

The Caribbean Court of Justice – Excelling in Distinguishing?

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*Since its establishment in 2005, the Caribbean Court of Justice (CCJ) has seen consistently low adoption of its appellate jurisdiction, with few states choosing it as their final court of appeal. However, despite the limited uptake of this optional jurisdiction, the CCJ has had a remarkably significant impact—particularly in relation to the mandatory death penalty and the criminal offences of buggery and serious indecency. This paper examines the decisions and influence of the CCJ in human rights, focusing on key rulings such as *Nervais and Severin v The Queen* [2018] CCJ 19 (AJ); *McEwan v Guyana* [2018] CCJ 30 (AJ) and *Holder-McClean-Ramirez et al v Attorney General of Barbados* (2022) 44/220. It compares these to judgments of the Judicial Committee of the Privy Council (JCPC), including *Chandler v The State (No 2) (Trinidad and Tobago)* [2022] UKPC 19; *Surratt v Trinidad and Tobago* [2007] UKPC 55; and *Chantelle Day et al v The Governor of the Cayman Islands et al* [2022] UKPC 6. Through this analysis, the paper explores how CCJ jurisprudence is shaping the human rights landscape in the Commonwealth Caribbean, and assesses the potential implications for the future appeal of the court's appellate jurisdiction.*

Keywords: Human Rights; Buggery; Serious indecency; Commonwealth Caribbean; Death penalty

Introduction

The Caribbean, located between the Americas centred around the Caribbean Sea, comprises of thirty-three political entities, including independent states, dependant territories and overseas territories. Its human history is traced confidently to 3100 BC,¹ with indigenous populations including Arawaks, Caribs, Taíno and Mayan. The region was colonised from the 16th century onwards, from Hispaniola in the north (now Haiti and the Dominican Republic) to Trinidad and Tobago, Guyana and Suriname in the south, Barbados to the east and Belize to the west, in Central America. Colonisation of the region came from Britain, Spain, France, the Netherlands and Portugal, with the influence of each omnirelevant. The diversity of colonisers within the region produced similarities in jurisdiction by European coloniser with regards culture, language, society and notably, legal system, and continues to influence political and economic alliances in the region today.

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¹Wilson (2007) at 28.

Commonwealth Caribbean

The Commonwealth Caribbean is a group of English-speaking states, colonised by the United Kingdom, located in and around the Caribbean Sea. The term includes island states, such as Barbados, St Vincent and the Grenadines and Jamaica, and those on the mainland of South and Central America, including Guyana and Belize. Through their shared history of colonisation by the British, starting in the 1600s, commonalities remain across the states, including, in the majority, the use of the common law legal system.² Common law emerged in England during the Middle Ages through legal reforms introduced by Henry II, its title derived from the commonality of application across the country.³ A common law system relies on judgments to determine a legal rules as opposed to Parliament through statute. In reality, a common law legal system operates through a combination of statute and case law, utilising both codified and uncoded legal frameworks. Commonalities produced by colonial history continue to influence political and economic alliances, most notably, the Caribbean Community (CARICOM).

The Judicial Committee of the Privy Council (JCPC)

The jurisdiction of the Privy Council (JCPC) originated around 1066 and the Norman conquest, wherein Norman monarchs believed “the King is the fountain of all justice throughout his Dominions, and exercises jurisdiction in his Council, which act in an advisory capacity to the Crown.”⁴ Over time, Privy Council Committees were formed, with the present structure formed under the Judicial Committee Act 1833, assigning the JCPC as the highest court of appeal for British colonies in both civil and criminal cases. Upon independence from Britain, a number of former colonies chose to maintain their relationship with the JCPC and its jurisdiction as the final court of appeal. With the passing of time, states across the world began establishing their own final court of appeal and ceded jurisdiction from the JCPC to their own domestic or regional final appellate courts. However, as of May 2025, the JCPC remains the final court of appeal for twenty-nine countries. Seventeen of these are overseas territories, a Sovereign Base Area or Crown Dependency, leaving twelve independent states. Out of the twelve independent states, 58%, seven states, are in the Caribbean.⁵

Caribbean Community (CARICOM)

CARICOM emerged following the dissolution of the West Indies Federation in 1962, superseding the Caribbean Free Trade Association in 1972. Established in 1973 by the Treaty of Chaguaramas, CARICOM is a political and economic union,

²This caveated language is relevant primarily for St Lucia, the legal system of which is a hybrid of civil law and common law owing to its colonisation by both the French and the British.

³See Baker (2002) for a detailed history.

⁴Barnard (2023).

⁵Antigua and Barbuda; The Bahamas; Grenada; Jamaica; St Christopher and Nevis; Saint Vincent and the Grenadines; Trinidad and Tobago.

comprising of fifteen member states and six associate members.⁶ Of the fifteen member states, thirteen have a British colonial association, including Montserrat which is currently a British overseas territory. Of the six associate members, five are British Overseas Territories.⁷ Through its objective to enhance and facilitate regional integration, CARICOM rests on four pillars – economic integration, foreign policy coordination, human and social development and security. Its legal basis is found in the Revised Treaty of Chaguaramas, signed in 2002, which sought to build on the original Treaty of Chaguaramas by creating a single market and single economy (CSME).

