MONALAW STUDENT LAW REVIEW

FACULTY OF LAW
THE UNIVERSITY OF THE WEST INDIES
MONA CAMPUS

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DEAN'S MESSAGE

It is with immense pride that I introduce the MonaLaw Student Law Review (MSLR).

The MSLR was conceived as a platform for MonaLaw students to engage with topical legal issues, whilst sharpening their research and writing skills.

Overall, the MSLR would not only increase the visibility and credibility of our students' research but should showcase the commitment of the faculty to advancing legal scholarship in the region.

Research leads to the creation of new knowledge and the MSLR represents an opportunity for students to participate in critical and transformative thinking, in the pursuit of developing a Caribbean jurisprudence rooted in the imperatives of the region.

A key component of the mission of MonaLaw is our commitment to excellence and to produce research that informs policy-making and development. In this regard, as the articles in the MSLR are researched, written and edited by law students, under the guidance of faculty members, it enables future attorneys, judges, policymakers and leaders of the Caribbean to embrace the tenets of our mission and cultivate the requisite skills.

The MSLR therefore represents an important step towards providing a robust legal education that seeks to advance the frontiers of knowledge at MonaLaw, regionally and globally.

As we celebrate the inaugural issue of the MSLR, I wish to extend my appreciation to all contributors, reviewers and the entire team responsible for its publication. Congratulations on your commitment to critically engage and provide insights that can have an enduring impact on the legal landscape.

Professor Shazeeda Ali
Dean,
Faculty of Law
The University of the West Indies, Mona Campus

CONTRIBUTORS

Desiree Alleyne is an MPhil/PhD student at MonaLaw. Her article focuses on Advance Fee Fraud, otherwise called "lotto scamming" in Jamaica.

Brittney Henry is a third-year LLB student at MonaLaw. Her case brief, 'Interpretation of the Revised Treaty of Chaguaramas: Community Law and Human Rights,' reviews the case of Shanique Myrie and its implications for CARICOM nationals' freedom of movement throughout the Community.

Ramzan Hosein is a PhD student at the Faculty of Law, University of the West Indies, St Augustine, whose thesis is being supervised by Professor Shazeeda Ali, MonaLaw. His article investigates how various factors impact Corporate Governance in the Caribbean by analysing regional and international corporate scandals.

Bianca Lawson is a third-year LLB student at MonaLaw. Her article seeks to unveil the insufficiencies of Jamaica's Sexual Offences Act by addressing the problematic gendered nature of the provisions.

Sean Andrew Vasciannie is a second-year LLB student at MonaLaw. His article builds on Professor Ralph Carnegie's similarly entitled 1996 article and reviews the evolution of Caribbean constitutional orders, with a particular focus on government structures and the understanding of fundamental rights and freedoms.

Julia Wedderburn is an attorney at law and alumna of MonaLaw LLM '23. Her article examines Jamaica's compliance with their international obligations under The International Convention on the Elimination of All Forms of Racial Discrimination.

Faculty Advisors

Professor Shazeeda Ali, Dean and Professor of Corporate and Financial Law

Professor Stephen Vasciannie, Professor of International Law

Dr. Christopher Malcolm, Deputy Dean and Senior Lecturer

Dr. Yentyl Williams, Research Assistant

Student Advisors

Alison Samuda, LLB UWI '23

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Interpretation of the Revised Treaty of Chaguaramas: Community Law and Human Rights Brittney Henry

Summarised Factual Background

This case concerns the Caribbean Court of Justice (CCJ) Application No OA 2 of 2012 between Shanique Myrie (claimant) and the state of Barbados (defendant) Jamaica (intervener). Shanique Myrie, a Jamaican national, arrived at the Grantley Adams International Airport in Barbados on March 14, 2011, and was denied entry into the country. The following day, she was deported to Jamaica after being detained in an airport cell.

Ms Myrie claimed before the Caribbean Court of Justice (CCJ) in its original jurisdiction. She claims she endured a painful and humiliating body cavity search by border officials and was placed in an unsanitary cell.

She claimed that she was subjected to treatment which was in breach of her right to freedom of movement and a violation of her fundamental human rights. Her claims were in reference to the provisions of the Revised Treaty of Chaguaramas (RTC) and the 2007 Conference Decision on July 4th, 2007.

She claimed an entitlement to the freedom of movement in the Caribbean Community (CARICOM), with a right to enter without any form of harassment or discrimination on the grounds of nationality. She further claimed that she was entitled to be treated no less favourably than other nations of the CARICOM.

The State of Barbados denied all allegations against them. Barbados claimed that Ms. Myrie was rightfully refused entry into the country. The State justified its denial of entry to Ms. Myrie in that she had told lies to

the immigration officials as to the identity of her host in Barbados.

The burden of proof rested on Ms. Myrie to prove the aforementioned factual claims. After the Court examined all the oral and written evidence presented, it found that Ms. Myrie had properly discharged this burden.

The Court held that when a CARICOM national is refused entry into a Member State on a legitimate ground, that national should be given the opportunity to consult an attorney or a consular official of his or her country or to contact a family member. The visiting national must present a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The threat posed should, at the very least, be one to do something prohibited by national law, proportional to Community law.

The Court made a declaration that Barbados had breached Ms Myrie's right to enter Barbados. The Court ordered Barbados to compensate Ms Myrie in pecuniary damages.

Legal Analysis

The practical framework of the CCJ, in its original jurisdiction, interprets the RTC establishing the CARICOM, which outlines the four freedoms, in particular, the freedom of movement of people within the Community.[1] The scope of the right should, arguably, extend to the principles governing international human rights. This regime is critical and perilous to the limited jurisdiction of the Court.

It is an important factor, interestingly urgent, foreseeable and certain, that the right to freedom of movement of people within the Community is

1 See preamble, Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy (adopted 5 July 2001, entered into force 4 February 2002) 2259 UNTS 1 (RTC).

known as a mere privilege and immunity offered by the Member States.[2] This implies that this right is prospective and can be withheld from "undesirable persons," in contravention of the provisions of the RTC, on reasonable grounds. On the contrary, the Universal Declaration on Human Rights (UDHR) is the substratum instrument offering humans free enjoyment of a wide scope of rights attributable to human life.[3] This is an indication of the distinctive rights and obligations offered under international instruments versus the right to the four freedoms of the RTC.

The interpretation of article 45 of the RTC,[4] and the 2007 Conference Decision,[5] indisputably and simultaneously outline that the right of definite entry for six months is neither open-ended nor absolute.[6] What the treaty does, is allow the Member States the direction to determine whether the entry of the person in question is detrimental to their society. This means that the substantive rights under the RTC are adjustable by a diversity of factors; on the other hand, prima facie, human rights under international instruments are definite, and violation warrants criticisms and sanctions. In *Trinidad Cement Limited v The Competition Commission*,[7] Byron J adopted from the *Myrie* judgement that the rule of law comprises legal certainty and protection of the rights of the State and individuals. It is critical, then, to understand that this necessity creates legal accountability; this accountability extends as a sovereign right of the State to constrain itself from immunities of the RTC.[8]

In analysing the evidence in the *Myrie* case,[9] the Court ensured, in

2 ibid art 229.
3 Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Resolution 217 A(III) (UDHR)).
4 See RTC (n 2) art 45.
5 Caribbean Community Secretariat, 'Conference on the Caribbean 2007' (CARICOM 2007) <https://caricom.org/communique-issued-at-the-conclusion-of-the-twenty-eighth-meeting-of-the-conference-of-heads-of-government-of-the-caribbean-community-caricom-1-4-july-2007-needhams-point-barbados/> accessed 2 November 2022.
6 RTC (n 2).
7 [2012] 81 WIR 24, [2012] CCJ 4 (OJ).
8 RTC (n 2).
9 ibid.

its foregoing, to adopt general rules of international courts and tribunals, but did not attempt to extend its jurisprudential interpretation of the evidence as if it were under international instruments. It is interesting how uncompromising and strict the Court is in refusing to incorporate decisions of international treaties on the subject matter. The robust view of the Court is that whether international law is enacted in municipal law, necessary to create binding rights and obligations, it cannot be extended to a Community level.[10] This, the Court says, will destroy the intention and uniformity of Community law. In a different way, Myrie's claim of violation of her human rights to freedom of movement and right not to be discriminated against would fail, prima facie because incorporation of international obligations was never a condition or requirement of the RTC in the adjudication of disputes within the Community.

In light of the foregoing, the original jurisdiction of the CCJ will not exit the parameters of intercepting and applying provisions of the RTC. Disputes with dimensions and features of human rights remain outside its jurisdiction. It is a legitimate expectation that freedom of movement is an international right under international instruments, but freedom of movement within the CARICOM is a privileged right.

10 Winston Anderson, 'Free Movement within CARICOM- Deconstructing the Myrie vs Barbados' (OECS Bar Association Meeting, St George's, 7 December 2013) <https://ccj.org/wp-content/uploads/2021/03/Remarks-by-the-Honourable-Mr-Justice-Winston-Anderson-at-the-OECS-Bar-Association-Meeting_20131207.pdf> accessed 1 November 2022.

Legislative Review: Proposed Amendments to Jamaica's Sexual Offences Act 2009

Bianca Lawson

Introduction

This legislative review serves to propose several necessary amendments to Jamaica's Sexual Offences Act 2009 to address the problematic gendered nature of the provisions. This submission is supported by numerous legal frameworks both international and regional, legal articles and reviews, as well as relevant case law and statutes.

In examining the recommendations noted the Concluding Observations of the Committee on the Elimination of the Discrimination against Wome-Jamaica[1] there are several proposals highlighted that must be executed to effectively eliminate discrimination against women. The most notable of these are the amendments to be made to Jamaica's Sexual Offences Act 2009.[2] These amendments were advised based on numerous transgressions regarding several treaties, both international and regional, that pertain to the eradication of discriminatory laws against women. Amendments should be made primarily in respect of Articles 2 (f) of CEDAW,[3] Article 26 of the International Covenant on Civil and Political Rights (ICCPR),[4] as well as the Belem do Para Convention,[5] which operates as the principal regional treaty for addressing the discriminatory policies and laws of the Organization of American States (OAS).

1 Concluding Observations of Jamaica, United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW/C/JAM/CO) 6-7, 6 August 2012.
2 Sexual Offences Act 2009 (Jamaica)
3 United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women1979, art 2 (F)
4 International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, art 26, <https://www.refworld.org/docid/3ae6b3aa0.html> accessed 30 November 2022]
5 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994).

Alongside the presence of various treaties, one must also consider the documented prevalence of sexual violence within the Caribbean and greater Americas Region; despite severe underreporting within the OAS, sexual violence exceeds that of global estimates by as much as 5%. Many scholars would argue that this surge is encouraged due to the blatant discriminatory pattern reflected in laws pertaining to sexual violence, particularly when addressing women and children. With both regional and international frameworks contextualized, this article will analyze various sections of the Jamaica Sexual Offences Act that continue to violate the previously highlighted treaty articles on non-discrimination.

Rape: Section 3 Sexual Offences Act 2009 (Jamaica)

At the outset, focus must be placed on Section 3 of Jamaica's Sexual Offences Act, as many take issue with the narrow and fixed definition of "rape" in the Act. Specifically, the language of Section 3 allows only for the offense to be perpetuated by a man onto a female. In broadening this limited interpretation, the proposed amendment would be to modify the legal language to successfully achieve a gender inclusive approach as well as address situations outside of the heteronormative. Anika Grey highlights the reason for proposing this amendment in that, these unjust laws further women's oppression within a society and allow for cementation of the pre-existing gender inequality.[6]

In examining the manner to approach the proposed amendments, it is imperative to note that 'gender inclusive' is not synonymous with 'gender neutral'. Tracy Robinson in discussing this, highlights that gender neutral language is not a suitable means of alteration as it often

6 Anika Grey 'The Role of Sexual Offence Courts in Furthering the Feminist Projects of Eliminating Sexual Violence and Women's subordination' in Ramona Biholar and Dacia Leslie (eds.), Critical Caribbean Perspectives on Preventing Gender-Based Violence (Routledge 2022).

leads to a "gender blind" approach,[7] as seen in the Sexual Offences Act of Bahamas.[8] This approach, rather than addressing the pre-existing gender inequality, would further it by blanketing the current discrimination faced by women. This is coupled with the idea that rape at its core contains power and domination. Robinson believes that the implication of a gender-neutral approach would not eradicate this idea, but rather cement it as a role reversal in a heterosexual relationship. Similarly, Dr. Ramona Biholar highlights the error in general neutrality by stating that it narrows the offence to the scope of heteronormative relationships.[9] This scope does not effectively address the 'invisible' parties existing outside of Cisgender heterosexual relationships, thus leaving marginalised members of society without the appropriate means of seeking redress. In applying this to the proposed amendment, it becomes facile to see why one would recommend it be constructed in the likeness of the Sexual Offences Act of Guyana.[10] This would remove the gendered language of defining both the perpetrator and the victim, as well as offering an intimate precise definition regarding the actus reus and removing any terminology that would prelude to genital of either party. This would effectively allow for any party to seek redress regardless of identifying gender outside of a heteronormative dynamic.

Consent: Section 3(2) Sexual Offences Act 2009 (Jamaica)

One cannot effectively discuss amendments to be made to Jamaica's Sexual Offences Act without highlighting the vague concept of consent found in section 3 (2),[11] which merely details scenarios of false and fraudulent representation or threat of physical injury. Despite

7 Tracy Robinson 'Fictions of Citizenship Bodies without Sex: The Production and Effacement of Gender in Law,'1 small axe: a journal of criticism 4, 5.
8 Sexual Offences and Domestic Violence Act of Bahamas 2010.
9 Ramona Biholar 'Discriminatory Laws' in Biholar and Leslie (n 8).
10 Sexual Offences Act Guyana, 2010 s 3.
11 Sexual Offences Act of Jamaica, 2009 s 3(2).

this vague definition, scholars like Catherine Mackinnon and Lucinda Finely highlight the key role it plays in the dispensation of law. Mackinnon in her analysis of the concept believes it to be insufficient which directly contributes to the underreporting of cases due to it being a grey area that ignores the reality of gender inequality. She argues the male legal idea of consent does not make the act consensual but rather allows for a level of acceptance or voluntariness in the act to proceed, as consent is null in unequal power relations that exist between the sexes. In closing her point, she emphasises cases where consent was found valid despite the act being conducted in unequal power settings; this has only served as a means of further discouragement to others to seek the appropriate legal redress.

Lucinda Finely likewise cements MacKinnon's view by highlighting that it is truly the man who decides whether a woman has consented, based on their understanding of the concept. This can be noted in the case of *Levi Levy v R,*[12] where the appellant claimed the transgressions done against her were greatly downplayed due to the law finding her attempts at resistance not sufficient in eradicating consent. This case highlights the effect of the unequal balance of power and how this has allowed male jurisprudence the ability to dictate exactly how and when women consent to sex.

It must also be noted that this issue of consent stemmed from a deeper societal understanding of a women's role. Mackinnon believes that mere changing of words are a bandage over a deeper sore as it will never eradicate gender inequality in society. However, the statutory change from 'consent' to 'affirmative consent',[13] would remove the idea of 'no meaning yes' to a definitive 'yes meaning yes'. While this is not a sure-fire solution due to the force aspect, it would aid in addressing grey areas regarding the concept. This concept of affirmative consent is not

12 [2022] JMCA Crim 13.
13 Catherine A. MacKinnon, 'Rape Redefined' (2016) 10 HLPR 2.

widely adopted but can be noted in international bodies such as Rule 70 of the International Criminal Court ('ICC').[14]

Grievous Sexual Assault: Section 4 Sexual offences Act 2009 (Jamaica)

As previously highlighted, due to the narrow definitions of Section 3 regarding rape there are several notable gaps left in the law, particularly when addressing members outside of heteronormative relationships as well heterosexual dynamics where the provision's criteria do not aptly address them. Several jurisdictions sought to rectify this by erecting an entirely new provision; however, this would be accompanied by an extremely diminished penalty. In amending this provision, it is not audacious for one to recommend the absorption of the provision into the general section regarding rape.

Biholar in discussing this highlights that the reduction in sentencing "erodes the gravity of the sexualized harm" and rather than aiding in closing the gaps within the law, it widens them.[15] Secondly, the masculine legal language of the law is clearly noted, due to the cisgendered male view that these violations are somehow less grave than that of rape as the victims are marginalized 'invisibles' who operate outside their scope. She continues to argue that the gender-neutral language does not aid, but rather reinforces hegemonic masculinity thus furthering the gender imbalance.

In furthering Biholar's point, in 2019 the Inter-American Commission on Human Rights (IACHR) issued a report addressing the legislative loopholes that jurisdictions have used to manufacture ambiguous terms regarding sexual violence to avoid calling a situation rape despite it

14 ICC Rules of Procedure and Evidence 2002 Rule 70.
15 Biholar (n 11).

reflecting those conditions. [16] The nuances in these terms made the law increasingly difficult to apply, leading to a multitude of cases without remedy due to women not even being aware that their situation qualified as rape. The amendment for this section is its absorption into the provision of rape, mirroring that which is laid out in section 3 of Guyana's Sexual Offences Act.

In concluding, Tracy Robinson highlights that it is imperative we "give harm a name and find a word to express the nature of the violation woman face."[17] That name is rape and so it should be appropriately delegated the correct penalty.

Marital Rape: Section 6 Sexual Offences Act 2009 (Jamaica)

Marital rape in Jamaica should be read in light of section 22 (B) of CEDAW concluding opinion 2021,[18] which specifically detailed amendments to be made to the provision to effectively eradicate the restricted conditions that accompany it. In examining the provision, it is facile for one to note the exclusion suffered by married women as opposed to their single counterparts. Section 6 (3) highlights that for a woman to be a victim of spousal rape, there must be an existing level of judicial separation and she must not be engaged in cohabitation. These excluding requirements do not appropriately align with international law, namely the conditions laid out in paragraph 33 of CEDAW General Recommendation 35,[19] and the IACHR.

16 Inter-American Commission on Human Rights, Violence and Discrimination against Women and Girls: Best Practices and Challenges in Latin America and the Caribbean, OAS, 14 November 2019.
17 Tracy Robinson 'Fictions of Citizenship Bodies without Sex: The Production and Effacement of Gender in Law,'1 small axe: a journal of criticism 4.
18 CEDAW (n 1) s 22, 67.
19 General Recommendation, United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW/C/GC/35) para 33.

It is imperative that amendments be made regarding these excluding conditions to offer married women the same protection as their single parallel. Robin West in his examination of marital rape found that its origin stemmed from the misogynistic idea that married women did not need to consent as the mere fact they were married was considered consent in and of itself. [20] He likewise criticized common law's archaic belief that the unification of marriage absolved a woman of her own autonomy. This belief allowed for courts to hold that it is impossible for a man to rape his wife in cases such as *R v R.*[21]

In proposing an amendment to the law regarding marital rape, while some may call for its removal in entirety as was done in Bahamas, it would be arguably sufficient for modern Jamaican to begin by eradicating subsection 3 of the provision thus successfully removing the limited conditionals. Inspiration can be taken from the sexual offences act of Guyana[22] which in 2020 removed the exemptions found within the provision and has instead framed the provision to be unambiguous and gender neutral.

Buggery: Section 76 Offences against the Person Act 2009 (Jamaica)

In examining amendments to be made to the Jamaican Sexual Offences Act regarding discrimination,[23] it is imperative that one make mention of provisions outside of rape that ought to be scrutinized. When analyzing provisions such as Buggery in Jamaica's Offences Against the Persons Act, it becomes facile for one to note the inherently gendered nature of law within Jamaican statute.

20 Robin West, 'Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment' (1990) Georgetown Law Faculty Publications and Other Works, 648.
21 [1991] UKHL 12.
22 Sexual Offences Act of Guyana Section 37.
23 Jamaica's Offences Against the Person Act 2009, Section 76.

In addressing buggery, its differentiation from the provision of rape despite identical circumstances allows one to understand the gravity of male hegemony on the construction of law. While the nature of the provision isn't inherently gendered, it is not difficult to see that its construction blatantly excludes parties outside of heteronormative relationships from pursuing legal redress. As highlighted by Finley, legal definitions and conceptualizations of terms allows for one to see society's view on the crime reflected within the law and further cementing this view into the fabric of a nation. As previously stated by Robinson, rape at its core revolves around domination and submission and the reinforcement of gender roles. Hence, rape between two men has no place within the law and is as a mere assault. It should be noted that buggery carries a lesser sentence, thus dictating that the harm suffered by men is unproportionate to that suffered by women who are seen as a submissive party. This provision should be absorbed into the umbrella term of rape as its purposeful exclusion furthers the existing ideology of female submission and male domination.

