Existing Law and the Implementation of a Bill of Rights:

A Caribbean Perspective

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Against a background of locally applied English common law, a body of statute law, rules of construction, maxims and modes of interpretation developed over centuries, and a rich case law derived from England, its Empire and Commonwealth, Guyana, Belize and the several island states of the Commonwealth Caribbean have proclaimed Fundamental Rights and Freedoms in their Constitutions,[1] in chapters familiarly referred to as Bills of Rights.

Two questions are raised by the introduction of a regime of constitutionally guaranteed rights into a system of existing law. The first relates to the creation of (or omission to create) a device directed at establishing the relation of the newly declared rights to existing laws.[2]

The second relates to the general impact of existing law on the perception of the rights declared and thus on the interpretive functions of the courts. In both cases, the ultimate issue is whether the apparently innovative significance of the rights will be given effective expression.

The Constitution Anticipates the Issue

Five Commonwealth Caribbean states[3] have attached to their Bills of Rights a provision described as a »special savings clause«[4] in the Chapter entitled Fundamental Rights and Freedoms. In the remaining countries the matter is left open by the omission of the clause.

Perhaps the greatest single challenge to the courts since the introduction of the constitutions, has been the application and interpretation of the special savings clause in

1 The Constitutions are in the main those adopted at Independence from Great Britain. The republican constitutions of Trinidad and Tobago and Guyana largely re-enacted, particularly in the first mentioned territory, the earlier Bill of Rights provisions. The constitutions of the earlier Bill of Rights provisions. The constitutions of the former Associated States reproduce in independence constitutions Bills of Rights of their Associated State constitutions.

2 See note 5 infra.

3 They are as follows: Barbados, s. 26; Trinidad and Tobago, s. 6; Jamaica, s. 26 (8); Guyana, Art. 152; and Belize, s. 21. In the case of Belize, the operation of the clause is for five years only.

4 For a discussion of the mechanics of the Special Savings Clause. See *Francis Alexis,* When is an Existing Law Saved. (1976) P. L. 256.

litigation alleging contravention of the rights and freedoms. To the judges falls the decision whether or not the clause is to be allowed to strangle the rights set out or whether judicial resourcefulness and breadth of vision can, within the apparently limiting affect of the clause, allow for the emergence from existing law – a not insubstantial part of which was designed for colonized peoples – of a rigorous and effective system of enforced rights and freedoms.

Subject to inter-territorial variation,[5] *Section 26(8)* of the constitution of Jamaica may be seen as typifying the basic premise of the clause. The section reads as follows:

> »Nothing contained in any law in force immediately before the appointed day shall be held inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.«

It is to be noted that the section does not deem consistent existing laws and actions thereunder, neither does it require them to be construed in accordance with the constitution. It therefore, allows courts to indicate that action or law is in derogation of rights but saved only by the shield provided by the clause.

In conjunction with the special savings clause must be considered the notion or indeed the dogma that the rights set out in the constitutions had been enjoyed (though not enforceable per se) *before* or at the time of the promulgation of the constitutions. The notion derives from the apparently innocuous indication of a present enjoyment in the settingout of the rights, either in the rhetoric of Trinidad and Tobago's, »It is hereby recognized and declared that there have existed and shall continue to exist« the specified rights, or in the blander and more common formula »Every person *is* entitled to . . .« From this, has been derived the proposition that, »these rights though now guaranteed have not been augmented by the constitution«.[6] In the same vein is the proposition that *post-constitutional legislation* cannot be held to encroach on a right or freedom if its terms could not have been properly regarded as an encroachment on the existing fundamental rights. The thrust of the contention is that the constitutional rights are to be enjoyed, in any event, only to the extent possible *before* the constitution. This historical approach, if applicable to those declared rights which were arguably incohate or indeed

5 The clauses in the constitutions of Barbados and Guyana specify »written law« as saved against the rights and freedom declared, so that, *prima facie,* acts done under the authority of the common law are challengeable in these territories as inconsistent with the provisions of the Bill of Rights. The meaning of »law in force« or »existing law« is generally defined separately, but in the constitutions of Guyana and Trinidad and Tobago, the range of existing law is incorporated in the clause itself by stating as in *section 6 (1),* Trinidad and Tobago, that the rights and dreedoms shall not invalidate:

(a) an existing law

(b) an enactment that repeals and re-enacts an existing law without alteration or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right. The definition of existing law then includes enactments referred to in the body of the clause.

6 Per Philipps, J. A. in *Lascalle* v. *Attorney General (Trinidad and Tobago)* (1971), 18 W.I.R. 379 at 396. The words quoted stated the conslusion; the premise on which it is based is only hinted at in the judgement.

non-existent before the constitutions,[7] would render them practically without effect even though key appear in the Bills; as for ›established‹ rights, their implementation would be limited to *pre-constitution* understandings of their scope.

The case law on the clause as such reveals two somewhat divergent trends. The one is illustrated by the duo of Privy Council decisions, *Maharaj,* v. *A.G. (T & T),*[8] *Thornhill* v. *A.G. (T & T)*[9] on the one hand, and on the other by *Nasralla* v. *The Director of Public Prosecutions*[10] and its progeny.

