibid n (8)

⁴³ Julie A. Veach "On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers" (10.1.1997) Vol 72, Issue 4, Article 9, Maurer School of Law: Indiana University, Indiana Law Journal 1211

⁴⁴ Harvey Garman "An Introduction to Canadian Corporate Insolvency Law" November 2008: "Super-priority claims in bankruptcy out-rank even a secured creditor ... the employee wage [is one such] super-priority claim [under the Bankruptcy and Insolvency Act of Canada]."

⁴⁵ Barbados Bankruptcy and Insolvency Act, s 113 (1) (d), preferred creditors: '... wages of employees...'

⁴⁶ Trinidad and Tobago Bankruptcy Insolvency Act, 2007 section 127 (1) (d) "excluding severance, claims for wages, salaries, commissions or compensation of any employee for services rendered during the six months immediately preceding the bankruptcy, together with disbursements properly incurred by a traveling salesman in and about the bankrupt's business, during the same period, so as not to exceed such amount as may be prescribed by Order in each case"

⁴⁷ Ibid n (16) the aim of the Act is rehabilitation and preservation of a viable organisation and considering the overriding interest of the Jamaican economy.

⁴⁸ The Canadian Report of the Standing Senate Committee on Banking, Trade and Commerce, DEBTORS AND CREDITORS SHARING THE BURDEN: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, November 2003: "Bankruptcy and insolvency situations usually have devastating effects for everyone affected: the consumer or corporate debtor, family and friends, communities, unpaid suppliers, uncompensated – and perhaps unemployed – employees, creditors and shareholders, among others."

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TITLE OF ASSIGNMENT

The Law must recognize that ‘the effect(s) of insolvency are not limited to the private interests of the insolvent and his creditors, but that other interests of society or other groups in society are vitally affected by the insolvency and its outcome, and ... (should) ensure that these public interests are recognized and safeguarded.’

CORPORATE INSOLVENCY

‘The modern era law of corporate insolvency should reflect a law preventing the free-for-all grab of assets and to allow for an orderly, fair and equitable process, taking into consideration all interests both those of the private contractarians and also the community or other groups when giving effect to the law.’



Darinka Munoz
3rd Year Student

THE DRAFTSPERSON'S WEB

by Darinka Munoz

INTRODUCTION

In reviewing the drafting instructions, the draftsman must be ever mindful of the Public Law and the ubiquitous Interpretation Act which govern their jurisdiction. In adopting this stance, the approach of the courts in the Commonwealth Caribbean will be examined and critiqued. Specifically, this paper will argue that Administrative law principles such as Natural Justice, the Constitutional protection of fundamental rights and freedoms, the separation of powers doctrine and the pervasive principles of the Interpretation Act affect the validity or interpretation of legislation.

BACKGROUND

In order to achieve this, some background will be provided on the basic concepts highlighted by this proposition. According to Professor Crabbe, "An Interpretation Act lays down the basic rules as to how the courts should interpret the provisions of an Act of Parliament. It also defines certain words or expressions so that there is no unnecessary repetition of the definition of those words in other Acts."¹ Certainly, when drafting instructions materialize, they become legislation which has legal effect. Therefore, Legislation drafted in contravention of Public law may be ultra vires or unconstitutional and declared null and void.

In addition, "The rules of natural justice are presumed to apply to bodies entrusted with

¹ VC Crabbe, *Legislative Drafting* (2nd edn, Cavendish Publishing Ltd 1994) p 68.

judicial or quasi-judicial functions only.² Natural justice refers to the 'basic fundamental principles of fair treatment. These principles include the duty to give someone a fair hearing; the duty to ensure that the matter is decided by someone who is impartial; and the duty to allow an appeal against a decision.'³ Further, the three main aspects of Natural Justice can be summarized as follows: the hearing rule, the rule against bias⁴, and the no evidence' rule.

Subsequently, the various case law will demonstrate the Public law principles in action. On the aspect of Natural Justice, this paper will focus on the hearing rule.

ADMINISTRATIVE LAW

First, Administrative law principles such as Natural Justice can ultimately affect the validity of legislation. Thus, the draftsperson must take into consideration these principles when provided with the drafting instructions. If the rules of Natural Justice are not adhered to, even in the process of the enactment of legislation, the effect is that the relevant legislation may be struck out by the courts. In the Guyanese case of *Attorney General v Mohammed Alli*,⁵ the respondent applied to the High Court for declarations that certain sections of the Labour Act were invalid. The Court of Appeal held that the use of the present tense in article 11 of the Constitution of Guyana ('are entitled to participate ')... indicated that the article bestowed on trade unions and other organisations an unequivocal right of participation in the decision-making processes of the State; a provision of primary importance to members of trade unions (i.e section 28C) having been

² Concordia University Handbook (Office of the General Counsel 2011) p4 https://www.concordia.ca/content/dam/common/docs/policies/official-policies/2011_Natural_Justice.pdf accessed 16 October, 2015

³ *Natural Justice* (Lexis Navigator, nd) lexisnexis.com accessed 16 October, 2016

⁴ In *Meerabux v Attorney General of Belize* [2005] UKPC 12, the appellant, a former judge of the Supreme Court of Belize, was accused of misbehaviour in office. The question was whether simply because of his membership of the Bar Association, that Mr Arnold—the Chairman (a member of the tribunal to rule in the case), could be identified in some way with the prosecution of the complaints that the Association was presenting to the tribunal so that it could be said that he was in effect acting as a judge in his own cause. It was held that there was no automatic disqualification since the Chairman had to be an attorney and every attorney had to be a member of the Bar Association in Belize. Further, he was disengaged from the matter.

⁵ [1987] 41 WIR 176 (CA).

enacted **without consultation**⁶ with the Trades Union Congress and contrary to their legitimate expectations, the provision should be struck out⁷.

In this case, the correlation between Public Law principles emerge. Even though the main focus of this section is based on Administrative Law principles, arguments were based on Constitutional Law principles as well, since it was the Guyanese constitution that entitled the trade unions to participate in the decision-making process of the State. The technical scrutiny of the courts is also emphasized. In the instant case, the present tense was a consideration that lead the courts to their conclusion. It is important then, for draftspersons to be very well versed with the rules of grammar and syntax.

On another point, the Administrative Law principle of Legitimate Expectation was an additional ground for which the provision was struck out. As stated by Massiah C, ‘the Trades Union Congress had, by virtue of articles 11 and 38 of the Constitution, a reasonable expectation to be consulted in a matter of primary importance to their members. An analogue may be found in the concept of legitimate expectation, a doctrine that has developed in reference to the principles of natural justice...’⁸ It is evident that Massiah C made the analogy between Legitimate Expectations, arising from the relevant articles of the Constitution, to principles of Natural Justice to substantiate his argument for the invalidity of the provision.

Furthermore, Administrative Law principles of fairness and reasonableness must be observed when the draftsperson is granted drafting instructions to confer powers on someone since the courts have the power of determining the legality of the power the legislation is attempting to confer. In *Watt v Prime Minister*, a case from Antigua and Barbuda, the Representation of the People (Amendment) Act, 2011 was enacted. The Prime Minister appointed a retrospective date by the 2012 Order of when it shall come into force, with the aim of affecting the decision of a previous judgment instituted against him. It was held by the Court of Appeal that in addition to the **conventional challenges to the exercise by an official of a discretion conferred by a statute of**

⁶ Emphasis added

⁷ *Mohammed Alli* (n5) 177-178.

⁸ *ibid* 208.

'illegality', 'irrationality', and 'procedural impropriety', the court would add 'unconstitutionality'¹⁰ ... A discretion conferred upon a public authority had to be exercised reasonably and in accordance with the law. The court declared that the decision of the Prime Minister to appoint the retrospective date so as to affect the previous decision was an abuse of his discretion. Therefore, the date the Act was deemed to have come into force was null and void and of no legal effect, and the 2012 Order was ultra vires and invalid and would be quashed.

Markedly, the instant case highlights the importance of the draftspersons integrity and knowledge of the rules of Natural Justice. For example, a draftsperson cannot draft a legislation granting a Minister the power to kill human beings who don't support his political party. This is because even though Parliament possesses extensive power, it is still constrained by the Public Law, inter alia. The draftsperson cannot blindly follow the drafting instructions provided, but instead, needs to be critical of the instructions, to ensure that it is not in breach of any of the rules of Natural Justice or the Constitution.

Another important consideration that draftspersons must be cognizant of when drafting legislation are the statutory ouster clauses. It is important that draftspersons are aware that even though they may have the power to draft legislation that ousts the jurisdictions of the courts from reviewing legislation, the courts would still go behind that ouster clause if there is a breach of the principles of Natural Justice. Thus, there is no absolute immunity.

To illustrate, in the *Attorney General of the Bahamas v Ryan*¹¹, a case construing immigration legislation in the Bahamas, the applicant applied for Bahamian citizenship but his application was denied. The Bahamas Nationality Act 1973 empowered the Minister concerned to refuse an application for specified reasons or any other sufficient reason of public policy. The decision did not have to be reasoned and was not subject to review by the courts. Even though there was a statutory ouster clause it was held by the Privy Council that:

⁹ [2013] 85 WIR 289 (CA).

¹⁰ Emphasis added

¹¹ [1980] 2 WLR 143

[C]lauses preventing ministerial actions becoming subject to judicial review extended only to prohibiting the court from re-examining the decision of an inferior tribunal, including executive authorities exercising quasi-judicial powers, if the decision was one which the tribunal had jurisdiction to make. A decision affecting legal rights of individuals arrived at by a procedure which offended natural justice was outside the jurisdiction of the decision-making authority. Thus the Minister's decision was made without jurisdiction and the court was not prevented from inquiring into its validity.

Therefore, it is evident that an ouster clause does not bar the court from reviewing a decision that breached Natural Justice. The Minister's decision was reviewable, as he had breached a Principle of Natural Justice.

Despite of the principle of Parliamentary Sovereignty, the courts have become less hesitant in exercising their power of judicial review in order to protect the rights of individuals from state infringement. As such, draftspersons must put into application their knowledge of Natural Justice principles so as to minimize the likelihood of the legislation drafted being expunged or being severed by the courts. In many instances, these Acts require the expenditure of time, costs and effort. Contrary to the above example provided, Parliament in most of these occasions has a particular purpose (or public policy objective) for which legislation is drafted and these may not be accomplished if the legislation drafted is inadequate. Thus, the minimization of error is most warranted since defective Acts do not effectively address the issue Parliament is trying to solve.

CONSTITUTIONAL LAW

Second, it is of crucial importance that the draftsman is aware of the Constitutional protection of fundamental rights and freedoms when contemplating upon the drafting instructions. The Supreme Law Clause of the Constitution provides that any law inconsistent with the Constitution is void to the extent of the inconsistency.¹² This is one of the most important protections citizens have against state infringement of their rights. Draftspersons must therefore be cognizant that despite having vast majority of freedom when it comes to drafting legislation,

¹² Constitution of Belize 2012, cap 4, s 2.

the Supremacy of the Constitution poses limits to the extent of their freedom. Further, Redress Clauses also provide for protection of fundamental rights. Thus, if an individual alleges that any of their fundamental rights in the Constitution has been, is being or is likely to be contravened in relation to him that person may apply to the Supreme Court for redress.¹³

In essence, the Constitution is the ultimate protector of the rights of individuals from state infringement. In *Paponette v Attorney General*,¹⁴ the constitutional issue which arose for consideration was whether there was an infringement of the appellants' right to the enjoyment of property under section 4(a) of the Constitution of Trinidad and Tobago. The appellants were Maxi-Taxi (public transportation) owners who were relocated and made to undergo various administrative changes in their business. Pursuant to the authority conferred by the 1997 Regulations, they were charged a fee for every exit journey and decided whether they were "fit and proper" persons to be granted a permit to use the City Gate facility at all. The government failed to justify the interference on the basis of the public benefit argument. As such, the breach was established.