Conclusion

In concluding, it is undeniable that at present the Sexual Offences Act of Jamaica 2009 reflects an arguably gendered and archaic approach to the application of sexual based laws; consequently this has resulted in high amounts of undocumented sexual offense based crimes. It is important to note that the solution to addressing the discrepancies within the laws is not to adopt a gender-blind approach but rather to mirror that of the sexual offences act found in Guyana that seeks to address the gaps rather than occlude them through broadening definitions.

As previously discussed, the key amendments to be made within the Jamaica's Sexual Offences Act 2009 would include the broadening of the general concept of consent laid out within the Act as well as the overarching breadth of section 3 so as to include parties outside the cisgender heteronormativy in order to effectively create room for equal application of the law, free from discriminatory confines.

Secondly, it is indisputable that married women deserve legal protection that explicitly mirrors that of their single counterparts; thus alteration must be made so as to either widen the scope in which married women can receive legal remedy under Section 6 of the act or alternatively the section should likewise be absorbed under the provisions detailing 'Rape'. Lastly, one could argue that the scope of 'rape' can be effectively expanded so as to adequately address scenarios of 'Grievous Sexual Assault' as well as 'Buggery' without the reduced weight of a lesser sentencing.

In amending these provisions, the Jamaica Sexual Offences Act would aid in the erasure of discriminatory laws that continue to perpetuate gender inequality within societies and reinforce archaic gender norms.

Floreat The Westminster Model? Issues Since Carnegie

Sean Andrew Vasciannie

Introduction

Professor Ralph Carnegie's 1996 article, '*Floreat* the Westminster Model?' stated, "When we speak of our Westminster model Constitutions, we are not being lawyers or even political scientists. We are at best being poets."[1] This quote encapsulates his comparative analysis of the Westminster system, or 'model Constitutions' as he termed it, which shall be discussed herein with reference to the Commonwealth Caribbean and Britain. By this reference to poetry, Carnegie subtly conveyed the idea that the Caribbean constitutional order was emerging gradually and perhaps imperceptibly away from and towards its parent model in Britain. Starting with this foundation, the present article reviews some of the developments in the Caribbean constitutional order(s) since Carnegie's article of 1996. It touches on the significance of developments since Carnegie concerning the structure of government and our understanding of fundamental rights and freedoms. Carnegie, in 'Floreat the Westminster Model?', raises two fundamental questions: to what extent does the Westminster system exist in the Caribbean, and should it be regarded as a worthwhile framework? Over the last quarter of a century, both Britain and the Commonwealth Caribbean have changed in several ways which alter our understanding of Westminster constitutions. It may now therefore be appropriate to add a new dimension by analysing some of the recent episodes and amendments which have implicated Westminster constitutions in the Caribbean and Britain. The independence of the judiciary, Prime Ministerial power, human rights, Parliament, and the Head of State are among these.

1AR Carnegie, 'Floreat the Westminster Model? A Commonwealth Caribbean Perspective' (1996) The Caribbean Law Review, 1, 12.

The Westminster System

The Westminster system is a form of parliamentary democracy which has emanated from Britain[2]. Countries using this model generally have certain features, including a Head of State who is not the effective head of government (such as a King or Queen), an elected bicameral or unicameral parliament, an independent judiciary, and a government formed by the political party which has majority support in the lower House based on 'first-past-the-post' elections. This framework has been exported from Britain and implemented, to a great extent, in Commonwealth Caribbean countries.[3] Nevertheless, a recurring theme in Carnegie's article is that Commonwealth Caribbean countries are not purely Westminster systems in terms of their constitutions and governmental structures. There are subtle but important discrepancies between Westminster in Britain and in the Caribbean.

The title of Carnegie's article is a rhetorical question: 'Floreat the Westminster model?'. Posed as a question, this can also prompt an enquiry into whether Caribbean people should endorse the Westminster system. There are several positive aspects of the Westminster system in the Commonwealth Caribbean. Most significantly, Caribbean societies have retained their liberal democratic structures despite the creeping rise of totalitarianism and political instability in parts of the developing world. Major interference and overt political violence have also been noticeably absent in 21st century Commonwealth Caribbean elections. Yet, the Jamaican experience from 1967-1997 as well as the Grenada implosion of 1983 stand out as problematic episodes in the Caribbean's generally peaceful approach to elections.[4] Since 'Floreat the Westminster Model?', no political revolution or coup has successfully overthrown a Westminster government in the Commonwealth Caribbean.

2 Fiadjoe AK, Commonwealth Caribbean Public Law (Routledge-Cavendish 2011), 137
3 For discussion, see also Margaret DeMerieux, Fundamental Rights in Commonwealth Caribbean Constitutions (UWI Cave Hill, 1992), 3-5.
4For Jamaica's experience at the turn of the century see, e.g., Lisa Ann Vasciannie, 'Election Observation: The Case of the December 1997 Elections in Jamaica' 51 (2002) 2 Social and Economic Studies..

There are, however, several criticisms concerning the operation of the Westminster system in the Caribbean. Various scholars suggest that Westminster in the Caribbean facilitates autocratic rule. This is especially true in terms of prime ministerial power.[5] Critics also point to the idea of a " second democracy,"[6] which posits that while the electorate may vote in general elections once every five years, they have very little control or representation in governmental decision making. Furthermore, the socio-economic and political landscape in the Commonwealth Caribbean has soured since the late 1990s in that issues such as money laundering, alienation of the poor, lottery scamming, murder, inequality, and political corruption have become more prevalent. Westminster did not create all these problems per se, but there is criticism insofar as it has been unable to effectively solve them.

Independence of the Judiciary

Independence of the judiciary is an essential aspect of the Westminster model in the Commonwealth Caribbean. Arguably, the judiciary is the only branch of Caribbean government which is truly independent in practice. Unlike the executive and legislature, sitting judges may not exercise executive power or serve as part of other branches of government. Carnegie used this as a point of juxtaposition with Britain's judiciary, which was, at the time, linked to some extent, both the executive and the legislature.[7] With respect to the executive, the lord chancellor, traditionally a member of the cabinet, also served as a senior judicial officer and presided over the House of Lords as a

5 Speech delivered by Ralph Gonsalves, cited in Tracy Robinson, Arif Bulkan, and Adrian Saunders, Fundamentals of Caribbean Constitutional Law (1st edition, Sweet & Maxwell, 2015), 102. See also The National Democratic Movement (Jamaica), General Policy Document No.1: Policies for a Better Tomorrow (Government of Jamaica, Ministry of Education, Youth and Culture, 1994).4.
6 Jack Corbett and Wouter Veenendaal, 'Westminster in Small States: Comparing the Caribbean and Pacific Experience' (2016) Contemporary Politics..'
7 Op. cit. 1

legislative body. This was a case of overlapping responsibilities that raised questions about the independence of the judiciary, in the period up to 2009. Similarly, members of the judicial House of Lords, Britain's highest court, were simultaneously, at least in formal terms, participants in the work of the House of Lords in its legislative capacity. The Supreme Court is currently Britain's highest court.

There is still, however, distinction to be made between independence of the judiciary in Britain as opposed to in the Commonwealth Caribbean. At the time of Carnegie's exposition, the British Westminster model prompted the suggestion that separation of powers did not fully apply. Since that time, however, reforms to the British system have seen the establishment of a Supreme Court and the withdrawal of Supreme Court judges from the legislative House of Lords. This now means that, in the British model, Supreme Court judges cannot be perceived as belonging to more than one branch of government. The same is true of the Westminster export model in the Caribbean, which has traditionally kept the judiciary separate from other branches of government.[8] In this way, therefore, the parent model Westminster constitution and the export model have grown towards each other.

The Hinds Case

The approach taken by the Privy Council to the question of the independence of the judiciary in the famous case of *Hinds and others v R* is noteworthy.[9] The majority decision in *Hinds and others v R* stands *inter alia* for the proposition that the sentencing powers of the Supreme Court judges may not legitimately be transferred to members of the Executive. In this case, the sentencing powers of Supreme Court judges could not

8 Carnegie (n 1)
9 Hinds and others v R (1975) 13 JLR 262.

be transferred to an Executive parole board.[10] Independence of the Judiciary should not be compromised, and hence judicial sentencing powers should not be transferred to the Executive. Where judicial independence may be compromised through legislative action, the typical Caribbean export model constitution will render the legislative change null and void. The effect of this approach, which is characteristic of the export model, is that the powers of Caribbean Supreme Court judges are protected from possible interference by the Legislature.[11] If the legislature is to amend judicial power at the Supreme Court level by transfer of functions to the executive, it is required to do so through amendments to the Constitution, and not by amendments to ordinary legislation.

In contrast, as noted by Carnegie,[12] a different situation prevails with respect to the British model. There, the supremacy of parliament ensures that it is possible for the legislature to change the status of judges by ordinary legislation. This is a reminder then, that in the Caribbean, the Constitution is supreme while in Britain, supremacy rests with Parliament. This is true even following the passage of the British Human Rights Act,[13] as the procedures under the Act have been carefully crafted to preserve parliamentary supremacy.

Hinds and others v R[14] also highlights the constitutional protection afforded to Superior Court judges in Jamaica as against judges of the lower, unprotected courts (i.e., the Magistrates Court or the Parish Court). The Privy Council found that unprotected lower courts could not be given the same sentencing powers as the Supreme Court and Court of Appeal. This protects the jurisdiction of the Supreme Court from the erosion, whether political or otherwise, which would occur if 'unprotected'

10 On this point, see Albert Fiadjoe, Commonwealth Caribbean Public Law (2nd Edition, Routledge, 1999)159, n2.
11 ibid.
12 Carnegie (n 1).
13 The UK HR Act 1998.
14 Hinds (n 9).

Parish Court judges were given the sentencing power of 'protected' superior court judges.[15] A more modern question surrounds whether this reasoning applies to 'unprotected' courts at the highest level such as the Privy Council and the Caribbean Court of Justice. If so, how does that implicate the transfer from one 'unprotected' top court to another? This was one of the main issues in the *Independent Jamaica Council for Human Rights et al v. Syringa Marshall-Burnett and the Attorney General of Jamaica* (hereafter referred to as the 'CCJ case').[16] In this case, the Privy Council took it for granted that Caribbean governments could not interfere, in any way, with the work of the Privy Council but that some forms of interference were conceivable with regard to the CCJ. This premise that the Caribbean Court of Justice may be vulnerable to interference was not substantiated in the Privy Council's judgment.

Appointment of an Acting Chief Justice

Jamaica's Prime Minister, Andrew Holness' appointment of an acting Chief Justice in 2018, and pronouncements made by him at the time of the appointment[17] raise another set of fundamental issues pertaining to judicial independence. In this matter, the executive, in the form of the prime minister, reserved the right to retain or dismiss the acting Chief Justice, Justice Bryan Sykes, and to decide on his status based on his judicial performance. Normally, the role of Chief Justice is permanent until retirement. Having an acting Chief Justice, apparently subject to Prime Ministerial power, compromised the independence of the judiciary in so far as the executive could conceivably try to influence court decisions.

15 Carnegie (n 1).
16 Independent Jamaica Council for Human Rights et al v. Syringa Marshall-Burnett and the Attorney General of Jamaica (2005) UKPC 3.
17 Bainnes S, 'Holness Hits Back at Critics - Defends Position on Chief Justice Appointment' (Lead Stories | Jamaica Gleaner, 3 February 2018) accessed 15 May 2023

In the circumstances, ninety-seven Jamaican Court of Appeal, Supreme, and Parish Court judges publicly registered their "grave concern" in an extensive statement supporting the independence of the judiciary in Jamaica.[18] The episode ended when Chief Justice Sykes was fully appointed by Prime Minister Holness. This demonstrates the vigilance required to guard the independence of the judiciary. In some instances, it may be necessary to appoint an acting Chief Justice in the Westminster system, such as, for example, where the Chief Justice suffers from ill health. This was not the case in Jamaica in 2018, and so the public scepticism concerning the actions of the executive appears to have been well founded.[19] The unprecedented criticism presented by the ninety-seven judges concentrated on the Prime Minister's explanation of the rationale for "recommending an acting instead of a permanent appointment to the post of Chief Justice."[20] For the judges, some of the Prime Minister's comments undermined the fundamental principles of the separation of powers and the independence of the judiciary.[21] In supporting their position, the judges cited, among other things, the Commonwealth (Latimer House) Principles on the Three Branches of Government (2003),[22] as well as the Bangalore Principles of Judicial Conduct (2001).[23] The former document identifies the independence of the judiciary as a key component in upholding the rule of law, human rights protection, and principles of good governance, while the latter states plainly that "Judges are not beholden to the government of the day."[24]

18 Jamaica Peace Council, "Declaration on Separation of Powers, Judicial Independence, and Judicial Accountability – 97 Judges of the Court of Appeal, the Supreme Court, and Parish Courts of Jamaica", 2018.
19 For earlier concerns about the role of the Prime Minister in judicial appointments in the Caribbean see,Selwyn Ryan, The Judiciary and Governance in the Caribbean (SALISES UWI, 2001),7-11.
20 See Declaration (n 18) para 1.
21 ibid para 5.
22 ibid para 17.
23 ibid para 19.
24 ibid.

Although the position of the judges was firmly grounded in principle and appears to have prompted the Prime Minister to change his proposed course of action, this episode raises an intriguing question for the Westminster system. That is, if the Prime Minister had insisted that his approach was constitutional, which judges in Jamaica could have been called upon to address this question? Most of the judges took a clear view to the effect that Prime Minister Holness' comments could have weakened judicial independence, and although the Chief Justice himself was not numbered among the ninety-seven judges, he could not have acted as a judge in his own cause. The Westminster export model does not provide for a direct approach to the Privy Council in these circumstances; nor does it say what course of action is to be taken by litigants when most members of the judiciary have openly taken a position on a legal issue before that matter has gone to court. This is an issue that Professor Carnegie could not have reasonably anticipated, but it underlines the importance attached to judicial independence by the Jamaican bench at all levels.

It should not escape our notice that a major fear concerning the Caribbean Court of Justice has been that this Court may become vulnerable to political interference by the Executive. In the years since the establishment of the Caribbean Court of Justice, nothing on the judicial side suggests that the Court will succumb to external interference. On the other hand, it is fair to suggest that some Caribbean nationals remain fearful that the Executive will be tempted to interfere in the workings of the highest Court in the Caribbean.[25] Carnegie does not address this point but the decision of the Privy Council in The Caribbean Court ofJustice case,[26] suggests that the matter has not been firmly resolved.

25 For general discussions on the appellate Jurisdiction of the CCJ see, for example, Duke E. Pollard, The Caribbean Court of Justice: Closing the Circle of Independence (Ian Randle 2004), ch 3 and 5; Report of the West Indian Commission, Time for Action (UWI 1993), 497-501; Stephen Vasciannie, "The Appellate Jurisdiction of the Caribbean Court of Justice" in Richard Albert, Derick Obrien, and Seshauna Wheatle (eds), The Oxford Handbook of Caribbean Constitutions (OUP 2020), . 503-528; Delano Franklyn (ed), We Want Justice: Jamaica and the Caribbean Court of Justice (Ian Randle 2005).
26 Independent Jamaica Council (n 16).

Prime Ministerial Power

Concentration of Powers

Independent Commonwealth Caribbean territories have Prime Ministers as their effective Head of Government. Commonwealth Caribbean Prime Ministers have more executive power than the British Prime Minister. Caribbean Prime Ministerial powers include the direction of government, the appointment and dismissal of the Governor General, Attorney General, Ministers, and Senators.[27] Some scholars argue that this promotes efficiency and gives the Prime Minister the necessary ability to tackle a wide range of governmental challenges. Prime Ministers may use delegated legislation to rule by decree within the parameters of the parent legislation. For example, the Jamaica Disaster Risk Management Act (2015) and similar Acts across the Caribbean have been used as ad hoc tools in the management of the COVID-19 crisis.

On the other hand, the concentration of vast power in an individual is problematic. Excessive Prime Ministerial power hinders democratic processes and may create a toxic environment for both the government and its constituents. The structure of the Westminster system means that the Prime Minister may utilise his or her parliamentary majority to pass legislation that undermines important rights. For example, the Jamaican Prime Minister is empowered to commit Jamaica to various international treaties, and this may be done without reference to the Parliament. Similarly, if a treaty is to be incorporated into Jamaican law, the Prime Minister's majority will prevail even if the Opposition firmly disagrees with that position. In short, unless legislation goes against entrenched or deeply entrenched constitutional provisions, the Prime Minister's will seems to be unfettered.

27 See Carnegie (n 1) 7.; see also Lloyd G. Barnett, The Constitutional Law of Jamaica, (OUP 1977), 63-66; Stephen Vasciannie, Arguments and Facts: Caribbean Public Law, Governance, Economy, and Society (New Caribbean Publishers 2016) 68-70.

The power of Prime Ministers is also amplified by the composition and small size of Caribbean parliaments. Carnegie points to the lack of 'Backbenchers' in Commonwealth Caribbean Countries as one important factor. This remains true, because in most instances, several members of the winning majority in Parliament will have ministerial positions. So, for example, in Barbados, the cabinet selected by Prime Minister Mia Mottley as of 26 May 2018 comprised thirty members, a clean sweep of all the seats in Barbados' parliament.[28] The result is that the balance of power is rarely in favour of backbenchers in the Commonwealth Caribbean.

The original English Westminster parliament has many non-affiliated members who are not always inclined to share the government's general perspective. Generally, parliamentary disapproval of the Prime Minister may lead to a vote of no confidence. In Britain, for example, Theresa May was voted out of office over Brexit disputes. The vote of no confidence is incorporated into Caribbean constitutions and has been applied in a few cases since Carnegie presented his arguments. In the main, however, this tends to be a viable political approach only where the government and opposition are closely balanced in the parliament of the Caribbean state. Most notably, the government of Guyana was changed by the loss of a single parliamentary vote[29]. The seats were closely held as between the government and the opposition and so a change on the part of one voting member of parliament gave rise to a change in government. This situation differs from that in Britain where a change of government is likely to turn on different perspectives of large groups of parliamentarians.

28 'Mottley Names New Cabinet, Plans to Amend Constitution' (Caribbean | Jamaica Gleaner, 27 May 2018) accessed 16 May 2023

29 Krauss C, 'Guyana's Government Falls in No-Confidence Vote' (The New York Times, 22 December 2018) accessed 16 May 2023

Fixed Election Dates

At the time of Carnegie's article, the British Prime Minister reserved the right to set the date for general elections. This gave a distinct advantage to the party in power for it could structure its arrangements to seek the best result for its members. The opposition party or parties would remain in the dark as to the election date until the Prime Minister chose to disclose it. This situation changed in Britain with the passage of the Fixed-term Parliaments Act.[30] In brief, the Fixed-term Parliaments Act provided for elections on a specified date once every five years. Significantly, this Act was short-lived. In 2022, by virtue of the Dissolution and Calling of Parliament Act, the United Kingdom has returned to the approach based on Prime Ministerial discretion, so that the UK Parliament is no longer established on a fixed term basis. The change to the fixed term approach has not been introduced in the Caribbean export model constitutions. The practice of calling a snap-election remains in place in the region, as is evident, for instance, by the 2022 Barbados election which was called two years ahead of the five-year limit. Furthermore, Caribbean Prime Ministers largely retain the right to dissolve parliament and set the election date for the new parliament.

Ministers Without Portfolios

The Prime Minister determines the composition of the cabinet. Usually this allows the Prime Minister the power to appoint Ministers with specific responsibilities within discrete ministries, such as Finance, Foreign Affairs, and Health. Significantly, however, Prime Minister Holness, in Jamaica, in addition to selecting his cabinet, has been inclined to name a fair number of Ministers without Portfolio. Thus, not counting former Minister Robert Montague, who was relieved of his

30 The Fixed-term Parliaments Act (2011) c14.

position in March 2022, there are presently four Ministers without Portfolio in the cabinet comprising twenty-one members. This goes against the usual practice in the British Westminster system which traditionally sees the appointment of only one Minister without Portfolio. The recent Jamaican practice is also unusual in the sense that the Ministers without Portfolio are given defined Ministerial responsibilities but are housed within the Office of the Prime Minister. This practice has not been generally undertaken by other Caribbean countries.