In *Nasralla,* the question in general terms was whether the statement of the right being litigated was to be co-existensive with the existing law on the subject. In approaching the question, the Privy Council judgement started, significantly, not with the special savings clause, but with the presumption that »the fundamental rights which it [the Bill or Chapter on Rights] covers are already secured to the people of Jamaica«.[11] Indeed, it was from this »presumption« that the Privy Council moved to the special savings clause. What was implied was that this clause was in some way postulated upon or justified by the »presumption of pre-constitution enjoyment«. This meant that the existing law already catered for the rights and freedoms so as to make them subject to it. The special savings clause was in effect derived from and justified by the presumption.

Section 20(8) of the Jamaican constitution, the right conferring provision litigated in Nasralla, reads thus:

> No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence.

Nasralla had been acquitted by a jury of murder, but no verdict had been reached on manslaughter. Having decided that the right stated in the Constitution had to be interpreted as co-extensive with the common law, the Jamaican first instance court, the Court of Appeal, and the Privy Council, interpreted the Common law,[12] from a wealth of material capable of producing divergent results, to deny Nasralla is claim *not* to be put on trial for manslaughter.

7 Two examples of ›new‹ rights may be found in Section 4 of the Trinidad and Tobago Constitution, namely, the right of the individual to respect for his private and family life; and the right of the parent or guardian to provide a school of his own choice for the education of his child or ward.

8 [1979] A.C. 385 (P.C.).

9 [1981] A.C. 61 (P.C.).

10 [1967] 2 A.C. 238 (P.C.).

11 Supra note 10 at 247.

12 The exercise can be summed up thus: (a) The »autrefois acquis« concept had to be reconciled with that of »double jeopardy«, so that the latter was to be given a restricted meaning, and could only operate where there had been »a conclusion by verdict«; (b) A jury hearing an indictment containing, the one count only of murder but not reaching verdict on manslaughter, had given a partial verdict and not a general verdict; (c) Juries can, in modern times, be required to give an alternative verdict.
As the jury had not been required to give a verdict on manslaughter it had neither convicted *Nasralla* nor put him in jeopardy of such conviction. The proposition at (c) was clearly not an established rule of law, but put forward as part of a »tidying up« of the law in the area, undertaken for the resolution of the issue before the court.

This case was the first to pronounce authoritatively on the impact of existing law on the Bills of Rights.

Based on *Nasralla,* relief has been denied in a line of cases brought under the redress clause of the Bills of Rights by applicants condemned to death. The view of the Privy Council in all the cases (by a majority in the last) was that the sentence of, *and/or*[13] the infliction of the death penalty for murder *could not be unconstitutional,* as this punishment was authorized by a law in force at the proclamation of the Constitutions. The Trinidad and Tobago cases litigated the *Section 4(a)* »right of the individual to life . . . and the right not to be deprived thereof except by due process of law«; and *Section 5(2)(b),* whereby Parliament may not impose or authorize the imposition of cruel and unusual treatment of punishment.

In *De Freitas* v. *Benny (Trinidad and Tobago),*[14] it was argued for the applicant that the carrying out of the death sentence (but not the sentence itself) was unconstitutional. After citing *Nasralla,* the only case referred to in the judgement, the Privy Council declared that the applicant's claim failed *in limine* as »sentence of death for murder . . . is mandatory under the *Offences Against the Person Ordinance* which was in force at the commencement of the Constitution«. At that point of the judgement, the validity of the *carrying out*[15] of the sentence seemed to hang from the constitutionality of the *sentence* but later in the judgement it was pointed out that another 1925 enactment (an existing law) specifically anticipated the carrying out of the death sentence. To be noted is the court's handling of an argument on the exercise of the *prerogative* power of mercy. In denying a claim, premised on natural justice, that the applicant was entitled to see the report of an Advisory (Mercy) Committee and to be heard by that Committee, the Privy Council said: »Mercy is not the subject of legal rights. It begins where legal rights end«. The legal quality of mercy – discretionary and not quasi-judicial – was based on the asserted similarity of the prerogative of mercy in Trinidad and Tobago and in England. The specific matter of the relationship or prerogative powers and newly guaranteed rights is returned to later.[16]

The main interest of *Abbot* v. *Attorney General (Trinidad and Tobago)*[17] was the recognition that the execution of the death sentence was part of a legal process, not ending with a judgement, and one that therefore had to be »due«. As a consequence, the *manner* of carrying out a sentence *could* contravene the notion of due process. And so, there could be contravention of the »due process« where the lapse of time between pronouncement of sentence and notice of execution was so prolonged as to make the defendant believe that the sentence had been commuted to life imprisonment. In the

13 The distinction which appears clearly in the case of *Abbot* (see infra) is largely blurred in the other cases in the series.

14 [1976] A.C. 239. (P.C.).

15 The term »carrying out« does not appear to refer to the method by which the death sentence is carried out but to the fact of its execution.

16 See infra.

17 [1979] 1 W.L.R. 1342 (P.C.).

instant case, the Privy Council allowed itself to be guided by the judgements in the lower court of Trinidad and Tobago as to what might constitute an unreasonably long period in dealing with an applicant for reprieve. Evidence and arguments as to the average »waiting time« on deathrow, in fact before the court, could not however be put in terms of existing law and *Nasralla* did not impinge on this discussion.