The case of *Paponette* highlights that individuals are entitled to a spectrum of rights enumerated in the Bills of Rights of their respective Constitutions. However, these rights also have limitations. Draftspersons must be cognizant of the rights and limitations granted to persons under the Constitution since only then can they know in what province their Acts will stand. Professor Arif Bulkan¹⁵ advances the test applied by the courts to determine whether a 'police power' limitation on fundamental rights are valid or not as follows:

- (a) The restriction on the right is pursuant to a "law" or meets the standard of legal certainty.
- (b) There is a rational connection between the measures and a legitimate public goal listed in the limitation clause.
- (c) The measures limiting the right are proportionate.

¹³ Constitution of Belize 2012, cap 4, s 20 (1).

¹⁴ *Paponette v Attorney General* [2010] UKPC 32 para 25 (PC).

¹⁵ Robinson, Bulkan, Saunders, *Fundamentals of Caribbean Constitutional Law* (Sweet and Maxwell 2015) para 9-022.

Admittedly, though the draftsman is not a judicial arbiter, it is of crucial importance for the draftsman to know the extent on which the provisions which they are drafting can impinge on the particular rights. On the point of legal certainty, it is vital for the draftsman to be precise when drafting legislation. If legislation is too vague it will be struck down for being unconstitutional. As stated in the Commonwealth case of *Sabapathie v State* “law must be formulated with sufficient precision to enable the citizen to regulate his conduct. So the principle of legality applies, legislation which is hopelessly vague must be struck down as unconstitutional.”¹⁶ In addition, it is doubted whether a provision that is too vague is capable of achieving the purpose for which Parliament wanted the Act drafted in the first place.

Draftsmen must be aware that the law does not operate in a vacuum, but rather it is part of an interconnected framework which regulates the conduct of persons in a society. Therefore, even among the different Commonwealth Caribbean jurisdictions, Acts cannot be so easily imported. Thus, if Trinidad and Tobago has a legislation seeking to achieve a specific purpose, and it is valid. It does not necessarily mean that the same legislation can be imported in Belize and it would be valid also. The laws of each country are to be tailored for its people; who may possess different values, norms and ideologies from the people of another country.

Intriguingly, a draftsman in Trinidad has different considerations to have in mind when drafting legislation. These are called Special Acts which only exist in Trinidad and Tobago presently in comparison to the other Commonwealth Caribbean territories. These are laws passed by a special procedure that are allowed to derogate from the protected fundamental rights and freedoms. The legislation drafted must expressly declare that it will have effect despite any inconsistency with the guaranteed rights.¹⁷ The Act would then have effect, unless it is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

Third, it is of vital importance that in the drafting process, the draftsman considers the separation of powers doctrine. Notably, most of the Commonwealth Caribbean territories have democratic societies.

¹⁶ *Sabapathie v State* [1999] UKPC 31 para 15 (PC).

¹⁷ Constitution of Trinidad and Tobago 1976, cap 1:01 s13.

The separation of powers doctrine is a principle of good governance since it institutes a system of checks and balances. The doctrine's main aim is to protect citizens from infringement of their rights by those in authority.

In the case of *Attorney General of Belize v Zuniga*,¹⁸ the government enacted legislation that amended the Supreme Court of Judicature Act in relation to breach of injunctions. The Caribbean Court of Justice (hereinafter CCJ), found that the mandatory minimum fines were held to be in breach of the separation of powers doctrine along with the five-year minimum imprisonment in default of payment. Those provisions "deprive[d] the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime"¹⁹. The CCJ opted in severing the offending provisions from the act. It is emphasized by this case, that the draftsman needs to be aware of the legal principles governing the society where the provisions drafted will be enacted. When drafting legislation, the draftsman must be cautious as to not usurp the powers of the Judicial branch of government.

Moreover, when drafting legislation, the draftsman must be perceptive, so as not to blur the boundaries among the three branches of government since this is likely to result in the invalidity of the legislation. This is what happened in *J Astaphan & Co (1970) Ltd v Comptroller of Customs of Dominica*²⁰ where the Customs Act of Dominica empowering a customs officer to impose upon an importer of goods such further sum as he may require in addition to the estimated duty. Sir Vincent Floissac CJ expressed the view, *inter alia*, that if the 'further sum' was a penalty, the discretion conferred on the customs officer to determine its amount in a particular case conferred a judicial power on the executive and was inconsistent with the doctrine of separation of powers. Thus it is evident that the draftsman cannot grant powers to individuals which are in breach of the separation of powers doctrine.

INTERPRETATION ACT

Fourth, in reviewing the drafting instructions, the draftsman must be

¹⁸ *Zuniga and others v Attorney General of Belize* [2014] 84 WIR 101

¹⁹ *Ibid*, para 61.

²⁰ *J Astaphan & Co (1970) Ltd v Comptroller of Customs of Dominica and Others* [1996] 54 WIR 153

ever mindful of the ubiquitous Interpretation Act governing their jurisdiction. The Interpretation Act is an overarching tool which assists with the interpretation of all legislations enacted. Thus, if certain legislation is ambiguously drafted, and its uncertainty is a component in a court action, the courts will seek to determine Parliament's intention in interpreting the legislation. Though this may be a useful exercise of the courts powers, since legislation may be seen as flexible; in some instances, it undermines Parliament's true intention. As such, draftspersons must be precise and concise in materializing the drafting instructions on paper.

Additionally, according to the Belize Interpretation Act,

*Save where the contrary intention appears either from the context of this Act or any other Act or instrument, the provisions of this Act shall apply to this Act and to any other Act in force whether such other Act comes or came into operation before or after the commencement of this Act and to any instrument made or issued by virtue of this Act.*²¹

In the Belizean case of *Attorney General et al v Maya Leaders Alliance*,²² the respondents contended violations of their rights to property. They claimed that the proprietary nature of these rights was affirmed by, *inter alia*, International Human Rights Law. It was held by the Court of Appeal, that the appellants were bound in both Domestic Law by constitutional provisions and International Law, arising from Belize's obligation thereunder to respect the rights and interests of the respondents established with the assistance of s65 (b) of the Belize Interpretation Act. The provision stated as follows:²³

(B) that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not.

Sosa J reasoned that:

²¹ Belize Interpretation Act 2011, cap1, s 2 (1)

²² Bz [2013] 17 (CA)

²³ Belize Interpretation Act 2011, cap 1, s 65 (b)

In the case of Belize, explicit sanction for an importation of international standards albeit, in respect of the interpretation of legislation is to be found in s65 (b) of the Interpretation Act.

In essence, the principles of interpretation contained in the Interpretation Act, arise when the legislation is ambiguous. As such, draftsmen, if provided with specific drafting instructions must attempt to maintain clarity and conciseness in the provisions drafted. However, draftspersons may also receive assistance in maintaining the above maintained aims from the Interpretation Act.²⁴

Moreover, the Jamaican case of *National Transport Co-operative Society Ltd v Attorney General*²⁵ revolved primarily around the interpretation of section 3(1) of the Public Passenger Transport Act (hereinafter PPTA). This case highlights the flexibility which the Interpretation Act provides with regards to the interpretation of legislation. When analyzing the legislation, the courts look to see the most feasible interpretation that was intended being the singular or plural form. The relevant section provided:

*“The Minister may grant to any person **an exclusive licence**²⁶ on such conditions as may be specified therein to provide public passenger transport services within and throughout the Corporate Area by means of stage carriages or express carriages or both.”*

The argument of whether the licences previously granted by a Government Minister was valid turned on the above interpretation of the words ‘exclusive licence.’ It was held that when construing section 3(1) of the PPTA, section 4(b) of the Interpretation Act is applicable, so that, “unless there is something in the subject or context inconsistent with such a construction ... words in the singular include the plural”. If a licence is to be both exclusive and applicable throughout an area, there can only be one such licence; accordingly, “there is something inconsistent in the ... context” with the word “licence” being read as “licences” in section 3(1) of the PPTA.²⁷ As such, the Privy Council held the licences granted by the Minister to be invalid since they were in

²⁴ In s2 (2) of the Belize Interpretation Act a list of definitions are provided which apply to all Acts enacted unless expressly provided to the contrary.

²⁵ [2009] UKPC 48

²⁶ Emphasis added.

²⁷ Ibid para 28

contravention of the Act.

Furthermore, in the Bahamian case of *Kemp v Mamlakah Ltd*,²⁸ the principal issue for the court was whether dower had been abolished by the Inheritance Act 2002. It was held that Dower had been abolished by s 3 of the Inheritance Act 2002. Further, s 10 of the 2002 Act was declarative of the general law and *rights of dower* saved thereby referred to rights acquired within the meaning of s 20(c) of the Interpretation Act²⁹. The relevant section of the Interpretation Act provided as follows: Where a written law repeals in whole or in part any other written law, the repeal shall not:

- (a) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed;
- (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed;
- (c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability ... and any such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the repealing Act had not been passed.

In the instant case it meant rights of dower in dowerable property of which husbands died solely seised prior to the commencement of the Act. The right to dower was an inchoate right, but it was not one that could become a right acquired within the meaning of s 20 of the Interpretation Act unless the husband died. It is evident that the Interpretation Act influences the interpretation of legislation that has been repealed as well. Thus, the draftsman must be aware of its effects so that they know how their legislation will be interpreted and ensuring their purpose is achieved.

CONCLUSION

Finally, in supporting the view that in reviewing the drafting instructions, the draftsman must be ever mindful of the Public Law and the ubiquitous Interpretation Act governing their jurisdiction. It was evident that the courts play a role as sentinels of justice in reviewing

²⁸ *Kemp and another v Mamlakah Ltd* (2008) 73 WIR 16

²⁹ Interpretation and General Clauses Act of the Bahamas 2010, cap 2, s 20 (c)

legislation for its legality. Judicial review on the basis of the hearing rule and general principles of justice were analyzed.

Similarly, Constitutional Law principles were of utmost importance since any law inconsistent with the Constitution is void to the extent of the inconsistency. It was seen that in the Commonwealth Caribbean, Constitutional Supremacy seems to reign over Parliamentary sovereignty. In this light, the rights of the individuals are protected by the Constitution although there are some limitations provided by it. Another important Constitutional principle is the separation of powers doctrine since the judiciary plays a vital role in reviewing legislation to ensure the three branches of Government do not tread upon each other's territory.

