



Promotion of Rule of Law in Judiciaries in Africa

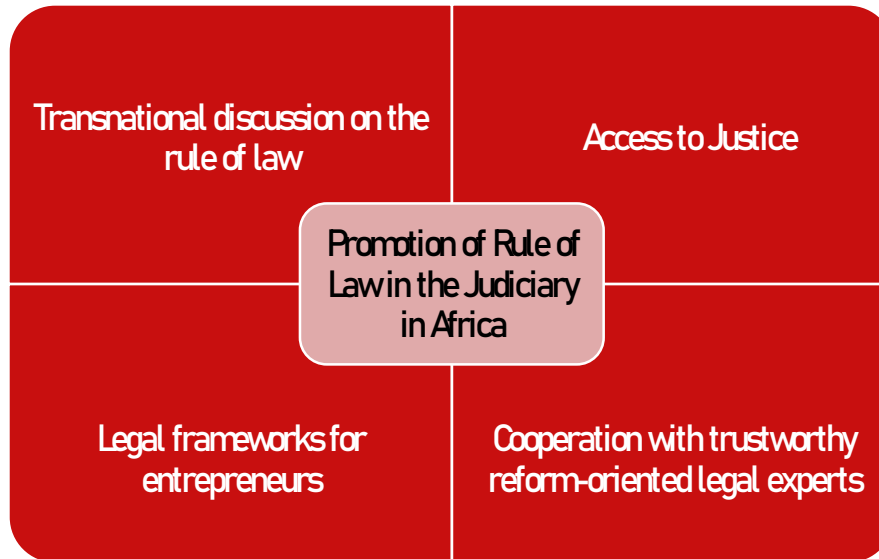
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**Developing Caribbean Jurisprudence
(and What it Means for the Rule of Law in the Region)**

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I. Introduction

I would also like begin with a disclaimer. While I am trained as both a lawyer and a sociocultural anthropologist, I have, for over a decade now, more strongly identified as an anthropologist, which means I tend to approach the world a little differently. Thus, instead of approaching the rule of law through a classically *legalistic* lens, I approach the topic from a sociocultural perspective. Meaning: while the overarching objective of this panel is to consider “how the CCJ’s jurisprudence has impacted and continues to impact the development of the rule of law,” I do not, actually, offer a direct examination of the CCJ’s jurisprudence.¹ Rather, I consider the context and considerations that inform this jurisprudence and ask how the resulting product—borne from this context and these considerations—might have an impact on the rule of law. What I am interested in exploring, in other words, is how the CCJ makes its jurisprudence “Caribbean” and what effect this has on the rule of law in the region.

As many of you know, the concept of a “Caribbean jurisprudence” is one that is very important to the Court. The preamble of the *Agreement Establishing the Caribbean Court of Justice*, in fact, expects the CCJ to “have a determinative role in the further development of

¹ Caribbean Association of Judicial Officers. 2017. Website. http://thecajo.org/cajo/?page_id=7038 (last accessed 13 Nov. 2019).

Caribbean jurisprudence.”² So, that is the question I pose: How is the CCJ developing something called *Caribbean* jurisprudence, and what does this mean for the rule of law in the region?

II. Methodology

What I have to say on this topic is based on my research at the CCJ, which took place in 2012 and 2013. During that time, I spent a total of about 14 months living in Port of Spain and volunteering at the CCJ—with, of course, the Court’s full knowledge and permission to pursue my research there. During this time, I was able to observe and participate in a wide variety of the Court’s work, from trials to tours to day-to-day activities. I also collected and analyzed the Court’s many publications, such as its Annual Reports and educational brochures; I closely followed the media and read the local newspapers; and I certainly took a look at the Court’s judgments, though these did not constitute the primary focus of my research. Additionally, I conducted over 50 interviews with the judges and staff of the CCJ, as well as academics, judges, and lawyers in Trinidad, Barbados, and Jamaica. And, relevant here, I asked nearly everyone I interviewed to give me their definition of Caribbean jurisprudence, and I received over 50 different responses – leaving open, therefore, the question of what constitutes this ever-important concept.

It is based on these quite standard anthropological methods of data collection, plus a great deal of reading and thinking, that I offer my comments and conclusions today.

III. An Early Conclusion

Let me to jump right to one of my conclusions—and then I will offer more details on how I arrived there. I suggest that the CCJ tackles the task of “developing Caribbean jurisprudence”

² *Agreement Establishing the Caribbean Court of Justice*. 2001. Georgetown, Guyana: Caribbean Community (CARICOM) Secretariat.

through an institutional-wide, multi-pronged effort to make these two words—that is, “Caribbean” and “jurisprudence”—thinkable together. What I mean by this, is that to develop something like “Caribbean jurisprudence,” as a unitary concept, the CCJ must first convince the region and the broader international community that an autochthonous, *acolonial*, and truly “*Caribbean* jurisprudence” can legitimately and authoritatively exist. While this may be a slightly controversial argument, I suggest that this project of making one’s own jurisprudence thinkable is a project that all courts, everywhere have had to undertake during the initial decades of their existence. Just because a group of people gathered together under the auspices of some institution speak, does not mean that their words have the power and authority of the law. Something—indeed, multiple things—help to empower these words with the impact of jurisprudence of one flavor or another. It is to these multiple things that I turn to next.

IV. Findings

Specifically, taking the sociocultural and historical context of the CCJ into consideration, I suggest that there are four broad “things” that contribute to making Caribbean jurisprudence thinkable. First, whatever the Court is calling jurisprudence must be recognizably jurisprudence. But, second, as much as it is recognizably jurisprudence, it must also be decidedly distinct from British jurisprudence. Which leads to the third consideration: not only must it *not* be British jurisprudence, but it ought to be palpably Caribbean in quality. And, lastly, it is essential that it is of consistently high quality. I will address each of these four considerations in turn.

a. Recognizably jurisprudence

First, I want to point out what might be the most obvious and, hence, most easily overlooked, which is that there are established cultural norms regarding what actually “counts” as jurisprudence. Thus, whatever kind of jurisprudence the CCJ wants to develop (whether it be

Caribbean or otherwise) it must be minimally recognizable as jurisprudence pursuant these norms. And what are these norms? In the Anglophone Caribbean these norms of jurisprudence generally come from the British legal history of the region and include things like the Common Law use of precedent; the issuance of decisions by professional judges (rather than, say, lay judges); the somber, serious, and thoughtful delivery of judgments; how these judgments are then archived and captioned in a way that they can be cited in future cases; and the staid presentation of the courthouse itself. There are certainly more. But the point is that there are certain culturally based expectations that are shared amongst the majority of the CCJ's member-states about what constitutes a court and what can count as jurisprudence, and these expectations simply must be met if the CCJ has any hope of convincing anyone that what it is doing is developing law.