One detects a shift from the rigorous position on the »prerogative« and »the discretionary« expressed in *De Freitas*. If due process extends to the enforcement of judgements and the carrying out of sentences, then it can impinge on procedures relevant to the ultimate fact of reprieve or condemnation. The idea is however not made express in the judgement.

The most recent decision in the Nasralla mode is the Jamaican case of *Riley & Others* v. *Attorney General*.[18] The five applicants in *Riley* had been sentenced to death for murder between *March 1975* and *March 1976*. The last of the five appeals was dismissed in *January 1977* and petitions for special leave to appeal to the Privy Council had all been dismissed or abandoned by *October 1978*. Between April 1976 and January 1979, the death penalty had been suspended in Jamaica. But in January 1979, the Jamaican House of Representatives (unlike the Senate) voted to retain the death penalty and in *May and June 1979*, the Governor-General issued warrants for the execution of sentence on the applicants. The applicants then proceeded under the redress provision attached to the Bill of Rights, claiming infringement of *Section 17* thereof. This section proscribes torture, inhuman or degrading punishment or other treatment. *Section 17(2)* contains what is in effect a savings clause of its own, thus:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

The minority judgement in *Riley* is discussed in detail below.[19] The brief majority judgement reasserted the position in *De Freitas*, posited on *Nasralla*, and in its consideration of *Section 17(2)*, made the profound observation that »[a]n obvious instance of a description of punishment exceeding in extent that authorized by law would be the execution of a death sentence by burning at the stake«. This was followed by the assertion that since *»[t]he legality of delayed execution* by hanging, of a sentence of death *could never have been questioned before independence«*, *Section 17(2)* was satisfied and therefore *Section 17(1)* had not been contravened.

The »could never have been questioned« formula seems to be a device to avoid describing long delayed execution as actually lawful *before* the Constitution came into force. It also recalls the views discussed earlier, that action not challengeable under existing law is not to be challenged under the Bill of Rights. This denial of any innovative role for the Bills of Rights cuts across the spirit of the duo of cases in which the Privy Council took a view

18 [1982] 3 W.L.R. 557.
19 See infra.

which *prevented* the complete emasculation of the Trinidad and Tobago Bill of Rights and Fundamental Rights generally.

In *Maharaj* v. *Attorney General of Trinidad and Tobago (No. 2),* the facts were as follows: Justice Maharaj sentenced the appellant Maharaj, a barrister to seven days imprisonment for contempt. On that day, the appellant gave notice to the Attorney General that the High Court would be moved to declare that the sentence contravened the right not to be deprived of liberty without due process of law. The motion was dismissed at first instance and on appeal with one vigorous and cogent dissent. As, at that time, an appeal against conviction for contempt of court lay only to the Judicial Committee of the Privy Council, the appellant had also obtained leave to apply for the quashing of his conviction for contempt on the ground of a denial of natural justice. The Privy Council quashed the order on the ground claimed. Armed with this decision, their Lordships now had to decide to the final appeal on the constitutional motion. Had the applicant's liberty been taken away *unconstitutionality,* and if so, what was the appropriate form of redress? Their Lordships held that the failure to observe the principle of natural justice, as expressed in the rule requiring a person charged to be given an opportunity to answer, constituted a breach of the right *not to be deprived of liberty without due process of law.* The Court further held that the provision in the Trinidad and Tobago Constitution giving a »right to apply to the High Court for redress« without prejudice to any other action in respect of the same matter, had created *a new remedy.* Existing Law was engaged on two distinct points, albeit interrelated ones on the particular facts. Predictably, the special savings clause and the presumptions and premises discussed earlier, formed the basis of arguments against the appellant's claims. It was clear that the state would have had an absolute immunity to an action, prior to the Constitution, and it was also clear that the violation of the rules of natural justice had not, before the enactment of the Constitution, given rise to an *independent* cause of action, though breach of these rules would, certainly in other areas of the criminal law, form the basis of an appeal against conviction. The Privy Council decided that the special savings clause did not legitimize conduct which was *not lawful* under existing law. »There was no existing law which authorised that of which complaint was made.«[20] That having been decided, some logical space was left for the decision that the absence of a *remedy* at law as it existed at the promulgation of the Bill of Rights could not exclude the remedy set out in the constitution.

In concluding that a *new remedy* had been created by the redress provision, it was pointed out that some of the rights declared to exist were not, at the coming into force of the constitution, redressable by action in the courts. It followed that these had been »rights without remedy for breach« – a species that Lord Diplock described as »de facto rights« and an example of which was to be found in the Trinidad and Tobago constitution in »The right to join political parties and to express political views«. It then

20 [1979] A.C. 385, at 396.

followed that the absence of a remedy in existing law could not exclude the remedy of redress now given in the constitution and did not attract the operation of the special savings clause. The practical result of the State's argument that the absence of a remedy at existing law equalled no right was effectively refuted.