Lastly, the ubiquitous Interpretation Act serves as an interpreting tool that is interconnected with other Acts. As such, the draftsman must be intimately aware of the provisions in the Interpretation Act since especially if the legislation drafted is ambiguous the Interpretation Act will be used to bring clarity as regards to Parliament's intention by the courts. Nonetheless, the courts have been very hesitant in exercising their discretion since they seek not to intrude upon the Acts of

Parliament.

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TITLE OF ASSIGNMENT

Administrative law principles such as Natural Justice, the Constitutional protection of fundamental rights and freedoms, the separation of powers doctrine and the pervasive principles of the Interpretation Act affect the validity or interpretation of legislation.



Jamila Greene
2nd Year Student

THE FOREIGN ACCOUNT COMPLIANCE TAX ACT (FATCA): REDEFINING THE RULES OF ECONOMIC SOVEREIGNTY WITH REFERENCE TO SELECTED COMMONWEALTH CARIBBEAN TERRITORIES

by Jamila Greene

The Foreign Account Tax Compliance Act¹² of the United States created a reporting mechanism for foreign persons of the US to report their earnings or holdings over US \$50,000. Banks not in compliance are to be faced with a 30% withholding tax, while persons face a penalty accrued on an annual basis. The main thesis of this paper is that the Act represents a redefinition of the rules of economic sovereignty, specifically in relation to the economic coercion, as viewed under Article 2 (4) of the UN Charter and economic sovereignty from the Declaration of Friendly Relations of States, with specific attention to the case of Trinidad and Tobago and Barbados.

In presenting this argument, the sociological jurisprudential school of thought was used to question the concept of statehood, specifically, whether it is positive law or simply a metaphysical concept. Law, they argued, is a representation of the man of his day and his view of the times which he is within. Therefore, it must be viewed within the context of the man and his day. Further, it was presented that international law must be the 'living law' of the nations, with the overall purpose to protect countries freedom to exercise their local norms without

¹² 111th Cong. (2009-2010).

intervention. While in agreement with this, it is further argued that the experiences of indigenous massacres, slavery, indentureship and colonialism, all created a dichotomy in the perception of statehood which is embedded in the ethos of international law. As such, the concept of statehood and international law is said to create a dichotomy between the developed and developing countries, who are inherently attributed different roles in the international system as it was developed at a time when this dichotomy existed.

The discussion of this paper then extended to defining economic sovereignty within the various sources of international law, referencing both hard and soft law. It found that territorial sovereignty does not require a States' border be defined, further adding to the inquiry on whether the concept of statehood is positive law or metaphysical. Economic sovereignty was found to truly have no express definition in international law in hard law, however, numerous attempts have been made to do so, and however, they remain in soft law.

The essence of this discussion was in demonstrating how the terms of economic coercion and sovereignty have further been impacted by the acts of the US in relation to this Act; a domestic law, with semi-universal application, giving supranational powers to a municipal institution. It proved that international law appears to be unwilling to change to acknowledge the changing times of the concept of 'force' and 'warfare'. In fact, it has been shown to display convenient acquiescence. This has been to the disadvantage of developing countries, throughout the system.

It will end by recommending that the States of the developing world continue to utilize regional integration blocs to withstand, collectively, events such as these that remain unpunished in international law given their shared historical, social and economic commonalities.

"...these are radical and controversial (even outrageous) international law and international tax law principles, completely violative of comity and sovereignty. What is worse, the well-established and well respected orthodox principles of international law, conflicts of laws and tax law remain entrenched for every other area of endeavour. We are therefore in a kind of schizoid arena since these new aggressive principles of law

are only being applied to the offshore financial construct.”

– Professor-Marie Belle Antoine,

“The Caribbean Offshore Financial Services Revolution –

A Bold, Futuristic Initiative Requiring Brave Leadership” 2015.

The Financial Account Tax Compliance Act (FATCA) are found in Title V of HR 2847 of the Hiring Incentives to Restore Employment Act (HIRE)¹, enacted on August 25, 2010 to amend the Internal Revenue Code of 1986. This provision created reporting requirements for “United States persons or United States owned foreign entities”² with foreign financial assets in excess of US \$50,000³. Countries and banks were to undertake compliance before the Act became effective in the US on July 1st, 2014 with reporting deadlines of September 30, 2015, December 31, 2015 and December 31, 2016⁴ or be faced with a 30% withholding tax for non-compliance from the Internal Revenue Service (IRS)⁵. Non-complying individuals on the other hand would be made to pay a penalty⁶. While all countries and financial institutions had a ‘choice’ to comply, any for-profit institution or country reliant on their banking system economically or commercial must seriously consider the implications 30% being withheld on certain payments. Therefore, the word ‘choice’ is used loosely to define the true liberties afforded under the scenario. To achieve compliance, countries had the choice of one of two model agreements. Financial institutions could register on their own to the IRS to gain a Global Intermediary Identification Number (GIIN) showing their compliance, notwithstanding the position of their State.

In the post-war world order, the coordination of taxation on the international level has been between States bilaterally in the form of bilateral agreements while, more recently, regional bloc have created tax harmonization regimes. While the legislation sought to create or improve incentives to ameliorate the employment situation in the US, it

¹ *ibid*, Chap. 4, sec 1471 (c) (2) (B) (ii)

² *ibid*, sec. 6038D (a)

³ Further extensions were permitted beyond this period as announced on September 22, 2016 while countries and foreign financial institutions are permitted to seek extension, as was the case of Trinidad and Tobago in October, 2016.

⁴ Above fn 1, chap. 4, sec. 1471 (a).

⁵ Above fn 1, sec. 608D (d).

⁶ Government of Trinidad and Tobago, Review of the Economy 2016 (2016).

has international implications on the legal framework guiding international tax law and the international financial system, especially those of small island developing states (SIDS) whose economies are vulnerable to the externalities of the international economy. This paper does not assume that it was done from a position of malice, however, its effects are expected to be far-reaching. The financial system (finance, insurance and real estate) of Trinidad and Tobago was reported in 2016 to contribute 15% to GDP with a projected 17% contribution in 2016⁷. Barbados has both a dual banking system; onshore and offshore, which has an asset value of 140%⁸ and 1,000%⁹ of the country's GDP respectively. To date Trinidad and Tobago has encountered domestic difficulties in getting the Act passed by Parliament, requesting further extensions. This extension while granted, was not done with a "strong recommendation that Trinidad and Tobago pass legislation no later than February 2017"¹⁰ from the US through its Embassy. Barbados' respective agreement entered into force on the 9th September, 2015. Both countries signed Model 1 Agreements¹¹ which require that banks report the relevant information to the taxation authorities who would subsequently report this information to the IRS. This agreement has been agreed to in some form in 113 jurisdictions. It will affect how the international financial system is regulated in countries, as the IRS has obtained supranational powers over independent, sovereign states. Additionally, it also has redefined the depth and breadth of unilateral action by a State ensure compliance to domestic laws, in the international arena; a redefinition that international law remains silent on.

This paper will argue that, in presenting the case of Trinidad and Tobago and Barbados, the US has further extended the permissible acts of economic coercion within Article 2 (4) of the UN Charter¹² and corroded

⁷ International Monetary Fund, "Barbados: Financial System Stability Assessment" IMF Country Report Series (February 2014), para 11.

⁸ World Trade Organization, "Barbados: Trade Policy Review 2014", para 4.45.

⁹ United States Embassy of Trinidad and Tobago, "Deadline Extended for FATCA Legislation" (30 September 2016).

¹⁰ This is contrary to Model 2 Agreements in which the Banks will report on their own, directly to the IRS. Templates of the Model Agreements, their respective annexes and the full agreements signed by each country can be found at the US Treasury Department website.

¹¹ Charter of the United Nations and the Statue of the International Court of Justice (1945).

¹² Resolution 2625, Declaration on Principles of International Law concerning Friendly

the concept of economic sovereignty within the Declaration of Friendly Relations¹³ through this compliance agreement. This thesis will extend further, to hold, that there remains a jurisprudential conundrum to as to the true definition of a State, especially those States created following centuries of involuntary economic, political and social servitude. It is within this unsolved philosophical grey area, that international law continues to acquiesce in the acts committed by some States to their advantage. As such, this paper will concern itself with the following; first, it will begin with a jurisprudential discussion on the concept of statehood in international law with particular attention to sociological school of reasoning. Then it will define general and economic sovereignty in positive international law. Subsequently, two sections will be devoted to presenting the arguments on the suggested violations to international law. This paper will conclude by making practical recommendations to Trinidad and Tobago and Barbados in light of their present circumstances.

JURISPRUDENTIAL ISSUES: STATEHOOD AND INTERNATIONAL LAW

International law was first coined by Jeremy Bentham to replace William Blackstone's law of nations as he felt the concept, which sought to explain the law between nations, was best explained in reference to a term with "international jurisprudence"¹⁴. The concept of a sovereign nation as understood in the contemporary sense was originally expressed in *Westphalia*¹⁵ and further expounded by various sources of international law. However, there remains a jurisprudential debate on whether international law is truly law. In light of this, it should only follow that there should be an inquiry into that of a state and the premise of statehood itself. A question of such a nature is important, not to further compound the theoretical conundrum, but to fulfill two purposes. First, to gather the theoretical and philosophical understandings of a State as a concept. It was in the *Deutsche Continental Gas-Gesellschaft v Polish State*¹⁶ that the court found that a sufficiently

¹³ Relations and Co-Operation among States in accordance with the Charter of the United Nations, A/RES/25/2615 (24 October 1970).

¹⁴ Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, as quoted in MW Janis, "Jeremy Bentham and the Fashioning of "International Law", American Journal of International Law, Vol 78, No. 2 (Apr., 1984), 408.

¹⁵ Treaty of Westphalia: Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies [1648].

¹⁶ (1929) 5 AD 11, 15.

¹⁷ Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence. I. Schools of

consistent territory can satisfy the criteria for statehood even if the borders are not yet fully defined. Therefore, it is fair to inquire whether a 'state' is a tangible entity or metaphysical concept that can be redefined based on more applicable sociological conceptions, notwithstanding its positive legal definition? This paper argues that historical events slavery, indentureship, colonialism and other forms of servitude in the Pre-WWII world order created a dichotomous view of statehood. These historical roles of servitude remain presupposed in the ethos of international law irrespective of the equality of States that is guaranteed by the UN Charter.

The sociological school of jurisprudence is a comparative study of law marrying traditional legal reasoning to philosophical and historical thought, politics, economics and social science¹⁷. It concerns itself with the social function of law and how this social function served to ensure or protect particular social interests of individuals and the community at large¹⁸. Josef Kohler developed a doctrine relating social history to law providing the following context¹⁹:

*We overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him... Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically, they are to be interpreted as products of the whole people, whose organ the law-maker has become.*²⁰

With respect to international law, FSC Northrup described the school's core the view being in the concept of the living law and pluralism. For international law to be effective it must appreciate the pluralism of the

— Jurists and Methods of Jurisprudence", The Harvard Law Review, (Jun. 1911) vol. 24, no. 8, 591-619, 614.

¹⁸ Roscoe Pound, "Legislation as a Social Function", American Journal Of Sociology (May 1913) vol. 18, no.6, 755-768, 763.

¹⁹ Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence [Continued]', Hard Law Review (Dec. 1911) vol 25, no. 2, 140 – 168, 158.