The Caribbean Court of Justice (CCJ)

The Revised Treaty of Chaguaramas was supplemented by the Agreement Establishing the Caribbean Court of Justice (CCJ), which came into force in 2002.⁸ In its Preamble, the Agreement envisages the CCJ as having a “determinative role in the further development of Caribbean jurisprudence through the judicial process” along with representing “a further step in the deepening of the regional integration process”.⁹ The Agreement recognised two jurisdictions of the CCJ – an original jurisdiction, tasked with interpreting and applying the Revised Treaty of Chaguaramas, and an appellate jurisdiction, replacing the JCPC with the CCJ as the final court of appeal. Constitutional amendment is required by jurisdictions to accede to the appellate jurisdiction. Article XXV of the Agreement requires state parties to the treaty to send their final appeals to the CCJ, whilst affording the right of reservation to Article XXV with the consent of Contracting Parties.¹⁰

The Appellate Jurisdiction of the CCJ

At time of writing, five CARICOM states have recognised the CCJ as their final court of appeal, replacing jurisdiction of the JCPC.¹¹ This represents fewer than half of eligible CARICOM members. Those yet to accede include Jamaica and Trinidad and Tobago, two of the largest states by population and economy, and, remarkably, the seat of the court, which is headquartered in Port of Spain on the island of Trinidad. Although reasoning is inevitably diverse, Mr Justice Saunders reported the following as possible explanation for the low number willing to commit to the CCJ in their appellate jurisdiction, instead remaining with the JCPC:

⁶Full members include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago.

⁷Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos.

⁸The Bahamas, Montserrat and Haiti are members of CARICOM, signatories of the Revised Treaty, but not parties to the Agreement Establishing the CCJ.

⁹Preamble, Agreement Establishing the Caribbean Court of Justice.

¹⁰Article XXXIX.

¹¹Barbados, Guyana, Belize, Dominica and St Lucia.

1. “Extraordinary constitutional hurdles that must first be overcome.” Constitutional provisions in both Grenada and Antigua & Barbuda require, for a constitutional amendment, Governments to obtain a qualified parliamentary majority in support of the measure and garner a two-thirds vote via referendum. In Jamaica, the JCPC held that constitutional amendments require a minimum of a qualified majority parliamentary vote.¹²
2. “The majority of people still know relatively little of the CCJ or fully appreciate its seminal value to the development of Caribbean society and Caribbean jurisprudence. Many consider that there are far more important bread-and-butter issues with which their government should concern itself. It is also true that, in spite of the impressive institutional and administrative measures employed by the CCJ to ensure transparency, consistency, access to justice, and judicial independence, some people still consider that British justice will always be purer.”¹³
3. Conflicting messages from London:
4. Justice Saunders cites four news articles, focusing on the retention of the JCPC by numerous Caribbean states. Lord Nicholas Phillips, who in 2009 suggested they had “overstayed their welcome” contrasted with Lord Reed, who stated that the judges of the JCPC considered it “an honour to serve the people of Jamaica”, and Lord Hodge who spoke of the “privilege to serve the nations and territories of the JCPC”.¹⁴

The potential reasoning advanced by Mr Justice Saunders focuses on messaging and barriers, considering how these may be influencing the desire to cede, as opposed to a consideration of the very different approaches adopted by the courts, and the interpretation of those approaches by those affected, which will be considered by this paper.

Jurisprudence and precedent of the CCJ

CCJ decisions constitute *stare decisis*, legally binding precedents in conformity with common law legal systems. With consideration to applicable precedent to their decisions, in *Boyce & Joseph v The Attorney General*¹⁵ the CCJ held:

“The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court.”¹⁶

¹²Saunders (2025) at para. 33.

¹³Ibid, at para 34.

¹⁴See Virtue (2023).

¹⁵*Boyce & Joseph v The Attorney General* [2006] CCJ 1 (AJ).

¹⁶ Ibid, at para. 18.

The court confirmed, with regards decisions of the JCPC, their binding nature until and unless overruled by the CCJ, their ability to overrule where necessary, and the jurisprudence of the JCPC holding equal weight as jurisprudence from courts in other Commonwealth jurisdictions. In the main, CCJ jurisprudence has been consistent with that emanating, past and present, from the JCPC. However, one area of significant divergence, which forms the focus of this paper, is that of human rights, specifically those seemingly denied through the interpretation of savings clauses in Commonwealth Caribbean Constitutions.