The problem of existing law in relation to the immunity problem before the court can best be highlighted by comparing the majority judgement, delivered by Lord Diplock, with that of the lone dissenter, Lord Hailsham. The latter argued that the necessary implication of the decision of the majority must be that under existing law there had been an action on the facts both against the state and the judge. Lord Hailsham's concern with the effect of existing law was altogether differently focused from that of the majority. His Lordship was concerned with the question as to whether proceedings could be brought for the wrongful activities of a judge. For him then, existing law was the rule or rules on judicial immunity. Lord Diplock, on the other hand, looked to see whether there was an existing rule of law which could shield the alleged breach of a right. There was none. While the dissenting judgement set existing law, i. e., the law on judicial immunity, against the redress section which was considered to be purely procedural, the majority decision gave that section a status independent of existing law. Further, by looking first at the substantive matter of breach of a right found to be *unshielded by existing law,* the majority in *Maharaj* eliminated from the constitutional jurisprudence of the region a role for immunity doctrines which in other countries had made all but non-existing actions for the infringement of rights.[21]

In *Thornhill* v. *Attorney General (Trinidad and Tobago),* the Privy Council completed the theorem on existing law, the first part of which was set out in *Maharaj (2).* The section litigated in *Thornhill, Section 2(2)(c)(ii)* of the 1962 Constitution (now *section* 4(2)(c)(ii) of the 1976 Successor constitution), declared that no Act of Parliament should »deprive a person who has been arrested or detained, of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him«. Thornhill had been arrested after a so-styled shoot-out with the police. Despite several requests to consult with his lawyer, it was three days after his arrest and after an identity parade that he was allowed to see his lawyer. The reason for the refusal was that the police feared that acceding to the request would make the obtaining of self-incriminating statements less likely. At first instance, the appellant was granted a declaration that the right set out above had been infringed. After a successful appeal by the state, the case fell to be decided by the Privy Council.

The case for the State was a remarkable twist on the »save and existing law« argument which seeks to curtail rights. It was accepted on both sides that no written enactment giving the right to consult a lawyer existed at the time of the promulgation of the constitution. Further, it was a fact that in *1965* the judges of Trinidad and Tobago had

21 This is exemplified in the United States, at both State and Federal levels. See N. Dorsen, P. Bender and B. Neuborne. I. Emerson, Haber and Dorsen's *Political and Civil Rights in the United States.* 1495–1528 (4th ed. 1976).

adopted the English *Judges Rules, 1964 with Appendix A*.[22] Principle (C) of these rules corresponded to but was not identical with the »right« as stated in the Trinidad and Tobago Constitution. Counsel for the State argued that no right to a lawyer existed at common law[23] and as there was no written law conferring the right, *Parliament* could not in any event abrogate or infringe it. In effect the right claimed by the appellant did not exist, but had wrongly been assumed to by the makers of the Constitution. The judges' rules and any actual according of access to a lawyer for a detained person amounted to mere practice involving no right. The Privy Council judgement, focusing on Section (1) and on the right not to be deprived of liberty without due process, asserted that the rights and freedoms referred not only to those enjoyed as a matter of legal entitlement, but those enjoyed *de facto* as a result of a settled policy of abstention from interference by the executive or a settled practice by way of administrative or judicial discretion. Section 1., which declared the continued existence of these *de facto* rights, had converted them into *legal* rights for whose contravention the constitution provided redress. The impact of *Sec. 3,* on these negatively created rights could then be expressed in these terms:

> »All that Section 3 [the special savings clause] does is to say that if the failure of the executive or public authority or officer to prevent individuals from acting in a particular way in the exercise of the rights or freedoms described in Section 1 was contrary to a mandatory provision of a law in existence at the commencement of the Constitution which required them to prevent it, then to that extent the *de facto* exercise of the right or freedom is not preserved and converted into a legally enforceable right by Section 1. In other words, Section 1 does not operate to repeal any existing law.«[24]

The pre-constitution practice of allowing access to counsel did not contravene an existing law. Here then, the *Nasralla* premise did not prevent an understanding of existing law, such as would widen the scope of a fundamental right.

The theorem partly enunicated in *Maharaj* and completed in *Thornhill* now reads: where rights are claimed under the Constitution, the special savings clause does not legitimize action not *lawful* under existing law, and equally it does not render without legal effect action not *unlawful* under existing law so as to deny in either case the existence of a fundamental right.[25]

Maharaj and *Thornhill* showed that existing law did not prevent the vindication of rights and freedoms where there would have been previously no cause of action. To that extent,

22 »The Judges Rules and Administrative Directors to the Police« were first formaly issued in 1912 and last significantly revised in 1964. They are meant to guide the police on proper procedure in the questioning of suspects and others, and the taking of statements. They are *not,* in English law, binding rules of law, and though their non-observance *may* lead to the exclusion of confessions and statements, this is in the discretion of the judge, once the statement or confessions are shown to have been made voluntarily. The rules can be found in [1964] 1 All E.R. 1114.

23 The first instance judge, taking a non-static view of the common law, was prepared to recognise a common law right to counsel, as existing at the time of the promulgation of the constitution.

24 [1981] A.C. 61, at 72.