²⁰ *ibid.*

²¹ The living law, while not empirically defined, it said to be the law objective law of the

living law²¹ and base its rules upon that principle²². International law, accordingly, must give effective to this living law, with respect for the indigenous living law of the world's people and cultures. Only then would it be justified for the sovereignty of one nation to be transferred to an international legal authority. However, the purpose of international law is not to create a singular law which States are obligated to adhere to without question. In fact, it is argued that, the purpose of international law was further explained:

*... the justification for police action is not that the living and positive law ideology of one of the disputants is right or that the other is wrong.... Upon this basis no nation in the world community is forced to choose between either ideology of the disputants. It is simply sharing the common responsibility of guaranteeing to others and to itself the right of the people of any nation to give expression to their own cultural living law norm while drawing upon those of others as they themselves choose, regardless of what the respective cultural traditions and choices may be.*²³

However, it is within this sociological doctrine that brings into question the concept of the State itself for law is described a product of human behaviour²⁴. N. Politis described the state and the international community to be abstract construction that are both fictitious²⁵. Law and its institutions are to be regarded within the social construction of its creation, and not in absolute, rigid terms that may have been more related to the legal positivist view of the sovereign and the role of laws and its sanctions in society. According to the sociological school, there is room for the redefinition of the international legal system with greater context placed on the societal influences on rules and the interests of the individual, as opposite to positive law.

of a specific culture, in its present state. Issues arose among sociological jurists as to how to identify this criteria, however, this paper will refer to the living law as the indigenous law and identity of a specific culture or country of the day.

²² "Contemporary Jurisprudence and International Law" (1952) Volume 61, No. 5, Yale Law Journal, 623, 647.

²³ *ibid*, 649.

²⁴ Robert Kolb, "Politis and Sociological Jurisprudence of Inter-War International Law" vol. 23, no1, The European Journal of International Law 233-241, 236.

²⁵ *ibid*.

²⁶ Translation to the General Treaty, signed in Congress of Vienna (June 9, 1815), Institute

For small island developing states, and other former colonies, this is an important point. Both the concept of the State and the rules of international law were created while many people were not regarded as having the same freedoms within the eyes of the law. The language of Westphalia spoke to empires, a concept which is less relevant to States of the present day. International law redeveloped it to the Montevideo standard. However, after two World Wars, many independence movements, numerous economic declines, the rise of regional integration, the development of science and technology, the expansion of the world's financial system and the rise of fundamental and cyber terrorism, there must be a call for a further redefinition of the concept of the State and the rights attached to it. Otherwise, the very equality that is enshrined in the UN Charter can be deemed void as international law no longer represents the world universally as it was intended to. However, the applicability of the UN Charter is also questionable as it can rightly be argued that it is no longer representative of the 'living law' of the day.

The UN Charter was created in 1945 while Empires still dominated large expanses of population over territories that were gained through the violent displacement of indigenous peoples. As present international law changes with custom, it is questionable why more credence was not given to the New Economic World Order which articulated more clearly the view of many former colonies for the rules to adjust to have greater representation their circumstances and interests. The UN System in itself is created with a large amount of power left to the Security Council where permanent members are representative of the former world order established coming out of World War II; a time where sun was only beginning to set on colonization in the strict senses. If the rules of the United Nations are to be regarded within the social context that was suggested by Kohler, it would not be farfetched to conclude that the norms of the former world order lay presupposed within them, to the disadvantage of developing nations.

Therefore, this paper suggests that the rights and obligations of States should be revisited to reflect the new world order. However, given that this has not yet happened, the context of this paper will discuss the issues at hand within the confined of the present positive international law, notwithstanding the jurisprudential objections to some of its presuppositions.

ECONOMIC SOVEREIGNTY IN INTERNATIONAL LAW

The modern concept of sovereignty was first enshrined in the Treaty of Westphalia which provided in Article 64 “free exercise of Territorial Right, as well as Ecclesiastical” to the Kingdoms of the day. Later, the *Vienna Congress*²⁶ would lead to a new order in the international system for the Western powers premised on an external function of sovereignty²⁷. This function concerned itself with the relations between States in which a separate and distinct internal function coexisted independently within the borders of each sovereign nation²⁸. The system would take its contemporary form following evolutions after the two (2) World Wars. However, before dwelling on this important evolution, it is important to note that these events, principles and concepts all developed while native populations were killed and displaced, humans legally made chattels in the name of economic growth through the institution of slavery and colonies deprived of their right of identity and self-government. It must constantly be remembered that the system of international law was created in a time where these principles did not apply to a considerable portion of the world’s population.

Agreements such as the *Pacific Settlement of Disputes (Hague I)*²⁹ and the *Limitation of Employment of Force for Recovery of Contract Debts (Hague II)*³⁰ sought to curtail the escalation of events into warfare by creating avenues for the settlement of disputes. However, at this time, sovereignty in international law continued to maintain distinct internal and external identities. It was not until the *Covenant of the League of Nations*³¹ that selected countries would form “a general association of nations...under specific covenants for the purpose of affording mutual guaranteed of political independence and territorial integrity”³² that these identities would converge.

²⁶ of Latin American Studies, University of London.

²⁷ Samantha Besson, ‘Sovereignty’, Max Planck Encyclopedia of Public International Law, (April 2011).

²⁸ *ibid.*

²⁹ [1899].

³⁰ [1907].

³¹ Treaty of Peace with Germany (Treaty of Versailles) [1919], Part I

³² President Woodrow Wilson, “President Woodrow Wilson’s Fourteen Points”, (8 January, 1918).

³³ Above fn 32, art 13 (4).

However, it made use of force permissible 3 months after peaceful settlement³³, self-defense³⁴ and non-compliance to the *Covenant*³⁵. It was in this same treaty that the sovereignty of colonies was transferred to the mandatory trust system³⁶ which can be argued to be a form of recolonization for some. However, it is important to note that this treaty gave, in some respects, recognition to the plight of colonized nations. Furthermore, it can also be said that the sovereignty of the minorities within the modern international system was still in its conceptual infancy while the concept in application to the developed nations continued to morph. Following the collapse of the League, the UN system through the *UN Charter and the Statute for the International Court of Justice (ICJ)*³⁷ would redefine the international legal system and the concept of sovereignty in its entirety to its present day version.

Article 2 (1) of the *Charter* bases the organization on “the principle of the sovereign equality of all its Members”³⁸. Further Article 2 (4) states that “All Members shall refrain in their international relations from the treat of or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”³⁹. Non-use of force was found by the *Nicaragua Case*⁴⁰ —to be a principle of customary international law with an exception found in Article 51 which permits use of force as necessary in the act of self-defense once reported to the UN Security Council. The Declaration of Friendly Relations⁴¹ expounded on Article 2 (1) of the *UN Charter* by stating the following:

In particular, sovereign equality includes the following elements:

- a. State are judicially equal;
- b. Each State enjoys the rights inherent in full sovereignty;
- c. Each State has the duty to respect the personalty of other States;

³⁴ Caroline Case (1837) 29 BFSP 1137-1138.

³⁵ Above fn 32, art 16 (1).

³⁶ *ibid*, art 22.

³⁷ [1945].

³⁸ Above fn, 37.

³⁹ *ibid*.

⁴⁰ Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v United States of America), Judgement (27 June 1986)

⁴¹ above fn 13.

⁴² Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion (8 July 1996).

- d. The territorial integrity and political independence of the State are inviolable;
- e. Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

While the *Nicaragua Case* and the *Nuclear Weapons Case*⁴² have both presented conflicting views on the binding nature of General Assembly Resolutions. While there is value in this discourse, this paper will be — that:

*... a prohibited intervention must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely (for example the choice of a political, economic, social and cultural system, and formulation of foreign policy). Intervention is wrongful when it uses, in regard to such choices, methods of coercion, particularly force, either in the direct form of military action or in the indirect form of support for subversive activities in another State.*⁴⁴

This is applicable where non-military use of force such as unilateral economic measures and cyber-attack have become important threats to the national security of countries. Developing countries have attempted to bring attention to their unique situation regarding sovereignty through UN Resolutions, though not binding.

They made an ambitious attempt to redefine the world economic order premised on sovereign equality in the international system, through Resolution 3201 titled Declaration on the *Establishment of a New International Economic Order*⁴⁵. However, The *Charter of Economic Rights and Duties of States* expounded further on the principles lightly

—⁴³ Given that there is no precedent in international law, the ruling on the Nicaragua Case was not contradicted as understood in the common law. However, the interpretation that was given in this ruling has been conflicted by the Nuclear Weapons Case which has been cited as the legal authority, notwithstanding the nature of sources of international law.

⁴⁴ above fn, 13, para 205.

⁴⁵ A/RES/S-6/3201 (1 May 1974).

⁴⁶ A/70/152 (16 July 2015).

addressed in the NEIO Resolution. The essence of the movement was captured in Article 16 (1) of the Charter which stated:

It is the right and duty of all States, individually and collectively, to eliminate colonialism, apartheid, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practise such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples. It is the duty of all States to extend assistance to them.

More recently, the report titled 'Unilateral Economic Measures as a means of Political and Economic Coercion'⁴⁶ monitored the use of these types of measures in the international system that sought to undermine sovereign equality of States. It found that, "Recent trends suggest that the use of smart (or targeted) sanctions, such as arms embargoes, asset freezes and travel bans, has been increasing, although broadly-defined trade embargoes still exist. Empirical evidence indicates that the unilateral measure, especially broad trade embargoes, can have severe unintended consequences, such as adverse impacts on human rights, public welfare and the long-term growth prospects of the affected country"⁴⁷.

THE CASE OF TRINIDAD & TOBAGO

Following the announcement of the incoming FATCA legislation, Trinidad and Tobago, like much the compliant jurisdictions, signed an Agreement endeavoring to sign the Model 1 Agreement by a specific date. Issues within the domestic legislature has resulted in the country requesting a further extension. Upon this request, the US Embassy submitted the following Statement:

"I wanted to take a brief moment to provide another update on FATCA. Let me start by saying we strongly recommend that Trinidad and Tobago pass legislation no later than February 2017, in order to carry out the commitments undertaken when the FATCA agreement was signed by our

⁴⁷ *ibid*, para 12.

⁴⁸ above fn 11.

*two countries, and in line with the implementation plan put forward by the Government of Trinidad and Tobago. I would remind all of Trinidad and Tobago that FATCA is just one element of the strong and broad relationship between our two countries. In fact, we have signed several bilateral agreements to expand our cooperation just within the past six months*⁴⁸

The language and tone of this statement could be implied to have a number of meanings. While this assessment will not extend itself into the semantics of the statement, the context of it can be said to be well-worded, diplomatic force into compliance⁴⁹. This is important in the wider context of the threat or use of economic force for the international system as international law remains silent when events such as these take place⁵⁰. While the principle of *pacta servanda* stands, the international standard should establish ground rules for statements of such a nature. By setting a standard of acquiescence on these events, the international economic laws do not develop to protect smaller developing countries heavily reliant on other countries' economies from predatory practices. Countries are left in positions where they must regard their socio-economic bread and butter, before the positive principles of sovereignty⁵¹. Examples of the results of such threats into compliance in the region are the Jamaica during the bauxite crisis and Cuba trade embargo and internationally, more recently, the worldwide impact of the US-OPEC shale/oil price wars. The results of these events are extensive with similar devastation to actual physical warfare.