Constitutional savings clauses

Savings clauses have been at the centre of debate concerning colonial-era legislation and its incompatibility with rights and freedoms guaranteed under Commonwealth Caribbean Constitutions. Their initial purpose was to provide legal certainty post-independence by preventing pre-independence legislation being challenged as unconstitutional post-independence. They were included in all Commonwealth Caribbean Constitutions, taking one of two forms. The first, narrower form is a special savings clause, protecting pre-independence laws authorising but not those mandating.¹⁷ The second, wider form is a general saving clause, protecting all pre-independence laws.¹⁸ In Barbados, for example, the general savings clause reads as follows:

26. (1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question—
(a) is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;
(b) repeals and re-enacts an existing law without alteration; or
(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent.

The special savings clause in Jamaica reads as follows:

13. (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011.

¹⁷As seen in all OECS states, including St Vincent and the Grenadines, St Lucia, St Kitts and Nevis and Dominica. See *Pratt v A-G of Jamaica* [1994] 2 AC 1 (JM PC) and *Hughes v R* [2002] 2 LRC 585 (SLU CA).

¹⁸As seen in Trinidad and Tobago, the Bahamas, Jamaica and Barbados.

Initially intended as a method to reconcile existing legal provisions with newly introduced fundamental rights guaranteed by the Constitution, for many, they are perceived as a perpetual barrier for citizens seeking to challenge laws deemed inconsistent with human rights obligations. Whilst some constitutions included a time limit on the savings clauses (Belize, for example, reflecting their transitional purpose, laws were ‘saved’ for five years post-independence), most had no such provision. This rendered the majority of constitutional savings clauses *prima facie* existing in perpetuity, provided the protected law remains in force and the Constitution not amended. The consequence of their enduring nature has been to shield provisions and decisions made prior to independence, prior to the enactment of the constitution, from legal challenge, holding the law in a period of stasis despite alleged conflict with the Constitution. Examples include, but are by no means limited to, the mandatory death penalty and the criminalisation of same-sex sexual activity, through varying forms of buggery and serious or gross indecency provisions. Such provisions have been judicially acknowledged as in violation of constitutionally protected rights and freedoms but attracted protection by savings clauses where, simply put, the provision or decision was in force at, and remained as such post, independence.

The preceding decades have witnessed multiple legal challenges, mounted by citizens and rights groups seeking to challenge laws as in breach of constitutionally afforded rights. Such challenges have produced arguments on interpretation, constitutional supremacy, the efficacy (or otherwise) of savings clauses and the role of the judiciary where law is contested as failing with Parliament omitting to act. Analytical themes consistently emerging from this discussion have been situated in the provision of rights juxtaposed with the failure to guarantee them, the remit of the court vs the remit of Parliament, Parliamentary responsibility to repeal as opposed to judicial declaration of incompatibility and resulting reliance on judicial interpretation of constitutions, their enabling Acts and the savings clauses themselves. Resolution of this conflict between rights, interpretation and supremacy of law has not been through the executive or legislature, but instead the judiciary, utilising highest appeal courts, and resulting, owing to the current jurisdiction of the CCJ for some and JCPC for others, a divergence of legal opinion produced through multiple judicial decisions from both courts in the Caribbean region. A significant number of Commonwealth Caribbean states continue to afford jurisdiction to the JCPC as their final court of appeal. JCPC jurisprudence is binding on lower courts, pseudo-binding on itself¹⁹ and provides crucial interpretation on areas of law seemingly in conflict with constitutional guarantees across states who retain the jurisdiction of the JCPC. The CCJ, as noted above, can choose to adopt or depart from JCPC decisions.

¹⁹see *Matthew v State of Trinidad and Tobago* [2004] UKPC 33 and *Chandler v The State (Respondent) (No2) (Trinidad and Tobago)* [2022] UKPC 19.

Savings Clauses and the Judicial Committee of the Privy Council

In the 1983 case of *Riley v Attorney General*,²⁰ the JCPC held that savings clauses in the Constitution of Jamaica protected the extensive delay in carrying out the death penalty from constitutional scrutiny as in breach of protection against inhumane and degrading treatment. However, the cases of *Roodal v The State*²¹ (now overturned) and *Pratt v A-G of Jamaica*²² appeared initially to represent an adjustment in the judicial interpretation of savings clauses. In *Pratt*, the JCPC overruled its own decision in *Riley* and held that an extensive delay “except where the delay had been the result of some fault of the accused” would constitute a breach of constitutional guarantees, and in *Roodal* held that the mandatory death penalty was unconstitutional as in breach of protection from arbitrary and disproportionate punishment. However this position was relatively short-lived, when the JCPC were presented with interpreting the modification provisions contained in the parent Act of the constitution, and the savings clause contained in the constitution. In *Matthew v State of Trinidad and Tobago*,²³ the defendant challenged the mandatory death penalty for murder, arguing that rendering it discretionary would be in conformity with S5 of the Trinidadian and Tobagonian constitution. S5 of the Constitution states “existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act”. The JCPC held that the Constitution recognised itself as supreme in S2, rendering the savings clause, provided at S6 (1), a clear and unambiguous statement of supreme law. The interpretation of the JCPC was that the savings clause held priority over the mandate to modify, rendering the mandatory death penalty saved by S6, which did not need to be read in a way to give effect to S5. In doing so, their earlier decision in *Roodal* was overruled, with “the decision as to whether to abolish the mandatory death penalty (as) a matter for the parliament of Trinidad and Tobago”.²⁴ The same year, the JCPC heard the case of *Boyce v The Queen* a Barbadian appeal concerning the mandatory death penalty and its incompatibility with the constitutional right not to be subjected to cruel, inhumane and degrading treatment. The JCPC held that whilst the mandatory death penalty would not have been compatible with the Barbadian Constitution in the absence of the savings clause, where it was present as here, the mandatory death penalty was protected as an existing law.²⁵