25 In *Grant* v. *D.P.P.* [1982] A.C. 190, the Privy Council refused to extend the logic of Thornhill, by affirming the power of the Director to proceed on indictment without preliminary inquiry, though there had been an established practice of hearing such an enquiry.

the existing law clause need not have the effect of equating the pre- and post-constitutional status of rights and freedoms either as to their content or their enforcement. They thus deny one postulate on which the majority decision in *Riley* was founded, namely, that the action brought in that case could not have been conceived or maintained when the constitution came into force.

The cases considered above reflect some of the problems inherent in the clause and to which it addresses itself. Thus, the mere insertion of the special savings clause suggests that existing law could in fact contravene the provisions of the Bill, as understood by the constitutions-makers. At the same time, the clause, especially in conjunction with the *Nasralla* presumption (in fact a premise), could be taken to indicate that existing law reflected an acceptable level of recognition of rights and freedoms. But perhaps its most significant consequence lies in its impact on the meaning of rights. In form, the clause makes of existing law a shield, but, in effect, it defines. It is hardly right to say that the clause makes the rights prospective in application, by not saving »future Laws«, but rather the rights constitute what is left after existing law is taken into account. Admittedly, existing law is always there to play its part in the attribution of meaning to provisions of the Bill of Rights, as to any other part of the constitution. The presence of the special savings clause, however, compels the court to bring existing law into the interpretive process. The courts cannot and do not breakdown, into totally separate steps, the interpretation of the rights, the examination of the action or legislation complained of, and the finding of a breach. Therefore the application of the special savings clause becomes no mere shield but, as part of the process of adjudication, determines the extent and meaning of the right. Thus, before the Privy Council decision in *Thornhill,* taking existing law to deny a right to counsel would have meant that »due process« was to be defined so as not to include access to counsel. A similar analysis were advanced claiming that there was a right of freedom of assembly, as limited by existing law, on the date of the constitution. The judgement however declared. »If Section 1 of the Constitution is in the nature of a preamble, the argument that its purpose is to declare existing fundamental rights and freedoms fails. It is true that persons in the State enjoyed certain rights and liberties before the constitution came into force, but those rights and liberties existed only at common law and were not necessarily the same as those granted by the Constitution.«[27]

On this understanding of the matter, »present entitlement« looked not to the extent that rights were enjoyed up to the time of the constitution, but conceived the present entitlement as referring to the meaning of the rights set out in the constitution, and necessarily to any meanings that could be attributed to them *after* the constitution came into force. This illustrates that the *Nasralla* view of present entitlement is not logically required by words indicating a present enjoyment of declared rights.

The judgement of *Powell* took a technical point of some interest by considering the *general* savings clause to be found in all the Acts or Orders to which the Constitutions

27 Supra note 19 at 415.

are appended. The clause states that existing laws shall from the coming into force of the constitution be construed with such modifications, adaptations, qualifications and exceptions as may be would be applicable to the existing law giving immunity for judicial activities when made applicable, as in *Maharaj* (before the Privy Council judgement), to the right to bring an action claiming breach of a fundamental right or freedom.

Bill of Rights not containing a special savings clause

A feature of the Chapter on Fundamental Rights and Freedoms in the constitutions of those island-states formerly in Association with the United Kingdom, is the absence of the special savings clause. These Bills have been reproduced in their independence constitutions, and a case from pre-independent St. Christopher, Nevis and Anguilla was one of the earliest to indicate the path to be taken where an enactment predating the promulgation of the constitution was challenged as infringing a constitutional right. In *Chief of Police* v. *Powell* and *Chief of Police* v. *Thomas,*[26] legislation which had been enacted shortly before the promulgation of the Constitution, was declared void. The *Public Meetings and Processions (Amendment) Ordinance 1976,* required the prior permission in writing of the Chief of Police for all meetings, assemblies, etc., in »every public place«. The discretion of the officer being completely unregulated, the Ordinance was declared *ultra vires* the Constitution both as not reasonably required for the exercise of the police power, and as not reasonably justifiable in a democratic society.
Section 1. of the relevant constitution, in introducing the rights and freedoms, used the formula, »whereas everyone in . . . is entitled to . . .« From this, it appears arguments necessary to bring them into conformity with the relevant constitutions, imperial Acts and Orders. The learned judge declared that the effect of this on existing laws was to repeal the latter to the extent of their inconsistency with the constitution. The generalsavings clause, often considered as operating merely to change titles and names of offices etc. on a change of constitutional status, was here given the *substantive* function of invalidation. While this effect for the general savings clause of making contingent and unspecified part of the whole body of law is to be doubted, the function of the *general* savings clause as a rule of *construction,* where a given law or laws have been specifically preserved, is illustrated in the Privy Council decision in *Attorney General St. Christopher, Nevis and Anguilla v. Reynolds.*[28] In this case, the *Leeward Islands (Emergency Powers) Order in Council 1959* had been specifically preserved until a specified date by S. 108 of the relevant constitution. The Order was therefore constitutionally valid, and it was also existing law for the purpose of the constitution's *general* savings clause. The Order permitted the Governor of the territory to make such laws, during a period of emergency, *as seemed to him* expedient for the public safety, defence, and public order.

26 (1967) 11 W.I.R. 403.
28 [1979] 3 All E.R. 129 (P.C.).