The social and cultural context of the UN Charter was at a time where two devastating wars had taken place in the past three decades. However, the lack of responsiveness of the international system to the present day economic use of force raises a number of questions regarding the international system as a *bona fide* legal system, the

⁴⁹ It must be remembered that according to Article 26 States are required to observe the principle of *pacta servanda* which requires all agreements to be executed in good faith. Therefore, Trinidad and Tobago is obligated to fulfill what it has committed to in the Agreement nonetheless. It cannot withdraw any commitments in the Agreement.

⁵⁰ The standard for economic coercion was in the Nicaragua Case which found that economic coercion, in the context of forcing a state to comply with certain measures, was contrary to the UN Charter. However, this was due to the combination of force and the economic measure.

⁵¹ above fn 44.

⁵² International Financial Services Act (2002), secs 93-102.

relevance of the international system to the world today and finally, whether the system's level of care and attention is tipped in favor of the traditional world powers. While these can be argued in great length, it can be seen that the force in which FATCA has been handled through the world is a serious game changer in how we view the permissible economic acts under international law. Unilaterally, the IRS became a supranational player in the international system through an Agreement that has growing universality. If every nation were to create a taxation system similar to the US, at what point would the international system seek to tame the creation of these supra-national institutions through positive law to protect the integrity of the international system? If each State begins to act unilaterally, would the international system lose even more of its powers of enforcement? Economic sovereignty may be as fluid a concept as that of statehood; however, the FATCA legislation has made an impact on the extent to which a State is permitted to use economic tools of coercion at the international level into compliance, without accountability.

THE CASE OF BARBADOS

As previously discussed, Barbados has a significant offshore banking sector, which made compliance with the FATCA legislation critical for its economy. The country in signing on to the Agreement chose a Model 1 Agreement which allows for the tax authority of the State to report to the IRS on behalf of its locally-based banks. Legislation supporting the offshore sector including tax, duty and exchange control exceptions⁵², establishment of purpose trusts⁵³ and protector trusts⁵⁴, confidentiality⁵⁵ and the applicability of the laws of Barbados over foreign laws in relation to immovable property⁵⁶, among others. Particular attention will be focused on the confidentiality assurance to international trusts that will be compared to that information which is required to be submitted to the IRS in relation to United States persons.

The International Financial Act provides in sec 48 that the following information submitted to the Central Bank will be confidential "statement, returns or information furnished or submitted by a licensee

⁵³ International Trusts Act (1995), secs 9-14.

⁵⁴ *ibid*, sec 26.

⁵⁵ *ibid*, secs 28.

⁵⁶ *Ibid*, secs 25-18.

⁵⁷ *above* fn 48.

in report of its business shall be communicated or disclosed”⁵⁷. Additionally, the International Trusts Act provides that instruments creating the trusts, register and documents are confidential and not available to the public⁵⁸. Given that the trust was considered immovable property according to the laws of Barbados, and not that of foreign laws, it was not subject to the law of other jurisdictions, unless they were agreements entered into force by Barbados. However, now that FATCA has been transformed into the legislation of Barbados, information provided is confidential, safe, for tax purposes⁵⁹. The information to be reported according to the agreement include the name, address, account, reporting financial institution number, account balance, interest paid (for depository and custodial accounts) and gross proceeds from sale⁶⁰. Notwithstanding Barbados agreement to the Treaty, this paper finds that the FATCA regulations has further eroded the boundaries of legal acts under the *Declaration of Friendly Relations* in relation to sovereignty and the territorial integrity of a nation. It in was in the Nicaragua Case that the state declared “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter and the Charter of the Organization of America States”⁶¹. While there can be threat or use of force established, it is understood that the territorial integrity and political independence of a nation is a cornerstone of international law. Therefore, what extent does international law the monitor the extent and reach of domestic legislation into the territorial integrity or political independence of a state? While Barbados complied, why has internal law not set standards upon which states can engage in fair and equitable relations with one another?

The FATCA has demonstrated the extent to which a domestic legislation can have internal reach and corrodes the principle of economic

⁵⁸ above fn 49, sec 13 (1), (2)

⁵⁹ Income Tax (Automatic Exchange of Information) Regulations 2015, art 14 (3) (a), art 3 (8) as per Agreement between Barbados and the Government of the United States of America and the Government of Barbados to Improve International Tax Compliance and to Implement FATCA Treaty.

⁶⁰ Agreement between Barbados and the Government of the USA, art 2 (2).

⁶¹ above fn 40, para 288

territorial integrity and independence of a nation. Globalization has in fact established that we now lived in a borderless world order, however, this borderless has persistently been to the disadvantage of smaller nations who are generally on the receiving end of obligations from more developed nations. Countries coming out of colonialization are operating on a lesser plane than the one in which the developed nations were permitted to develop; creating a clear dichotomy in the world order for developed and developing nations. International law perpetuates this dichotomy and further, reiterates it through lack of positive rules or acquiescence when these events happen.

PRACTICAL RECOMMENDATIONS

Given the presentation of this discussion, it remains clear that international law is a system still not defined, yet operating to the disadvantage of some given its inherent and historical nature. However, States are not completely powerless to the effects of the imbalance of this system. It requires a response that will harness of the collective strengths of countries that share commonalities in their history, economic, geographic situation and their future trajectory; regional integration. CARICOM, though the regional integration unit of the region, normally signs Agreements on behalf of the entire region, except where permission is given by the Secretariat to negotiate unilaterally. Even where unilateral decisions are made, the approval of CARICOM is still necessary before it enters into force. In this present case the Agreement is signed, therefore, there is no value in wondering why the regional unit did not work collectively on this. However, this paper make a strong recommendation for the region to collaborate to manage the ebbs and flows of the potential effects of this legislation on their domestic economies, a collaboration that should extend beyond that of FATCA but into all areas. As Small Island Developing States (SIDS), there will never be a time where the voices of one nation will be able to outcry that of one with millions of persons and an even larger public and private pursue. Therefore, collective efforts allow for the best interest of all to be heard more clearly using the power of voting delegates within the international system.



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Deshon Griffith, LLB
3rd Year Student

A CRITIQUE OF THE BARBADOS SUPREME COURT'S APPROACH TO MILITARY DECISIONS IN JUDICIAL REVIEW PROCEEDINGS

by Deshon Griffith

ABSTRACT

The justiciability of military decisions has been a contentious issue across Commonwealth jurisdictions for centuries. Some scholars take the position that the exercise of this administrative power can and should be supervised by the courts; others agree but posit that the extent to which this power may be reviewed ought to be limited. It appears, however, that the extreme and unqualified position in Barbados is that the power cannot be reviewed by the judiciary at all, under any circumstances. This approach has serious ramifications for members of the Barbados Defence Force who may be adversely affected by administrative decisions made in the course of disciplinary proceedings or otherwise by military authorities.

In view of a recent increase of courts-martial in the country, and as a member of the armed forces himself; the author has sought to unearth the true legal position with respect to the justiciability of military decisions in Barbados. The author structures this paper metaphorically and demonstrates his thesis critically; analysing the historical, social and jurisprudential components of the issue. The approaches in the United Kingdom and other Commonwealth Caribbean jurisdictions are considered in order to critically assess the Barbadian approach holistically which, in tandem with the aforementioned components, provides the reader with a holistic appreciation

for the issues raised.

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I. INTRODUCTION

“Judicial redress has been denied to soldiers aggrieved by the commission of serious procedural errors as a result of which they appeared to have suffered substantial prejudice.”¹

Scales and Errors

1. The Greek goddess Themis personifies the moral force of the judicial system. She is often depicted as blind-folded, symbolising her impartiality; carrying a two-pan beam scale, which she uses to weigh the determining factors of each case and; brandishing her unsheathed double-edged sword, a symbol of the judicial system’s power to punish or protect either party in the name of the law.² Cumulatively, this symbolism demonstrates the courts responsibility to entertain the

¹ Harry Woolf and others, De Smith, *Woolf & Jowell’s Judicial Review Of Administrative Action* (5th edn, Sweet & Maxwell 1995)

² E. M Berens and Joe Larkins, *The Myths And Legends Of Ancient Greece And Rome* (MetaLibri 2009), 75

complaints of each party in a legal dispute on an objective basis; weighing the factors which are critical to the determination of the case and ruling in a manner which would give effect to justice. When determining questions of administrative law, it appears necessary for Themis to utilise her measurement apparatus twice. She must first use the Scale of Justice to determine whether or not she will adjudicate on the matter at hand and thereafter to determine the weight of the claimant's submissions in light of opposing arguments by the defendant. It would appear, however, that in Barbados the Scale of Military Justice is marred with a systematic error.³ In other words, in the context of judicial review proceedings relating to military decisions, the court's reasoning appears to be flawed and thus incapable of accurately and precisely determining the true legal outcome of a given case.⁴

Objectives

2. It is said that systematic errors are difficult to locate because one does not know where to look for them to begin with. However, it is the aim of this paper to identify these errors by the process of calibration i.e. determining the accuracy of the Barbadian approach using accepted administrative law principles. This paper seeks to: (1) critically assess the approach of the courts to review of military power in the United Kingdom; (2) critically assess the current position in Barbados stated in the case of *Re Young* in light of this foregoing approach.

II. BRITISH JURISPRUDENCE ON REVIEWABILITY

"[W]here the civil rights of a person in military service are affected by the judgment of military tribunals... this Court ought to interfere to protect those civil rights."⁵

Introduction

3. Judicial authority from the United Kingdom has shown that the courts have taken several approaches to judicial review of military decisions over the years. This chapter seeks to delineate the evolution of the

³ <<http://www.physics.ryerson.ca/sites/default/files/u3/2011/04/Labs-IntroToErrorsFinal.pdf>> accessed 9 December 2015.

"Systematic Error refers to an error which is present for every measurement of a given quantity; it may be caused by a bias on the part of the experimenter, a miscalibrated or even faulty measuring instrument, etc."

⁴ *ibid* "Systematic errors affect the accuracy of the experiment."

⁵ In *re Mansergh* (1861) 1 B. & S. 400 (Cockburn CJ) [Emphasis added]

jurisprudence in this area in order to identify the current legal position, extract the rationale behind it and determine whether or not it ought to remain.

Early Approach

4. The reviewability of decisions pertaining to military law and discipline can be dated as far back as 1326 in the case of the Earl of Lancaster.⁶ Having been tried and convicted under martial law five years prior, the decision was reviewed and reversed⁷ on the ground that he was tried in a time of peace⁸ contrary to the prevailing law.⁹ This review was, however, allegedly carried out by the legislative and not the judicial branch of government.

5. In the 1774 case of *Mostyn v Fabrigas*¹⁰ Lord Mansfield referenced *Comyn v Sabine, Governor of Gibraltar*;¹¹ a case whereby a King's Bench court reviewed the trial and conviction of a carpenter by a garrison court-martial. The plaintiff was sentenced to imprisonment and three hundred lashes by the court-martial and deported. He brought an action for trespass against the governor who had approved the sentence in 1738. The court found that the carpenter was not subject to military law and thus the court-martial acted illegally for want of jurisdiction. He succeeded in the action against the governor and a substantial sum of damages was awarded.