In *Chandler v The State (Respondent) (No2) (Trinidad and Tobago)*²⁶ the JCPC were again asked to review the mandatory death penalty in Trinidad and Tobago. In doing so, they were required to consider whether their decision in *Matthew v State of Trinidad and Tobago*²⁷ had been incorrectly decided. Much of the discussion centred on *stare decisis* and legal certainty, with the JCPC quoting Lord Slynn in

²⁰*Riley v Attorney General* [1983] 1 AC 719.

²¹*Roodal v The State* [2005] 1 AC 328 (TT PC).

²²*Pratt v A-G of Jamaica* [1994] 2 AC 1 (JM PC).

²³*Matthew v State of Trinidad and Tobago* [2004] UKPC 33.

²⁴See *Ibid*, at para. 6.

²⁵*Boyce v The Queen* [2004] UKPC 32.

²⁶*Chandler v The State (Respondent) (No2) (Trinidad and Tobago)* [2022] UKPC 19.

²⁷*Matthew v State of Trinidad and Tobago* [2004] UKPC 33.

Lewis v Attorney General of Jamaica [2001]²⁸ that the JCPC should be “very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so.”²⁹ The JCPC held that the test to be applied was whether the approach in previous decisions had been “wrong”, with the conclusion that it had not been wrongly decided.³⁰ The Board noted the judge’s role of interpretation of the words of a constitution, and in doing so, where clauses are “concrete and specific” they do not “invite judicial participation in giving them practical content”.³¹ The doctrine of legal certainty was pitched against societal change and evolution – saving clauses were introduced to provide legal certainty,³² and despite the “problems caused by the preservation of laws that were enacted in a different time”³³ the JCPC prioritised the savings clause and the historical purpose of savings clauses. The mandatory death penalty was ‘saved’ and immune from challenge as in breach of constitutional protections.

Savings Clauses and the CCJ

The interpretation and application of savings clauses have been at the fore of the CCJ developing its own jurisprudence, departing from the decisions of the JCPC. Such provisions were discussed at length in the CCJ decision in *Nervais v R*,³⁴ a Barbadian appeal again interrogating the constitutionality of the mandatory death penalty. The Crown relied on the JCPC decision in *Boyce and Joseph*³⁵ arguing that the savings clause protected the mandatory death penalty as an existing law³⁶ preventing determination as in breach of constitutional protections. The majority judgment of the CCJ disagreed:

“The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status”.³⁷

The overt condemnation continued:

“The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must

²⁸*Lewis v Attorney General of Jamaica* [2001] 2AC 50.

²⁹*Ibid*, at 75.

³⁰*Chandler v The State (Respondent) (No2) (Trinidad and Tobago)* [2022] UKPC 19, para 72, 73.

³¹*Boyce v The Queen* [2004] UKPC 32, para 29 paraphrased in *Chandler* para 22.

³²See *Chandler v The State (Respondent) (No2) (Trinidad and Tobago)* [2022] UKPC 19, para 72

³³*Ibid*, at para. 73.

³⁴*Nervais v R* [2018] CCJ 19 (AJ).

³⁵*Boyce v The Queen* [2004] UKPC 32.

³⁶S2 Offences Against the Person Act CAP 141.

³⁷*Nervais v R* [2018] CCJ 19 (AJ) para 53.

be condemned³⁸ [...] With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights”.³⁹

Their legal reasoning centred in what has been termed a “modify-first” approach, which saw the appellants argue that the 1966 Independence Order of Barbados, which stated that existing laws should be construed as to be in conformity with the Barbados Independence Act 1966 enabled law to be modified so as to secure constitutional guarantees. This was counter to the legal reasoning of the JCPC, which prioritised the savings clause in its constitutional positioning as supreme law. Departing from the position of the JCPC, the CCJ agreed with the appellant:

“(w)e are additionally ruling that the effect of section 26 (savings clause) of the Constitution has long been misunderstood to the extent that it was given priority over the mandate to modify contained in the Independence Order [...] No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it”.⁴⁰