It may be that Prime Minister Holness is seeking greater efficiency from Ministers by moving them from one assignment to another, within his office, in quick succession. Alternatively, it may be that the Jamaican Prime Minister wishes to act as a steward for some of his Ministers. The results of this approach are not yet fully evidenced. Under the Westminster system, the Prime Minister, who is *primus inter pares*, is empowered to dismiss individual members of government.

Appointment of a New Prime Minister

It is tempting to assume that Prime Ministers in Westminster model countries are directly elected, but this of course is not so. Normally, the Prime Minister is the member elected to the House of Representatives following a general assembly, who commands the support of a majority in that House. There may be instances in which power may need to be transferred from one Prime Minister to another where a general election has not taken place. This transfer is achieved without reference to the national electorate. In some cases, the new Prime Minister has been selected by the members of the majority group in the House of Representatives on the government side.[31] In others, it has been achieved

31 This occurred, for example, in the case of the transfer from the deceased, Sir Donald Sangster, to Hugh Shearer in 1967.

by a vote for the new President or leader of the party which holds power at the time of the change in Prime Minister.[32] In either case, the national electorate is not consulted, and the Prime Minister is selected by a relatively small number of people. This follows from the logic of the Westminster system because the Prime Minister in this system is not elected directly by the populace, but it does seem to be at least a little inconsistent with the idea that the country's leader should be elected as leader by most of the electorate.

Parliament

House of Lords and Senate

Carnegie also compares the composition of Commonwealth Caribbean Parliaments with that of the British Parliament. Parliaments in the Caribbean may have either one (unicameral) or two (bicameral) houses. Dominica, Guyana, St. Kitts-Nevis, and St. Vincent and the Grenadines are unicameral,[33] while the other Commonwealth Caribbean countries are bicameral. Britain's Upper House (the House of Lords) has great decisional authority over executive matters. For this reason, Carnegie suggests that Caribbean unicameralism is incompatible with Westminster in Britain. He further submitted that, even in bicameral territories, Caribbean Upper Houses bore "no resemblance to the composition or constitution of the House of Lords."[34] This was mainly because members of the House of Lords served on a lifetime or heredity basis at the time Carnegie wrote. Today, this is not entirely true: many hereditary peers have lost the right to sit in the House of Lords by virtue

32 This applied, for instance, with respect to the transfer of power from Prime Minister Michael Manley to Prime Minister Patterson and to the transfer from Prime Minister Patterson to Prime Minister Simpson Miller, in 1992 and 2006, respectively.
33 Guyana does not have a Prime Ministerial system in the same form of other English speaking Caribbean states. See, Tracy Robinson, Arif Bulkan, Adrian Saunders (n 5)88-89.
34 Carnegie (n 1), 12

of the House of Lords Act (1999). The British House of Lords, today, serves primarily as a review chamber for the House of Commons, and to this extent, it shares similarities with the Senate in some Caribbean states. We cannot, however, ignore the question of scale. The British House of Lords currently has more than seven hundred and fifty sitting members, making it larger than the House of Commons and placing it second to the National People's Congress of China in terms of size. The largest Caribbean Senate, that of Jamaica, comprises twenty-one members.

The Elected Body

All Commonwealth Caribbean territories have a Lower House. Lower Houses of Parliament in the Caribbean are regarded as equivalent to the House of Commons in Britain. However, Carnegie highlights two significant distinctions. First, as noted above, the House of Commons has a relatively large number of 'back-benchers' who may not be inclined to share the government's perspective on critical decisions. The British Prime Minister's power is therefore limited to that extent. Secondly, the British parliament has almost absolute decision-making power over the substance of legislation. Parliamentary sovereignty in Britain is such that legislation will not be found to be void for inconsistency with their unwritten constitution. This is not the case in Commonwealth Caribbean territories where the Constitution is the supreme law. The difference between Parliamentary sovereignty in Britain and constitutionally circumscribed sovereignty in Caribbean states may represent a paradox, but it is a paradox that has come to be accepted by the latter group of states.

It should also be noted that Britain has retained the concept of Parliamentary sovereignty even though the country adopted the Human Rights Act (1998) which came into force on October 2, 2000. In keeping with the sovereignty of the British Parliament, the British courts cannot override Acts of the British Parliament even where these Acts appear to conflict with the Human Rights Act. In such cases of conflict, the Court may issue a Declaration of Incompatibility, but this does not negate

the Act of Parliament. In this system, Carnegie's observation on the significance of Parliamentary Sovereignty remains valid. In contrast, in the Caribbean's Westminster export model, there is no shortage of cases, before or since Carnegie, in which the Privy Council, as the final Appellate Court, has struck down Parliamentary legislation on the grounds that the legislation is inconsistent with the terms of the written constitution.[35]

The Opposition

Another important aspect of parliament is the Opposition. The Opposition is determined to be the party in the Lower House of Parliament with the second highest number of seats. Carnegie concedes at least to the idea that Commonwealth Caribbean states attempted to follow Britain's opposition model. However, Caribbean Oppositions are different from British Oppositions. The small size of typical Caribbean Oppositions is one notable difference. The small size has made it more probable that parliamentary ties may take place. This is true where there is an even number of seats in the elected House.

How is the head of state to recognise which party is the government where there is a tie? While an electoral tie is highly improbable in Britain because there are six hundred and fifty seats in the House of Commons with several parties vying for them, in the typical Caribbean state, the total number of seats rarely if ever exceeds sixty five,[36] and may be as low as eleven.[37] Notably, in the post-Carnegie period, Trinidad and Tobago, with thirty-six seats, experienced a tied result in the general election held on December 10, 2001.[38]

35 See for example, Hinds (n 9), Pratt and Morgan v AG of Jamaica (1993) 30 JLR 473; Reyes v R (2002) UKPC1;, R v Hughes (2002) UKPC 12; Fox v R (2002) UKPC 13.
36 This is true for Guyana's National Assembly with 65 seats. The Jamaican House of Representatives has 63 seats.
37 In the closely contested elections of November 1993 in St. Kitts Nevis, the parties vied for 11 seats.
38 (Elections and Boundaries Commission | Partners in democracy) accessed 16 May 2023

Caribbean constitutions offer limited assistance as to the appropriate procedure where there is a tie. In the case of *Florence Bobb and Girlie Moses v Patrick Manning,*[39] from Trinidad and Tobago, the Privy Council, quoting Patrick Manning noted that "This political result was unprecedented for the country.[40]" It meant, among other things, that a speaker of the House of Representatives could not be elected and that a budget for the governance of the country could not be completed. In the end, a new general election was held on October 7, 2002, and at this election the People's National Movement, led by Patrick Manning, won twenty seats to the House while the Opposition Party, the United National Congress, took sixteen. The tie had paralyzed the government of Trinidad and Tobago for almost a year and the country's Westminster constitution provided no clear guidance on how the issue could be addressed legally.

Clean Sweep Elections

Along with ties, the small size of Caribbean legislatures also significantly increases the probability of one party winning all the seats in the Lower House. No single party has ever won all the seats in the British House of Commons, but this situation has occurred in the Commonwealth Caribbean. The lower number of constituencies in the Commonwealth Caribbean is the main factor giving rise to this result. There have been significant new developments and innovation in this area. Clean sweep victories have occurred in Jamaica,[41] Grenada,[42] Trinidad and Tobago,[43] Barbados,[44] and St. Vincent and the Grenadines.

39 [2006]UKPC 22.
40 ibid.
41 December 15, 1983.
42 January 18, 1999, February 19, 2013, and March 13, 2018.
43 May 26, 1971.
44 May 24, 2018, and January 19, 2022.

Like Britain, Commonwealth Caribbean territories use the 'First-past-the-post' system. Effectively, each member of parliament is individually elected based on whether they have more votes than their opponents. Grenada has had three elections in which the government won all the seats in the Lower House. Notably, in all three situations, the runner-up party obtained approximately forty percent of the votes! This shows that in the 'first-past-the-post' system it is possible for a government to win all seats in the House of Representatives even if the Opposition wins a substantial number of votes. Constitutionally, this has created a problem for Grenada because Grenada's Constitution assumes that there will be an Opposition Leader. That Leader has the right to appoint three of Grenada's thirteen senators. Where there is no Opposition party in the elected House, the Leader of the Opposition cannot be legally identified. Barbados has also had two recent 'clean sweep' elections. The Barbados Labour Party won all thirty seats with approximately seventy percent of the votes each time. The Barbados Labour Party took a different approach. One member of the Government left the Barbados Labour Party to become the Leader of the Opposition in the House of Assembly. He then had the right to appoint certain senators.

Are there ways to reduce the impact of this problem? One suggestion is to have one government member resign to become the Leader of the Opposition. Another option is to allow the Prime Minister to select members of the Senate who do not belong to the Prime Minister's party. Further, the number of people in the House of Representatives could be increased. The probability of a clean sweep victory would be reduced to the extent of such an increase. A guaranteed seat could also be provided to the leader of the opposition or for a small number of opposition members. Alternatively, Commonwealth Caribbean Parliaments could use proportional representation. In that system, the number of Opposition seats would instead be dictated by the percentage of the popular vote acquired.

Carnegie noted challenges faced by Caribbean jurisdictions when one party boycotted a general election. He also mentioned that, in some instances, the general election may lead to the placement of only one

opposition member in the elected House. As to boycotted elections, Carnegie paid most attention to the decision of the People's National Party not to contest the 1983 election.[45] He did not, however, expressly consider the case where no opposition member is elected in a contested race. He is certainly correct in his assertion that heavily one-sided results "is far from being the Westminster model in substance."[46]

Head of State

Although Professor Carnegie did not explore the matter extensively in his article, substantial debate now surrounds whether Caribbean countries should assume republican status.[47] Already four states: Guyana, Trinidad and Tobago, Dominica, and Barbados, have become republics and have local Presidents.

In the debate concerning republican status, Jamaica's main political parties have reached agreement that the British monarch should be replaced by a local President but continue to differ on the appointment process that should apply. The position of the Jamaica Labour Party (JLP) is that the President should be elected by a two thirds majority in each house of Parliament, while the Peoples' National Party (PNP) maintains that elections should be achieved by two thirds of the aggregate number of seats in both houses. In Jamaica, change from the British monarch can only be undertaken following the majority decision of the electorate in a referendum.

Former Jamaican Prime Minister, PJ Patterson, has suggested that the JLP and the PNP agree on the replacement of the British Monarch

45 Carnegie (n 1) 4. For discussion, see also Fred Phillips, West Indian Constitutions Post-Independence Reform (Oceana Publications1985), 168-172.
46 Carnegie (n 1) 4.
47 See especially Simeon C.R. McIntosh, Caribbean Constitutional Reform: Rethinking the West India Polity (Caribbean Law 2002) 104-117; Norman Girvan, 'Assessing Westminster in the Caribbean: Then and Now' (2015) 53 Commonwealth and Comparative Politics 1,96.

before the referendum is held. This approach should lead to the amicable removal of the British monarch, but the matter should be subject to extensive debate in Jamaica before any final decisions are made. It has long been the view of some analysts that the British monarch should be replaced. The example of Barbados has given strength to this perspective. On another view, however, post-colonial Westminster systems may not require both a President and a Prime Minister. The Prime Minister in the current system is the head of the Cabinet and the President could serve as a source of unity for the wider society. Arguably, however, there may be no need for both a Prime Minister and a President for the Prime Minister may be sufficient for most purposes.

Human Rights

Rex Nettleford argued that the shift towards the preservation of human rights was catalysed, in the Anglo-Caribbean, by the Emancipation Act of 1833[48]. The 21st century has also given rise to some revolutionary changes. For example, the Jamaican Constitution was amended to include the Charter of Fundamental Rights and Freedoms in 2011. Jamaica's General Savings Law Clause was also repealed. The volume of cases which implicate human rights has also increased to include cases such as *Julian Robinson v The Attorney General of Jamaica,*[49] *INDECOM and Dave Lewin v Police Federation and Ors,*[50] *Quincy McEwan and Ors v. Attorney General of Guyana,* [51] and *Joseph et al v Attorney General,*[52] among others. Carnegie perhaps did not elaborate on human rights in his discussion of the Westminster model because it may have been less topical in the past.

48 cited in McIntosh (n).2
49 [2019] JMFC Full 04.
50 2019 JCPC 0098.
51 [2018] CCJ 30 (AJ).
52 [2006] CCJ 3 (AJ).

Despite the recent emphasis on human rights in the Commonwealth Caribbean, there have been some major setbacks. The retention of special and general savings law clauses in some Commonwealth Caribbean territories has hindered the development of human rights jurisprudence by effectively 'shutting out' various laws from judicial review.[53] For example, Bahamas' special savings law clause saves flogging, an inhumane punishment, from judicial review.[54] Both the Westminster system itself and the drafters of Caribbean Constitutions are to blame. Premier Norman Manley, for instance, vehemently supported special savings law clauses and sought to preserve the pre-independence constitutional status quo as much as possible.[55] This was also consistent, in 1962, with the perspectives of the British authorities.

Fortunately, the highest Commonwealth Caribbean appellate courts have sought to limit, as far as possible, the applicability of savings law clauses. In *McEwan*,[56] the Caribbean Court of Justice displays its disapproval of General Savings Law Clauses and outlines potential tactics designed to avoid their full application. The Privy Council, in *Hughes v R,*[57] also reaffirms the narrow interpretation which they apply to savings law clauses. Unfortunately, savings law clauses are still potent. This is evidenced by *Pinder v R,*[58] where in the opinion of the majority, the special savings law clause shut out judicial review of flogging as an inhumane punishment.

The Westminster system in the Caribbean has thus facilitated limitations on human rights. Legislative change could remove these delinquent statutes. *Pinder v R* elucidates the conscious re-introduction

53 The first Commonwealth Caribbean countries to gain independence incorporated general savings law clauses that negated some fundamental rights and freedoms: see, e.g., Robinson, et al. (n 4) 436.
54 Pinder v R [2002] UKPC 46.
55 Trevor Munroe, The Politics of Constitutional Decolonization 1944-1962 (ISER UWI, 1972),149.
56 Quincy McEwan and Ors v Attorney General of Jamaica (n 66).
57 [2002] UKPC 12 (11 March 2002).
58 [2002] UKPC 46 (The Bahamas) (23 September 2002).

of an inhumane punishment via statute in Bahamas after it had been previously repealed.[59] Flogging was abolished in Jamaica less than 10 years ago, but Jamaica's parliament was notoriously slow to remove this "barbaric" form of punishment as is highlighted in *Errol Price v R.* [60] This shows that some parliamentarians also seek to erode basic human rights for various reasons.

Conclusion: The 'Westmonster' System?

Westminster in the Commonwealth Caribbean and Britain has been subject to major change over the last 25 years. Since the time of Carnegie's article, a plethora of developments have affected our understanding of the independence of the judiciary, Prime Ministerial power, Parliament, Heads of State, and human rights in the Caribbean. Some changes have made Westminster in the Caribbean more like Britain while others have had the opposite effect. Nevertheless, there is an urgent need for constitutional reform especially regarding Prime Ministerial power, the general structure of government and some aspects of human rights. The problem, however, is that the majority-will in various Parliaments is not always supportive of change. Some critics decry the Westminster export model and highlight its so-called 'Westmonster' features and the fact that it is an imposition by the British Parliament on most Caribbean societies.[61] Carnegie does not go this far but his article continues to highlight the need for structural reform in certain critical areas.

59 ibid.
60 See Lord Nichols and Lord Hope dissenting judgments, ibid.
61 McIntosh (n 47) 1-45

Jamaica and The International Convention on the Elimination of All Forms of Racial Discrimination

Julia Wedderburn

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has as its core purpose the definition and eradication of all forms of racial discrimination in all sectors of public and private life through the provision of education that counters concepts of superiority based on racial differentiation and the provision of effective protection and remedies through competent tribunals. It aims to guarantee the enjoyment of political, economic, social and cultural rights without discrimination on the grounds of race, colour, descent, or national or ethnic origin.

Jamaica signed the ICERD on August 14, 1966, and later ratified the Convention on June 4, 1971. As a party to the ICERD, Jamaica must ensure that its domestic laws and practices are consistent with Convention requirements.

Prior to becoming a signatory to this Convention, Jamaica established its stance on racial discrimination through constitutional provisions. Section 24 (1) and (2) of Jamaica's Constitution, passed in 1962, prohibited any law that would be discriminatory in itself or in its effect and further prohibited the treatment of persons in a discriminatory manner by persons acting by virtue of a written law or in the performance of any public office or public authority. These provisions reflected Jamaica's pre-independence perspective on racial inequality exhibited through its commitment to nationalism and social and economic equality for a largely marginalised black population, as well as through pronouncements and actions against racism in international forums.

In 2011, the Charter of Fundamental Rights and Freedoms

(Constitutional Amendment) Act was passed, amending Section 24, among others, of the Jamaican Constitution. Section 13(3)(i); 13(4); and 13(5) had the effect of guaranteeing the right to freedom from discrimination on the ground of race or colour applying to all laws and binding the legislature, executive, all public authorities and natural or juristic persons. Of note, this amendment extended the prohibition on racial discrimination to private individuals, companies and any entity recognised as having legal personality.

Save for the constitutional provisions, Jamaica's domestic law is devoid of legislation on racial discrimination.

The adequacy of the constitutional provisions in satisfying Jamaica's obligations under ICERD is to be measured. Has Jamaica taken satisfactory steps to eliminate all forms of racial discrimination in all sectors of public and private life? The yardstick must be evidence of positive steps to eradicate racial discrimination through education and the implementation of effective protection and remedies. This will be evident not just in decided cases brought before the courts but also in the sentiments of the general population in the assessment of the country's social, cultural, economic and political constructs.

The Origin of Colourism

Slavery in Jamaica is the genesis of the country's history of colourism, that is, discrimination based on skin colour. Whites who were plantation owners were invariably at the pinnacle of the social strata, while blacks were slaves and at the base. During slavery, children who were born to white plantation owners and black slaves were granted special privileges and often manumitted, given educational opportunities and the ability to hold land, creating a light-skinned middle class. This created "a skin colour stratification process whereby a higher value was placed on people with light skin so that light-skinned people of African

descent enjoyed greater privileges than their darker-skinned peers."[1] This stratification continued after emancipation; displaced ex-slaves were deprived of the means to education, which resulted in their inability to get certain jobs, participate in political life and elevate on the social scale. Jamaica then has an ingrained racial situation embedded in its social class order.

Bridging the Divide

The rise of nationalism and the push towards self-governance became the engine for change. The establishment of the People's National Party in 1938, which was tied to trade unions, orchestrated reform in the working conditions of ordinary black Jamaicans. Norman Manley and the People's National Party agitated for Universal Adult Suffrage. Sir Alexander Bustamante and his Jamaica Labour Party, formed in 1943, also affiliated with trade unions, were also instrumental in the advocacy for workers' rights. In 1955, Norman Manley became Chief Minister of Jamaica and initiated the passing of the Facilities of Title Act that enabled people who occupied land for seven years to receive loans for development. He was also credited with the drive towards land ownership significantly, increasing the number of landowners in Jamaica. The Norman Manley administration also expanded the reach of education by providing grants to poorer children, usually from the dark-skinned lower class. Additionally, in 1958 he introduced the Common Entrance Examination that afforded free places in high schools, usually dominated by light-skinned fee-paying Jamaicans, to dark-skinned lower-class children.

These reforms initiated the move towards a more equitable distribution of wealth and opportunity in Jamaica, eroding social barriers and causing benefits to accrue to ordinary Jamaicans.

1Henrice Altink, 'Out of Place: Race and Colour in Jamaican Hotels, 1962-2020' 95 (2021) New West Indian Guide / Nieuwe West-Indische Gids 3-4.

Post Independence Jamaica

As stated above, Jamaica's Constitution of 1962 enacted its stance towards racism by prohibiting discriminatory laws and acts by public officials. Its social reforms in the pre-independence years encapsulated its commitment to bridging the racial divide. Subsequent to the ratification of ICERD in 1972 following an incident at the Skyline Hotel where a dark-skinned government minister claimed to have faced racial discrimination, the then Prime Minister Michael Manley reportedly issued a statement that the Government would do all to counter racial discrimination, direct or implied, even between the Jamaican people. During his tenure as Prime Minister, Michael Manley would go on to implement several social policies resulting in further erosion of the rigid racial stratification of Jamaican society. His policies may not have been a direct response to the Skyline Hotel incident, but they proved his commitment to eliminating all forms of racial discrimination.