6. In the oft-cited case of *Lieutenant Frye*¹² the basis of the court-martial's decision to convict the plaintiff was some depositions of persons whom he was not permitted to confront.¹³ He brought an action for false imprisonment against the president of the court-martial and succeeded on account of erroneous admission of certain evidence. Not only were substantial damages awarded but the Court of Common Pleas

⁶ Blackstone, Commentaries 413; 'Civilian Judicial Review of Military Criminal Justice' 66 *Military Law Review* (1974) 1

⁷ It was parliament who reversed the decision, see *Ex parte Milligan*, 71 US (4 Wall) 2, 128 (1866); 'Civilian Judicial Review of Military Criminal Justice' (1974) 66 *Military Law Review* 1

⁸ 'Civilian Judicial Review of Military Criminal Justice' (1974) 66 *Military Law Review* 1

⁹ *supra* note 6

¹⁰ 98 ER 1021

¹¹ 'Civilian Judicial Review of Military Criminal Justice' (1974) 66 *Military Law Review* 1, 4

¹² *ibid*; 'Courts-Martial And The Constitution' (1957) 71 *Harvard Law Review* 293, 320

¹³ *ibid*

noted that the plaintiff could bring actions against the other members of the court-martial as well.¹⁴

7. At this point scholars considered it well established that the courts were competent to issue prerogative writs to prevent courts-martial from exceeding their jurisdiction, just as any other inferior tribunal.¹⁵ They further took the view that writs of certiorari could be issued to quash court-martial decisions based on procedural errors but would only be granted where there had been a manifest error.¹⁶ Notably Stephen Adye, the leading courts-martial text writer of the period, opined that judicial review was possible to the same extent as in criminal cases tried by the common law courts.¹⁷

Excess of Jurisdiction

8. The 1792 Court of Common Pleas decision of *Grant v Gould*¹⁸ is, however, cited as ‘pouring cold water’ on the aforementioned postulations.¹⁹ In this case Grant was charged with the offence of “advising and persuading” two members of the Foots Guards “to desert Her Majesty’s service.” He was tried and convicted by court-martial of being “instrumental to, and promoting” the enlistment of the two members, an offence for which he had not been arraigned,²⁰ and was thereby sentenced to receive one thousand lashes with the cat-o’-nine tails at such times and in such proportions as Her Majesty deemed fit. He applied for a writ of prohibition on the grounds that: (1) he was never a soldier and thus not subject to the jurisdiction of the court-martial; (2) there had been procedural errors with respect to the court-martial’s receipt and rejection of certain evidence and finally; (3) he was convicted of an offence not stated in the charge.

9. Lord Loughborough noted that “the courts of Westminster Hall have from time to time exercised” authority over courts-martial “for the

¹⁴ *ibid*

¹⁵ 'Civilian Judicial Review of Military Criminal Justice' (1974) 66 *Military Law Review* 1, 4

¹⁶ Gordon D. Henderson, "Courts-Martial and the Constitution: The Original Understanding" (1957) 71 *Harvard Law Review* 293, 320

¹⁷ *ibid*

¹⁸ (1792) 2 *Blackstone (H.)* 69

¹⁹ 'Civilian Judicial Review of Military Criminal Justice' (1974) 66 *Military Law Review* 1, 4-5

²⁰ (1792) 2 *Blackstone (H.)* 69, It was however stated to be a lesser offence of a similar nature

purpose of preventing them from exceeding the jurisdiction given to them.” In circumstances where the courts found that there was an excess of jurisdiction,²¹ an order of prohibition would be granted. Satisfied that the court-martial did, in fact, have jurisdiction over Grant; Lord Loughborough refused to submit to the view that there may be any other grounds on which the courts may issue a writ of prohibition against the decision of a court-martial. He noted, in particular, that the court was incapable of issuing the writ of prohibition in respect of the alleged errors with respect to receipt and rejection of evidence because, *inter alia*, such errors were not grounds for prohibition. Furthermore, although the applicant’s charge was phrased differently from his sentence, they were substantially the same and as such he refused to issue a prohibition in respect of that alleged ‘error’

10. Notwithstanding popular academic opinion, it is this writer’s view that the general principle emanating from this case is that an order of prohibition may only be granted against the decision of a court-martial where it proved that said court-martial has exceeded its jurisdiction. In this case the court did, in fact review the decision of the court-martial, however; upon review, the court was not satisfied that it could issue the order of prohibition as the court-martial had acted within its jurisdiction.

Distillation and Distortion

11. In the subsequent case of *In re Mansergh*²² the applicant sought an order of certiorari to quash the decision of a court-martial to dismiss him for grossly insubordinate conduct highly unbecoming of a commissioned officer and subversive to military discipline. Cockburn CJ noted in his judgement that:

“[W]here the civil rights of a person in military service are affected by the judgment of military tribunals, in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction, this Court ought to interfere to protect those civil rights.”²³

Here the learned Chief Justice made it clear that the court had the

²¹ (1792) 2 Blackstone (H.) 69, 100 Assumed power to act in matters not within their cognizance

²² (1861) 1 B. & S. 400

²³ *ibid*, [Emphasis added]

cognizance to interfere with the decisions of military tribunals to protect the civil rights of persons of military service; a point which was not specifically elucidated in *Grant v Gould*. These civil rights, as he explained, include the rights to life, liberty and property which he distinguished from matters which involved only the military status of applicant. The learned Chief Justice reasoned that matters which involved only the military status of the applicant were not reviewable as military personnel were engaged at the pleasure of the sovereign i.e. their engagement was the sovereign's prerogative which was not considered reviewable at the time.

12. However, Cockburn CJ's insertion of the clause "*in pronouncing which the tribunal has either acted without jurisdiction or has exceeded its jurisdiction*" raises three questions in relation to the application of this principle: (1) is there a distinction between acting without and acting in excess of jurisdiction; (2) if such a distinction exists, what is the distinction and; (3) must the military authority act without or in excess of jurisdiction for the court to intervene for the protection of the aforementioned civil rights? Unfortunately, this aspect of the dictum was not further adumbrated in the judgement. Nonetheless, it is generally accepted that Cockburn CJ was making the point that the court has a responsibility to intervene to protect the civil rights of military personnel which is independent of the court's discretion to intervene where there has been an excess of jurisdiction on the authority of *Grant v Gould*²⁴. This is perhaps due to the fact that the civil rights referred to by the learned Chief Justice are all rights guaranteed by the constitution. It would then follow that the court ought to protect those rights, being the guardian of the constitution.

13. This writer, however, takes the view that acting in excess of jurisdiction and infringing civil rights are not necessarily separated. Lord Reid clarified in *Anisminic Ltd v Foreign Compensation Commission*²⁵ that "there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a

²⁴ Chandler v Bernard et al TT 1999 HC 31, Des Vignes J; S.A. De Smith, *Judicial Review of Administrative Action* (4th edn, London Stevens & Sons Ltd 1980); Rama G Vidhu, *Court Martial Process* (Vij Books India 2011), 337

²⁵ [1969] 2 A.C. 147

nullity.”²⁶ The learned judge went on to list a plethora of scenarios whereby a tribunal would have exceeded its jurisdiction including, where it failed to comply with the rules of natural justice. Breaching the applicant’s civil rights ought to be recognised as one of those acts which would cause a tribunal to exceed its jurisdiction. In any event, breaching the principles of natural justice often involves the infringement of the applicant’s civil rights and, to that extent, the breach of civil rights in the exercise of jurisdiction is an excess of jurisdiction.

14. This writer further submits that regardless of any intention to make a distinction between acting without and in excess of jurisdiction, there is no material difference between the two. Abusing one’s decision-making power and making decisions concerning matters over which one is powerless both amount to acting beyond the scope of one’s powers. Put differently, a decision maker has no jurisdiction to abuse his power and as such would be acting without jurisdiction if he does so. Altogether, it is respectfully submitted that Cockburn CJ’s distillation of the ruling in *Grant v Gould* was unnecessary and can be identified as the origin of distortion of the law with respect to justiciability of military decisions.

15. *R. v. Army Council, ex p Ravenscroft*,²⁷ which post-dated *In re Mansergh*, appeared to take a more restrictive approach to reviewability. In this case, the applicant sought *mandamus* to compel a court of inquiry to be re-assembled and try him according to law. He sought the order on the grounds that: (1) he was convicted without his case being properly heard and; (2) the statutory rules relating to the constitution and proceedings of courts of inquiry were not complied with. These statutory rules included the requirements under the Army Act and their regulations that: (1) prior notice be given to all persons concerned with respect to the assembly of courts of inquiry and; (2) any individual subject to inquiry be given full opportunity to, *inter alia*, be present during the inquiry, cross-examine witnesses and give his own explanation.

16. Nonetheless, Viscount Reading CJ dismissed the application. In deciding whether the court could issue a writ of *mandamus* to the Army Council and whether the court had jurisdiction to hear the matter the

²⁶ *ibid*, 171

²⁷ [1917] 2 K.B. 504

learned Chief Justice made the following observations. Firstly, he reasoned that the court could not compel the Army Council to exercise in a particular way its discretionary power to reassemble a court of inquiry and that the applicant's complaint rightfully was, instead, against the officer who convened the court of inquiry. He also noted that, notwithstanding the foregoing, such matters concerned "military conduct and purely military law affecting military rules for the guidance of officers or discipline generally" with which, in his view, the court "has no power to interfere."²⁸ This conclusion was drawn from the dictum of Willes J in *Dawkins v Lord Rokeby*.²⁹ Finally, he made it clear that this judgment was not to be taken declaring that the court has no jurisdiction over the Army Council altogether, however, he did not expound upon the circumstances in which the court should assert its jurisdiction over the military.

17. In this writer's view, this case cannot be taken to have overturned *In re Mansergh* for the following reasons. Firstly, the learned Chief Justice never out-rightly condemned *In re Mansergh*. Instead, this writer respectfully submits that the two decisions can be reconciled in that: (1) the learned Chief Justice failed to recognise and address a clear issue of civil rights infringement; thus mistaking the issue at hand for a matter of *purely* military law and discipline³⁰ and; (2) the court did consider whether the Army Council acted without or in excess of jurisdiction albeit in a very narrow sense. In respect of the first point, both of the applicant's grounds clearly should have alerted the court that his rights to protection of the law and a fair hearing were affected. The court, therefore, ought to have intervened to protect the applicant's civil rights. In terms of the second point, the court identified that the Army Council had the jurisdiction to reassemble the court-martial at its discretion and concluded that, by choosing not to do so, it acted within its jurisdiction in the strict sense. However, the Army Council very well could have exercised its discretion unreasonably and thus would have exceeded its jurisdiction.³¹ Had the court explored these issues correctly, the judgement could have been squarely reconciled with *In re Mansergh*. Secondly, notwithstanding that he relied on the dictum of Willes J, it

²⁸ [1917] 2 K.B. 504, 508

²⁹ 176 E.R. 800

³⁰ i.e. a situation which was within the proper and exclusive jurisdiction of the military authority in question

³¹ *supra* note 25

must be pointed out that the same judge made the following observation in *Dawkins*:

“[I]t would be a platitude for me to lay down the...absolute necessity, of the maintenance of the *constitutional liberties* of the subjects of this country. Those constitutional liberties will, however, be found to be best maintained by each department of the Government keeping within its own proper limits, as assigned by law.”³²

18. In other words, the maintenance of constitutional civil rights is of utmost importance and each governmental body must maintain those rights whilst functioning within the ambit of its jurisdiction. Notwithstanding the fact that he went on to say that matters which fall within the jurisdiction of the military must be determined by military men and that military personnel have agreed to submit to military law, the foregoing dictum makes it clear that firstly the military as a department of the Government, must function within its proper limits assigned by the law and must give effect to the civil rights of its members. Finally, since the learned Chief Justice emphasised that the court could issue writs of mandamus to the military in other circumstances, it quite possible that he would have endorsed intervention to protect civil rights had that issue been recognised in the instant case.