In doing so, where the JCPC aligned the savings clause with constitutional guarantees, both as reflective of supreme law and with primacy over requirements to modify, the CCJ determined that the Independence Order held primacy over the savings clause in the constitution. The same year, 2018, the CCJ were once again faced with the question of savings clauses with regards Guyanese criminal law preventing public non-conforming sex presentation. Specifically, the law criminalised males wearing female attire and females wearing male attire in a public place or way, for any improper purpose.⁴¹ In *McEwan et al v Attorney General of Guyana*⁴² the appellants argued that the offence was “vague, uncertain, irrational and discriminatory,”⁴³ rendering it unconstitutional. The state argued that the offence in question was in force prior to Guyana’s independence in 1966 immunising it from constitutional scrutiny through the operation of the savings clause.⁴⁴ The CCJ in its majority judgment held that, when interpreting the Constitution as a whole, weight should be placed on affording citizens enjoyment of fundamental rights and freedoms.⁴⁵

Four approaches were detailed as available for courts to adopt to “ameliorate the harsh consequences of the application of the savings law clause”:⁴⁶

³⁸Ibid, at para 58.

³⁹Ibid, at para 59.

⁴⁰Ibid, at para 62, 63.

⁴¹S153(1)(xlvii) of the Summary Jurisdiction (Offences) Act of the Laws of Guyana prohibits every person who, “being a man, in any public way or public place, for any improper purpose, appears in a female attire; or being a woman, in any public way or public place, for any improper purpose, appears in a male attire.”

⁴²*McEwan et al v Attorney General of Guyana* [2018] CCJ 30 (AJ).

⁴³*McEwan et al v Attorney General of Guyana* [2018] CCJ 30 (AJ) para 95.

⁴⁴Article 152 Constitution of Guyana.

⁴⁵Para 41, caveated with “unless there is some overriding public interest”.

⁴⁶Ibid, at 42.

1. Savings clause must be construed narrowly, that is to say, restrictively.⁴⁷
2. Only the individual human rights stipulated in the clause itself is protected, not additional constitutional provision that falls outside the specified individual human rights.⁴⁸
3. Courts should, as far as possible, avoid an interpretation of domestic law that places a State in breach of its international obligations.⁴⁹
4. Courts should first apply the modification clause to the relevant pre-independence law before attempting to apply the savings law clause.⁵⁰

The majority judgment held that the offence was not ‘saved’, and therefore the court were open to find it inconsistent with, rendering it in breach of, fundamental rights guaranteed in the Constitution of Guyana.⁵¹ This position was confirmed and applied in 2022 in *Bisram v The Director of Public Prosecutions*⁵² a case concerning whether unconstitutional procedural powers of the DPP of Guyana were saved as an “existing law”. In determining the application of the savings clause, the court expanded upon their ‘modify first’ interpretation in *Nervais* and *McEwan et al*, defining it as a “method of interpreting together the savings and modification clauses so that existing laws that infringe fundamental rights are first suitably modified before they are applied”⁵³ the court described their approach as “enlightened”⁵⁴ and interestingly, acknowledged that this approach should be adopted “until the parliament gets around to amending or otherwise addressing them” (them being existing laws that challenge the fundamental rights laid out in the Constitution).⁵⁵ In both reiterating and expanding upon their reasoning for the modify first approach, as provided in *McEwan*⁵⁶ and *Nervais*⁵⁷ the CCJ reasoned:

- The importance of the Constitution;⁵⁸
- The evolutionary nature of the Anglophone Caribbean Constitutions;⁵⁹
- The modify first approach respects the Constitution as supreme law by advancing its “cherished ethos”;⁶⁰

⁴⁷Ibid.

⁴⁸Ibid, at para 43.

⁴⁹Para 44.

⁵⁰Para 45

⁵¹Para 60.

⁵²*Bisram v The Director of Public Prosecutions* [2022] CCJ 7 AJ.

⁵³Ibid, at para 61.

⁵⁴Ibid, at para 64.

⁵⁵Ibid.

⁵⁶*McEwan et al v Attorney General of Guyana* [2018] CCJ 30 (AJ).

⁵⁷*Nervais v R* [2018] CCJ 19 (AJ).

⁵⁸“A Constitution embodies the most fundamental aspirations of a nation and its people. It is crafted to endure through all manner of, sometimes unforeseeable, circumstances. Interpretation of such a document absolutely requires an examination of, not just its text, but also its structure, its history and antecedents, and the moral values and governing principles underlying and/or proclaimed by it” para 62.

⁵⁹Ibid.

⁶⁰Ibid, at Para 63.