By a regulation made under S. 3(1) of the Order, a person could be detained without trial »if the Governor is satisfied« that a person was involved in acts prejudicial to the public safety and order and that it was »necessary to detain« him. The plaintiff had been detained without cause (as admitted by the State) and sued successfully. The Privy Council did not declare the Order or Section 3 thereof *ultra vires* the constitution, but instead turned to the general savings clause and determined that the regulation had to be read subject to the Bill of Rights section which proscribed unlawful deprivation of liberty. The order then had to be read as permitting regulations only to the extent that they were reasonably justified for dealing with public emergency, and the regulation itself was construed so as to require the Governor General (title of the Head of State under more advanced constitutional arrangements) to be »satisfied *on reasonable grounds*«. Thus, given flexibility of attitude, and an express avoidance of formalism, the court could find the Order valid, without rendering nugatory the protections given the individual. Existing law was made subject to the constitution.

This approach may have been adumbrated by the case of *Beckles* v. *Dellamore*,[29] decided under the emergency provisions contained in the then Trinidad and Tobago Chapter on the Bill of Rights, which also contained the special savings clause. The Constitution set out the condition for the validity of a proclamation of the existence of an emergency, while the 1949 Ordinance (specially saved existing law), under which detention regulations were made, did not require the condition. The regulations were valid as in any event emanating from existing law, but the validity of the *proclamation* itself was impugned by the applicant as the *Ordinance* did not require compliance with the condition set out in the *Constitution*. The court decided that it would be incongruous not to *construe* the Ordinance with such modifications, etc. as to make the proclamation conform with the constitution, by stating one of two reasons for the declaration of a state of emergency. The purpose of conformity was to give effect to the object which the constitution intended to achieve. In the case of an emergency situation, which empowered detention, it was to advise persons wishing to challenge state actions taken during the period of emergency, of the character of the situation, regarded by the state as constituting the emergency. The proclamation was found to conform with the constitution.

The absence, then, of a special savings clause removes the fettering effect of existing law from the determination of the extent of a fundamental right and any breach thereof. Where special provision is made for a particular pre-constitution law, as in the *Reynolds* case, the resourceful court, can, by the mode of construction, and for the purpose of giving effect to the rights and freedoms, make the existing law conform to those rights.

29 [1965] 9 W.I.R. 299 (C.A.).

Existing Law and the interpretation of the Bill of Rights

A new Bill of Rights emerges from a background of prior understandings – legal and political – of individuals' and in some cases a group's relation to the State. Irrespective of any device designed to cater for existing law, the latter impacts on the Bill of Rights by virtue of its role in the process of interpretation of an attribution of meaning to proclaimed rights and freedoms, and in their application in particular cases. Rights set out as propositions of law are often of imprecise and of variable meaning, and in the discharge of the judicial tasks involved, judges quite naturally look to the state of existing law. The extent to which existing law shackles the court, and confines the understanding of the rights and freedoms is finally a matter of judicial perception. The willing judge can take existing law as his starting point, but can also distinguish; overrule in the case of common law concepts; pass plainly on the policy implications of one interpretation against another, in resolving the issue before him; or even, take into account, the policy of international conventions.

In *A.G (Bermuda)* v. *Fisher,*[30] the question before the court was the meaning to be attributed to the word »child«, as it appeared in *Section 11(5)(d)* in the Bermuda constitution. By this subsection, a person shall be deemed to belong to Bermuda if that person is ». . . under the age of 18 and is the child, stepchild or child adopted in a manner recognized by law of a person to whom any of the foregoing paragraphs of this subsection applies«. *Section 11,* forming part of the Chapter on Fundamental Rights and Freedoms, grants freedom of movement in and immunity from expulsion from Bermuda to ›belongers‹.

A declaration of belonger status, granted at first instance to the applicant parents, was overturned on appeal in Bermuda on the ground that »child« meant »ligitimate child« in traditional common law, one might say »existing-law« usage. On appeal to the Privy Council, that court asserted that given the antecedents,[31] both municipal and international, of the island's Bill of Rights, its width and generality, there was a need for a generous interpretation suitable to give to individuals the full measure of fundamental rights and freedoms involved and to protect them. To accomplish this, the common law meaning of child was abandoned, and though the judgement proceeded on the wider ground stated, the Privy Council then illusrated from the case law a trend to depart from the common law meaning of the word.

Where the body of law existing at the coming into force of the Rights and Freedoms is specially saved as against these rights, and where the notion prevails that rights have been declared to the extent of their pre-constitution evidence, then courts appear to ask in the words of *Pigeon J.* (dissenting) in the Canadian case of *The Queen* v. *Drybones,*

30 [1979] 3 All E.R. 21 (P.C.).

31 The Court referred to the European Convention for the Protection of Fundamental Rights and Freedom; the United Nations Declaration of the Rights of the Child; and the International Covenant on Civil and Political Rights. Of the latter two instruments it was said: Though these instruments at the date of the Constitution had no legal force, they are certainly *not* be disregarded as influences upon legislative policy.

»where is the extent of existing human rights and freedoms to be ascertained if not by reference to the statute books and other legislative instruments as well as to the decisions of the courts?«[32] The answer to the question is predetermined by the formulation of the question and the premise on which it is based. But even here, room for judicial choice remains, for, as in *Nasralla,* a multitude of decisions of the courts could lead to opposite views of the extent, in existing law, of a declared fundamental right.