So, during the process of building the CCJ, the inaugural judges and staff members faced a more-or-less blank slate. In principle, they *could have* made this Court into anything they wanted, but, I suggest, they were clearly hemmed in by these norms. As described in the CCJ's first *Annual Report* under a section called "Creating Traditions," we can see how the CCJ made some thoughtful and symbolically meaningful changes (which I turn to later), but we also see that it did not stray from foundational norms of what we might call "courtliness."³ For example, the CCJ made a decision with regard to the color of the judges' robes, but there was never a second thought as to whether the judges should wear robes in the first place. Similarly, the Court chose one term of judicial address over another, but it did not dispense with the norm of having a decidedly recognizable term of judicial address. So, while robes and titles may seem relatively

³ Caribbean Court of Justice. 2007. *Annual Report 2005-2006*. Port-of-Spain, Trinidad and Tobago: CCJ. Available online. <http://www.ccj.org/publications/annual-reports/> (Last accessed 6 June 2019).

inconsequential, the disregard these norms would have surely undercut the CCJ's ability to legitimately develop any jurisprudence at all. What we end up with, then, are judgments that look and sound like recognizable legal decisions, and a courtroom and judges that have all the familiar bells and whistles of law, from a raised bench, to robes, to a deferential term of address.

And this constitutes my first point. It is a simple one: the CCJ, in 2005, opened a new court and while, in some sense, it had a clean canvas and could have done absolutely anything it wanted, the Court, critically, decided to make its jurisprudence eminently recognizable as such.

b. Distinct from British jurisprudence

Moving on to the second consideration in the CCJ's development of Caribbean jurisprudence, which is that Caribbean jurisprudence must be distinct from British jurisprudence. This is where things become more difficult because while, on the one hand, the CCJ must honor the basic norms of jurisprudence (which have largely come from the British legal tradition), on the other hand, it must show that it is distinct from this same British legal tradition. After all, especially in its appellate jurisdiction, the CCJ is meant to mark an end to ongoing legal dependence. What, then, does the Court do?

I suggest that it walks a narrow line between preserving recognizable norms and distinguishing itself from the region's British legal heritage. I offer two examples. First, I return to the CCJ's decision to retain a formal term of judicial address, a decision, I just argued, that echoes and preserves the formality and deference that is expected of jurisprudence in an Anglophone state. But the CCJ, in a very deliberate decision, decided not to address its judges as "My Lord" and "My Lady." Instead, the Court decided that its judges would be addressed as "Justice" or "Your Honour." In its first *Annual Report*, on the "Creating Traditions" page, once again, the CCJ described why it made this particular decision, and the rationale it offers

underscores that this was a pointed decision to break from the British model.⁴ The Court wrote: “We are not Lords over serfs, we are Honourable men and women of the Caribbean, working for our Caribbean and we bow in unison to the Caribbean people whom we serve.” Undoubtedly subtle and elegant, it is, nonetheless, clear that the reference to “lords over serfs” is meant to represent British legal history and tradition, and, to this, the Court basically says, “that is not us, we are not British, we will call our judges Your Honour.” We can see here, therefore, how the CCJ at once respects cultural norms by retaining a formal term of address, but then deliberately alters that term of address in a way that can indicate a break.

My second example comes from one of the Court’s earliest judgments: the *Joseph and Boyce* death penalty appeal from Barbados in 2005. In this appeal, the Court had to wrestle with, for the first time, the question of how Privy Council precedent would be handled by the CCJ, and I suggest that what Justices De La Bastide and Saunders wrote in their judgment very much reflects what I have been saying: that the British legal heritage of the region must be respected, but that, ultimately, this Caribbean court is not British and will act independently. Specifically, they wrote:

The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence... In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC ... Furthermore, [the judgments of the JCPC] continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court.⁵

⁴ Caribbean Court of Justice, 2007.

⁵ *The Attorney General Superintendent of Prisons Chief Marshal v. Jeffrey Joseph and Lennox Ricardo Boyce*. [2006] CCJ 3 (AJ), paragraph 18, emphasis added.

This is very much a tightrope between respecting and departing from well-established norms of justice in the region, and the CCJ has been criticized for leaning too far in one direction or the other. For this reason, it continues to make adjustments in order to strike just the right balance.

c. Palpably Caribbean

Let me turn now to the third consideration in developing Caribbean jurisprudence. We know that it must be, first, recognizably jurisprudence, but that, secondly, it cannot be “British” jurisprudence. Even more than this, I suggest, thirdly, that not only cannot it *not* be British, but that it must be palpably “Caribbean.” And how does the Court do this?

One way that the Court’s approaches this issue has been to make the institution itself overwhelmingly, obviously, visibly, and audibly Caribbean to its core. Thus, making it impossible for the jurisprudence that emanates from it to be anything but Caribbean in nature. What does the CCJ do more specifically to accomplish this? I invite you all to take a guided tour of the courthouse if you ever find yourself in Port of Spain. The tours have likely evolved since I last took one, but what I and all of the visitors to the Court learned in 2012 or 2013 is that the CCJ overflows with Caribbeanness. Its walls are painted the colors of the Caribbean, the robes of the judges signify the blue of the Caribbean sea and brilliance of the Caribbean sun, the artwork hanging in the halls is by Caribbean artists, the Court hosts an annual Caribbean moot court competition, the staff are all from the Caribbean region, and the history of the Court is steeped in a Caribbean drive to complete the circle of independence. The Court’s Caribbean essence, I submit, is made veritably sensible (literally, sense-able) through its own presentation of itself.