19. In any event, the subsequent case of *R v. Secretary of State for War, ex p Martyn*³³ endorsed *In re Mansergh*. Here the applicant was arrested as a deserter and brought before a court-martial. Although the court-martial held he was not subject to military law a subsequent court-martial was convened more than a month later. This court-martial was not convened in compliance with the Rules of Procedure 1926 which required the subsequent court-martial to be convened forthwith. The applicant was adjudged a deserter and sentenced to nine months' detention. He applied for *certiorari* on the ground that the court-martial had no jurisdiction to try him.³⁴ Lord Goddard CJ explained that the court had jurisdiction review matters of military law in so far as the civil rights

³² *Dawkins v Lord Rokeby*, 176 E.R. 800 [Emphasis added]

³³ [1949] 1 K.B. 242

³⁴ *ibid*, He also sought an order of habeas corpus, however, that was contingent on the first order of *certiorari* being granted

of the soldier or other person with whom they deal may be affected.³⁵ On the facts, the learned Chief Justice did not find that such an issue was raised. Additionally, although not expressly stated in the judgement, the court also looked to the question of whether the court-martial had acted without or in excess of jurisdiction and found that since it was conceded that the applicant was a soldier the court-martial had jurisdiction to try him.³⁶

20. Although this judgement can be reconciled with in *Re Mansergh* insofar as statement of the law is concerned, this writer respectfully submits that there is a clear discrepancy in respect of the issue of jurisdiction. Although the court considered whether the court-martial acted without or in excess of jurisdiction as required by in *Re Mansergh*, that issue was answered in a very narrow sense. The court recognised that the court-martial had the jurisdiction to try soldiers and as such concluded that, by trying and convicting the applicant, it acted within its jurisdiction. However, it was not considered whether the court-martial exceeded that jurisdiction by trying and convicting the applicant notwithstanding the glaringly blatant fact that it had not been convened in accordance with the wording of the statute.³⁷ In this respect, this writer doubts the soundness of this decision.

Contemporary Approach

21. According to popular academic opinion, the law in the UK remains that the court will exercise its jurisdiction over matters concerning military law and discipline where the military authority in question has acted without or in excess of jurisdiction in a very narrow sense or its decision has affected the civil rights of the applicant.— However, this does not augur well with more recent legal authority. These cases seem to be more in line with the approach expounded in *Anisminic* whereby the court exercised its power to prevent inferior tribunals from exceeding their jurisdiction in a broader sense. In *R v Army Board of Defence Council ex p Anderson*³⁹ Taylor LJ held that a decision of the Army Board with respect to a complaint of racial discrimination in the army was reviewable on the ground of unfair procedure. He quoted

³⁵ *ibid*, 243

³⁶ *ibid*

³⁷ *supra* note 24

³⁸ *supra* note 47

³⁹ [1992] Q.B. 169

⁴⁰ William Wade and Christopher Forsyth, *Administrative Law* (6th edn, Oxford University

Wade,⁴⁰ who summarised the principles laid down in *Ridge v Baldwin*,⁴¹ and agreed that a power which affects the rights and interests of an individual must be exercised judicially i.e. fairly or in accordance with the rules of natural justice.⁴² In the subsequent case of *R v Ministry of Defence ex p Smith*,⁴³ the Ministry of Defence discharged four servicepersons pursuant to the policy that, homosexuality was incompatible with service in the armed forces. The Court of Appeal held, *inter alia*, that: (1) both the decision and the policy were reviewable on the ground of irrationality⁴⁴ and; (2) only cases involving national security properly so called and where the courts actually lack the expertise or material to form a judgement on the matter were beyond the scope of judicial review. These decisions make it clear that the law expounded in *ex p Martyn* and previous cases can no longer be said to represent the legal position in the UK with respect to justiciability of military decisions.

22. It must further be conceded that decisions such as *ex p Martyn*, which took a restrictive approach to reviewability of military decisions, were all made during a period where the UK was in a state of war. In such circumstances deference would clearly be given to the military by the courts in order to secure the essential interest of this institution, discipline. History has shown that a lack of discipline in the army could be prejudicial to the institution and by extension the state. In fact, as noted in the previous chapter, it was a state of indiscipline which caused Parliament to enact the Mutiny Acts.⁴⁵ This writer takes the view that the courts, in fear that their decisions would be prejudicial to the discipline of the army and thus affect the defence of the realm, permitted the military to determine their own issues without interference. This pusillanimous approach, however, cannot withstand the post-World War II explosion of administrative law as evidenced by *Anisminic* and subsequent decisions. Concomitantly, the procedural fairness intrinsic in military law itself must be given effect to lest the Army Act and all the rules of procedure made pursuant thereto be rendered nugatory.

Press 1998)

⁴¹ [1964] AC 40

⁴² S.A. De Smith, *Judicial Review of Administrative Action* (4th edn, London Stevens & Sons Ltd 1980) pp 518-519

⁴³ [1996] Q.B. 517

⁴⁴ Notwithstanding that the application was ultimately dismissed

⁴⁵ see p 5 for discussion

Conclusion

23. It is concluded therefore that, in the UK, military decisions are justiciable and the courts ought to intervene to prevent military authorities from exceeding the jurisdiction given to them in a broad sense. It is only where the court does not have the requisite materials or expertise in the matter at hand or where it is a matter of national security proper that the court should exclude judicial review.

V. THE BARBADIAN APPROACH

*“The applicant has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered that service, entitles him to have.”*⁴⁶

The Case of Re Young

24. Notwithstanding the fact that the courts of Commonwealth Caribbean jurisdictions have generally sought to adopt the UK approach,⁴⁷ Barbados’ approach is unique; as evidenced in the case of Re Young.⁴⁸ Sergeant Young was convicted of conduct prejudicial to good order and military discipline in a summary hearing before the Deputy Chief of Staff of the Barbados Defence Force,⁴⁹ and petitioned the Chief of Staff on the grounds that, inter alia: (1) he had not been given an abstract of the evidence against him; (2) he was denied the statutory period in which to prepare his defence; (3) the DCOS exceeded his statutory powers by imposing the sentence of dismissal and subjected him to a double penalty contrary to the Defence Act⁵⁰ and; (4) subsequent to the trial he was further kept in close arrest for a period exceeding 48 hours. The COS subsequently told the applicant that the findings were confirmed and that all he was trying to do was to challenge all the other proceedings that had gone on before in the BDF. Young sought certiorari to quash both the DCOS’ decision and the COS’ subsequent confirmation on the above grounds. He also sought

⁴⁶ *Re Young* (1993) 47 WIR 60, 65-66 (Waterman J)

⁴⁷ Notwithstanding that it remains unsettled whether they will adopt the more contemporary approach or the archaic approach which is inconsistent with the social and jurisprudential reality of the Caribbean. See *Ramathal v Defence Council* TT 2009 HC 274; *R v Jamaica Defence Force, ex p Pitter* JM 1997 SC 40

⁴⁸ *supra* note 46

⁴⁹ in his capacity as Young’s commanding officer

⁵⁰ *supra* note 92, 63 According to the court he was told that his commanding officer would recommend to the Chief of Staff that he should not be reengaged when his period of engagement had elapsed. He was also sentenced to reduction in rank

mandamus to compel the COS to adjudicate on the matter according to law. Waterman J relied on the dicta of Lord Goddard CJ in *ex p Martyn* and Viscount Reading CJ in *ex p Ravenscroft* to conclude that the court ought not to interfere.

Inconsistency

25. It is this writer's view that Waterman J's approach can be reconciled with neither *Anisminic* nor the pre-*Anisminic* UK approach. Firstly, the learned judge failed to consider whether the decisions affected the applicant's civil rights not to be deprived of his liberty except by due process of the law, to a fair hearing and protection of the law, contrary to the both cases on which he relied. In those cases, the judges did not interfere because they found no issues concerning the applicants' civil rights and were satisfied that the military authorities acted within their proper jurisdiction, albeit in a narrow sense.⁵¹ Some of the grounds raised by the applicant, such as the denial of time to prepare his defence, could have supported an argument that such civil rights were affected by the decision. Secondly, the court considered whether both the DCOS and the COS acted without or in excess of their jurisdiction in a very narrow sense, contrary to *Anisminic*. Waterman J concluded that since the applicant was a soldier they had jurisdiction to try him and review his trial respectively. However, had the court considered *Anisminic* and/or *Thomas* it would at the very least have concluded that it had jurisdiction to intervene to determine whether the DCOS or COS exceeded their jurisdiction by breaching the rules of natural justice.

26. This writer further contends, respectfully, that even if the learned judge was attempting take a new approach to justiciability of military decisions it is inconsistent with the Administrative Justice Act. The decisions of both the COS and DCOS were administrative acts in that they were each made by an "other authority of the Government of Barbados," i.e. a military authority, in the exercise of power conferred by an "enactment," i.e. the Defence Act, in the wording of s 2 of the AJA. The grounds of review under s 4 include excess of jurisdiction as well as any breach of natural justice which can clearly be reconciled with *Anisminic* as well as the pre-*Anisminic* approach in that a breach of natural justice may involve breaches of the aforementioned civil rights. Additional evidence in support of this view can be found in the First Schedule of

⁵¹ See chapter 2 generally for discussion

the Act; which indicates that the requirement under s 13 to provide reasons for decisions which ought to be made fairly or in compliance with the rules of natural justice extends to decisions relating to disciplinary matters made by any authority under the Defence Act. This requirement clearly demonstrates that matters concerning military discipline are subject to judicial review insofar as compliance with the rules of natural justice is concerned and by extension the civil rights of the affected individual.

Conclusion

27. It therefore must be conceded that *Re Young* was wrongly decided on many accounts and ought not to be considered authoritative of the Barbadian approach to justiciability of military decisions. Recourse ought to be given instead to contemporary administrative law principles enunciated in *Anisminic* and codified in the AJA.