Perhaps the most crucial aspect of the impact of existing law on the guarantee of Rights and Freedoms arises when the question of the meaning of right is converted into a historical search for a right already known in law and corresponding to the meaning claimed by an applicant. Such a search must generally be fore-doomed to produce no such right, and where the judiciary is committed to strict legalism, anything falling short of a strict right will not be considered. The celebrated case of *Collymore* v. *Attorney General Trinidad and Tobago*[33] illustrates. Here, the issue before the court was the meaning of the right of »freedom of association and assembly«. The court had been invited by the applicant to fine as a component thereof, the »right to strike«. The court was satisfied that the contested *Industrial Stablization Act 1965* abridged »the so-called right to strike and to declare a lock out«. The court was not therefore involved primarily in the exercise of measuring a piece of legislation against a provision of the Bill of Rights in the Constitution but was required to pronounce on the meaning of the stated right. The legislation concerned had been enacted subsequent to the constitution and therefore the special savings clause could not affect the court's deliberations. Further, the judgements make no express mention of the *Nasralla* presumption of entitlement as at the promulgation of the Constitution.

Notwithstanding, the Trinidad and Tobago Court of Appeal dredged[34] the common law and statute law of England to establish that in law, there existed not a *right* to strike, but an *immunity* protecting against legal proceedings for strike action. In the absence of a ›right‹ to strike in existing law, that ›right‹ could not be a component of the freedom of association.

There was little attempt to discover a substantive meaning for the stated right and indeed had that been done, the theoretical distinction between »right«, »freedom«, and »immunity«, pronounced without explication, might have been abandoned when it was considered that the constitution gave a *right* to something expressed in terms of the word »freedom«. Further, and somewhat alarmingly, the judgement of Phillips J. A. relying on English constitutional texts, found it necessary to observe that the right of freedom of association was often *not* classified, »as per se a liberty of the subject otherwise than as

32 [1970] S.C.R. 282, at 302.

33 [1967] 12 W.I.R. 5 (C.A.).

34 The historical excursus started with the medieval system of industry in Britain, and thence through the various Combination Acts, the history of mutual assistance associations in England, earlier Trade Disputes and Trade Union Acts and those enacted between 1906–27, with a passing reference to the *1933 Trade Union Ordinance [Trinidas and Tobago]* which reproduces in a limited way the English Trade Union Act (1875).

an emanation from other well established rights, namely, the rights of personal freedom, freedom of speech, and public meeting«.[35]

Existing law and indeed, »text«, came fairly near to ousting what should have been the predominance of the constitution itself, which clearly makes of freedom to associate, an independent right. The Court of Appeals' handling of the claim in *Collymore,* may be contrasted with that of the Privy Council, though the decision was unchanged. Eschewing the historical approach, the Privy Council concerned itself with the attributing of meaning to the constitutional text before it. In this way it properly conceived its task as one of *interpretation* in order to ascertain the nature of the right to freedom of association.

Collymore, too, offers a point of contrast with the case of *Thornhill.* In the latter, existing practice as a not unlawful executive concession was built into the content of a fundamental right. In *Collymore,* one arguably dealt with a stronger case for the inclusion of a legally grounded immunity, in the conception of a right. Indeed the fact that the immunity was part of existing law and therefore of the background to the constitution, might well have been deployed in the task of construction and interpretation with which the Court of Appeal was in fact presented. Perhaps the best explanation of *Collymore* in the Trinidad and Tobago courts, was that the historical search was used to hide the true basis of the decision, namely that it was for Parliament to determine the extent of the constitutional right litigated in the exercise of its general law-making powers for the peace, order and good government of the Stated.[36]

One turns finally to the powerful dissenting judgement in *Riley,* te facts of which have been stated earlier. The significance of this dissent is that without denying the preservation of existing law either through the special savings clause or *Section 17(2)* of the Jamaica Constitution, it arrived at a conclusion, or better took a path to its conclusion, more consonant than that of the majority with judicial preparedness to create a new jurisprudence of rights and freedoms For the minority, the fact that the sentence of death was in accordance with the law could not be determinative of the appeals.

The question was whether the carrying out of the sentence, in the circumstances which had arisen, was cleared of inhumanity and legalized because the death sentence was lawful before the appointed day; the majority merely asked whether the death sentence existed under the pre-constitution law.

According to the minority, the *inhuman treatment was* in the present case *punishment by death after prolonged delay.* Subsection (2) dealt only with description of punishment

35 Supra note 33 at 30.

36 This view was in fact expressed if a little indirectly in the judgement of the Chief Justice, which had earlier declared the court to be »guardian of the constitution«. Tagged onto the trade union history was the following observation:

> »But the freedom to associate confers neither right nor license for a course of conduct or for the commission of acts which in view of Parliament are inimical to peace, order and good government of the country. What is or is not inimical to the peace, order and good government the country is not for the courts to decide.

and could not validate inhuman treatment in subsection (1), merely because a particular punishment was an ingredient of alleged inhuman treatment.

The minority judgement made observations which are not only on the impact of existing law on conferred rights, but effectively took the view that these should be seen as acting upon existing law. The minority treatment of the relation between prerogative power and the enjoyment of the fundamental rights and freedoms is instructive.