- In a democracy, the courts must interpret both the Constitution and law so as to promote human rights and fundamental freedoms;⁶¹
- Where a Constitution can be interpreted in two ways, one which advances fundamental rights and one which infringes them, a court has a responsibility to adopt the former;⁶² and
- Domestic law must be interpreted as far as possible in conformity with a state's international obligations.⁶³

The impact of the CCJ approach to savings clauses in domestic jurisprudence was evidenced in the landmark ruling of the Barbados High Court in *Mc-Lean-Ramirez and Ors v. The Attorney General of Barbados*⁶⁴ which saw the Bajan court adopt the CCJ approach of interpretation. In doing so, the High Court adopted the CCJ approach from *McEwan* and *Nervais* when determining whether the offences of serious indecency and buggery were saved laws or ones open to constitutional challenge. Utilising the narrow interpretation, the court held that the savings clause did not protect the laws from challenge, enabling individuals to “enjoy the fruits of the Constitution’s fundamental rights and freedoms.”⁶⁵

Contrasting the Approaches

The jurisprudential reasoning of the CCJ focuses on fundamental rights and ideals - they utilise terms such as democracy, freedoms, human rights, evolution and respect. It presents as a court situating itself as a progressive (so termed enlightened), liberal, rights-focused and importantly, independent court, providing a new and different lens to the interpretation of an old problem. This approach enables the CCJ to not only witness but enable the legal landscape of the region to change through their determination and its application in domestic courts, as opposed to remaining stagnant (in law), fixed in time in a colonially imposed (legal) position. An interest is also demonstrated in disrupting and dismantling what can be of the legacy of colonialism, which sits so prominently in the most important legal document of each jurisdiction, its Constitution. Constitutions which otherwise seemingly prioritise pre-independence legislation, made under colonial rule, over itself, it being the very document representing political independence from colonial governance and moving the power to an independent state. And it cannot be ignored that the fundamental rights and freedoms which the Constitution seeks to protect, human rights and individual/collective freedoms, are the very rights which were denied to persons enslaved in each of the Commonwealth Caribbean jurisdictions. For legislation imposed during colonisation to receive such protection in jurisdictions formed through the propertisation and enslavement of peoples which was introduced and enforced by that same colonial power is as of its self, obtuse. What remains to be seen is how this rights-focused approach is received across the Commonwealth

⁶¹Ibid, at 66.

⁶²Ibid.

⁶³Ibid, at 67.

⁶⁴*Holder-McClean-Ramirez et al v AG of Barbados* (2022) 44/220.

⁶⁵Ibid, at para 70-71.

Caribbean region, and whether it serves to expand the jurisdictional reach of the court to the remaining independent states who continue to afford jurisdiction to the JCPC as their highest court of appeal. Or, in the alternative, whether this approach is perceived as justice through the back door, utilising legal interpretation to force legislative change as opposed to Parliamentary processes of legislative amendment and/or repeal.

*Chandler*⁶⁶ afforded the JCPC the opportunity to consider and respond to the modification first approach of the CCJ before presenting their reasoning for disagreement. As discussed above, the position of the JCPC in their judgment remained centred in the prioritisation of the Constitution as supreme law, as opposed to the statute which enacted it. In aligning their approach to the reasoning for savings clauses, the court considered the impact of a ‘modify first’ approach:

“The introduction of such Constitutions in the absence of a savings clause, or with a savings clause which took effect only after the existing law had been modified so far as was possible by judicial interpretation, would have called into question the interpretation and application of existing statutes and laws and have risked creating substantial legal uncertainty. The legal challenges that might have arisen in the aftermath of the adoption of a written Constitution would have covered many areas of life and imposed a great burden on the courts to re-establish a degree of legal certainty.”⁶⁷

The JCPC continued:

“The “modification first” approach [...] ignores the historical context in which the savings clauses were enacted [...]. Further [...] the meaning of the savings clause does not change over time, unlike the general statements of (Constitutional) rights and freedoms [...] which, in accordance with the living instrument doctrine, can adapt to changes in a society’s understanding of those rights and freedoms. In the Board’s view, the problems caused by the preservation of laws that were enacted in a different time do not entitle the Board to overlook the historical purpose of the savings clause.”⁶⁸

Analysis

Much has been written about the reasoning of the JCPC contextualised in its perceived failure to prioritise human rights.⁶⁹ However, the JCPC judgments reveal two unambiguous themes in such cases – the first a mode of interpretation which differs from the CCJ, and the second the role of the court contextualised within the role of Parliament. Further, the rhetoric surrounding the CCJ, its jurisprudence and indeed its popularity in the region has been heavily centred in departure from colonial legacies. In *Nervais* the CCJ stated:

⁶⁶*Chandler (Appellant) v The State (Respondent) No 2 (Trinidad and Tobago)* [2022] UKPC 19.

⁶⁷*Chandler*, at para 72.

⁶⁸*Chandler*, at para 73.

⁶⁹ See, for example Saunders (2023); Morrison (2006).

“The approach does not remove the imperial taint of the view that what was done under the colonial regime cannot be struck down, but it accords to the Society the comfort that the courts will not be prevented from ensuring that the laws conform to the supreme law of the Constitution and are not calcified to reflect the colonial times. The inescapable irony is that in most cases, the rules which it has been said we are bound to apply here in the Caribbean have long since been changed in England, while, on the view that has until now prevailed, we must remain trapped in the colonial past.”