In 1974 Michal Manley introduced free education from primary school to university. The increase in educational access was a major step in removing the institutional barriers to the private sector and preferred government jobs formerly held by light-skinned Jamaicans. It also allowed dark-skinned Jamaicans to access higher levels of education, elevating them to positions of influence in the political sphere as well as educational institutions at the primary, secondary and tertiary levels. The Jamaica Movement for the Advancement of Literacy was also formed with the aim of targeting older Jamaicans and increasing the literacy of the population. This drive to make education accessible to all Jamaicans created the opportunity for the upward social mobility of dark-skinned Jamaicans. The People's National Party administration also reformed land ownership in Jamaica, providing land ownership to small farmers through its Project Land Lease Programme, providing them with technical support and access to loans in order to maximise productivity leading to greater economic yield. The Manley-led administration also repealed the Master and Servants Act enacted in 1842, which required obedience and loyalty from servants to their employers, infringement of which was punishable before a court of law. The Act was replaced

by the Employment (Termination and Redundancy Payments) Act 1974 "to address the need to ensure adequate compensation for workers in the light of experiences of workers losing their jobs after giving various periods of service to an employer without any compensation as well as to address the need to legislate for the protection of workers who did not have the benefit of trade union advocacy."[2]

The erosion of systems that erected barriers preventing lower-class, dark-skinned Jamaicans from accessing education, economic advantage and social mobility created the gradual infiltration of dark-skinned Jamaicans into the higher social classes of Jamaica. Providing opportunities for dark-skinned Jamaicans to access higher education and, eventually, to access higher levels of employment caused black influence and ideologies to permeate the consciousness of the majority of Jamaicans. This, it can be argued, has reduced the prevailing culture of privilege and entitlement of light-skinned Jamaicans.

Further, Jamaica has been an example in the fight against racial discrimination on an international front leading the fight against apartheid in South Africa by introducing a boycott of goods in 1960 and further bringing about the Gleneagles Agreement among Commonwealth countries prohibiting sports links between Commonwealth countries and South Africa.[3] The rejection of racial discrimination by Jamaica's political leaders may have served to inject anti-racist ideologies into the consciousness of Jamaicans, resulting in a growth of cultural rejection of racial discrimination. This cultural rejection was evident in popular songs of the day, such as "President Botha" by Cocoa Tea and "Free Mandela" by Brigadier Jerry.

2 Senate of Jamaica, 'Order of Business of the Senate of Jamaica' (Jamaica Parliament, 21 September 2012) <https://www.japarliament.gov.jm/attachments/750_ORDER%20OF%20BUSINESS.pdf> accessed 4 March 2022.
3 Stephen Vasciannie, Caribbean Essays on Law and Policy (University of Technology, Jamaica Press 2020) 206-252.

21st Century Jamaica

Examining Jamaica's post-colonial past, it may be argued that the society has made significant gains in highlighting and speaking against racism in international fora and in bridging the divide between light-skinned and dark-skinned Jamaicans. However, it cannot be said that Jamaica has eliminated racial discrimination; reduction is a step in the right direction, and eradication is the goal.

Arthur Hall[4] reports that a mobile youth survey conducted by Respect Jamaica in association with the local office of UNICEF found that 68% of young Jamaicans believe that class discrimination was a major issue. Though class discrimination was identified as a major issue, racial discrimination was not considered a major issue. This may be evidence that Jamaica has successfully reduced the social and economic gap between light and dark-skinned Jamaicans, thereby effectively eliminating social strata based on skin colour and providing equal opportunity for all. However, Jaevion Nelson, Human Rights advocate, was quoted in the article to state his surprise that racial discrimination is not higher on the list as he still sees it as being closely related to class.

Henrice Altink[5] reported on Black Lives Matter protests in Jamaica on June 6, 2020. In the article, the author claimed that the protestors, while protesting incidents of police brutality, stressed that the victims had one thing in common, poverty, low social status and dark skin. Due to the small number of protestors, this protest did not gain much traction. Still, it cannot, without an attempt to overstate, be minimised in showing that Jamaicans are exposed to or perceive themselves to be exposed to discrimination based on the colour of their skin.

4 Arthur Hall, 'Broken - Class, Colour and Gender Discrimination Hurting Our Youth' (The Gleaner, 31 March 2016) <https://jamaica-gleaner.com/article/news/20160403/broken-class-colour-and-gender-discrimination-hurting-our-youth> accessed 5 March 2022.
5 Henrice Altink, 'Black Lives Matter in Jamaica: Debates about Colourism Follow Anger at Police Brutality' (The Conversation, 22 June 2020) <https://theconversation.com/black-lives-matter-in-jamaica-debates-about-colourism-follow-anger-at-police-brutality-140754> accessed 5 March 2022.

In a song by popular recording artist Etana entitled "Wrong Address", the singer paints a picture of educated young Jamaicans facing discrimination based on their address, suggesting that persons from low-income communities are not preferred employees regardless of their education status. One might seek to argue that this does not provide evidence of racial discrimination, but in a society where light-skinned persons reside in high-income communities and low-income communities are predominantly occupied by dark-skinned Jamaicans, the correlation cannot be ignored.

In his article,[6] Louis Moyston states his belief that the race and colour problem in Jamaica is denied and rejected in the motto chosen: "Out of Many One People." He believes that the ideology of multiracialism should be seen as an attempt to neutralise the hostility of the black masses towards a situation in which whites and other racial minorities dominate and control the local economy. Furthermore, he believes that the political parties during the early years did not do enough to eradicate racism in Jamaica but instead sought a racially neutral formula which has caused racism to perpetuate in the society.

The opinion of Moyston is not without merit. It is a reality that racial minorities dominate Jamaica's local economy. In 2001, Randolph Persaud listed the historical make-up of Jamaica's Upper Middle Class as Bombay Merchants, Syrians, Lebanese, Chinese and Jews.[7] Despite some infiltration of dark-skinned business owners and public officials, the dominance of these racial minority groups remains. Examining the reason for this dominance is to be done with care as many factors may be stated as contributors, but one cannot but consider the possibility of systematic racism. Though touted as a North American term, systemic racism – systems and structures that disadvantage a particular race – creates disparities in many 'success indicators,' including wealth, the

6 Louis E A Moyston, 'Racism Alive and Well in Jamaica' (The Observer, 7 April 2020) <https://www.jamaicaobserver.com/columns/racism-alive-and-well-in-jamaica/> accessed 5 March 2022.
7 Randolph B Persaud, Counter-Hegemony and Foreign Policy: The Dialectics of Marginalised and Global Forces in Jamaica (SUNY Press 2001).

criminal justice system, employment, housing, health care, politics and education. Taking education in Jamaica as one indicator, the evidence of non-traditional, poorly funded, overpopulated schools predominantly situated in low-income communities and attended by dark-skinned Jamaicans may point to discrimination to the effect of maintaining a status quo, creating disparity.

Gary Spaulding[8] reported on the comments of Jamaica's High Commissioner to Trinidad and Tobago, Sharon Saunders, following Jamaican Tessanne Chin's victory in the competition "The Voice." He comments that Tessanne Chin, despite her Chinese heritage, described herself only as Jamaican. She further stated that Jamaicans are, first and foremost, Jamaican despite having a different racial-cultural mix, a situation she believes is absent in Trinidad and Tobago. This, she believes, bears out Jamaica's national motto, "Out of Many One People." While Moyston's opinion on the reasons for the chosen motto is debatable at best, statements such as that of Sharon Saunders, which seem to ignore the prevalence of actual or perceived discrimination based on skin colour, may cause one to ponder whether the motto has in fact neutralised the masses.

In its report to the Committee on the Elimination of Racial Discrimination, [9] Jamaica reported that its challenge is overcoming the residual impact of slavery on society as skin colour is sometimes approximated with opportunities for upward social mobility. The Government's focus then is on policies that address the needs of economically and socially disadvantaged groups. Despite this pronouncement, more can be done to uphold treaty obligations. Michael

8 Gary Spaulding, 'Colour and Class in Ja & T&T' (The Gleaner, 26 December 2013) <https://jamaica-gleaner.com/gleaner/20131226/lead/lead2.html> accessed 5 March 2022.
9 UN Committee on the on the Elimination of Racial Discrimination, 'Combined 21st to 24th reports submitted by Jamaica under article 9 of the Convention, due in 2016 : International Convention on the Elimination of All Forms of Racial Discrimination' (21 May 2019) CERD/C/JAM/21-24 para 8.

Manley's pronouncement after the Skyline Hotel incident that the government would do all to counter racial discrimination, direct or implied, even between the Jamaican people, was a clear acknowledgement of the need to regulate racial discrimination, not just in the public sector, but also in the private sector. Yet it was not until 2011, some 39 years after the incident, that the constitution was amended to extend the prohibition on racial discrimination to private individuals, companies and any entities having legal personality.

Additionally, Jamaica has failed to pass legislation expressly incorporating the provisions of ICERD. In justifying its stance, Jamaica has argued that passing domestic legislation is unnecessary as the constitution already makes suitable provisions. It is asserted that the convention allows for state discretion in the way it applies particular measures against discrimination in its domestic laws and that common law provides adequate protection in instances where protection is not fully safeguarded by the constitution. Furthermore, it is argued that express legislation would be superfluous as the country is devoid of racial problems, evidenced by the absence of cases alleging racial discrimination in local courts.[10]

In countering these arguments, one can postulate that legislation incorporating the provisions of the Convention in domestic law would seek to define provisions, clarify the effect and application of these provisions and prescribe specific measures for breach, thereby creating real guarantees, which could have the effect of leading to actual cases where acts of racial discrimination occur. It is evident from the above statements that the country is not devoid of racial discrimination or the perception thereof. A lack of cases then cannot be evidence that racial discrimination does not exist but is more likely to be evidence that persons may not have effective recourse. Additionally, an argument has been postulated that the lack of cases may be due to the unreasonableness

10 Vasciannie (n 3).

of the person alleging racial discrimination to prove that they have been discriminated against. This may be considered unreasonable due to the fact that it is difficult in the circumstances to provide proof of what was in the person's mind motivating his actions. In the United Kingdom, a two-stage test is employed in discrimination claims. In the first stage, a prima facie case is made out by the claimant. Once a prima facie case is established, the onus is placed on the respondent to prove an adequate non-discriminatory explanation of the treatment complained of.[11] This, it is suggested, could be employed in order to provide a realistic prospect of success in racial discrimination cases.

Additionally, Government policies should be employed to eradicate social stratification based on skin colour. Jamaica, as a young nation, seemed to have made significant strides in this regard, evidenced by the abovementioned policies and legislations, which served to provide opportunities for marginalised dark-skinned Jamaicans. However, this thrust has seemingly slowed over the last few decades and may now be piecemeal at best. The bare constitutional provisions are inadequate, and greater effort must be made through the enactment of the legislation, the provision of real remedies arrived at through assessment of our modern situation echoed through the voice of the masses. These efforts must be genuine and sustainable, not mere policies that may change on the change of political leadership but through laws which are more permanent and prescriptive.

11Madarassy v Nomura International Plc [2007] EWCA Civ 33, [2007] IRLR 246; Base Childrenswear v Otshudi [2019] EWCA Civ 1648, [2020] IRLR 118.

Advance Fee Fraud in Jamaica: The Law Reform (Fraudulent Transactions) (Special Provisions) Act 2013

Desiree Alleyne

Introduction

Advance fee fraud is a financial crime and is parochially called 'lotto scamming' in Jamaica. It is said that the name was taken from the formal, approved and legislated lottery game in Jamaica which is locally referred to as 'lotto.' International stakeholders tend to refer to it as sweepstakes fraud. It is an economic crime. Elderly persons in developed countries, mainly in the United States of America, are targeted by some Jamaicans and told that they have won money in a lotto, usually millions of dollars and that they have to send money to pay certain administrative/ processing costs or taxes to get these winnings. In particular, in order to succeed, these swindlers warn their victims not to tell their family or friends about this grand windfall. This criminal activity was so prevalent that elderly Americans were warned of calls coming from the Jamaican 876 country code.[1]In response, the Parliament of Jamaica enacted the Law Reform (Fraudulent Transactions) (Special Provisions) Act in 2013 ('the Act'). A review of some of the offences stated in the Act makes it clear that the legislators aimed at combatting the growth of this lotto scam by making illegal the systems and procedures used by criminals during the commission of the advance fee fraud offence.

1 AARP, 'Scammers Lurk Behind Area Code 876: Older residents should beware of threatening con artists using Jamaican numbers' (AARP, 13 August 2012) <https://www.aarp.org/money/scams-fraud/info-09-2012/beware-area-code-876-nh1788.html> accessed 11 June 2021.

The Fraudulent Transactions Act

The Fraudulent Transactions Act made it an offence to inter alia, obtain property by false pretence; cause another person to visit Jamaica for any purpose connected with the commission of the 'lotto scamming offence'; possess or traffic in an access device which is used to facilitate the advance fee fraud crime and use an access device to transfer or transport money or monetary instrument from Jamaica to the outside of Jamaica or to a place in Jamaica from a place outside Jamaica if the person believes that money is 'substantially related' to the proceeds of unlawful activity.

Section 10 makes it an offence to knowingly possess the identity information of another person in circumstances in which it is reasonable to assume that it is for an unlawful purpose, and section 11 states that demanding money with menaces from another by using any electronic communication system with a view to obtaining a benefit from the other person and/or with the intent to cause loss to the other person is also an offence. This section is similar to section 42A (1) of the Larceny Act 1942 which states that unwarranted demand with menaces shall be deemed extortion. The difference is that section 11 of the Law Reform (Fraudulent Transactions) (Special Provisions) Act specifically states that demand by menace is an offence if it is done by electronic communication. It refers to scamming offences as this is the particular method utilised by these fraudsters.

According to section 13, in imposing a sentence under the Act, the Circuit Court Judge must consider, inter alia, the age of the victim, whether the victim suffered from a physical or mental disorder, whether menaces were used to commit the offence, and whether there was persistent badgering or aggression used in the commission of the offence. That is usually the method used by these criminals to commit the offence, as they make hundreds of harassing calls daily to elderly victims who may be suffering from cognitive disorders.

Section 15 states that in a trial for an offence under the Act, if it is proved that the accused is in possession of property for which he cannot account satisfactorily and is disproportionate to his income, then that is admissible evidence that he is in breach of the Act. Section 16 authorises a Justice of the Peace to issue a search warrant of premises where there are reasonable grounds to believe that there is evidence relating to the 'scamming' offence.

Section 17 of the said Act states that the court must order restitution for the victim, in the amount lost by the victim as a result of the fraud. Interest must also be ordered for the period the victim was deprived of his property. This is similar to The Criminal Justice (Administration) (Restitution Orders) Regulations 2021, which was passed pursuant to the amendment to the Criminal Justice (Administration) Act of 2017 in which section 24 of the Criminal Justice (Administration) Act 1960 was amended to add a section 24A which states that the Court may impose a restitution order in addition to any other sentence if satisfied that the victim had suffered financial loss as a result of the commission of the offence.

The Fraudulent Transactions Cases

So far, there have been three appeals to the Court of Appeal of Jamaica as a result of prosecutions undertaken pursuant to the Act. The Court of Appeal in two of the three cases, *Kurt Taylor v R,*[2] and *Meisha Clement v R*,[3] considered whether the sentences given by the Circuit Court Judges were appropriate in all the circumstances. In the other case *Demetri Hemmings v R*,[4] the consideration was whether the rules of disclosure to the defence and the Circuit Court were complied with by the prosecution.

2 [2016] JMCA Crim 23.
3 [2016] JMCA Crim 26.
4 [2020] JMCA Crim 44.

In the Kurt Taylor case, Mr Justice Williams JA, who delivered the judgment, noted that the appellant on 3 December 2014 pleaded guilty to knowingly possessing identity information of persons contrary to section 10(1) of the Act. The background to this case is that the police went to the appellant's residence in St Elizabeth with a search warrant and, under a bunk bed in his bedroom, found a 'lead sheet' of paper with names, United States telephone numbers and addresses. This 'lead sheet' was seized along with two cell phones. A name and telephone number on the lead sheet were discovered in one of the phones. The appellant was convicted and sentenced to five (5) years imprisonment.

The maximum sentence for this offence is 15 years, but Mr Justice Williams JA said that the trial Judge erred in having a starting point at that statutory maximum. His Lordship, in disagreeing with the trial Judge noted in paragraph 28 of the judgment that Mr Taylor did not have any previous convictions and that the offence for which the appellant pleaded guilty and was convicted consisted of one lead sheet, with a telephone number that was found in one of the cellular phones that were seized. Further, although the learned trial Judge said Mr Taylor did not appear remorseful, a plea of guilty can be regarded as an indication of remorse. Also, in the post-sentencing report, the Probation Officer wrote that the appellant now recognised that persons were severely affected by the lotto scamming crime, and therefore persons should not commit this offence. He has learnt the hard way.

His Lordship also stated in paragraph 31 of the judgment that a non-custodial sentence should have been considered by the trial Judge as the option of a fine is expressly stated in the Act. Therefore, although the effects of lotto scamming are extensive and damaging, the Circuit Court Judge should not automatically be of the view that a custodial sentence is appropriate. His Lordship then opined that the learned trial Judge should have considered a non-custodial sentence and that if she was of the view that a non-custodial sentence was not appropriate, then the best sentence should have been three years imprisonment having regard to all the circumstances in the appellant's case such as his physical

condition as he was at risk for sore infections, his inability to receive good care in the prison, his good record and guilty plea.

What is of importance is that Justice Williams JA said that they could find no fault with the learned trial Judge considering the effect of lottery scamming as the lead sheet is used to commit the crime of scamming. The Court of Appeal ordered the immediate release of the applicant on compassionate grounds and further ordered that the remainder of his sentence of three years imprisonment be suspended for a period of two years from the date of the judgment. His Lordship had also noted that the legislators did leave the option of a fine for the Judge to impose instead of a sentence of imprisonment. Having regard to the fact that a fine goes to the Crown's coffers, and elderly victims are the ones who suffer a decimation of their income when this type of fraud is committed, it is appropriate to note at this juncture that where it is proven that the accused benefitted monetarily from the crime, the Circuit Court Judge should also make a restitution order where the victims of the crime are ascertainable.

In the Meisha Clement case, the applicant pleaded guilty and was sentenced pursuant to the said Act. Justice Morrison delivered the judgment, noting that the circumstances which led to the applicant being charged are that on 24 August 2013, police officers searched the applicant's house and found several credit/debit cards bearing the names of persons residing overseas. The applicant, when cautioned, said she was paying taxes for those persons. Investigations revealed that these cards were valid. She was charged pursuant to section 8(2) of the said Act on the ground that she had "fraudulently possessed the access device (which were the credit cards) to obtain services that are provided by the issuer of the access device." She pleaded guilty and was sentenced to 8 years imprisonment. She appealed to the Court of Appeal of Jamaica on the ground that she was forced to plead guilty and that the sentence was excessive.

Justice Morrison considered the fact that the Judge reviewed the social enquiry report and her antecedents and also noted that the

31-year-old applicant spent ten months in custody awaiting trial, was a mother of two children, with previous convictions for possession of and uttering forged documents and breaching the Corrections Act. Further, she was not honest when she outlined her educational achievements to the Probation Officer. It was untrue she had a Bachelor's Degree, but she did obtain certification in America as a Certified Home Nurse. His Lordship also stated that as there was no evidence that she was forced to plead guilty, the conviction would be upheld. The prosecutor's assistance concerning sentencing was requested by the Court of Appeal because of the newness of the Act and the absence of precedents to assist the court.

The prosecutor urged the Court of Appeal not to interfere with the sentencing. His Lordship stated in paragraph 23 of the judgment that although the statutory maximum sentence of imprisonment for breaching section 8 of the Act is 15 years imprisonment, the starting point would depend on the particular circumstances of each individual's case. Therefore, as a plea of guilty should be considered an expression of remorse, the sentence should be discounted by about one-third. The time spent in custody must also be considered, as well as the offender's antecedents. His Lordship also opined that in all the circumstances of this case, the trial Judge erred by utilising 15 years as the starting point. It was therefore reduced to 7 years. The Court of Appeal recognised that the breach of section 8(2), which is the possession of the access devices (credit cards), was a serious offence with "potentially serious consequences." Even though a guilty plea is usually seen as an expression of remorse, the Court of Appeal expressed the view that the applicant's conduct and utterances were correctly seen as an aggravating feature by the trial Judge; furthermore, that the plea of guilty was made because of "irresistible evidence" against the applicant after the search of her house. The one-third discount was applied, and the Court of Appeal reduced the sentence of eight years imprisonment for breaching the Act to five years imprisonment, ruling that the sentence of eight years imprisonment was manifestly excessive.