But the CCJ doesn’t just rely on aesthetics, as important as they are. It also makes other symbolic adjustments to establish the its Caribbeanness. One example was offered to me by a CCJ judge, who after hearing a little about my research, offered this “gem,” as he called it,

suggesting that I might want to use this example in the future. And, so I turn to it today. This judge explained that when citing a particular Privy Council case in a judgment he was drafting he wrote something along the lines of “In the Privy Council case, *A v. B...*” He explained that he had not given this much thought until another member of the bench, who had read a draft of the judgment, suggested that he change “In the Privy Council case...” to “In the Jamaican case, *A v. B...*,” as the case had, in fact, originated in Jamaica and had been decided by two Jamaican courts prior to making its way to the Privy Council. The judge who told me this story was struck, as he put it, by how such a “small suggestion made such a difference.” And the difference, I suggest, is that the CCJ, with such subtle adjustments, injects the Caribbean into the law and creates a distinctly Caribbean characteristic to the jurisprudence.

d. Consistently High Quality

I turn at last to the fourth consideration in the development of a legitimate, authoritative, and thinkable Caribbean jurisprudence: which is that this recognizable, non-British, acutely Caribbean jurisprudence be of the highest quality. Certainly, one way that this is done is through the judgments themselves, which are thoroughly deliberated, expertly reasoned, legally sound, and thoughtfully written. The written jurisprudential product, in other words, is of objectively high quality. But, as with the other points I have covered, there is more to it. It is not enough for the written product to be of high quality; the institution that produces it must also exemplify untainted excellence because so often in this region, as I learned during my research, even the finest judicial decisions can be undercut by long-harbored, quite often unfounded, suspicions of political interference, favoritism, financial mingling, and so on. Because of these suspicions, whether founded or not, the CCJ finds itself in a position where it must doubly prove the high-

quality nature of its work in order to ensure that its jurisprudence will be considered legitimate and authoritative by the very people for which it is developed.

To this end, the CCJ has gone to great lengths—and some of the folks I interviewed thought the Court might have taken things too far in some regards—to prove that it is an institution of the highest, most unassailable quality. This is something I observed in person in 2012/2013, when I was there, and something we can all see on the CCJ’s Frequently Asked Questions page on its website, where the Court puts to writing exactly how it sees itself as high-quality.⁶ For instance, on this webpage, there is a question about the possibility of political manipulation, which the CCJ answers lengthily, proudly concluding that “The Caribbean Community is the *only* integration movement whose judges are not directly appointed or elected by Member States.” There is also a question about how the judges are paid and whether this might open the door to political pressure. Here, the CCJ notes its innovative funding structure (the Trust Fund), something that the CCJ regularly holds out as a means of ensuring the independence of its judges. The webpage even poses a question to itself about the quality of the Court’s judicial pronouncements. To answer this, the CCJ touts the impressive resumes of its judges and notes that the two previous Presidents of the CCJ were also members of the Privy Council.

Now, this association with the Privy Council comes at some risk, since it seems to associate the Court quite closely with the British legal system, something, we know, the Court might want to distinguish itself from. What is interesting, though, is that the CCJ quickly works to abate this risk by also pointing out that these two past Presidents have never actually been

⁶ Caribbean Court of Justice. 2012. Frequently Asked Questions. <https://www.ccj.org/about-the-ccj/faqs/> (Last accessed 13 Nov. 2019).

invited to sit at the Privy Council. What the Court is trying to indicate, I suggest, is that “Yes, we are as high quality as the highest quality Court in the United Kingdom, *but* this does not mean that we actually participate in the making of British jurisprudence.”

V. Conclusion

In the interest of time, I will wrap up my presentation by circling back to the underlying objective of this panel. How does the development of Caribbean jurisprudence by the CCJ contribute to the rule of law in the region? Well, if we understand the development of Caribbean jurisprudence in a more anthropological way, as I have suggested, we can see that the CCJ’s work contributes to the rule of law in the region by inviting the region to believe that it has its *own* law, by suggesting that this law should be followed because it is not law from the outside, but law from the inside, and, importantly, that this law is, by many measures, worthy of respect and obedience. So, from my perspective, one of the most important things that the CCJ works to accomplish through its development of Caribbean jurisprudence is a renewed faith in law sustained by a new relationship to the law. That is, the Caribbean can be the source of its own laws.

The Caribbean Court of Justice and the Rule of Law

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The concept of the rule of law has been given pride of place in the developing jurisprudence of the Caribbean Court of Justice, both as a interpretative tool for breathing life and structure into the fundamental rights and freedoms enshrined in Caribbean Constitutions, and in particular the right to protection of the law, and as a standalone, nominative core constitutional principle against which legislative and executive acts are to be judged. This is a developing story. The impact which the CCJ's rule of law jurisprudence will have on the constitutional landscape is yet to be fully appreciated. But before embarking in a bit more detail on an examination of these developments, it is first necessary to flesh what it is that the concept of the rule of law entails.

In its most obvious configuration, the rule of law requires that all persons must obey the law, including in particular public authorities bearing coercive powers. It means moreover that the exercise of those coercive powers must have a foundation in law. This aspect of the rule of law applies to judges no less. As Justice Anderson was to admonish his brothers and sisters in the majority in *Nervais and Severin v R*¹, courts are not permitted to "interpret the Constitution according to their own predilections and prejudices and thus undermine the Constitution and the rule of law." He said so even while he himself invoked concepts associated with the rule of law in emasculating the mandatory death penalty². But more on that story later.

¹ [2018] 4 LRC 545, at [106].

² Ibid, at [112].

There are other facets of the rule of law on which there is broad academic and judicial agreement. Thus, the rule of law requires that laws be made by authorised law making bodies; that laws be sufficiently clear to give persons they may affect notice of the conduct which is proscribed; that laws should not be retrospective in effect; that they should apply equally to all persons they may affect; that arbitrary power and unfettered discretions are to be eschewed; that there should be access to an appropriate tribunal to resolve disputes about rights and obligations; that the tribunal charged with resolving those disputes should be independent and impartial; that there should be a separation of powers between the judiciary, on the one hand, and the legislature and the executive on the other.³ This list is not intended to be exhaustive.