In discussing Trinidadian and Tobagonian jurisprudence from the JCPC, the then President of the CCJ, Justice Saunders, stated:

“[...] as is currently the case in Jamaica, there similarly needs to be in this country, a more vocal, consistent debate in the Press and social media, in the LATT and academic circles, among government and opposition about bringing justice back home to the Caribbean. There is no good reason, not a single one, why at this time, appeals from the Court of Appeal of Trinidad and Tobago should be decided by the JCPC when there exists a Caribbean court, located in Port of Spain, that is capable of doing so. Given the judgments handed down in *Matthew*, *Chandler* and *Maharaj*, unless the legislature of Trinidad and Tobago does what that of Barbados has done, the rights of the citizenry of this country will take second place to the outmoded laws enacted by a colonial legislature.”⁷⁰

The position of the CCJ cannot therefore be analysed in isolation from the coloniality attached to the JCPC. The CCJ, through its judgments and representatives, inextricably link the JCPC with coloniality, and by association, the CCJ with independence within their lens of interpretation.

Modes of Interpretation

The two courts diverged on their method of interpretation which was instrumental in their determinations of the continuing relevance of savings clauses. Both language and interpretation was starkly divided – simply put, one which looked backwards, and one which looked forwards. The JCPC centred reasoning in the purpose of savings clauses – they were introduced to ensure legal certainty, to prevent multiple laws being challenged immediately post-independence and allow the legal structure of each state sufficient time to adjust. They were not originally intended to protect only those which didn’t require modification to be constitutionally compliant, as that would render the clause redundant. Instead they served to protect laws which could be considered in breach of constitutional guarantees, and that position cannot be reconciled with an overarching duty to modify law which was recognised as in conflict with constitutional guarantees. For the JCPC, reasoning for the inclusion of the savings clause upon independence serves as the correct lens through which to interpret its position in law today. The CCJ centred their interpretation in the modify-first approach- the enabling Act at the time of independence provided legal

⁷⁰The Savings Law Clause in the Constitutions of Caribbean Countries and its Impact on the Protection of Human Rights. Saunders, President of the Caribbean Court of Justice, Caribbean Judges’ Forum on HIV, Health & Human Rights The Brix, Port of Spain 27 October 2023.

redress in the form of obligations to modify, prioritising this responsibility over the savings clause provision. Their position presented as one able to circumnavigate the savings clause to secure constitutional guarantees. Whilst a savings clause exists, the interpretation adopted by the CCJ enabled it to be defeated by a modification obligation, rendering the clause obsolete and enabling the prioritisation of constitutional rights and protections. It remains to be seen how, or indeed if, the CCJ will respond to the position of the JCPC in their criticism of the modify-first approach, however their strong rhetoric centred in evolution and change will invariably continue. For the CCJ, their lens was one of prioritising active and rights-centred law, discussing how the law must remain dynamic and relevant, forward thinking as opposed to fixed and static in a colonial time-warp.

Responsibility of Parliament

The position of the JCPC on the responsibility of Parliament with regards outdated legislation has been audible, continual and consistent. The case of *Surratt v Trinidad and Tobago*⁷¹ which questioned whether the creation of an equal opportunities tribunal was inconsistent with the constitutional provision guaranteeing separation of powers, highlighted the role of Parliament in such conflicts, which has since been a recurring feature of JCPC judgments. In *Surratt* the JCPC held:

“Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance.”⁷²

In *Attorney General of Trinidad and Tobago v Vijay Maharaj*⁷³ the question for the JCPC was whether the Sedition Act of Trinidad and Tobago, which criminalises hate speech and acts⁷⁴ was in breach of the constitutional guarantee of freedom of speech. The JCPC held that the Act was protected from constitutional challenge under the savings clause, and again highlighted the responsibility of Parliament:

“In the Board’s view, one of the functions of section 6 of the Constitution is to give Parliament the power to determine which pre-independence laws should be retained and which should not.”⁷⁵

The sentiment was reiterated in *Chantelle Day et al v The Governor of the Cayman Islands et al* [2022] UKPC 6, which concerned the Marriage Law (2010

⁷¹*Surratt v Trinidad and Tobago* [2007] UKPC 55.

⁷²*Surratt* para 58.

⁷³*Attorney General of Trinidad and Tobago (Respondent) v Vijay Maharaj Substituted on behalf of the Estate of Satnarayan Maharaj for Satnarayan Maharaj and another (Trinidad and Tobago)* [2023] UKPC 36.

⁷⁴See S3 Sedition Act 1920.

⁷⁵Para. 78.

Revision) defining marriage as a union between a man and woman as husband and wife. This Act was challenged as unconstitutional, breaching multiple constitutional guarantees including the right to private and family life, freedom of conscience and freedom to manifest belief in marriage, and freedom from discrimination in the enjoyment of rights.⁷⁶ The JCPC, again in finding for the State, noted:

“The Board takes this opportunity to reiterate the point made by the Court of Appeal, that the interpretation to be given to the Bill of Rights as explained in this judgment does not prevent the Legislative Assembly from introducing legislation to recognise same-sex marriage. The effect of the interpretation endorsed by the Board in Page 25 that this is a matter for the choice of the Legislative Assembly rather than a right laid down in the Constitution.”⁷⁷

The most explicit criticism of the executive and their role on ensuring out-dated legal provision is overruled came in *Chandler*, where the JCPC concluded:

“Laws, which predate the creation of the 1976 Constitution and, but for the savings clause, would be exposed to constitutional challenge [...] will continue to exist only so long as Parliament chooses to retain them. It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws.”