Justice Morrison then expressed in paragraphs 62 to 63 of the judgment that the Act represented what Parliament considered to be its pressing social problem and that the maximum demonstrated Parliament's intention to seriously punish the behaviour of the offenders. However, because of the new legislation, sentencing judges will have challenges imposing the appropriate sentences in "an unfamiliar legal and factual context," which is why detailed instructions were given in this case. The appeal against the conviction was dismissed. The appeal against the sentence was allowed, and the sentence was reduced to five years imprisonment from eight years imprisonment. The Court of Appeal did indicate in the Kurt Taylor case what were the considerations of the court in deciding the sentencing starting point. Mr Justice Williams JA said in that case that if one starts with one lead sheet as the maximum, what will the trial Judge start with when an accused is being tried for being in possession of 100 lead sheets? Therefore, some guidance as to sentencing was given to Circuit Court Judges trying that type of offence. It can be inferred that the more aggravating the circumstances of the offence, the starting point could move nearer to the statutory maximum stated.

Another case pursuant to the said Act is that of Demetri Hemmings. Justice Pusey JA (AG), who delivered the judgment, noted that the said Act is primarily aimed at dealing with modern advance fee frauds, which are often carried out by electronic communications. The prosecution presented evidence that the appellant was found in possession of an Apple iPad in his home, and when it was forensically examined, it was discovered that they possessed the identity information of other persons and that he transacted the business of obtaining that identity information unlawfully. Also, that he had the information in his possession with the intention of committing criminal offences, he was therefore convicted of knowingly possessing identity information of other persons and transacting business utilising the identity information in contravention of section 10 of the said Act.

Justice Pusey JA (AG) explained in paragraph 4 of his judgment that section 10 of the said Act was aimed at criminalising the tools used by the fraudsters to perpetrate the advance fee fraud crime, as they use the identity information they had illegally obtained to contact and mislead their victims into sending money in the hope that they would receive a financial windfall which the fraudsters promised to them. In allowing the appeal, his Lordship noted that the Crown's failure to disclose to the defence and put before the court the crucial compact disc, which, on the Crown's case, held the record of the appellant's transactions and the electronic proof of the possession of identity information, was an "egregious, inexcusable and incurable" failure which resulted in the appellant not having a fair trial. The conviction was thereupon quashed, the sentence set aside and a verdict of acquittal entered. This case demonstrated that it is important that the prosecution ensures that all the rules of disclosure are complied with so that these fraudsters can be successfully prosecuted.

Conclusion

Thus far, one has observed that the principles of sentencing and rules of disclosure have been brought to the fore in the appeal cases pursuant to the Act. Prosecutions pursuant to sections 8 and 10 of the Act were also regarded. There is no doubt that as more cases are brought to the Court of Appeal, the application of other sections of the Act will also be perceived, and additional legal issues will be illuminated for clarification and guidance.

Corporate Governance in the Caribbean: An Overview of Legal Developments in Trinidad & Tobago and Jamaica

Ramzan Hosein

Summary

This article reviews the concept of corporate governance and provides a critical comparison of the roles and interests of shareholders and management in the corporate world. It does so by probing various regional and international corporate scandals and how interlocking boards, shadow directors and recent corporate developments have impacted governance in the Caribbean.

A thorough analysis of legislative and recent case laws which seek to enforce good governance and its impact on the Caribbean was undertaken, with a particular focus on two landmark cases that gained the attention of the Supreme Court of Canada, namely, the People's and BCE Inc. Cases, and the implication of both cases on directors' Common law duty of care. Emphasis was placed on the unresolved issues of both cases, particularly in relation to creditors, the validation of the Business Judgement Rule and the implications to directors. This was juxtaposed with directors' duty to creditors at or near insolvency, under the relevant Companies Act and the Common law in Trinidad and Tobago, and whether or not directors must have regard to their interest in the decision-making process.

It was found that established governance principles were breached or not enforced; an example is the Clico fiasco. Indeed, the breach of established governance principles and or non-observance was also ascertained in the First Citizen Bank's (FCB) Initial Purchase Offer (IPO) 2013 and the Guardian Holdings Limited's (GHL) merger with National Commercial Bank of Jamaica (NCBJ). Governance principles in terms of the Caribbean seem to be mere rhetoric because while most firms enunciate good governance as part of their organisation's structure, actual governance is nothing short of absent, if not only a window dressing.

Introduction

Corporate governance can be referred to as the mechanisms, interrelationships, and practices by which a corporation is governed. It encompasses the business of all the various stakeholders, public and private, formal and informal,[1] with the objective of managing that interest to the paramount advantage of the corporation. Corporate governance involves balancing the interests of a company's many stakeholders by providing corporate policies and procedures for the attainment of the corporation's strategic goals. It encompasses every sphere of management, which includes action plans and internal controls for performance measurement and corporate disclosure.[2] The concept of good corporate governance is, therefore, critical to any organisation to ensure that the actions of the company are managed for the benefit of all its stakeholders. Indeed, it essentially depicts the interconnectedness between constituents who are affected by the corporation.[3]

1 Sandra Glasgow, 'Emergence of Corporate Governance in the Commonwealth Caribbean' in Suzanne Ffolkes-Goldson (ed), Commonwealth Caribbean Corporate Governance (Routledge 2016).
2 James Chen, 'Corporate Governance Definition: How It Works, Principles, and Examples' (Investopedia, 22 March 2023) <https://www.investopedia.com/terms/c/corporategovernance.asp> accessed March 7 2018.
3 Sarah Mehta Alexander, 'Directors Duties Under the CBCA: Shareholder Theory versus Stakeholder Theory Consideration of Stakeholder Theory's Legal and Moral Supremacy' (LLM thesis, University of Toronto 2012).

Roles of Shareholders and Management

It has been argued that shareholders are the centre of the corporate universe; managers and boards must orbit around them.[4] In other words, the board's ultimate duty is to the shareholders in terms of wealth maximisation. However, conflicts between management and shareholders are frequent because of incompatible interests. This is particularly acute in respect of minority shareholders in closely held companies, who are usually resistant to litigation because legal recourse in the event their rights are infringed can be expensive and risky.[5] Indeed, in most publicly listed corporations, a large number of shareholders are very small investors who do not take any active involvement in the undertakings of the corporation other than simply being a shareholder. It is decidedly impossible to expect a shareholder who owns a few hundred shares in a company which has 250 million outstanding shares on the open market to actually attend an annual general meeting or to even take an interest in the affairs of that company. Institutional investors, on the other hand, such as the National Insurance Board (NIB) and the Unit Trust Corporation of Trinidad and Tobago (UTC), may exercise some discretion in the affairs of a relevant corporation. They may often control a significant number of shares and consequently will earn the right to appoint directors to the respective boards. For example, in the 2022 financial statements of the First Citizens Bank of Trinidad and Tobago, the NIB was stated as the second largest shareholder, with an eight percent holdings in that said company, more than other established Pensions and Trust Companies in Trinidad and Tobago.[6]

From a legal standpoint, however, shareholders do not own the corporation; they have ownership in a share, which entitles them to

4 Justin Fox and Jay W Lorsch, 'What Good Are Shareholders?' (Harvard Business Review, 1 August 2014) <https://hbr.org/2012/07/what-good-are-shareholders> accessed March 9 2018.
5 ibid.
6 FCB Financial Statements 2022 <https://www.firstcitizensgroup.com/tt/wp-content/uploads/sites/2/2023/01/FC_2022_AR-FULL-REPORT-1.pdf> accessed 24 April 2023.

dividends if and when it is approved by the board of directors. In law and practice, shareholders have little or no opportunity in most, if not all, of the decisions of a corporation; the Board ultimately has that responsibility. Indeed, many boards and their top management often articulate their role as being to maximise shareholders' wealth; but their actions, remunerations and bonuses, coupled with the absence of any real intervention by shareholders in the affairs of the corporation, can be considered as mere rhetoric on the part of any board. Melvin Eisenbergobserved that while a shareholder's goal is to maximise the firm's earning per share (EPS), such may not be the principal objective of any manager.[7] Magdalena Jerzemowska also pointed out that managers often seek to intensify the scale of companies, even if it is contrary to the interests of shareholders.[8] Such conduct, which values growth, often causes conflicts of interest between managers and shareholders, whose desire is simply the maximisation of their share price.

Simone Sepe reinforced the view of director superiority by arguing that shareholders lack effective supremacy to hold boards accountable and to challenge them to serve in the best interest of shareholders.[9] He further argued that the implicit power of removal is largely a fable because of managerial entrenchment and shareholders' inability to alter that right. Thus, corporate governance becomes a pivotal role in protecting shareholders due to the ever-questionable unfettered powers directors can exercise in the performance of their duties.

Thus, the notion that shareholders are at the centre of the corporation and their interest is first and foremost can be regarded as fanciful, if

7 Melvin Aron Eisenberg, 'The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking' (1969) 57(1) California Law Review <https://lawcat.berkeley.edu/record/1110263> accessed 31 March 2018.
8 Magdalena Jerzemowska, 'The Main Agency Problems and Their Consequences' (2006) 14(3) Acta Oeconomica Pragensia 9 <https://www.vse.cz/polek/download.php?jnl=aop&pdf=73.pd> accessed 17 March 2018.
9 Simone M Sepe, 'Board and Shareholder Power, Revisited' (2016) 101 Minn L Rev 1377 <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1158&context=mlr> accessed 29 March 2018.

not totally disingenuous. The board and managers, not shareholders, therefore, stand in a far more favourable position in the corporation and consequently can be regarded as the parties with the tangible powers. A good example of these competing interests and influence is what transpired during the WorldCom debacle,[10] whereby managers

concealed $11 billion dollars in expenses by treating those expenses as capital expenditures contrary to recognised accounting principles. Their sole objective was the enhancement of earnings per share to boost share prices, designed to benefit them via stock options and bonuses.

Thus, the role of managers and the board of directors, in relation to that of shareholders, have been brought to eminence, especially in respect of all the various corporate scandals that have permeated over the past few decades. Such scandals have clearly placed shareholders in a disadvantaged position and advanced the question, are shareholders really at the centre of the corporation?

Corporate Governance Scandals

Over the past few decades, corporate governance disputes have plagued the corporate world, sometimes leading to serious economic fallout and forcing action, in some cases, by companies, regulators and various governments.[11]

In the 1990s, the collapse of two giant American firms, Enron and

10 WorldCom's chief executive, John Sidgmore, blamed the company's former chief financial officer, Scott Sullivan, and the former controller, David Myers, 30,000 employees lost their jobs and investors lost $180 billion dollars. See Mark Tran, 'Worldcom Accounting Scandal' *The Guardian* (London, 9 August 2002) <https://www.theguardian.com/business/2002/aug/09/corporatefraud.worldcom2> accessed 15 March 2018.

11 As a consequence of the Petrobras Car Wash scandal in Brazil, former President Luis Inacio Lula de Silva was sentenced for 12 years for corruption; Lula gets support from local trade unions. See Michelle Loubon,'Lula Gets Support from Local Trade Unions' Daily Express: Trinidad Express Newspapers (Port of Spain, 2 May 2018) <https://trinidadexpress.com/news/local/lula-gets-support-from-local-trade-unions/article_f7be3e80-4e3e-11e8-bf20-cf93182c12cd.html> accessed 3 May 2018.

WorldCom, was largely due to poor accounting standards, questionable integrity of external auditors and, most importantly, the role and responsibilities of directors in this corporate fiasco.[12] In the Freddie Mac scandal, the company misstated US$5 billion dollars in earnings, while in the American Group Insurance scandal, there was US$3.9 billion dollar in accounting fraud coupled with bid rigging and stock price manipulation. In the Lehman Brothers scandal, the company hid over $50 billion dollars in debt disguised as sales. All of the mentioned scandals went on for years unabated, which reinforced the notion of poor corporate governance system in those organisations, which led to grim consequences.

In the case of Enron, shareholders lost US$74 billion dollars, thousands of employees and investors lost their retirement savings, and there was a negative ripple effect on the stock market and investor confidence.[13]

Enron recognised revenue, which was non-existent, to boost earnings per share as a mechanism to enhance share price. Most importantly, external auditors had a responsibility to shareholders. failed despondently to report on those corporate missteps. It was argued that the watchdog such as the Securities and Exchange Commission (SEC), whose duty was to raise issues with respect to poor corporate governance, worked for Wall Street and not the Regulator. Indeed, it was in Wall Street's interest to protect investors, but they failed miserably.

In the United Kingdom (UK), there were also issues relating to poor governance standards, which led to the collapse of previously prominent

12 Tran (n 10); David Hancock, 'World-Class Scandal At WorldCom' (CBS News, 26 June 2002) <https://www.cbsnews.com/news/world-class-scandal-at-worldcom/> accessed 20 March 2018; Simon Romero S and Riva D Atlas, 'WorldCom Files for Bankruptcy; Largest U.S. Case' The New York Times (New York, 22 July 2002) <https://www.nytimes.com/2002/07/22/us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html> accessed 21 March 2018.

13 Enron's share price in 2000 was $80.When it collapsed in 2001, its share price was $0.50. See 'Enron Stock Price Chart and Data' *(Famous Trials*) <https://famous-trials.com/enron/1791-stockchart> accessed 23 March 2018.

blue-chip companies such as BCCI, the Mirror Group and Polly Peck, who was referred to as the darling of the stock market.[14] In some cases, directors were performing executive functions, which is a clear breach of any governance structure. In the case of Polly Peck, two billion dollars of the company's cash flow disappeared overnight because of a perceived poor corporate governance structure at that corporation.[15]

In terms of corporate governance, several Caribbean countries have adopted the Canadian model of corporate legislation, which focuses on the stakeholders' model rather than shareholder primacy.[16] Indeed, it has been argued that the doctrine of shareholder primacy focuses on wealth maximisation and disregards issues such as the impact on the environment and social consequences. In Jamaica, for example, its Company law legislation has specifically recognised the interest of not only shareholders but also an employee and the community,[17] unlike the UK where directors simply have a duty to regard other stakeholder's interests, which can be interpreted as secondary to the interest of shareholders.[18]

The Caribbean was not insulated from various corporate governance scandals over the last twenty years.[19] In the mid-1990, a crisis in Jamaica's financial sector resulted in six of the nine commercial banks, which

14 Paul Harris and Dominic Prince, 'Polly Peck Tycoon Asil Nadir Flies to UK after 17 Years on Run from £34m Fraud' *The Daily Mail* (London, 27 August 2010) <https://www.dailymail.co.uk/news/article-1306249/Polly-Peck-tycoon-Asil-Nadir-flies-UK-17-years-run-34m-fraud.html> accessed 22 March 2018; Dominic Casciani, 'How Asil Nadir Stole Polly Peck's Millions' *BBC News* (London, 22 August 2012) <https://www.bbc.com/news/uk-19161940> accessed 22 March 2018; Shenai Raif, 'Former Polly Peck Tycoon Asil Nadir Jailed for 10 Years' *The Independent* (London, 23 August 2012) <https://www.independent.co.uk/news/uk/crime/former-polly-peck-tycoon-asil-nadir-jailed-for-10-years-8076342.html> accessed 22 March 2018; Steve Lohr, 'World-Class Fraud: How BCCI Pulled It off -- a Special Report; at the End of a Twisted Trail, Piggy Bank for a Favored Few' *The New York Times* (New York, 12 August 1991) <https://www.nytimes.com/1991/08/12/business/world-class-fraud-bcci-pulled-it-off-special-report-end-twisted-trail-piggy-bank.html> accessed 22 March 2018.
15 Stephen Bates, 'How Polly Peck Went from Hero to Villain in the City' The Guardian (London, 26 August 2010) <https://www.theguardian.com/business/2010/aug/26/polly-peck-business-asil-nadir> accessed 25 March 2018.
16 Glasgow (n 1).
17 Companies Act 2004, s 174(4).
18 Companies Act 2006, s 260–266. Note that only the shareholders have a right to sue the company.
19 See Glasgow (n 1).

accounted for 60% of the deposits, five life insurance companies which accounted for 90% of the premium income, one-third of all merchant banks and several building societies were deemed insolvent and had to closed operations. Subsequently, the Bank of Jamaica pumped J$18 billion of cash flows to meet demands from depositors for withdrawal.[20]

In Trinidad and Tobago, there was the failure of Colonial Life Finance Group (CLICO), which was one of the largest conglomerates in the Caribbean, encompassing over 65 companies in 32 countries. CLICO managed assets of over TT$38b, representing over 25 per cent of the country's GDP.[21] The CLICO debacle had enormous corporate governance missteps, which could be traced as far back as the 1990s. In August 1998, a report[22] that reviewed CLICO activities over a five (5) year period that ended in 1996 indicated that the Company found it difficult to satisfy its Statutory Fund Requirement since 1992 but nevertheless, declared and paid dividends for three years, in violation of the Insurance Act.[23] In 1994 and 1997, the Supervisor of Insurance noted that the company was technically insolvent, yet still provided TT$ 20 million for political campaigning and gifts and scholarships to the politicians.[24]

The CLICO debacle pointed not only to breaches in established rules and regulations but basic corporate governance principles, which went on unfettered for years until its eventual collapse. Soverall magnified the effects of poor corporate governance at CLICO and the impact of such on the economies of the Caribbean by pointing out that the corporate

20 Financial Institutions Services Limited v CNB Holdings and Century Development Limited et al, Suit No CL 1996 /C330. The transgressions in this case are staggering, ranging from a breach of duty of care and skills, a breach of fiduciary duties, and numerous instances of negligence. In fact, the breach of corporate governance was so widespread that in one instance, the company's auditor was granted loans and an overdraft facility.
21 Wayne Soverall, 'CLICO's Collapse: Poor Corporate Governance' (2012) 2 AIJCR..
22 William Layne, 'Recent Financial Failures in the Caribbean-What Were the Causes and What Lessons Can Be Learnt?' (*Studocu*, 6 March 2012) <https://www.studocu.com/en-gb/document/the-open-university/international-finance/layne-financial-crisis-in-the-caribbean/10790715> accessed 24 March 2018.
23 ibid.
24 ibid.

missteps resulted in risk exposure to Trinidad and Tobago's economy and the spill over effects in the wider Caribbean at 10 per cent and 17 per cent of Gross Domestic Product (GDP) respectively.

Norman Girvan,[25] in his paper "Three Lessons of the CLICO Debacle," sought specific answers with respect to Clico's demised, "why the necessary legislation was not put in place...One lesson of the CLICO debacle, therefore, is that governments need to equip themselves in a timely manner with the necessary legal tools and supervisory instruments to effect adequate regulation of financial entities in the public interest and not seek to close the gate after the horse has bolted.

Girvan further alluded that "it is clear that the authorities cannot claim that 'we did not know'. Hence no entity, no matter how large its weight in the economy, can be safely regarded as being above proper oversight and regulation. Indeed, the larger it is, the more important adequate regulation becomes and the greater the consequences of its absence... the threatened collapse of CLICO/CIB has sent shock waves throughout the region, undermined public confidence in all financial institutions in all Caricom countries, and will cost the Trinidad and Tobago taxpayer an as yet undetermined amount of money".

Girvan identified a second lesson is that the Government needs to adopt and finalise the Caricom Financial Services Agreement as a matter of urgency. By this means, financial entities will not be able to escape regulations in one regional jurisdiction by exploiting legal loopholes in another ('regulatory arbitrage').

Finally, a third lesson identified by Girvan is "the need to revisit the commitments on financial services and their regulation made by Caricom, as part of Cariforum, under the Economic Partnership Agreement with the EU".

25 Norman Girvan, 'Three Lessons of the CLICO Debacle' BBC News (London, 4 February 2009) <https://www.bbc.co.uk/caribbean/news/story/2009/02/printable/090204_norman_girvan.shtml> accessed 1 April 2018.