All of these are collectively referred to in the academic literature as the formal conception of the rule of law, in that they have no bearing on the content or quality of the law which is to be obeyed or enforced. Laws which governed South Africa under the system of apartheid would pass muster under the formal rule of law lens as long as the laws which discriminated against black South Africans were made by constitutional bodies, were clear, enforced evenly, and administered by an independent and impartial judiciary, even although the mere portrayal of discriminatory laws being applied evenly and impartially rankles the nerves. Joseph Raz, a supporter of the formal conception of the rule of law, nevertheless appreciated the supreme paradox in the promotion of a lofty concept such as the rule of law, which had nothing to say about the quality of the law itself. The rule of law, he explained

³ Robinson, Bulkan and Saunders *Fundamentals of Caribbean Constitution Law*; Jeffrey Jowell – The Rule of Law Today in The Changing Constitution, ed. Jeffrey Jowell and Dawn Oliver, 3rd ed., Clarendon Press, Oxford, pp. 57-78; Joseph Raz – The Rule of Law and its Virtue – (1977) 63 L.Q.R. 195; Mark Ellis – Towards a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice – 72 University of Pittsburgh Law Review 192; Lord Bingham – The Rule of Law (2007) 66 Cambridge LR 67; Paul Craig – Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework (1997) Public Law 467; TRS Allan – The Rule of Law as the Rule of Reason (1999) 115 LQR 221; Peter W Hogg and Cara F. Zwiabel – The Rule of Law/The Rule of Judges: The Rule of Law in the Supreme Court of Canada (2005) 55 U of TLJ 715.

"... is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law."⁴

Indeed, under the formal conception of the rule of law, "the law may ... institute slavery without violating the rule of law".

It is precisely because the formal conception of the rule of law permitted nations with the worst human rights records to boast that their legal systems are based on the rule of law, that a competing school of thought has developed which infuses the rule of law with substantive content, and in particular, adherence to fundamental rights and freedoms. Lord Bingham was particularly troubled with the notion of a rule of law principle devoid of any substantive human rights content. To his mind:

"A state which savagely repressed or prosecuted sections of its people could not ... be regarded as observing the rule of law, even if the transport of prosecuted minority to the concentration-

⁴ Raz, p. 196.

camp ... (or to the slave plantation) were the subject of detailed laws duly enacted and scrupulously observed.”⁵

Arthur Chaskalson summed up the inadequacy of the formal conception of the rule of law, thusly:⁶

"[t]he apartheid government, its officers and agents were accountable in accordance with the laws; the laws were clear; publicized and stable, and were upheld by law enforcement officials and judges. What was missing was the substantive component of the rule of law. The process by which the laws were made was not fair (only whites, a minority of the population, had the vote). And the laws themselves were not fair. They institutionalised discrimination, vested broad discretionary powers in the executive and failed to protect fundamental rights. Without a substantive content there would be no answer to the criticism, sometimes voiced, that the rule of law is "an empty vessel into which any law could be poured."

For these reasons, Lord Bingham would imbue the rule of law with the obligation to protect human rights and to adhere to international law.⁷ For its part, the International Bar Association sees the essential characteristics of the rule of law as requiring strict adherence to fundamental principles that both liberate and protect.⁸ And the former Secretary General of the United Nations, Kofi Anan, defines the rule of law as being "consistent with international human rights norms and standards."

Mind you, the substantive conception of the rule of law has been roundly criticised for producing an unmanageable and unwieldy bull in the proverbial

⁵ Lord Bingham, p. 76.

⁶ Arthur Chaskalson, remarks at the World Form I, July 2008, quoted in Ellis *supra*, at pp. 194-195.

⁷ Bingham, *ibid*, p. 75.

⁸ International Association, Rule of Law Resolution (2005).

china shop. By promising everything, it is pointed out, the substantive rule of law ends up meaning nothing at all.

No doubt work still needs to be done to more closely define the contours of the substantive conception of the rule of law. Anticipating his critics, Lord Bingham confined his conception of the rule of law to “such human rights as, within that society, are seen as fundamental.”⁹ I prefer Ellis’ formulation. The rule of law would protect what he refers to as non-derogable rights such that “where a non-derogable right is systematically breached, curtailed, or derogated from, the rule of law cannot be said to exist.”¹⁰ Generally speaking, non-derogable rights would be those rights which are internationally accepted as *jus cogens* norms¹¹ and would include the right not to be subject to torture, or other cruel, inhumane or degrading treatment or punishment, the right to a fair trial, the right to freedom of thought, conscience and religion, the right to non-discrimination and the right not to be punished disproportionately.

This is of course not the paper in which to seek to settle the issue of the content of the substantive conception of the rule of law. The fact however is that the CCJ has already made far reaching strides towards making both the formal and some as yet undefined version of the substantive conception of the rule of law part of the Commonwealth Caribbean constitutional landscape. And this it has done both by infusing established fundamental rights and freedoms with precepts inspired by the rule of law and by establishing the rule of law as a virtual supra-constitutional principle operating along with and indeed in spite of the Bills of Rights.

⁹ Bingham, p. 77.

¹⁰ Ellis, p. 200.

¹¹ Ibid, p. 201.

In one of the first cases to reach the CCJ on the death penalty, **Attorney General of Barbados v Joseph & Boyce**¹², Justice Witt took his first stab at defining the rule of law. He was moved to do so because the preamble to the Constitution of Barbados had proclaimed Barbados as a nation which affirmed the belief “that man and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.” Apart from establishing that no one was above the law, to his mind the rule of law “imbued the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power.”¹³ It also embraced concepts like the principles of natural justice, procedural and substantive due process and the protection of the law. The right to the protection of the law therefore, he held, not only requires laws “of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power; but it also requires the availability of effective remedies.”¹⁴ Given that all bodies, including the Barbados Privy Council, was bound to act rationally, reasonably and fairly, he concluded that the ouster clause in the Barbados Constitution which sought to protect decisions of the Barbados Privy Council from judicial scrutiny had to be construed as narrowly and restrictively as possible. Apart from relying on the rule of law to flesh out the contents of the right to the protection of the law, therefore, he seems to have invoked the rule of law as a supra-constitutional principle which impacted upon the reach and effectiveness of the ouster clause.

For their part, de la Bastide P and Saunders J adopted¹⁵ Lord Millet’s definition of the due process of the law in **Thomas v Baptiste**¹⁶, which

¹² [2007] 4 LRC 199.

¹³ [314].