IV. CONCLUSION

*"...I am of the opinion that those allegations amount to allegations by the applicant that his civil rights have been affected. In these circumstances, I have decided that I ought not to decline jurisdiction to hear and determine this application for judicial review."*⁵²

Calibration Findings

28. Military law and authority has progressed from being dictated by the sovereign's will⁵³ to being fully determined by parliament.⁵⁴ The jurisprudence of its reviewability has developed from the mere belief to firm judicial pronouncement that in the United Kingdom military decisions are subject to judicial review; the only exceptions being where it is a matter of national security proper or one which the court has insufficient skill or material to adjudicate on. It was, however, held in the Barbadian case of *Re Young* that the court ought not to intervene in matters concerning military law and discipline at all which is inconsistent with either approach. Nonetheless, owing to significant errors in this judgement it is respectfully submitted that this case ought not to be considered the authority with respect to justiciability of Barbadian military decisions. Instead one should seek recourse to the contemporary understanding of Administrative Law codified in the

⁵² *Chandler v Bernard*, et al TT 1999 HC 31 (Des Vignes J)

⁵³ 1 Blackstone*262.

⁵⁴ Edward M. Byrne, *Military Law* (3rd edn, Naval Institute Press 1981).

provisions of the Administrative Justice Act of Barbados and enunciated in *Anisminic*, *Thomas* and other more recent cases. Thereafter, one would conclude that military decisions are fully justiciable except those involving matters of national security proper and those which the court has no insufficient skill and material to adjudicate on. This is the only approach which could restore equilibrium to the Scale of Military Justice.



Jeff Cumberbatch

Deputy Dean (Postgraduate & Research), UWI Cave Hill Campus

THE LIABILITY OF PRISONS FOR THE NEGLIGENCE OF THEIR INMATES

by Jeff Cumberbatch (Guest Writer)

The imposition of liability on one party for the wrongful acts of another that cause damage to a third is known in law as the doctrine of vicarious liability. Traditionally, for such liability to ensue, two basic questions need to be satisfied; first, the nature of the relationship between the wrongdoer and the party on whom liability is imposed, and second; the circumstances in which the act of the individual wrongdoer will attract liability for the other party. For centuries, the answers to these have been that the relationship must be mainly that of employer and employee and that the wrongful act be done in the course of the employment.

While the determination of these matters, especially the latter, has been subject to some reform in recent years, a recent decision of the English Supreme Court, *Cox v Ministry of Justice* [2016] UKSC 10, establishes that the prison authorities may be held vicariously liable for the negligent act of a prisoner effected in the course of work in a prison kitchen.

In this case, the victim, Mrs. Cox, worked as the catering manager at a prison in Swansea, Wales. She supervised four members of staff and had charge of the kitchen where meals were prepared for the prisoners. About 20 prisoners, also under her supervision, worked in the kitchen. On the fateful day, Mrs. Cox was working in the kitchen with an assistant and a number of prisoners. Some kitchen supplies were delivered to the

prison and she instructed four prisoners to take them upstairs to the kitchen stores. While doing so, one of the prisoners dropped a sack of rice, which burst open. Mrs. Cox bent down to prevent further spillage. While she was bent over, another prisoner attempted to carry two sacks past her, lost his balance, and dropped one of the sacks on Mrs. Cox's back, causing her injury. It was accepted that the prisoner was negligent in his conduct.

At the trial, the claim was dismissed on the ground that the prison service was not vicariously liable for the prisoner's negligence. The learned judge concluded that the relationship was not "akin to that between an employer and an employee", a formulation that had been posited by Lord Phillips in an earlier case in 2012, *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56; [2013] 2 AC 1, where he had urged at paragraph 35:

"The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied:

- i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;*
- ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;*
- iii) The employee's activity is likely to be part of the business activity of the employer;*
- iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;*
- v) The employee will, to a greater or lesser degree, have been under the control of the employer..."*

And, at paragraph 52:

"Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is "akin to that between an employer and an employee".

And even though the judge accepted that there were some respects in which the prison service relationship with the prisoner resembled employment, he also considered that there was a crucial difference. This was that employment was a voluntary relationship in which each party acted for its own advantage. The employer employed the employee as the means by which the employer's undertaking was carried on and furthered. However, the prison authorities were legally required to offer work to prisoners and they were required by the Prison Service Order to make payment for that work. Those requirements were not a matter of voluntary enterprise but of penal policy. The provision of work was a matter of prison discipline, of prisoners' rehabilitation and possibly of discharging the prisoners' obligations to the community. Although the work done by prisoners contributed to the efficient and economical operation of the prison, the situation was not one in which prisoners were furthering the business undertaking of the prison service.

An appeal against this decision was successful. Unanimously, the Court of Appeal was of the view that the work performed by the prisoners in the kitchen was essential to the functioning of the prison and was therefore done for its benefit. It was part of the enterprise or business of the prison service in running the prison. Although the relationship differed from a normal employment relationship in that the prisoners were bound to the prison service not by contract but by their sentences, and also that the prisoners' wages were nominal, these rendered the relationship even closer than one of employment, being founded not on mutuality but on compulsion. The state then appealed to the Supreme Court.

After a close analysis of the dicta of Lord Phillips cited above and their application to subsequent cases, Lord Neuberger, the President of the Supreme Court, who delivered the unanimous judgment of their Lordships concluded:

“The result of this approach is that a relationship other than one of employment is in principle capable of giving rise to vicarious liability where harm is wrongfully done by an individual who carries on activities as an integral part of the business activities carried on by a defendant and for its benefit (rather than his activities being entirely attributable to the conduct of a recognizably independent business of his own or of a third party), and where the commission of the wrongful act is a risk created by

the defendant by assigning those activities to the individual in question.”

His judgment concluded that the requirements stated by Lord Phillips were met in this case:

“The prison service carries on activities in furtherance of its aims. The fact that those aims are not commercially motivated, but serve the public interest, is no bar to the imposition of vicarious liability. Prisoners working in the prison kitchens...are integrated into the operation of the prison, so that the activities assigned to them by the prison service form an integral part of the activities which it carries on in the furtherance of its aims: in particular, the activity of providing meals for prisoners. They may commit a variety of negligent acts within the field of activities assigned to them. That is recognised by the health and safety training which they receive. Furthermore, they work under the direction of prison staff. Mrs. Cox was injured as a result of negligence by [the prisoner] in carrying on the activities assigned to him. The prison service is therefore vicariously liable to her”.

Lord Neuberger also dealt masterfully with each of the contrary arguments of the respondents. First, there was the claim that the relationship between the prison service and the prisoners working in a prison is fundamentally different from that between a private employer and its employees. This was because the primary purpose of the prison service in this context is not to advance any business or enterprise but rather to support a rehabilitation of the prisoners, and the prisoners, unlike employees, have no interest in furthering the objectives of the prison service.

His Lordship found himself unable to accept this argument. At paragraph 34, he averred:

“It is true that the prison service seeks to rehabilitate prisoners, and that setting them to work is one of the means by which it attempts to achieve that objective. Rehabilitation is, however, not its only objective: it has also been an aim of penal policy since at least the nineteenth century to ensure, as it was put in a 1991 White Paper, “that convicted prisoners contribute to the cost of their upkeep by helping with the running and maintenance of the prison and by providing goods and services in prison industries and

on prison farms”: “Custody , Care and Justice: The Way Ahead for the Prison Service in England and Wales” (1991) (Cm 1647), para 7.22. More importantly, when prisoners work in the prison kitchen, or in other workplaces such as the gardens or the laundry, they are integrated into the operation of the prison. The activities assigned to them are not merely of benefit to themselves: a benefit which is, moreover, merely potential and indirect. Their activities form part of the operation of the prison, and are of direct and immediate benefit to the prison service itself.”

Second, according to the respondents, other aspects of the relationship between the prison service and prisoners differed from the characteristics of an ordinary employment relationship. The prison service, for example, was under a duty to provide useful work for prisoners. Its choice of workers was restricted to the prisoners who happened to be held there. In that regard, it was pointed out that the courts had not imposed vicarious liability in respect of compulsory pilotage, where the master of the ship was compelled to surrender the navigation of his vessel to a pilot and had no power of selection. Furthermore, the prisoners’ pay was not a commercial wage, but a payment intended to motivate them.

Lord Neuberger responded to this argument thusly:

“These differences do not lead to the conclusion that vicarious liability should not be imposed, applying the approach approved in the Christian Brothers case. The fact that the incentive payments made to prisoners are below the level of a commercial wage reflects the context in which prisoners work, but does not entail that vicarious liability should not be imposed. The Christian Brothers case demonstrates that the payment of a wage is not essential.”

The third argument was that to hold the prison service vicariously liable for the acts of a prisoner would be a major development of the common law, which should be developed by the courts “only cautiously”.

Again his Lordship did not agree. He did not consider the decision to ascribe vicarious liability in this case involved a major development of the law but, rather, followed from an application of the relevant and applicable principles of law.

Fourth, counsel for the appellants argued that it was always necessary to ask the broader question as to whether it would be fair, just and reasonable to impose vicarious liability. Implicit in this was the thesis that since the prison service acts for the public benefit, any compensation to be paid as a result of a finding of liability would have to be met out of scarce public funds. Also that the prison service already owed a common law duty of care and statutory duties towards Mrs. Cox qua employee, so that there was no justification for imposing vicarious liability as well.

This failed to sway the Court. They did not agree that it was always necessary to ask the broader question since the criteria listed by Lord Phillips were designed to ensure that liability would be imposed only where it would be fair just and reasonable to do so. Although these criteria may be capable of refinement in particular contexts and were not to be applied slavishly, it should not be necessary, once they are satisfied, to re-assess the fairness justice and reasonableness in the particular case. On these facts, according to Lord Neuberger, *“for the prison service to be liable to compensate a victim of negligence by a member of the prison catering team appears to me to be just and reasonable whether the negligent member of the team is a civilian or a prisoner”*.

Lastly, the Court was not deterred by the doomsday scenario that if the claim were to succeed “there would be similar claims arising from the other activities undertaken by prisoners with a view to their rehabilitation, such as educational classes or offending behaviour programmes and there was also a risk of fraudulent claims being made for prisoner on prisoner incidents. A finding of vicarious liability, it was argued, might lead the prison service to adopt an unduly cautious approach to the type of tasks which prisoners were given the opportunity to do, given the potential impact on scarce financial resources.

In response to the first part, Lord Neuberger stated:

“I am not persuaded by these apprehensions. It is true that prisoners who participate in educational classes or offending behaviour programmes contribute towards their own rehabilitation, and in that sense may be said

to be acting in furtherance of one of the aims of the prison service. But there is an intelligible distinction between taking part in activities of that kind and working as an integral part of the operation of the prison and for its benefit.

Nor was he deterred by the prospect of fraudulent claims:

“As for the risk of fraudulent claims, that risk is inherent in the law relating to compensation for personal injuries, and employers, insurers and the courts are all experienced in guarding against it”.

Or by the risk of the prison service adopting an unduly cautious approach:

“As for the risk of an unduly cautious approach being adopted by the prison service, that risk is entirely speculative, and is based on a consideration only of the costs potentially resulting from the imposition of vicarious liability, without taking account of the costs which would result from a decision to cease employing prisoners and instead to employ civilian staff or external contractors at market rates of pay”.

The appeal was accordingly dismissed.

This decision would appear to hold some relevance for the regional prison service. Although reference is made in the judgment to some British statutory authority that permits the employment of prisoners in certain activities in the prison and provides for their remuneration therefor, there is no reason to think that the position in the region is not at least similar in both respects. In any event, the gist of the decision is based on ordinary principles of common law that are undeniably applicable in this jurisdiction.



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