The Government of Trinidad and Tobago, as an immediate response to the Clico's collapse, responded by initiating changes via the Insurance Amendment Act 2009 and 2013. [26]The objective was to improve the laws relating to insurance companies and regulatory authority as well as to provide the Central Bank with a wider range of corrective and preventative powers to reduce moral hazard and make the insurance system more robust.[27]

Several legal challenges were initiated following this debacle.[28] One decision came on the 30th April 2021[29] almost a decade after the collapse, which is another hurdle whereby legal recourse via the courts on all matters not only that related to breaches of the Company's Act

et al, takes years to complete. In her ruling, Judge Quinlan-Williams said of Monteil, "He knew that the payment of $78 million by CIB on February 14, 2007, for the benefit of Stone Street was unauthorised, was purely on oral terms, and no or no adequate security, was completely undocumented and was procured by Mr Trotman without having done any due diligence." Judge Quinlan- Williams further said,[30] "Monteil knew it was highly irregular and not in CIB's best interests, yet as chairman and a director of CIB, he allowed it to happen, leaving CIB exposed and unsecured...While still chairman and a director of CIB, Monteil was also

26 Nadaleen Singh, 'Central Bank Changes after Clico/HCU' Trinidad and Tobago Guardian (Port of Spain, 5 May 2013) <https://www.guardian.co.tt/article-6.2.400502.6c4343cb42> accessed 1 April 2018.
27 Kevon Felmine, 'Bill to beef up insurance laws in Senate today' Trinidad and Tobago Guardian (Port of Spain, 17 June 2013) <https://www.guardian.co.tt/article-6.2.402904.9effa16a01> accessed 2 April 2018.
28 See Jada Loutoo, 'Local Energy Firms Challenge Clico-Collapse Investigations - Trinidad and Tobago Newsday (Port of Spain, 8 September 2020) <https://newsday.co.tt/2020/09/08/local-energy-firms-challenge-clico-collapse-investigations/> accessed 2 April 2018; 'Trinidad Govt Challenges Baico, Clico Regional Policyholders' Lawsuit' Stabroek News (Georgetown, 7 October 2021) <https://www.stabroeknews.com/2021/10/07/news/regional/trinidad/trinidad-govt-challenges-baico-clico-regional-policyholders-lawsuit/> accessed April 2, 2018; 'Clico Policyholders Challenge Protection Law for Central Bank' The Gleaner (Kingston, 28 September 2011) <https://jamaica-gleaner.com/gleaner/20110928/business/business9.html> accessed 2 April 2018.
29 Jada Loutoo 'Andre Monteil Cilco Investment Bank Ex-CEO Ordered to Repay Bank $78 plus Interest'
Trinidad and Tobago Newsday (Port of Spain, 30 April 2021) <https://newsday.co.tt/2021/04/30/monteil-clico-investment-bank-ex-ceo-ordered-to-repay-bank-78m-plus-interest/> accessed 2 April 2018.
30 ibid.

found to have participated in and approved the transfer of loan obligations to CLF, which was not in existence at the time."[31] In respect to Mr Trotman, Judge Quinlan- Williams, ordered him to pay the restitution sum[32]. The judge said "it was for the breaches of his duty to act "honestly and in good faith and in the best interests of CIB" and to "exercise the care diligence and skill that a reasonably prudent director would exercise."[33]

Following this fiasco, the Central Bank of Trinidad and Tobago initiated action against all the parties, identifying a "ponzi scheme".[34] Javeed said, "The Central Bank and CLICO are claiming that two former executive directors of CL Financial (CLF) operated or procured the operation of two types of Ponzi schemes in the group, which collapsed in January 2009, posing a danger of disruption to the financial system of Trinidad and Tobago...The claim is part of a civil lawsuit brought by the Central Bank and CLF's subsidiary CLICO against CLF and its former executive directors—Lawrence Duprey and Andre Monteil and their respective companies, Dalco Capital and Stone Street Capital."

The court's findings and the subsequent actions by the Central Bank, which is the Regulator of Insurance Companies in Trinidad and Tobago, establish a history of poor governance at CLICO that has plagued Trinidad and Tobago for decades which was pursued by directors and

or senior officers of companies unfetter. It calls to question the role of the Trinidad and Tobago Securities and Exchange Commission (TTSEC), which has oversight responsibilities. CLICO Investment Bank (CIB) was "an investment bank" that traded securities, both in the domestic and foreign markets. Pursuant to Section 53(5)(a) of the Securities Industry Act, 1995, as of March 28, 2008, and 31st March 2009, respectively,

31 ibid.
32 ibid.
33 ibid.
34 Asha Javeed, 'Central Bank Claim in Lawsuit...two Ponzi Schemes in CL Financial' Trinidad Express Newspapers (Port of Spain, 13 February 2022) <https://trinidadexpress.com/newsextra/central-bank-claim-in-lawsuit-two-ponzi-schemes-in-cl-financial/article_b6182e8a-8d07-11ec-8888-7b1a84b49630.html> accessed 2 April 2018.

CLICO was listed as an investment advisor, CIB was listed as a Reporting Issuer and a Securities Company in 2008.[35]

Other Related Corporate Governance issues

Interlocking Boards

It was intended that the establishment of TTSEC in 1997 will create rules and procedures that will prevent the abuse of directors sitting on many boards in a small market, which existed at that time. Indeed, Sergeant and Stephen[36] in 2003 provided clear evidence of the presence of interlocking directorates via a survey of 30 companies listed on the TTSE. However, no clear regulations or codes has been enacted to deal with interlocking directorship, especially with publicly trading companies in Trinidad and Tobago.

Interlocking directorates occur when a person serves as an officer or a director of two corporations. While it is not generally illegal, interlocking directorates between two competing corporations are prohibited. In the USA for example, this falls under the antitrust laws because of its potential to result in anticompetitive effects such as allowing competitors to coordinate business decisions and exchange competitively sensitive information.[37]

Kelvin Sergeant and Kurt Stephen,[38] in 2003, provided clear evidence of the presence of interlocking directorates via a survey of

35 'Publication and Research' (TTSEC) <https://www.ttsec.org.tt/publications-and-research/list-of-registrants> accessed 1 April 2018.
36 Kelvin A. Sergeant and Kurt Stephens, 'Securities Market Development in Trinidad and Tobago: Contemporary Issues and Challenges' 2006. https://cert-net.com/files/publications/journal/2006_1_1/92_113.pdf> accessed 13 April 2023.
37 'Interlocking Directorates: Practical Law–Westlaw' (Thomson Reuters, 21 April 2017) <http://blog.legalsolutions.thomsonreuters.com/large-law/interlocking-directorates/> accessed 3 April 2018.
38 Kelvin A. Sergeant and Kurt Stephens, 'Securities Market Development in Trinidad and Tobago: Contemporary Issues and Challenges' (2006) JBEF 1(1) <https://www.cert-net.com/files/publications/journal/2006_1_1/92_113.pdf> accessed 4 April 2018.

30 companies listed on the TTSE, which revealed that 25 companies had at least one director presiding on the board of another listed company, which translated into 83 per cent of the listed companies with interlocking directorates. They alluded that this imperfection can result in negative perceptions about fairness which can lead to market inefficiency as well as possible insider trading. However, as of May 2018, no clear regulations or codes to deal with interlocking directorship, especially with public trading companies in Trinidad and Tobago, were enacted.

Sergeant et al.'s pronouncement is very much applicable today because very little has changed since that time. In 2013, one of the most visible insider trading matters with respect to a local company listed on the TTSE, Trinidad Cement Limited (TCL), called on TTSEC to undertake an investigation into whether or not a Republic Bank executive and a TCL shareholder contravened the insider trading provisions of the new Securities Act.[39] Both parties were directors of TCL at that juncture.

Contemporary Corporate Governance issues in the Caribbean

First Citizen Bank Trinidad and Tobago - IPO 2013

In July 2013, First Citizen Bank Trinidad and Tobago (FCB) launched the largest ever initial public offering (IPO) of shares on the Trinidad and Tobago Stock Exchange (TTSE), with a projected market capitalisation of TTD 1.1 billion, at an offer price of TTD 22.00 per share. An amount of 48,495,665 ordinary common shares were offered for sale to the public, which represented approximately 19.3% of the total share capital. Fifteen per cent (15%) of the shares on offer

39 Anthony Wilson, 'SEC gets insider trading complaint - TCL calls for probe' Trinidad and Tobago Guardian (Port of Spain, 5 August 2013) <https://www.guardian.co.tt/article-6.2.405684.721fef4d9e> accessed 4 April 2018.

(or 7.2 million shares) was apportioned to 1,664 employees of the First Citizens Group of companies (FCB).

A number of employees, however, for a multiplicity of reasons, did not participate in the IPO, thus creating an opportunity for any employees to purchase shares in excess of the discounted projected amount per employee of 5,000 shares.[40] Interestingly, FCB did not provide for this likelihood during the proposed allotment process,[41] which is a process that is expected in an IPO based on good governance.

This apparent deficiency led to the purchase of 659,588 shares by the bank's then Chief Risk Officer, Mr Philip Rahaman. It was alleged that Mr Rahaman used his insider position to purchase the mentioned quantum of shares from the under-subscribed employee allocation through a relative at Bourse Securities.[42] If anything, this should have been the first significant red flag in this fiasco when one considers the other related actions by Mr Philip Rahaman.[43] Moreover, it is quite coherent to expect that FCB's employees would have desired to use the services of FCB's Merchant Bank in respect of this IPO, who was the nominated underwriter, rather than any other brokers. Mr Rahaman, in the circumstances, may have assumed that his purchases would have garnered less attention via another broker instead of FCB's Merchant Bank.

40 'Statement by Finance Minister on the distribution of shares under the initial public offer of FCB Ltd' Trinidad and Tobago Government News (Port of Spain, 14 February 2014) <http://www.news.gov.tt/content/statement-finance-minister-distribution-shares-under-initial-public-offer-fcb-ltd#.ZCRQZMrMK3A> accessed 31 March 2019.

41 The projected amount of 5000 shares per employee, would have cost each employee approximately a hundred thousand dollars.

42 KNews, 'Trini Bank Insider Trading Scandal...players Make Major Move on DEM Bank Shares' Kaieteur News, (Georgetown, 24 December 2017) <https://www.kaieteurnewsonline.com/2017/12/24/trini-bank-insider-trading-scandalplayers-make-major-move-on-dem-bank-shares/> accessed 4 April 2019.

43 If during an IPO, one employee purchased approximately eight per cent of all the share allotted to the entire staff, this should have raised a red flag.

FCB's 2013 Annual Report indicated that Mr Rahaman bought 659,588 shares from an under-subscribed employee pool at a cost of TTD 14.5m (USD 2.3m). The TTSE reported on March 12th 2014 that Mr Rahaman sold 97% of his shares in January to relatives (among which is Mr Imtiaz Rahaman, the chairman of Bourse Securities (BBL)) and a group of family-controlled companies for TT$26.5m.[44] Incidentally, Mr Phillip Rahaman was dismissed on March 25th 2014.[45] One of the other central actors in this debacle was the managing director of Bourse Securities, Mr Subhas Ramkhelawan, who at that interval was also chairman of the TTSE and an independent Senator. Mr Ramkhelawan resigned from the Senate on April 9th, 2014.

There was no limit on the number of shares an employee could purchase overall,[46] which was a severe deficiency in the allotment process for employees.[47] This created the possibility for every employee to procure a greater number of shares than projected. This is quite evident in the FCB audit conducted by the bank's Chief Internal Auditor, whereby he stated that 11 employees purchased more than 20,000 shares each.[48] The cost of 20,000 shares would have been approximately TTD 400,000 for each of the respective employees.

While all the emphasis seems to be on Mr Rahaman, the First Citizens 2013 Annual Report noted that the next largest owner among the bank's directors and senior officers was Mr Larry Nath, the bank's

44 Has any of the various Regulatory Agencies verified that the sale by Mr Rahaman was bona fide? Did actual cash change hands, since the recipient of the shares was the Chairman of Bourse Securities, such may we be a book transfer.
45 The sale took place on January 14th, 2014, but was only reported by TTSE on March 12th, 2014, contrary to its own rule which require notice within 5 business days of the transaction.
46 Asha Javeed, 'Rahaman Sold Shares to Family' (TriniTuner.com, 30 March 2014) <https://www.trinituner.com/v4/forums/viewtopic.php?t=516981&start=270> accessed 18 April 2019.
47 The National Gas Company of Trinidad and Tobago Limited, 'Initial Public Offering: Basis of Allotment of Shares in Trinidad and Tobago NGL Limited' (NGL 1 October 2015) <https://ngl.co.tt/press-ad/ngl-ipo-basis-of-allotment> accessed 20 April 2019.
48 Javeed (n 46).

chief executive, who acquired 215,000 shares during the IPO.[49] The FCB audit[50] also indicated that 70 employees subscribed for more than the projected 5,000 shares per employee. Thirty-nine employees subscribed and were allocated between 5,000 and 10,000 shares. Nineteen employees subscribed and were allocated between 10,001 and 20,000 shares, and 11 employees (including CEO Mr Larry Nath and Mr Rahaman) subscribed for over 20,000 shares.

One of the interesting aspects that flowed from this debacle, is the role and responsibilities of the TTSE and the then chairman of the TTSE, who coincidentally is also the CEO of the brokerage responsible for the subsequent sale by Mr Rahaman. TTSE Rule 604 stipulates that share traded by directors and senior officers be submitted to the institution within five days. The actual sale by Mr Rahaman took place on January 14th 2014, but FCB and TTSE only reported these sales on March 12th 2014, two months after, contrary to its own rule, which requires timely notice within 5 business days of the transaction. This rule is designed to inform the public of any trading conducted by directors and senior officers who may have at their disposal information not known to the public, in relation to the outside investor who stands in a disadvantaged situation.

It is also interesting to note that the said parties' names again resurfaced in another matter in Guyana.[51]The FCB IPO highlighted several breaches of governance principles,[52] not only at FCB, but also

49 Suzanne Sheppard, 'First Citizens Boss Sells Shares for $12m Profit' Trinidad and Tobago Guardian (Port of Spain, 3 December 2014) <https://www.guardian.co.tt/article-6.2.379803.37f2a79e38> accessed 22 April 2019.
50 Javeed (n 46).
51 See 'Trini Bank Insider Trading Scandal...Players Make Major Move on DEM Bank Shares' Kaieteur News (Georgetown, 24 December 2017) <https://www.kaieteurnewsonline.com/2017/12/24/trini-bank-insider-trading-scandalplayers-make-major-move-on-dem-bank-shares/> accessed 22 April 2019.
52 No express limits on how many shares an employee can purchase. When that lucuna materialized with Mr. Rahaman's purchase, there were no intervention by FCB to prevent the allotment of shares. Also several other employees also purchase in excess of the implied limit. When Mr Rahaman sold, FCB did not advised the TTSE of the sale within the specific time frame provided by the TTSE.

at TTSE and at BBL. Indeed, the absence of proactive intervention by the TTSEC, may be a factor driven by the inability to take decisive actions, which may be linked to a poor governance structure. The settlement agreement[53] dated 20th December 2019 with respect to Mr Phillip Rahaman provided as per item 28 (a) "without admission of liability whatsoever, pay the Commission the sum of TT$750,000TT in full and final settlement". The other parties to this matter, namely Mr Subhas Ramkhelawan and Bourse Brokers (BBL) and Mr Imitiaz Rahaman, chairman of BBL, both also entered into settlement agreements with the TTSEC with similar terms as agreed with Mr Phillip Rahaman.[54] Mr Subhas Ramkhelawan and Mr Imitiaz Rahaman agreed to pay a fine of TT$1,300,000 and TT$750,000, respectively. The question is why will the parties agree to pay a fine of such magnitude without culpability? This is a question one hopes the Trinidad and Tobago Securities Commission (TTSEC) would have clarified. But that has never been their modus of operations, as a Statutory Agency which left much to be desired. So much for governance.

National Commercial Bank Jamaica (NCBJ) / Guardian Holdings Limited (GHL) Merger.

One recent regional corporate governance incident issue is that of the National Commercial Bank Jamaica Limited ('NCBJ') proposed merger with Guardian Holdings Limited of Trinidad and Tobago. The genesis of the takeover started in 2015 with the agreement for the acquisition

53 The Trinidad and Tobago Securities & Exchange Commission, 'Settlement Agreement: Hassan Phillip Rahaman' (TTSEC 3 Feb 2020) <https://www.ttsec.org.tt/wp-content/uploads/Settlement-Agreement-Hassan-Phillip-Rahaman.pdf> accessed 22 April 2020.
54 The Trinidad and Tobago Securities & Exchange Commission, 'Settlement Agreement: Subhas Ramkhelawan-BBL'(TTSEC 3 Feb 2020) <https://www.ttsec.org.tt/wp-content/uploads/Settlement-Agreement-Subhas-Ramkhelawan-BBL.pdf> accessed 22 April 2020; The Trinidad and Tobago Securities & Exchange Commission, 'Settlement Agreement: Imtiaz Azard Rahaman' (TTSEC 3 Feb 2020) <https://www.ttsec.org.tt/wp-content/uploads/Settlement-Agreement-Imtiaz-Azard-Rahaman.pdf> accessed April 22, 2020.

of 29.99% shareholding from the Lok Jack Family, the Ahamad Family and other affiliate entities.[55] Ironically, the price paid per share to those families has not been disclosed and some of the key members of that transaction were directors of the board at that time.[56] In fact, Mr Authur Lok Jack was at that time the chairman of the board and also a member of the corporate governance committee.

On December 8th of 2017, NCB Global Holdings Ltd (NCBGHL) launched an offer and takeover bid to all GHL shareholders to acquire up to 74,230,750 ordinary shares of GHL at a price of US$2.35 per share, which works out to be around TT$15.60, which the minority shareholders argued was significantly undervalued.[57] According to Peter Permell,[58] the Lok Jack and Ahamad families had sold their shares for TT$21 per share in the first transaction with NCBJ, and this was never disclosed from the start to all shareholders.[59] Permell is reported to have said, as it appears to him, that they tried to circumvent a lot of the rules surrounding the takeover code by acquiring 29.99 per cent, which is .01 per cent less than the 30 per cent takeover code and coming two years after, to now make an offer to everybody.

Indeed, minority shareholders of the company and NCBGHL are to disclose details of a 2015 'lock-up' agreement signed between the then

55 National Commercial Bank, 'NCBJ Finalises Acquisition of Interest in Guardian Holdings Limited' (JNCB, 11 May 2016) <https://www.jncb.com/About-Us/News-Room/News/NCBJ-finalises-acquisition-of-Interest-in-Guar> accessed 4 April 2018.
56 Guardian Group, 'Guardian Holdings Limited: Annual Report 2015' (2016) <https://c360filestore.blob.core.windows.net/strapi-files/assets/GHL_AR_2015_for_web_80072a0e32.pdf> accessed 4 April 2018; Guardian Group, 'Guardian Holdings Limited: Annual Report 2016' (2017) <https://c360filestore.blob.core.windows.net/strapi-files/assets/GHL_AR_2016_4e44bd1994.pdf> accessed 4 April 2018.
57 'Guardian Minority Shareholders Raises Concerns With SEC, Something Is Obviously Amiss With This Particular Offer' (Businessuite Market Online, 9 January 2018). <http://businessuiteonline.com/index.php/2018/01/09/guardian-minority-shareholders-raises-concerns-with-sec-something-is-obviously-amiss-with-this-particular-offer/> accessed 4 April 2018.
58 Peter Permell is a minority shareholder who is expressing his own opinion on this matter.
59 Businessuite Market Online, 'Guardian Minority Shareholders Say Offer Not Enough, Demand Details Of 2015 'Lock-Up' Agreement', 9 January 2018, http://businessuiteonline.com/index.php/2018/01/08/guardian-minority-shareholders-say-offer-not-enough-demand-details-of-2015-lock-up-agreement/ > accessed 5 April 2018

respective majority owners, the Lok Jack and Ahamad families, and Jamaican billionaire Michael Lee Chin.[60]

On the 26 of February 2018, the TTSEC launched an official hearing into the proposed merger,[61] and the hearing began on the 15th of May in respect to this matter.[62] On the 30th of October 2018, the TTSEC notified the public of a settlement agreement between the parties, [63] Item 33 (a) of the Settlement Agreement[64] provides "without any admission as to liability whatsoever, pay the Commission an administrative fine of $300,000TT." Item 33 (b) further stated "To at all times keep confidential all the contents of this settlement agreement."