¹⁴ Ibid.

¹⁵ Ibid., [63].

¹⁶ [1999] 2 LRC 733, 744.

applied equally to the protection of the law, which he said invoked “the concept of law itself and the universally accepted standards of justice observed by civilised nations which observed the rule of law.”

Less than a decade later Saunders J adopted Witt J’s formulation of the protection of the law, based upon the precepts of the rule of law, which demands that there be “access to appropriate avenues to prosecute, and effective remedies to vindicate, any interference with ... rights” and also afforded “adequate safeguards against irrationality, unreasonableness and unfairness or arbitrary exercise of power”¹⁷. That same year, the CCJ unanimously approved of Witt J’s formulation of the protection of the law, which it insisted was “grounded in fundamental notions of the rule of law.”¹⁸ Remarkably, the court went even further to hold that the protection of the law, founded on the rule of law, imports an obligation to adhere to international law commitments.¹⁹ In so holding, the Court referred with some measure of approval to Lord Bingham’s delineation of the principles of the rule of law as including compliance with state obligations in international law.²⁰

We await the Court's development of their particular aspect of the protection of the law, particularly having regard to the Court’s early insistence in ***Attorney General v Joseph & Boyce*** that obligations contained in international human rights treaties did not, by dint of the mere execution of a treaty, become part of the country’s domestic law.

On a more mundane level, the need to promote the rule of law by ensuring that a trial is fair was resorted to in ***Zuniga v Attorney General***²¹ to resolve the tension between the presumption of innocence and the permitted

¹⁷ ***Lucas v Chief Education Officer*** [2016] 1 LRC 384, [138].

¹⁸ ***Maya Leaders Alliance v Attorney General*** [2016] 2 LRC 414, [47].

¹⁹ [58].

²⁰ [52].

²¹ [2014] 5 LRC 1, [73].

imposition of a burden on an accused to prove particular facts. And in **BCB Holdings Limited v Attorney General**²², the Court accepted that it could refuse to enforce a foreign arbitral award on the ground that a fundamental principle of the rule of law, such as that which prohibits the executive from assigning unto itself law-making functions, had been violated to an unacceptable extent.

It was in **Mc Ewan v Attorney General**²³ that the Court declared the rule of law to be a core constitutional principle²⁴ and indeed struck down the cross-dressing law on the ground that it violated one of the precepts of the rule of law, in this instance the requirement that legislation which is hopelessly vague must be struck down as unconstitutional²⁵. It may be that that Anderson J was similarly reaching for a core constitutional principle derived from or inspired by the rule of law when he struck down the same law on the ground that it purported to criminalize intentions or a state of mind which was “not a competence constitutionally within the realm of the criminal law.”²⁶

The significance of locating the violation in the realm of core constitutional principles, not tethered to the fundamental rights and freedoms provisions, is that the savings law clause in the Guyanese Constitution was not applicable and the law was liable to be struck down without any modification²⁷.

It is with these developments in mind that I return to **Nervais & Severin**. At play in that case was the constitutionality of the mandatory death penalty in Barbados which was contained in a law which pre-existed the Independence Constitution. The Court was faced with two utterly conflicting

²² [2014] 2 LRC 81.

²³ [2019] 1 LRC 608.

²⁴ At [51].

²⁵ [85].

²⁶ [96], [106].

²⁷ [51].

provisions. The first, in the Constitution, prohibited the holding of anything contained in or done under the authority of an existing law to be inconsistent with or in contravention of the fundamental rights provisions of the Constitution. Viewed by itself, it precluded a finding that the mandatory death penalty was unconstitutional on the ground that it violated any of those provisions. The second was a provision in the Order in Council (section 4) which midwived the Constitution into being and which required existing laws to be modified in order to bring them into conformity with the Constitution. The Order in Council applied to all provisions of the Constitution, including the fundamental rights provisions.

In ***Boyce v R***²⁸, a majority of 5 to 4 of the Privy Council held that the savings law clause trumped the modification clause, rendering existing law immune from challenge on the ground of inconsistency with the human rights provision. The minority, led by Lord Bingham, held that existing law had first to be modified under the Order in Council before the savings clause could have effect.

There was some hard swearing on both sides. In the companion case of ***Matthew v State***²⁹, the minority lamented that the majority's interpretation of the constitution "does not ensure the protection of fundamental human rights and freedoms, degrades the dignity of the human person and does not respect the rule of law." Lord Hoffman received the criticism with something less than equanimity, taking time to accuse the minority of misusing the "living instrument" principle which, he said, they:

"... stirred into a jurisprudential pot together with "international obligations", "generous construction" and other such phrases, sprinkled with a cherished aphorism or two and brewed into a potion which will make the Constitution mean something which it

²⁸ [2005] 1 AC 400.

²⁹ [2005] 1 AC 433, [35].

obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can." ³⁰

Both majority and minority therefore accused each other of failing to fulfil the mandates of the rule of law, much like Anderson J's criticism of the majority in **Nervais**.

So, how is it possible to invoke the principles of the rule of law to support both points of view and what is it that prompted the majority in **Nervais** to adopt the minority's view in **Boyce**? I venture to suggest that the majority's approach of construing the modification clause and the savings law clause together and giving precedence to modifying existing law into conformity with the Constitution reflects a paradigm shift towards reading the Constitution as being subject to the overriding mandate to comply with a substantive conception of the rule of law. Listen to the President Sir Dennis Byron P speaking for the majority:³¹

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

He continued:³²

"[58] The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights..."

³⁰ In **Boyce**, [59].

³¹ **Nervais**, [53].

³² [58]-[59].

[59] ... With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."

This represents a cultural shift. It was not just a matter of construing the savings law clause narrowly. The enforcement of fundamental rights and freedoms must be given due priority which meant that the modification clause had to be applied first in time. The notion that anachronistic colonial laws which violate the fundamental rights provisions must continue in force until the legislature saw it fit to make long outstanding changes is the antithesis of a Constitution founded on the rule of law and an independent judiciary.

