NIDS: Why it didn’t pass the constitutionality test
PRESIDENT’S MESSAGE

My tenure as President of the Jamaican Bar Association comes at a time of great change for the profession. We have seen the rise of artificial intelligence in the provision of legal services, combined with the increasing popularity internationally of legal outsourcing services. Consequently, unprecedented advances in communication and technology, many professions will need to be proactive in rethinking the way they operate and assess their overall usefulness to the effective functioning of a society. The Legal Profession is no exception.

Modernization will be one of the core focuses of my presidency. It is my intention to simplify how we communicate with each other, and by extension with the wider public.

Each publication of the Jambar Journal incurs great expense for distribution amongst our valued members. It is a challenging undertaking, but we have persisted, because we are of the belief that the content is relevant, impactful and imperative to our development as practitioners. Printing costs, however, have been rising and proving prohibitive.

Consequently, the Publications and Law Reporting Committee of Jambar have been examining whether we are using the most cost effective, modern and environmentally-friendly methods to disseminate our Journals to our valued members. We have decided to use this edition as a test, by producing parallel publications, both electronically and in print.

Change is never easy, but it is inevitable. Our profession has grown exponentially over the last few years and will continue to grow. For us to remain true to the core of who we are as Attorneys-at-Law, we must use available technology to us to communicate, help and hold each other accountable to the codes to which we are sworn.

As we move forward, it is my hope that it will be as a more connected and unified body, that operates for the betterment of all Attorneys-at-Law and our greater society as a whole. Happy reading!

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Address letters and comments to jambarpubcom@gmail.com

www.jambar.org

The views expressed by the contributors are not necessarily those of the Jamaican Bar Association.
Welcome Message
From Co-Chairpersons

We take this opportunity to thank the Jamaican Bar Association and its leadership for allowing us the opportunity to steward the Association’s journal as co-chairpersons. Our theme for this issue is “Governance” and we have had the pleasure of editing articles for this issue which look at different variations of this theme.

Our lead article, by Ms. Kathryn Williams, explores the constitutionality of the National Identification System, which has been recently challenged and analyses governance within the bounds of the Constitution of Jamaica. Mr. Christopher Harper looks at varying approaches to regulating abortion—an example of governance within the context of morality and privacy. Mr. Marc-Francis Ramsay explores E-governance and the challenges of a digital society. Our President, Mr. Emile Leiba, contributes to the literature of the Journal through the lens of employment law and corporate governance. Ms. Kristina Exell analyses management of solid waste regulations and its governance. In addition, Ms. Janelle Knibb provides useful case briefs of recent cases at the Court of Appeal.

New Additions
We have introduced new segments within the Journal, which includes an Opinion on Policy and “What’s New – An Overview” which reviews new regulations. Mr. Daniel Thwaites opines on the privatization of Wigton Windfarm Limited within the context of governance and the implications of privatization of publicly-held companies. Ms. Rochelle Haynes delves into the Transfer Tax and Stamp Duty Orders, which demonstrate further aspects of governance.

Copyright Protection
Building on the legacy of our predecessors, we have established an affiliation with JamCopy, to protect the copyright subsisting in the articles in the Journal. This is just another way in which our Committee has worked to ensure that the contributors’ work is recognized and potentially produces royalty revenue for the Jamaican Bar Association.

Peer Review
We have followed the tradition of our predecessors, and continued the peer review process, which has proved to be useful for both authors and reviewers in the completion of their work. By introducing a double-blind review, the independence of the review is preserved, and compelling and thought-provoking articles are produced. We have formulated guidelines for reviewers and supported the authors in ensuring the artistic freedom is preserved.

Electronic Journal/Layout
Finally, as discussed by our predecessors, the Jamaican Bar Association is in the process of introducing an electronic journal, which will enhance your reading experience through ease of access and improved searchability through the journals when conducting research. We are conducting a pilot launch, which involves the accessibility of the Journal on our website at http://www.jambar.org. Please let us know what you think!

As always, we are grateful for your support, and we are always looking for thought-provoking articles. You may contribute to the literature of the Journal, review articles up for publication or assist in the editing process.

Send us an email at jambarpubcom@gmail.com to write, review, edit, or provide feedback on the Journal. We want to hear from you!

The views expressed by the contributors are not necessarily those of the Jamaican Bar Association.

Happy Reading!
Francois McKnight & Justine Collins
NIDS: Why it didn’t pass the constitutionality test?

Kathryn A. Williams

The now struck down National Identification and Registration Act (‘NIDS’) has garnered a lot of attention in the media since the Bill was first tabled in Parliament in September 2017. NIDS was expected to replace all forms of identification with a single identification card and a nine-digit number. This would have been required for all Jamaicans and persons ordinarily resident in Jamaica to access certain public services including health and water services. However, in the landmark decision of Robinson v The Attorney General of Jamaica, the Full Court struck down the entire legislation as unconstitutional, null, void and of no legal effect. This article examines why the Court arrived at that decision.