If one considers the definition of governance above, "It encompasses the business of all the various stakeholders, public and private, formal, and informal,[65] with the objective of managing that interest to the paramount advantage of the corporation. The concept of good corporate governance is therefore critical to any organisation to ensure that the actions of the company are managed for the benefit of all its stakeholders". Can the actions of the TTSEC in agreeing to a settlement agreement which provides that culpable parties pay an administrative fine but without admission of any liability and keep the agreement confidential be counter to prevailing governance principles?[66]

60 'Guardian Minority Shareholders Say Offer Not Enough, Demand Details Of 2015 'Lock-Up' Agreement' (Businessuite Market Online, 9 January 2018) <http://businessuiteonline.com/index.php/2018/01/08/guardian-minority-shareholders-say-offer-not-enough-demand-details-of-2015-lock-up-agreement/> accessed 5 April 2018.
61 'SEC hearing on NCBJ-GHL takeover bid today' Trinidad and Tobago Guardian (Port of Spain, 26 February 2018) <http://www.guardian.co.tt/business/2018-02-25/sec-hearing-ncbj-ghl-takeover-bid-today> accessed 5 April 2018.
62 'NCB bid for GHL goes before TTSEC' *Trinidad and Tobago Guardian* (Port of Spain, 4 May 2018) <http://www.guardian.co.tt/business/2018-05-04/ncb-bid-ghl-goes-ttsec> accessed 5 April 2018.
63 The Trinidad and Tobago Securities & Exchange Commission, 'Settlement Agreement Between the Staff of the Commission and Guardian Holdings Limited/In the Matter of Rule 61 and Rule 62 of Securities Industry (Hearings and Settlements) Practice Rules 2008' (TTSEC 22 November 2018) <https://ttsec.org.tt/wp-content/uploads/Executed-GHL-Settlement-Agreement.pdf> accessed 5 April 2018.
64 ibid
65 Glasgow (n 1).
66 OECD, G20/OECD Principles of Corporate Governance (OECD Publishing, 2015) <https://www.oecd.org/corporate/principles-corporate-governance/> accessed April 5 2018.

Caribbean countries, on a more positive note, have sought to enhance corporate governance; Jamaica, for example, has gone one step further by incorporating via its company law legislation[67] the concept of shadow directors. A "shadow director"[68] is an individual whose directions or instructions, the appointed directors of a company are accustomed to following. In other words, a shadow director is anyone who is indirectly calling the shots at a company, and the established board duly follows.[69]

Jamaica's courageous endeavour can be regarded as a proactive move in the development of Companies law legislation in the Caribbean.[70] It is rather astounding that other Caribbean territories, such as Trinidad and Tobago and Barbados, have not followed suit. Indeed a 'shadow director' can be held to the same standard of duty as directors under the Companies Act 2004 of Jamaica, and as such, this has positive connotations for corporate governance standards in the Caribbean. However, it is unclear whether the fiduciary duty and duty of care, diligence and skill apply to 'shadow directors' given the fact of conflicting case laws on the issue.[71]

While governance transgressions are frequent throughout the Caribbean and the wider world, several domestic / commonwealth legislative and judicial inventions have taken place, not only to enhance company law and the regulation of a company but also to improve and develop corporate governance principles. This is indeed critical because of the fallouts that occur due to several scandals, some of which are outlined above.

67 Companies Act 2004, s 183(7).
68 William Robins, 'Keynotes: Shadow Directors' (Keystone Law) <https://www.city.ac.uk/__data/assets/pdf_file/0008/133937/Shadow-Director.pdf> accessed 6 April 2018.
69 Ultraframe UK Ltd v Fielding [2005] EWHC 1638 (Ch), [2006] FSR 17.
70 Jamaica's enhanced legislative agenda was driven by the economic reform started by the IMF in 2013.
71 Mea Corporation Ltd, Re; Secretary of State for Trade and Industry v Aviss [2006] EWHC 1846 (Ch), [2007] 1 BCLC 618.

Legislation and Case Laws to Enforce Good Corporate Governance

Generally, the focus in the Caribbean in terms of corporate governance has been the role and responsibilities of directors and officers of the company, which is supported by the relevant Companies law Legislation, the Securities and Exchange Commission and the Stock Exchange.

The Trinidad and Tobago Companies Act 1995- Cap 81:01 (T&T), s 99(1) provides that: every director and officer of a company, in exercising his powers and discharging his duties, must/shall; act honestly and in good faith with a view to the best interests of the company; and, exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Most Commonwealth Caribbean Companies Acts typically states that, in determining what the best interest of a company is, a director must/shall have regard to the interests of the company's employees in general as well as to the interests of its shareholder.[72] The Jamaican Companies Law legislation differs in regard to the best interest of the company and refers to stakeholders; in other words, it has incorporated social responsibility into the duties of directors, but a director still owes a fiduciary duty only to the company.[73] However, the case law reviewed have cast more doubt and uncertainty as to the precise nature of who is to be regarded as stakeholders, especially creditors and most importantly, what is in the best interest of the company, a critical governance factor.

The various contemporary companies' law legislation in terms of good corporate governance is to have regard to the interest of not the company, but the company as a body of stakeholders. However,

72 See Companies Act 2004, s 183(7) (JA).
73 ibid s 174(8). See also Companies Act 1995, s 97(3) (AG); Companies Act 1997, s 95(3) (BRDO); Companies Act 1994, s 97(3) (DM); Companies Act 1998, s 96(3) (GY); Companies Act 1996, s 97(3) (LC); Companies Act 1995, s 99(3) (TT).

while the courts responded positively to this move, especially those in Canada, several issues need to be clarified if good governance is to prevail. The Supreme Court of Canada (SCC) sought to address some of those issues in Peoples,[74] as summarised below.

(i) The Peoples Case:

In the Peoples case, Peoples Department Stores Inc. was acquired by a subsidiary of Wise Stores Inc. from Mark and Spencer Canada Inc. (M&S).[75] The three Wise brothers were directors of both Wise Stores Inc. and its new subsidiary. To protect amounts due to M&S from the acquisition of People Inc., the purchase agreement restricted the consolidation of the two corporations.[76] The Wise Brothers subsequently executed a new procurement regime whereby Peoples Inc. will be responsible for all the procurement and, thereafter, will transfer items purchased on behalf of Wise Inc. to its purchasing department. Peoples Inc. within a few months, however, filed for bankruptcy; and its trustee claimed that the directors had breached their statutory duties of loyalty and care when they established the joint procurement strategy for both companies.

The court dealt with several issues, but the subject for which I propose to treat is their decision on whether directors owe a fiduciary duty to creditors. The court held that directors do not have a fiduciary duty to creditors, even during insolvency,[77] but they have a duty to consider the best interest of the corporation, which is not the best interest of shareholders, but the interest of all stakeholders.[78]

74 Peoples Department Stores Inc. (Trustees of) v. Wise [2004] SCC 68, [2004] 3 SCR 461.
75 ibid.
76 ibid.
77 The nature of the duty owed does not change when the company is near or at insolvency.
78 *Peoples* (n 184) [42].

One may argue at this juncture: do creditors' interests have added relevance in times of insolvency, more than even that of shareholders? Indeed, in times of insolvency, they are entitled to receive funding before shareholders; in fact, during the liquidation of a company, bondholders are paid ahead of shareholders. In some cases of insolvency, shareholders may not receive any return on their investment, and as such, it is questionable why their interest is placed ahead of creditors.

Waitzer et al.[79] reinforce this notion by arguing that the court, in respect of creditors, failed to apply the proper purpose analysis whereby they pointed out that creditors have other remedies available to them. However, are creditors not regarded as stakeholders in any corporation? If yes, why can't their interest be considered by management in any corporate scenario rather than alluding to agreed contractual rights, which may have little or no enforceability if the corporation has no funding to repay them?

The court, in Peoples, cited with approval the view of Justice Berger in Teck Corp. v. Millar[80] that those directors would be in breach of duty if they ignored the interest of shareholders; however, they had a duty as well to consider the interest of other stakeholders so as not to be accused of failing their fiduciary duty. The court overall found that there was no breach of fiduciary duties by the directors because their quest was to resolve a procurement/inventory deficiency. Indeed, the court reinforced the notion that a director's fiduciary duties are strict, and directors have a duty to consider all the circumstances in any decision-making process and to determine if they acted honestly and in good faith, which must be subjectively determined. Waitzer et al. were of the view that it is not clear how the court reconciled subjectivity and, at the same time,

79 Edward J Waitzer, 'Peoples, BCE, and the Good Corporate "Citizen"' (2009) 47 Osgoode Hall Law Journal < https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1138&context=ohlj> accessed 6 April 2018.
80 [1972] 33 DLR (3d) 288 [97].

considering all the circumstances of any case within the ambits of strict liability.[81] J Alex Moore and William Ainley [82] were also critical of how a duty owed exclusively to the corporation and not any one group of stakeholders would be applied in the takeover context.

Thus, although the court in Peoples created history by adopting a stakeholder's interest approach, a number of issues remained unresolved. This has created more uncertainty, especially in regard to creditors and directors' duty of care at the common law, which they articulate as objectively contextual.

(ii) Peoples Case and the Duty of Care at Common law

In Re City Equitable Fire Insurance Company Limited,[83] the common law requires that the standard for duty of care is that of a reasonable person. Section 99(1) (b) Trinidad and Tobago Companies Act provides that "every director and officer of a corporation, in exercising their powers and discharging their duties, shall … exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances."

In People Inc.,[84] it was held that the duty imposed on directors in respect of a duty of care was an objective contextual one and is identical to that imposed on all other persons. However, the word contextual can be regarded as vague in relation to the duty of care. Indeed, s 99(1) (b)

81 Waitzer (n 79).
82 J Alex Moore and William Ainley, 'BCE v. 1976 Debentureholders: An Unexamined Question Considered' (Davies Ward Phillips & Vineberg LLP, 21 May 2014) <https://web.archive.org/web/20140521031751/http://www.dwpv.com/~/media/Files/PDF/BCE_v_1976_DEBENTUDEBENTURE_AN_UNEXAMINED_QUESTION_CONSIDERED.ashx> (as cited in 'BCE Inc v 1976 Debentureholders' (Wikipedia, 16 December 2020) <https://en.wikipedia.org/wiki/BCE_Inc_v_1976_Debentureholders> accessed 7 April 2018).
83 [1925] 1 Ch 407 (CA).
84 *Peoples* (n 74).

permits social factors to be taken into account, as well as directors may owe a duty of care to an open-ended class of persons, which further compound the uncertainty of this section.

Christopher Nicholls was of the view that the court may have confused the two different concepts—the tort "duty of care," which anticipates many beneficiaries and the statutory "duty of care" [85]. He further argued that it is difficult to understand why a corporate statute would impose additional personal duties on directors rather than on the corporation itself.

Waitzer et al.,[86] in analysing the court's language in the Peoples case, argued that the court created further confusion by suggesting a broader duty of care, theoretically owed to a diverse, undefined group of stakeholders, which will serve to defeat the object of the duty of loyalty and will lead to suboptimal board decision making. Therefore, if a director is faced with a possible corporate opportunity which has certain risky aspects, will he be held accountable?

Subsequent to the People's case, Ferris and Morgan[87] are of the view that the courts are still struggling with the principles outlined by the SCC and its implementation. Thus, even though the People's Case has revolutionised the whole concept of the role of directors in terms of stakeholder interest, there may be difficulties in actually implementing the decisions. In 2008 the SCC had the opportunity to revisit the decisions of the People's case and further consider the role of a board of directors and manager of a corporation which will be discussed below.

85 Christopher C Nicholls, Corporate Law (Emond Montgomery 2005) 298-299 (as cited in Waitzer (n 272)).
86 Waitzer (n 79).
87 Heather MB Ferris and Michael B Morgan, 'The Peoples Decision – Two Years Later: Where Are We At And What Have We Learned' (LawsonLundell LLP, 31 October 2006) <https://www.lawsonlundell.com/media/news/194_ThePeoplesDecision.pdf> accessed 25 April 2018.

(iii) The Peoples Case and the Business Judgement Rule

Interestingly, the Peoples Inc. case also validated the Business Judgement rule, which has been formalised in the USA and insulates any board from judicial review of their actions.

A classic US case in Business Judgement rule is Shlensky v. Wrigley,[88] in which the plaintiff challenged the Wrigley board's refusal to install lights at Wrigley Field when every other major league baseball team played night games." The board defended its actions based on the preferences of Wrigley's majority owner, that baseball is a day game and that lighting the stadium would damage the surrounding community. The court granted the board's motion to dismiss, relying on the "business judgment rule" to preclude the plaintiffs from even inquiring into the basis for the board's decision. In Canada, in Stelco Inc., Re[89] the court after the Peoples case upheld the business judgement rule.

Therefore, if a board is well informed and acts in good faith, there is no evidence of any conflict of interest and, most importantly, acts in the best interest of the corporation, such will afford directors wider protection under this rule. The business judgement rule permits directors to take the necessary risk via managerial discretion, which could result in the enhancement of shareholders' wealth. It is not clear, however, how the business judgement rule will apply in insolvency situations and managerial discretion that run counter to the interest of creditors. Thus, it is possible that a board can argue that they acted in good faith and in the best interest of the company, even though creditors stood in a disadvantaged situation.

88 237 NE2d 776 (111 App 1968).
89 Stelco Inc., Re, (2005) 196 O.A.C. 142 (CA)

(iv) BCE Inc. v 1976 Debenture Holder: and the Concept of Fairness

In BCE Inc. v 1976 Debenture holder,[90] the Supreme Court of Canada held that the duty of directors is to act in the paramount interest of the corporation, akin to a good corporate citizen. This case introduced the concept of fairness when applying the principle of corporate law to decision-making:[91]"It is important to be clear that the directors owe their duty to the corporation, not to stakeholders, and that the reasonable expectation of stakeholders is simply that the directors act in the best interests of the corporation.[92] The principle of fair treatment can be defined as conduct that is ethical and commercially reasonable, which promotes a higher standard of fiduciary duty than what is demanded under the principle of good faith.[93]If and when directors are faced with conflicting interests, they are mandated to adopt a "tripartite fiduciary duty", considering the following variables and the expanded SCC's previous ruling in Peoples case, concerning the latitude of discretion accorded to corporate directors, providing they follow certain procedural steps. Directors have an overarching duty to the corporation, which contains: (a) a duty to protect shareholder interests from harm; and (b) a procedural duty of "fair treatment" for relevant stakeholder interests.[94]Thus, the decision in BCE Inc. reinforced the notion that in taking any decisions, a board can take into account factors other than the maximisation of shareholder's wealth.

The BCE Inc. case also promoted the concept of a 'Good Corporate Citizen', for which the concept is somewhat ambiguous. Waitzer et al. argued that the casual reference in the absence of a coherent analysis would add procedural costs that ensure adequate legal cover for board decisions rather than create new norms and incentives to guide

90 (2008) SCC 69 (CanLII), [2008] 3 SCR 560.
91 This case involved a leverage buyout in which one of the offers, were a consortium of three investors, who the BCE's directors determined to be in the best interests of BCE's shareholders.
92 BCE Inc (n 90) [66].
93 See Bhasin v Hrynew [2014] SCC 71, [2014] 3 SCR 494.
94 BCE Inc (n 90) [68].

corporate conduct.[95] BCE Inc. also articulated that the best interests of the corporation are the interests of those stakeholders that the board deems most worthy of protection, provided that due process is adhered to in the selection of which stakeholder interests are to be given priority. The court articulated a constricted test for impartiality by seeking to ascertain that the decision had a valid business purpose based on fairness. The Court also concluded that the fiduciary duty of directors is not confined to share price but the company as a going concern with respect to the long interests of the firm. The court in BCE Inc. also sets out a dual test to evaluate the oppression remedy.[96] For example, a creditor will have to establish that the corporation created a reasonable expectation and that such expectations were unlawfully disregarded. The concept of a reasonable expectation is objective in nature, having regard to the issue at hand and the relationship that exists between the parties. Finally, the court noted that directors could resolve conflicts between stakeholders by articulating that they have acted in the best interest of the corporation and have considered the impact of their decisions on all corporate stakeholders. However, Sealy[97] pointed out that where duties are owed to different stakeholders with opposing interests, the duty becomes fragmented, and the quest to be fair will be implausible. Indeed, in a commercial context, the quest for fairness via an objective standard may not be achievable. Moreover, seeking to merge the duty owed to a corporation with the oppression remedy may not be as informal as the court professes.

In the Peoples Inc. case, the court indicated that directors have a fiduciary duty to act in the best interests of the corporation, which may include stakeholders. In BCE Inc., the courts reaffirmed the decisions in

95 Waitzer (n 79).
96 An oppression remedy is a statutory right available to oppressed shareholders. It empowers the shareholders to bring an action against the corporation, if the conduct of the company has an effect that is oppressive, unfairly prejudicial, or unfairly disregards the interests of a shareholder. See Business Corporations Act 1985 (CA), s 24; Business Corporations Act (Ontario) 1990 (CA), s 248.
97 LS Sealy 'Directors' "Wider" Responsibilities - Problems Conceptual, Practical and Procedural' (1987) 13 MULR <http://www.austlii.edu.au/au/journals/MonashULawRw/1987/7.pdf> accessed 8 April 2018.

the People's case but introduced the concept of an affirmative "fiduciary duty" or what is termed as a "good corporate citizen." However, the court failed to clarify what is defined as the interest of other stakeholders in the People's case, which has further compounded the uncertainty in the law. Ed Waitzer et al.[98] argued that BCE Inc. seeks to promote fair treatment in respect of corporate decisions to all stakeholders, who are entitled to that shield, without further elaboration on the nature of that protection. The court appears to designate the board as an arbitrator as long as the board's decisions are fair without any conflicts of interest and due process is observed. In such cases, they will be protected under the expansive business judgment rule. It can be argued, however, that although the stakeholder debate is critical and a timely one, by characterising it as fiduciary obligations, the court may have done a disservice and further convoluted the issue. The quest of the courts to monitor competing stakeholder interests can be unnerving and much more intriguing than that of monitoring shareholder wealth maximisation. Indeed, judges may not have the skills to administer both tasks.

The BCE Inc. case has brought more clarity to the whole judicial process and has indeed built on the decisions of the People's case, especially with respect to the interest of creditors as a stakeholder of a company. The judgment expanded on the SCC's previous ruling in the People's case concerning the latitude of discretion accorded to directors of a company. However, BCE Inc. did not address explicit situations that creditors may face, especially in the insolvency or at or near insolvency.

Director's Duties to Creditors

Generally, directors owe no fiduciary duty to creditors during solvency;[99] in fact, such a duty is owed only to the company alone.[100]

98 Waitzer (n 79)
99 Walker v Wimborne [1985] 1 NZLR 242.
100 See Companies Act 1995, s 99(1) (TT).

However, in situations of insolvency, or near insolvency a duty may indeed be owed to creditors; Trinidadian statute requires that directors "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances".[101] Suzanne Folkes-Goldson articulated that this is very much consistent with the decision of the People's Case whereby the SCC confirmed that the duty of care, diligence and skill in comparable circumstances, under the Canadian Act extended to creditors.[102] Davies support this conclusion that in time of insolvency shareholders', interests are replaced by creditors' interests because, in insolvency, shareholders may not receive any distribution.[103]

However, the statues of Jamaica and St Kitts, clearly articulate that both fiduciary duty and duty of care and skills are owed to the company alone.[104] As such, the outcome of the People's case will not be applicable to those countries unless there is a legislative intervention to the effect that change. Another pertinent issue flowing out of the People's case with respect to a breach of duty of care was that the court must apply an "objective test". Martha O'Brien suggested that the subjective standard of competence under the common law had not been significantly altered by the Canada Business Corporations Act, and it is a combination of objective and subjective tests.[105] Moreover, the term "comparable circumstances" may be open to a subjective interpretation, which Ffolkes-Goldson alluded is counter to the intention of the legislature in Canada and suggests a duty retains a kind of subjective element.[106] Ffolkes-Goldson also argued that the test in the Jamaican Companies Act[107] is considered highly subjective in nature. Thus, the quest of the

101 ibid. See also Companies Act 2004, s 174(1)(b) (JA).
102 Suzanne Ffolkes Goldson, 'Directors' Duties to Creditors on or Near Insolvency and Duty of Care in The Commonwealth Caribbean: Should The Peoples Decision Be Adopted?' (2006) 6(1) OUCLJ 61, 71.
103 Paul L Davies (ed), 'Gower and Davies' Principle of Modern Company Law' (7th edn, Sweet & Maxwell 2003) 372.
104 Companies Act 2004, s 174(1)(a) (JA); Companies Act 1996, s 74(3) (KN).
105 Martha O' Brien, 'The Director's Duty of Care in Tax and Corporate Law' (2003) 36 U Brit Colum L Rev 673 (as cited in Ffolkes Goldson (n 102) 73).
106 Ffolkes Goldson (n 102) 73.
107 2004, s 174 (1)(b). See also Companies Act 1995, s 99(1)(b) (TT).