This shift is itself exemplified in the judgment of Anderson J who, while disagreeing with the majority on the interplay between the modification clause and the savings law clause, nevertheless found his own way of nullifying both the effect of the savings law clause and by extension the mandatory death penalty. While the Court could not find the mandatory death penalty to be unconstitutional, he held, the court "is not obliged, and cannot be obliged, to obey its dictate and thus to mandatorily impose the death penalty."³³ This was because "the judicial power to impose an appropriate sentence ... cannot be constrained by the legislative direction to impose an inappropriate sentence."³⁴ He elaborated:³⁵

³³ [109].

³⁴ [112].

"Whilst a constitutional provision may forbid the courts to hold a pre-existing law to be unconstitutional or inconsistent with the Bill of Rights, the separation of powers forbids the Legislature from compelling the Judiciary to impose a sentence that is cruel and inhumane, and one that is widely held to be contrary to fundamental human rights norms accepted by civilized countries adhering to the rule of law."

It is important to appreciate that Justice Anderson did not, at least in express terms, invalidate the colonial law containing the mandatory death penalty. For all intents and purposes, therefore, the law as it stood required the court to impose the sentence of death on anyone convicted of murder and one facet of the rule of law, which Justice Anderson himself espoused, required him to obey that law. Nevertheless, he found his way to do just the opposite in deference to a higher constitutional mandate, not contained in the Bill of Rights, but owing its provenance to the rule of law itself. He clearly identified the source of this extraordinary power when he made this reverberating declaration:³⁶

"National constitutions and laws are subservient to norms of *jus cogens* and courts everywhere are obliged to uphold and enforce such fundamental international principles."

Or as he said earlier³⁷, a court is bound by legislative and constitutional edicts, "unless those obligations are of a *jus cogens* nature".

Let us accept then that the CCJ appears headed, if it has not already gotten there, to the acceptance of core constitutional principles rooted in a substantive conception of the rule of law, which stands above the

³⁵ Ibid.

³⁶ [113].

³⁷ [107].

Constitution but is nevertheless an integral part of its supreme architecture. How else to interpret the Court's pronouncement, albeit obiter, first tentatively expressed in ***Bar Association of Belize v Attorney General***³⁸, but repeated in ***Nervais***³⁹, that "unwritten constitutional principles may ... limit the power of the (legislature) to amend the Constitution ..."

The task ahead, consistent with the rule of law principle of legal certainty, is to define more precisely the principles which will inform the development of those unwritten core principles and the identification of the non-derogable rights which the rule of law will protect.

As it is, there are some anomalies to work out. The Court in ***BCB Holdings v Attorney General*** accepted that the rule of law prohibited the executive from usurping the legislative function. Indeed, one of the core facets of the formal conception of the rule of law is that laws are to be made by authorised law making bodies. But if that is so, the Court's declaration, without much explanation, that the right to the protection of the law encompasses all international obligations, not just *jus cogens* norms, involves acceptance of the executive's authority to create constitutional rights simply by signing a treaty. Another route to the incorporation of international human rights treaties needs to be worked out which is consistent with rule of law precepts. Maybe it is time to take another look at an enforceable legitimate expectation that international human rights obligations, solemnly entered into, will be implemented.

Douglas L Mendes
31st October 2019
CAJO Conference 2019,
Belize City,
Belize

³⁸ [2017] 2 LRC 595, [50].

³⁹ [74].

The Rule of Law in the Caribbean Court of Justice

Dr Se-shauna Wheatle
31 October 2019

Revealing the Rule of Law

‘It has been through judicial review... that the rule of law has had its most significant recent development and where it has revealed the detail of its content.’

Jeffrey Jowell, 'The Rule of Law's Long Arm: Uncommunicated Decisions'

The Rule of Law as a Constitutional Principle

- ❖ Political Ideal
- ❖ Development goal
- ❖ Legal Constitutional Principle

The Rule of Law as a Constitutional Principle



Normative and Substantive Effect

- ❖ Furnishing Jurisdiction of the Court: *Joseph and Boyce*
- ❖ Normative Standard for Legislation: *McEwan v AG*
- ❖ Limiting the reach of the savings law clause: *McEwan v AG*

A bridge to Foreign and International Law

‘ “due process of law” is a compendious expression in which the word ‘law’ does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilized nations which adhere to the rule of law.’

Nervais v R [43] (Byron JCCJ)

A bridge to Foreign and International Law

‘It further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power.’

AG v Joseph and Boyce [20] (Wit JCCJ)

A tool for building Caribbean constitutional identity

- ❖ Locally rooted but internationally engaged
- ❖ Mixture of local and external influences
- ❖ Reckoning with colonial past
- ❖ Reckoning with persistent prejudices

A tool for building Caribbean constitutional identity

‘this Court is clearly of the view that the Appellants’ right to protection of the law, founded on the concept of the rule of law, which itself imports an obligation to adhere to international law commitments, has been breached.’

Maya Leaders Alliance v AG (Belize) [57]
(Byron P and Anderson JCCJ)

A tool for building Caribbean constitutional identity

‘The right to protection of the law is the same as due process which connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. *It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.*’

Nervais v R [45]

Respect and Protection of Minorities

‘The 1st – 4th named appellants are, or are perceived to be, different. They are transgendered persons. ...That is their reality. ... Unfortunately, it is a reality that, for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against those who are different. *It is for courts to afford the protection of the law to those who experience the brunt of such behaviour.*’

McEwan v AG [2] (Saunders P)



Title of Session: Developments in the Rule of Law in Africa and the Caribbean

Session Chairperson: The Hon Mr. Justice Adrian Saunders

Session Panellists:

Africa: **Ms. Vanessa Egert** – Legal advisor to GIZ

The Hon Mr. Justice Kashim Zannah – Chief Judge of Borno State, Nigeria

CCJ: **Dr. Lee Cabatingan**- Legal Anthropologist, Assistant Professor

Dr. Se-shauna Wheatle – University of Durham

Mr. Douglas Mendes SC

Objectives of Session:

- How the CCJ's jurisprudence has impacted and continues to impact the development of the rule of law
- Context and consideration of jurisprudence
- How it impacts the rule of law
- How the CCJ makes its jurisprudence Caribbean, and how it affects the rule of law in the region

Key points from presentations:

1. Ms. Vanessa Egert

GIZ promoting the rule of law in African Judiciaries

- GIZ helps clients and commissioning parties. They are presently working with partner in over 120 countries on over 1500 projects.
- Vanessa is mainly active in North Africa particularly Tunisia. This project is focused on Agenda 2030 and focusing on Ghana, Tunisia, .
- The project is divided into 4 supplementary fields.
 - a. Access to justice