The CCJ have been less vocal as to the responsibility of Parliament in their jurisprudence, and where it has been noted, their language appears more benevolent than that of the JCPC. In *Nervais* the judgment noted the role of Parliament but focused on the savings clause amendment, as opposed to the provision in question:

“The task of revising and amending the savings law clause is exclusively reserved for the Parliament of Barbados as and when that institution thinks it fit and proper to do so.”⁷⁸

In *McEwan*, counsel for the State specifically raised the question of ‘judicial legislating’, advising “(the) judiciary should be cautious not to succumb to deciding on social policy and effecting legislative reform, as these are the remit of the Executive and the Legislature.”⁷⁹ The response of the CCJ was to highlight the responsibilities of the judiciary in legislative challenge⁸⁰ and note the option of legislative reform by Parliament⁸¹ as opposed to any critique or challenge as to the lethargy or inaction

⁷⁶*Chantelle Day at al v The Governor of the Cayman Islands et al* [2022] UKPC 6 Para 11.

⁷⁷*Ibid*, at 59.

⁷⁸*Nervais* Para 11.

⁷⁹*Ibid*, at Para 143.

⁸⁰challenges to existing legislation, which seek to achieve reform that is properly the business of the legislature, are not challenges created or initiated by the judiciary; they are challenges that the Constitution gives aggrieved persons the right to make and they are challenges that the courts must (not may) hear and determine, once satisfied that they are justiciable (para 143).

⁸¹The certain way for the legislature to keep the courts from becoming engaged with legislative

of Parliament. Finally, in *Bisram* the CCJ again noted their responsibilities with regards challenge of constitutionality of laws existing “until the parliament gets around to amending or otherwise addressing them”.⁸²

These are markedly different approaches – the lens of the JCPC in this regard is narrow, applying their interpretation of the supremacy of the savings clause to prevent a declaration of constitutional incompatibility, batting responsibility explicitly back to the Parliament of the jurisdiction in question. In contrast, the lens of the CCJ in this regard is wide, with their interpretation through the modify-first approach enabling changes in law via a declaration of incompatibility, situated within a broader, post-colonial, societal and rights-based approach. In doing so, their concern with Parliament is naturally reduced – their interpretative method enables them to prioritise rights of citizenry and obligations of the state, whereas the JCPC are unable to do so under their interpretative method, despite recognition of conflicts between legal provision and rights and freedoms. And thus rely on Parliaments to do so.

Conclusion

How then have and will these divergent approaches be interpreted by the states which they influence? For the CCJ, might it be interpreted by some as the importation of human rights through the back door, using constitutional provisions to enable legal amendments and drag the law into the 21st century, carrying out change which Parliament are seemingly unwilling to do? For the JCPC, is their approach reflective of a judicial organ reluctant to appear to impose, in particular with regards culturally sensitive topics such as the death penalty, same-sex marriage and same-sex sexual activity?

Instead, are they determined to pass responsibility back to the domestic legislatures and executives to conclude the potentially unpopular conclusions – as elected members of parliament, those representing the people they were democratically elected by, bear responsibility for changing the law, in particular law which is culturally and societally sensitive. Or, in the alternative, as the then-President of the CCJ opined, are “Caribbean judges, being ‘closer to the ground’ keener to be more sensitive to and proactive in remediating the debilitating consequences of constitutional or legal provisions that deprive Caribbean people of the full enjoyment of their human rights”?⁸³ Diplomatically, does it benefit those with responsibility for changes in controversial areas of law, ones which religious and societal groups often have strong opinions towards, to instead sit with the courts, enabling legal change to take place without culpability for those seeking public favour through votes, reflected in their reluctance to heed the ever-louder calls from the JCPC?

Whilst their contrasting interpretations raise interesting technical, legal and societal questions, the result has been an imbalance of rights guaranteed for the

reform, as counsel apprehended may be involved in the adjudication of the challenge to section 153 is for the legislature itself to undertake that reform (para 144).

⁸²*Bisram* Para 69.

⁸³Saunders (2023).

citizenry dependent on jurisdiction – if your state has joined the CCJ, the likelihood of your constitutional rights being prioritised and protected (by the judiciary) are higher. If your state is yet to join and remains with the JCPC, the savings clause is unlikely to be defeated, leading to supremacy of pre-independence law over constitutionally guaranteed rights. This has rendered the same legal provisions being declared unconstitutional in one state as in breach of constitutionally guaranteed rights, and not in breach of the same constitutionally guaranteed rights in a neighbouring state, a very disappointing position for a region with innumerable present commonalities alongside futures seeking integration, interdependence and cooperation.

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