The dissenters asserted that the Mercy powers of the Governor-General, though as a matter of history derived from the Crown's prerogative of mercy, was now statutory and part of a written constitution. The Governor-General was required to take certain steps and was obliged to act on the recommendations of Jamaica's Privy Council (having duties similar to the Trinidad and Tobago Mercy Committee in this area). The Governor-General's powers were viewed more as *legal duties* and it was concluded that the exercise of his powers were, »a classic illustration of an administrative situation in which the individual affected has a right to expect the lawful exercise of the power but no legal remedy; that is to say, no legal remedy unless the Constitution itself provides a remedy«.[37]

Citing *Maharaj (2),* the dissent asserted the existence of *de facto* rights for breach of which there might not necessarily have been a legal remedy available to the individual at a time before the Constitution came into effect. The applicants had a »de facto« *right* to the *proper exercise* by the Governor-General of the *discretion* vested by the Constitution to him.

After considering *Abbott,* the minority looked to see whether exercise of the Governor-General's discretion could infringe *Section 17(1). Executive power, seen in De Freitas as adsolute discretion,* had been translated into *legal duty* imposed on the Executive Head.

The judgement is in complete opposition to *Nasralla* and reaches its goal *via* the route set out in *Fisher.* It commenced with an examination of the »ancestry« of the Jamaica Constitution and the decision in *Fisher,* and asserted that the majority judgement had ». . . adopted in its construction of the Constitution, an approach more appropriate to a specific enactment concerned with private law than to be a constitutional instrument declaring and protecting fundamental rights«.[38] According to the minority, the contribution of the Constitution to Jamaican jurisprudence was to offer the protection of a written Constitution, as regards rights and freedoms recognized and acknowledged by law. *»Law means, both the pre-existing law so far as it remains in force . . . and the new laws arising from the Constitution itself* and *from future enactment.«*[39] (Emphasis added.) *Nasralla* had effectively postulated that where it was possible to give existing law a different meaning from that of a provision in the Constitution the existing law should prevail, the introduction of a *new judicial remedy* negatived any presumption that the

37 [1982] 3 W.I.R. 557 at 565.
38 [1982] 3 W.L.R. 557; 563.
39 Supra note 38 at 564.

remedies available under the pre-existing law were necessarily sufficient, and suggested that the protection of rights and freedoms needed strengthening.

It is clear that existing law will impinge on the judicial task of constitutional interpretation. As a result different judicial perceptions of the conferred rights can have varying impact on the constitutional protection of fundamental rights and freedoms. On one approach these are made subject to existing law, and both such laws and post-constitution laws may derogate from a stated right if the »derogation« does not go beyond that which existed before the promulgation of the Bills. Existing law thus becomes a defining limitation on the rights, in addition to those stated in the setting out thereof. And, the implementation of a regime of rights adds nothing to the pre-existing situation.

But courts have another choice which, while not denying the special savings clause, allows for the consideration of the particular case on the basis that the fundamental rights and freedoms are part of a regime of law, as is existing law. This approach denies the automatic search for existing law either to shield potentially right-infringing action or to measure derogation against pre-existing limits to the enjoyment of a stated right. Thus finally, it is sumitted that the judicial attitude to existing law must accomodate itself to a mode of constitutional interpretation which will secure the priory purpose of the Bill of Rights, namely, the protection of the individual against abuse of power by the State, whether the act be legislative, judicial, or executive.

ABSTRACTS

Existing Law and the Implementation of a Bill of Rights: A Caribbean Perspective

By *Margaret DeMerieux*

The introduction of constitutionally guaranteed fundamental rights and freedoms into an existing system of laws, requires the law-maker to take account of the impact of these laws on the new right and vice versa. A decision to preserve the validity of existing laws, effectively makes of them a set of limitations defining the extent of the new rights. In the Commonwealth Caribbean, some states have used the device of a savings clause to validate existing law *against* new rights. In other states the absence of a savings clause allows courts to pronounce existing laws invalid as infringing the new rights. In either case however existing law forms the background to the interpretation and understanding of the new regime, with implications for its effectiveness or otherwise. The article examines some of the problems raised in the Caribbean, in this area.

The IMF's Policy On Conditionality: A Legal Perspective

By *Wolfgang Engshuber*

When the IMF was founded at Bretton Woods in 1944, it was intended that this organisation should prevent global monetary crises such as those of the 1930s. Meanwhile the IMF has come to play a major part in the attempts to control the international debt crisis. Nearly every rescheduling of debt now requires a stand-by or extended arrangement with the IMF. These arrangements between the debtor nation and the IMF are a crucial issue in the discussions about a New International Economic Order.
Developing countries accuse the IMF of violating the principles of sovereignty and the equality of states.
The article describes the legal framework of the IMF's conditionality policy and points out the limits of the IMF's powers. Even the institution's own »Guidelines on Conditionality« accept that the Fund has to pay due regard to the domestic social and political objectives and the circumstances of members.
A clarification of the limited powers of the IMF is important for all interested parties. If the IMF should inappropriately pre-empt domestic political considerations debtor nations should insist on their sovereign rights, and social interest groups should take into