The better access to justice component is being realised together with the African Lawyer Association to achieve timely access for citizens to the court through

digitalisation, tours and the creation of an app which is intended to allow for the anonymous reporting of corruption cases.

b. Transnational discussion on the rule of law:

This includes organising transnational conferences such as the ‘Rule of Law, Justice and Development ‘ Conference series which include coordinating with the Judicial Integrity Group. The Conference topics include areas such as digitalisation and women and justice. The next conference is scheduled for January 2020 in Berlin and is aimed towards the sharing of best practices and experiences among stakeholders to improve the legal framework for businesses and citizens.

c. Access to legal redress and legal frameworks for entrepreneurs:

This is an organised resource exclusively for lawyers. The long-term plan is to set up mobile clinics for young female entrepreneurs.

d. Cooperation with trustworthy reform oriented legal experts – Establishing court partnership with higher regional court Frankfurt and higher regional court Tunisia:

The aim is the promotion and dissemination of the Bangalore principals and to compare judicial ethics, exchange of best practices to strengthen impartial courts and judges, to implement convention against anti-corruption.

Generally, when GIZ starts working in another country, promotion of rule of law is still a highly needed area. In terms of implementation in Africa thus far, GIZ:

- Held a Conference on Access and Integrity – Approaches to a strong Rule of Law in Africa – in Abidjan February 2019; and
- Are planning a summer school for 30 students from Tunisia in Hamburg at the end of the year 2019

The closing idea came from Kofi Annan’s final speech as United Nation’s Secretary General and puts forward the idea that no country suffers from too much rule of law but so many countries suffer from too little.

2. The Hon Mr. Justice Kashim Zannah

- The Nigerian courts have begun acting as guardians of democracy and do whatever it takes to fulfil this role.
- In 1999, the court took a position to avoid political questions and exercised limitations with regard to elections and had them thrown out on one technicality or the other. However this proved risky and delayed democracy.

The right to run: Registration of political parties

- Independent candidacy was not permitted: party sponsorship necessary – excluded a lot of ideas and stifled opposition
- The electoral commission had powers to register political parties. Considering this, the Supreme Court intervened and said that electoral committees could not impose any other conditions on parties than what are constitutionally required .

- Disqualification of candidates- there was also the disqualification of candidates and a policy of restraint. The supreme court determined that this policy was killing democracy.
- There was a rebuke of Bello J in *Dalhatu v Turaki* (2003) . It was said that the Supreme Court essentially decided who the winner of the election was.

Judicial Muscle

- In *Amaechi v INEC* (74) n(2007) LPEL-449 (SC) – the individual won but the party substituted his name for another at the elections . When the party won, the Supreme Court intervened and said that the first candidate was the candidate in the eye of the law and should be sworn in.

Pushbacks: President Yar'Adua said that the Courts are not above rule of law.

- Another extreme pushback came from Vice President Atiku who stated that he had never seen any judgement so designed to disgrace one, exhibit lack of respect...therefore, if the worst comes to worst, I will insult any judge... it may not be only insults, but as well as beating such a judge. The cause of these harsh words was that a voter had died before the elections but his vote was still listed as being cast so the tribunal ordered a new election.
- Despite these pushbacks, the Supreme Court has moved ahead at full speed. In the 2019 elections in Rivers state, the ruling party was shut out and in Zamfara state, the party victory was handed over to the opposition.

Rule of Law and the CCJ/Caribbean

3. Dr. Lee Cabatingan

- What is Caribbean Jurisprudence? The task of developing Caribbean Jurisprudence is attacked by the CCJ as multipronged institutionalised approach to make the world's jurisprudence and the Caribbean jurisprudence stick together. To do this, the CCJ must first convince the world that Caribbean jurisprudence already exists. The Caribbean isn't the first region to have to undertake this exercise of legitimacy. All countries and states have to go through this project at the beginning of their existence. Making one's jurisprudence thinkable is something every region has to do.
- There are 4 things that make the Caribbean Jurisprudence thinkable :
 - a. *It must be recognizably jurisprudence*: whatever jurisprudence the CCJ wants to be noticed should be recognizable. There are certain cultural norms as to what counts as jurisprudence and it needs to be recognisable. Currently, the Caribbean delivers

thoughtful delineations of judgements. There are several shared opinions about what constitutes a court and what constitutes jurisprudence. There are some things which seem obvious to the identity of a court such as formal dress and if these weren't present it would undermine what is being done. In 2005, when the CCJ opened their court, they consciously made its jurisprudence recognizable by following basic norms of the courts.

- b. *It should be distinct from British jurisprudence:* the CCJ is working along a very fine line. They need to follow common British legal history but also needs to find its way apart. The way they have engaged this dilemma is by retaining a formal term of judicial address that echoes and preserves British legal history. However, the CCJ also made a deliberate decision to depart from British traditions and end the use of “my Lord/my Lady” to refer to judges. Instead, the CCJ uses the term “your Honour”.

The second example of how the CCJ balances this line can be seen in the Joseph and Boyce case where they reflected for the first time on how Privy Council precedence will be used in the CCJ's jurisdiction. In paragraph 18 the CCJ indicates that Privy Council decisions will naturally be considered carefully and respectfully and will continue to be binding unless and until they are overruled by the CCJ.

- c. *Palpably Caribbean:* the court approaches this by making it visually and all out Caribbean; a court house in Port of Spain would have learned that the court is overflowing with “Caribbean-ness” – the walls, robes, paintings etc. in the court are all influenced by Caribbean culture and countries. CCJ court judge explained that when citing a Privy Council case he can see with these small adjustments, how the CCJ injects Caribbean into the law.

The CCJ is obviously, visibly Caribbean to its core so that the jurisprudence is nothing less than Caribbean. This is evidenced through the dress, the artwork displayed throughout the court building, the staffing and the history of the Court. With small changes such as saying “in the Jamaican case...instead of in the Privy Council case...” when citing Cases, the court injects its Caribbean-ness.

- d. *It is essential that the work remains of a consistently high quality:* The judgements of the Court themselves are well researched and thoroughly written. However, in this region that sometimes is not enough and these decisions are viewed with suspicion.