Peoples' case of a virtuously objective test may be difficult to achieve if it is to be incorporated into current relevant companies' legislation in the Caribbean.

In Canada, after the BCE Inc. decision,[108] creditors found themselves in a far more favourable situation via the endorsement of the oppression remedy. BCE Inc. made it clear that the oppression remedy focuses on fair treatment, which is highly relevant to the fiduciary duty of directors.[109] In BCE Inc., the Supreme Court held that to successfully use the oppression remedy, first, a creditor's reasonable expectations must be considered, and a creditor must secondly establish that the actions of any directors or officers were done oppressively.[110]

Inga Andriessen argued that "the oppression remedy provisions are often aligned with respect to minority shareholders asserting rights against majority shareholders."[111] However, the oppression remedy is available to creditors of a company, and there is a strong line of case laws supporting that trust. Indeed, the oppression remedy can address any malevolence with respect to any interests of stakeholders affected by oppressive acts of a corporation or its directors, and the court has the discretion to fashion a remedy it thinks fits.[112] Oppression can also define as coercive and abusive behaviour that suggests bad faith,[113] or burdensome, harsh and wrongful conduct.[114] In Lalla v Trinidad Cement

108 BCE Inc (n 90).
109 OSLER, 'Key Lessons from the BCE Decision' (OLSER, 22 December 2008) <https://www.osler.com/en/resources/critical-situations/2010/key-lessons-from-the-bce-decision> accessed 8 April 2018.
110 It should be noted for example that St Kitts-Nevis does not have an oppression remedy similar to the CBCA, but has adopted provisions similar to the UK dealing with unfair prejudice by directors.
111 Inga B Andriessen, 'Case Law Supports Creditors' Use of Oppression Remedy' (AdvocateDaily) <http://www.advocatedaily.com/profile/case-law-supports-creditors-use-of-oppression-remedy.html> accessed 9 April 2018.
112 Paul MacDonald and Jeffrey Levine, 'Creditors' Use of the Oppression Remedy and the Mareva Injunction to Protect Corporate Assets' (McMillan LLP, 25 May 2009) <http://www.mcmillan.ca/Files/PMacdonald_Creditors_%20Use%20of%20the%20Oppression%20Remedy_0609.pdf> accessed 9 April 2018.
113 Demerara Holdings Ltd et al v Demerara Life Assurance Company of Trinidad and Tobago Ltd et al TT 2011 HC 86.
114 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, [1958] 3 WLR 404.

Limited,[115] the court held that unfair dismissal out of spite or malice could be a basis for finding oppression.

Therefore, if a creditor in times of insolvency or near insolvency can establish that directors or officers in the performance of their duties exercised bad faith, malice, abusive or any other oppressive behaviour and they have a reasonable expectation that their interest will be considered, they can argue that directors breached their duties owed to them. However, not in every situation will the court uphold the use of the oppression remedy because while the remedy may be wide, [116] judges have a great deal of discretion in its application.

In Herbert Distressed ,[117] the court quoted the People's Case and noted that the oppression remedy could be utilised to grant the broadest right to creditors of any common law jurisdiction. This case also affirmed that directors do not owe a fiduciary duty to creditors, but they are not without recourse if directors act in a manner that is oppressive or fails to exercise care, diligence and skills, and as a result, creditors suffer losses.

In Carr v Cheng,[118] the court defines the best interest of a corporation as depending on the circumstances, which include the interest of others. In JSM Corporation Ontario,[119] the court alluded that what was oppressive was based on expectation and reliance. Thus, if a corporation created an expectation that a specific creditor will be paid and that creditor relied on that fact, then they can argue that they had a legitimate expectation and reliance and as such, they must be paid. However, reasonable expectations are limited to those spelt out in the

115 TT 1998 HC 172.
116 Remo Valente Real Estate (1990) Limited v Portofino Riverside Tower Inc (2011) ONCA 784.
117 Harbert Distressed Investment Master Fund Ltd et al v Calpine Canada Energy Finance II ULC et al (2005) NSR (2d) 297.
118 (2005) BCSC 445.
119 *JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd et Al* [2006] OJ No 812 (SCJ).

contractual terms, and as such, if a creditor's claim is not contractually based, then they may not have a valid claim.[120]

Additionally, in Trinidad, a creditor can also bring a civil action against directors,[121] as a complainant seeking a derivative action,[122] or to restrain oppression.[123] Indeed, a creditor may not be owed a specific duty by directors, but they can be a complainant. The court can make an order as it thinks fit directing that any amount adjudged payable by a defendant in action be paid in whole or in part directly to the debenture holders of the company or its subsidiary.[124] Additionally, a creditor can apply to the court if the powers of the directors have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards their interest.[125] Thus, a director in making any decisions at or near insolvency may be liable if it can be proven that their conduct is oppressive; more importantly, they will be forced to consider acting fairly in the interest of creditors as well as other stakeholders.

However, there are several difficulties in actually enforcing this principle if directors owe a duty of imperfect obligations to creditors and the substance of that duty remains uncertain. What does it mean to "have regards to the interest of creditors?" If the interest of creditors conflicts, this will require some sort of balancing exercise, which may be nebulous. Indeed, different creditors \have different interests, and secured creditors are in a more favourable position than unsecured ones. The main question is that if a corporation has several creditors, which creditor do directors really consider?

120 See Peer Zumbansen and S B Archer, 'The BCE Decision: Reflections on the Firm as a Contractual Organization' (2008) Comparative Research in Law & Political Economy Research Report No. 17/2008 <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1191&context=clpe> accessed 27 April 2018.
121 Companies Act 1995, s 239.
122 ibid, s 240.
123 ibid, s 242.
124 ibid, s 241(c).
125 ibid 242(1)(c).

Directors' Duties at Common Law to Creditors

In Trinidad and Tobago, directors do not owe duties to the company's creditors; the duty is owed to the company only. However, at common law, they must have regard to the interests of creditors where the company is insolvent or of doubtful solvency.[126] In other words, directors must consider the interest of the creditor if the company is insolvent or near insolvent.[127] In Eastford Ltd. v Gillespie, Airdrie North Ltd,[128] where the company was said to be nearing insolvency, it was held that directors have a duty to take into account the interests of the creditors. The Eastford case alluded to the fact that directors may have to adjust their duties where a company was not insolvent but in the vicinity of it.[129] Folkes-Goldsonargued that adopting the common law places directors in an invidious position of having to cater to the competing interest, [130] but this most likely will be irrelevant in times of insolvency because both parties' interests often coincide.

Andrew Keay reinforced this notion by articulating that directors have a duty in the following insolvency situations;[131] firstly, when their company is nearing,[132] approaching,[133] or on the borderline as outlined in the Eastford Case above, or on the verge of insolvency.[134] He also argued that duty might also cover doubtful solvency,[135] where the company is

126 See Walker v Wimborne (1976) 137 CLR 1.
127 See Yukong Line Ltd. of Korea v Rendsburg Investments Corporation of Liberia [1998] 2 BCLC 485.
128 [2010] CSOH 132 [22].
129 Andrew R Keay, 'The Shifting of Directors' Duties in the Vicinity of Insolvency'(2015) 24(2) IIR 140 <http://eprints.whiterose.ac.uk/84965/5/Vicinity_of_insolvencyIIR_sub_revised.pdf.> accessed 27 April 2018.
130 Ffolkes Goldson (n 102).
131 Keay (n 129)
132 Nicholson and Ors v Permacraft (NZ) Ltd (In Liquidation) (1985) 3 ACLC 453, 459; Re New World Alliance (1994) 122 ALR 53; The Liquidator of Wendy Fair (Heritage) Ltd v Hobday [2006], EWHC 5803 Ch [66].
133 Geneva Finance Ltd v Resource and Industry Ltd (2002) 20 ACLC 1427.
134 Colin Gwyer & Associates Ltd v London Wharf (Limehouse Ltd) [2002] EWHC 2748 (Ch), [2003] BCC 885 [74].
135 Nicholson (n 132); Brady v Brady (1988) 3 BCC 535, 552.

subjected to a risk of insolvency occurring,[136] and even in situations whereby directors are aware that there is a real and not a remote risk of insolvency and creditors may be prejudiced by their actions.[137]

Keay further articulated that there may be cases in which insolvency may not be a visible factor, but the company may be in a dangerous financial position which places creditors at risk.[138] He pointed out that the adjacent a company gets to actually being insolvent, the more obvious it is that the duty will be triggered. Thus, although the common law position is quite contrary to the decision of the People's case and BCE Inc., whereby a director is to have regard for the company as a whole, inclusive of all stakeholders, at the common law, creditors can seek to enforce their common law rights, that directors do owe them a duty.

Indeed, this is consistent with the statutory duty imposed in Trinidad[139] to exercise care and diligence in insolvency or near insolvency.

The Peoples case and BCE Inc. have changed the landscape of the role of directors in a corporation and, most importantly, corporate governance not only in Canada but also in the Caribbean. However, several writers of repute have sought to dissect those decisions as it relates to other alternative corporate governance theories considered below.

Alternative Theories: Creditors Protection at or near Insolvency

In the BCE Inc. case, the court seems to have suggested that corporate law should be a branch of trust law as articulated by Berle and

136 See Kinsela v Russell Kinsela Pty Ltd (1986) 4 ACLC 215, 223. Note that the Court is agreeing with Cooke J in Nicholson (n 132); Winkworth v Edward Baron Development Ltd [1986] 1 WLR 1512; Hilton International Ltd (in liq) v Hilton [1989] NZLR 442.
137 See also Kalis Enterprises Pty Ltd v Baloglow [2007] NSWCA 191 [162]; Re HLC Environmental Projects Ltd [2013] EWHC 2876 (Ch) [89].
138 See Williams v Farrow [2008] EWHC 3663 (Ch) [21].
139 Companies Act 1995, s 99(1).

E. Merrick Dodd I 1931.[140] Berle argued that directors' powers should be exercised based on equitable principles, which ensures that in the execution of their duties, it is "for the benefit of all the shareholders as their interest appears".[141] In contrast, Dodd[142] treated the corporation as a separate legal entity, and directors are to be regarded as trustees, not for the shareholders but for the company as a whole. However, with respect to the stakeholder's debate, Berle articulated that corporate law should be promoted through trust law principles, while Dodd articulated legislative intervention.

Margaret Blair and Lynn Stout significantly advance Todd's trustee analogy in proposing the "team production" approach to corporate law as the basis for the existing legal duties owed by directors.[143] They argued that the board's quest is to balance the competing interests of specific stakeholders, which is critical to the attainment of the corporation. Indeed, stakeholders voluntarily assign control to the board, in promoting a team enterprise and as such, they are indebted to and responsible for balancing competing interests. They further argued that, similar to shareholders, these stakeholders have made specific investments with the desire to achieve some economic output from the firm. Indeed, Blair and Stout further reinforced the position of creditors in times of insolvency or near insolvency and articulate that if directors are to be regarded as trustees, then they must have regard for the interest of all creditors, failing which they can be held liable for breach of duty. Therefore, in times of insolvency, creditors' interest will become a contending factor under the team production approach, and directors will be held liable if they ignore any creditor's plight.

Secondly, there is the moral stakeholder theory (MST), which enunciates that a director's fiduciary duties go beyond the quest for

140 Adolf A Berle, 'Corporate Powers as Powers in Trust' (1931) 44 Harv L Rev 1049, 1074.
141 ibid 1049.
142 E Merrick Dodd, 'For Whom Are Corporate Managers Trustees?' (1932) 45 Harv L Rev 1145.
143 Margaret M Blair and Lynn A Stout, 'A Team Production Theory of Corporate Law' (1999) 85 Va L Rev 247.

profit maximisation but are subject to moral principles in the execution of their duties. Stakeholder theory states that a business is created to promote the interest of stakeholders, not just shareholders.[144] In other words, each stakeholder represents a broader constituency for corporate responsibility than stockholders.

Indeed, under the MST, directors will find it difficult to argue that they have abided by any laws if their conduct is deemed unfair or unjust.[145] Like team production theory, MST implies that a board's role is to account for the competing interests of various stakeholders, who will obviously include the interest of creditors as well as other stakeholders. Thus, under the MST, any board will be responsible for accounting for the creditor's interests at or near insolvency. Moreover, creditors will be regarded as a stakeholder and their interest must be taken into account by directors in the execution of their duties.

According to Russel Powell,[146] officers and directors who want to avoid personal liability for alleged breach of duty must consider the impacts and the interest of corporate stakeholders, not only shareholders, in making business decisions. Thus, Powell articulated that if directors, in making a decision, ignore creditors' interests, they can be held personally liable.

However, Andres Corfield[147] identified several difficulties in interpreting the concept of "the Stakeholders," which will cast severe doubts on its amplification as follows: Which class of stakeholders' interests the Board must take into account? Management may not be able to assess stakeholder's interest in the company, especially where

144 T Morphy, 'Stakeholder Theory' (Stakeholdermap.com) <https://www.stakeholdermap.com/stakeholder-theory.html> accessed 19 April 2018.
145 Timothy L Fort, 'Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes' (1997) 73 Notre Dame L.
146 Russell Powell, 'The Enron Trial Drama: A New Case for Stakeholder Theory' (2007) 38 U TOL L REV 1087.
147 Andrea Corfield, 'The Stakeholder Theory and its Future in Australian Corporate Governance: A Preliminary Analysis' (1998) 10(2) Bond Law Rev 213.

there are competing interests. In such cases, management will have to develop a formula to deal with various interests and risks. Most stakeholders have little or no influence over management, and as such, enforcement is just a moral obligation. Managers may be accountable to several stakeholders, which can result in conflicts and be answerable to persons other than shareholders.

Conclusion

Corporate governance issues will likely continue in the Caribbean for decades to come. The tendency of directors and managers to act in their interest or contrary to that of the company will not vanish overnight. The development of more stringent corporate standards,[148] and the enhancement of legislation to make fiduciaries accountable is the key to improving governance in the Caribbean. This may prevent any future fiasco such as CLICO, from ever recurring.

The People's and BCE Inc. cases have positively impacted the development of corporate law in the Commonwealth; however, several issues have to be answered and need to be clarified if the decisions can be incorporated in the Caribbean via any legislative changes. This is necessary for the areas of the duties to the creditor during insolvency, at or near insolvency and the oppression remedy. However, both cases fail to clarify the duty to creditors at or near insolvency and whether or not the standard of duty of care and skill is objective.

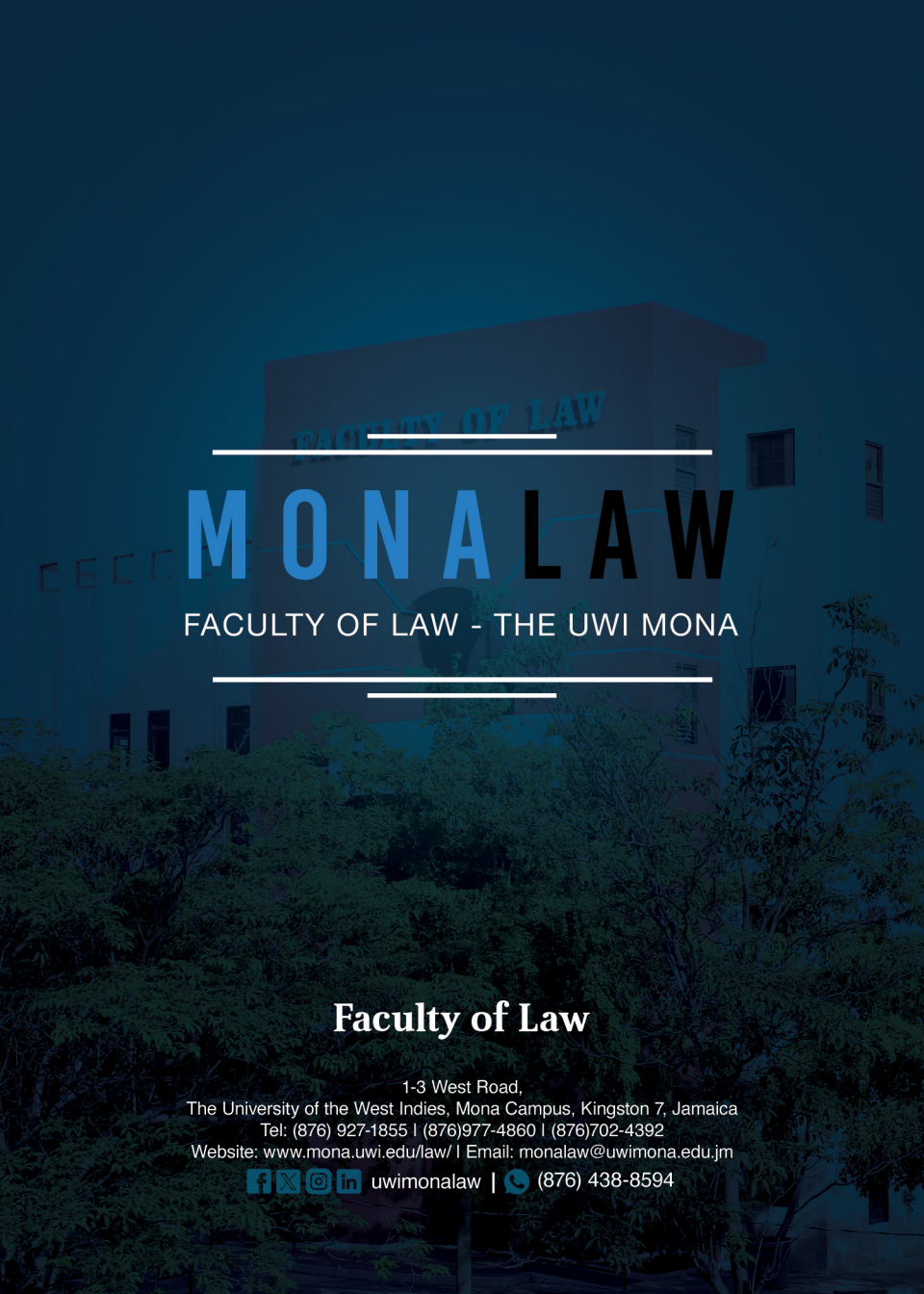
Indeed, some Caribbean territories, namely St Kitts and Jamaica currently have legislation which runs counter to the People's and BCE Inc. cases, St Kitts does not have an oppression remedy and similar to Jamaica the fiduciary duties by directors are owed to the company alone. Therefore, to incorporating the decisions of People's and BCE

148 OECD (n 66).

Inc. cases into those jurisdictions may call for a drastic shift in their legislative agenda. Contrarily, it may be quite easily implemented however in Trinidad and Tobago.

Jamaica's current legislation does not have an oppression remedy and does not include a definition of a complainant, as well as unfair disregard. There is also the objective/subjective debate in the People's and BCE Inc. cases, which many have argued, has imported a subjective aspect that cannot be reconciled with the court's objective standard.

The People's and BCE Inc. cases and subsequent decisions of the lower courts in Canada have confirmed that directors owe no fiduciary duty to creditors but solely to the corporation. This duty does not alter, even if the corporation is at or near insolvency. However, Blair and Stout have argued that directors do owe a specific duty to creditors not only at or near insolvency but also as a stakeholder; and if directors ignore the interest of creditors, they can be held liable, which is not clearly articulated in the People's and BCE Inc. cases. Finally, it is evident that creditors now have more avenues at their disposal to seek to recover their losses at or near insolvency, which may not have existed prior to the People's case. Indeed, the outcomes of both the People's Case and BCE Inc. can play a pivotal role in any amendments to the Companies Act of any Caribbean Country. Emphasis should also be placed on the other shortcomings of both cases so that legislative changes can be proactive and substantive.



MONALAW

FACULTY OF LAW - THE UWI MONA

Faculty of Law

1-3 West Road,
The University of the West Indies, Mona Campus, Kingston 7, Jamaica
Tel: (876) 927-1855 I (876)977-4860 I (876)702-4392
Website: www.mona.uwi.edu/law/ I Email: monalaw@uwimona.edu.jm
uwimonalaw | (876) 438-8594