The court has to do more and is well aware that they need to be the standard setter. This is evidenced even on their standards page where they point out that they are of constantly high quality.

Ways in which they are the most high quality court – the Caribbean court is the only one where judges aren't appointed by members of state, the court points out impressive resumes of their judges. They make their own jurisprudence, not British jurisprudence.

-If you understand the Caribbean jurisprudence in a more anthropological way, you can see how this law is followed. The CCJ's work invites the region to believe that it has its own law and suggesting that this law should be followed because it is law from the inside which is deserving and worthy of respect and obedience. This brings a renewed faith in the law sustained by a new relationship with the law. The Caribbean can be its own source of law.

4. Dr. Se-shauna Wheatle

- The rule of law can be seen as a political ideal, a development goal and a legal constitutional principle.

-The rule of law runs along a spectrum from “thin formal” to “thick substantive”. The thin version of the rule of law is that whatever the law says has to be obeyed. It doesn't need to be just or promote equality. The thick version of the rule of law is more substantive and can support human rights.

- Caribbean jurisprudence seems to show a thicker more substantive version of the rule of law.

-I wish to suggest that the CCJ has used the rule of law to fill gaps in Caribbean Bills or rights and to connect the region with global constitutionalist projects and the courts are developing a Caribbean version of the Rule of Law.

- How has the Rule of Law been used to fill gaps (the normative and substantive effect)?

a. The Rule of Law in jurisprudence: this has been used to supply jurisdiction for the court where the constitution hasn't particularly done this. eg. The Joseph and Boyce case demanded they should not be prosecuted until their international rights was denied. In this Barbadian death sentence case, a right to protection of the law was afforded by the constitution and demanded that the convicted persons not be executed until their petitions had been determined by the international human rights bodies. The issue of the CCJ was that the opening section of the Bill of Rights provided that there should be a recognition and built upon previous Privy Council jurisprudence but went much further and found that there would be a violation of due process. The case dealt with the court's jurisdiction and said that the court must have the inherent jurisdiction to provide relief because there is a right that is engaged here. This right has been breached here. Tracy Robinson said this research was provocative but cryptic. Justice Wit was a bit more explicit and ruled that there must be more effective remedies.

b. Furnishing jurisdiction of the court: The CCJ built up on Privy Council jurisprudence, in Joseph and Boyce two of the judges said that the court must have an inherent jurisdiction for the court to say the right had been breached. Justine Whitten said that the law cannot rule if it cannot protect.

c. Normative standard for legislation: In *McEwan v AG* the CCJ went even further to use rule of law for which legislation can be measured. The law violated the right to equality, discrimination etc.

d. Limiting the reach of the saving law clause *McEwan v AG*. In this case the CCJ went even further used the rule of law as a principle against which legislation should be measured. It was found that the law against cross-dressing violated the right to freedom of expression etc.

-The Rule of Law also acts as a bridge to foreign and international law-

Justice Byron in *Nervais v R* stated that, 'due process of law'' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilized nations which adhere to the rule of law.'

Justice Wit in *AG v Joseph ad Boyce* at paragraph 20 highlighted that, 'It further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power.'

CCJ has used the Rule of Law as a tool for building a Caribbean Constitutional identity that is: locally rooted but internationally engaged,

A mixture of local and external influences,
Reckoning with colonial past, and
Reckoning with persistent prejudice.

- The CCJ has been able to develop a Caribbean constitutionalism despite looking outward at constitutional standards. This could be seen from the *Maya Leaders Alliance* case where the CCJ said that the Mayan people's rights had been violated. The indigenous Mayas of Belize were fighting for land and the CCJ moved past a Eurocentric view of living and land ownership that had been established by the Privy Council. They mixed local law and local awareness of culture with international references – global south and global north and referred to a need to provide redress for centuries of oppression. 'this Court is clearly of the view that the Appellants' right to protection of the law, founded on the concept of the rule of law, which itself imports an obligation to adhere to international law commitments, has been breached.'*Maya Leaders Alliance v AG (Belize)* [57] (Byron P and Anderson JCCJ).

- 'The right to protection of the law is the same as due process which connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. *It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.*' *Nervais v R* [45]

-The CCJ has also considered the use of the rule of law for the protection and respect of minorities. McEwan was a striking case because the court used the rule of law in an equalising fashion – There was a critical assessment of the colonial past done by Justice Saunders and there was discussions between the links of cross dressing to religion.

‘The 1st – 4th named appellants are, or are perceived to be, different. They are transgendered persons. ...That is their reality. ... Unfortunately, it is a reality that, for whatever reason, confuses many and frightens, even disgusts, some in Caribbean societies often leading to derision of, and sometimes violence against those who are different. *It is for courts to afford the protection of the law to those who experience the brunt of such behaviour.*’ *McEwan v AG* [2] (Saunders P).

- Though the court the court made these observations, the rule of law still had to protect individuals within the state.

-The rule of law is seen as protective of minorities and not the different/transgender people. They have to turn to the law for protection for those who cannot have their voices heard.

5. Mr. Douglas Mendes

-The CCJ has said that the rule of law protects against irrationalities and unfairness.

-In the McEwan case, the court was able to bypass the savings law clause to find that the rule of law is an independent stand-alone basis. The cross dressing violated the rule of law. Going forward this is what the CCJ said the rule of law means.

-More academic discussion – conforms to the former conception of the rule of law. There is every indication that the CCJ is going towards developing a substantive comprehensive concept of the rule of law.

-The Maya case pointed out all the international treaties which are present and also incorporates that the executive cannot make law; he said that the existing law cannot dictate the judiciary. This is a debate that the CCJ will have to work out over time.

- The court previously went along with Justice Saunders that the existing law cannot dictate what the judiciary must do and that it must implement a penalty that the judiciary considers to be cruel and unusual punishment. No law can tell the judiciary to violate jus cogens. This went over and above the Constitution.

- The jurisprudence of the CCJ is being matched by the court’s suggestion in the Bar Association of Belize case which is that there may be unwritten principles in the constitution that the court can rely on to deny the legislature its own constitutional right to amend the constitution. What is left to be determined is the basis upon which the court is going to identify these rights.