NIDS prescribed that once a person met the criteria of a registrable individual, that is, that they were citizens of Jamaica and ordinarily resident here, they had a duty to apply to be enrolled in the NIDS Database. If they refused or failed to do so, without a reasonable excuse, then they would be liable on conviction to a fine not exceeding $100,000.00. "The NIDS database was to contain the identity and demographic information of registrable individuals, including an individual’s name and alias, date, time and place of birth, sex, height and principal and alternative places of residence." An individual’s biometric information was also to be included in the NIDS Database. The legislation made it mandatory to be enrolled in the database and to provide this information. In Robinson v AG, the Court found that this was a violation of the right to privacy and such an infringement was not demonstrably justifiable in a free and democratic society.

Section 13 (3) (j) of our Charter of Fundamental Rights and Freedoms (Charter) gives every person the right to respect for and protection of private family life, and privacy of the house and protection of privacy of other property and communication. Section 13 (2) (b) goes on to provide that this right may be limited where it is demonstrably justified in a free and democratic society. Therefore, an individual’s right to privacy can be limited by legislation where it is justified.

In Robinson v AG, the Court found that the wording of section 13 (2) (b) was critical as it meant that proportionality was now the test for constitutionality. In 2011, the Charter was amended to include this wording. Prior to this, it was the legal position that there was a presumption of constitutionality in that when a bill went through the legislative process to completion, we were all to presume that the proper process was followed and that the law was compatible with the constitution. In Robinson v AG, the Court observed that based on the 2011 amendment, the legislature made a deliberate choice of wording in order to bring about a particular approach to the interpretation of the fundamental rights and freedoms of the new Charter. Therefore, taken in the context of the new Charter, the presumption of constitutionality only applies to the extent that the law is presumed to be consistent with the constitution until a person establishes a case that the law has violated or is likely to violate his or her rights. Once that is done, the presumption of constitutionality has been displaced and from that point onwards the State must make the case for the justification of the infringement of the right.
For the State to establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. Second, once a sufficiently significant objective is recognized, it must be shown that the means chosen are reasonable and demonstrably justified. Therefore, the measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations, and the measure should hinder as ‘little as possible’, the right or freedom in question. There must therefore be proportionality between the effects of the measures which are responsible for limiting the right or freedom, and the objective which has been identified as of ‘sufficient importance’ – the more severe the effects of a measure, the more important the objective must be (Oakes Test). 7

Accordingly, the methodology for determining whether an abrogation or restriction of a fundamental right is permissible in a democratic state involves the consideration of the following questions:

- Is the legislative objective sufficiently important to justify limiting a fundamental right?
- If so, are the measures designed to meet the legislative objective rationally connected to it and are not arbitrary, unfair or based on unreasonable considerations? And
- Are the means used to impair the right or freedom no more than is necessary to accomplish such objective? 8

The Court in Robinson v AG referred to case law emanating from Europe (and other jurisdictions) on the circumstances under which an individual’s right to privacy may be abrogated by legislation. Article 8 (1) of the European Convention on Human Rights is similar, but not identical to section 13 (3) (j) of the Jamaican Constitution as it provides that: “everyone has the right to respect for his private and family life, his home and his correspondence.” In interpreting this article, the European Court of Human Rights (ECHR) has construed information relating to private life broadly as a concept which can include any information relating to an identified or identifiable individual.

In S and Marper v the United Kingdom 9, a case which was relied on by the Full Court, the European Court of Human Rights specifically held that the indefinite retention of both fingerprint and DNA profiles of an individual in an electronic database violated their right to private life under Article 8 of the Convention in circumstances where they had not been convicted of a criminal offence. The Court was of the view that the concept of ‘private life’; was a broad term not susceptible to exhaustive definition. It covered the physical and psychological integrity of a person and could therefore embrace multiple aspects of the person’s physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fell within the personal sphere protected by article 8. Therefore, the mere storing of data relating to the private life of an individual amounted to an interference within the meaning of article 8.
In Madhewoo v State of Mauritius and another, another case which was relied on by the Full Court, one of the issues to be determined was whether the provisions of the National Identity Card Act 1985 in Mauritius which required that a person’s fingerprints and other biometric information be registered on a chip, violated a citizen’s constitutional right of protection of their person and property against a search except with his consent. The Supreme Court of Mauritius held that the taking of fingerprints fell within the scope of that protection, and that the provisions of the 1985 Act which enforced the compulsory taking and recording of fingerprints disclosed an interference with the appellant’s rights under the constitution. However, the Supreme Court went on to find that this interference was justified in the interests of public order, and that it had not been shown that the provisions were not reasonably justifiable in a democratic society. It should be noted that in Madhewoo, the government put forward extensive evidence to show why the legislation was necessary in order to combat certain issues such as identity fraud.\textsuperscript{11}

The Privy Council upheld the Supreme Court’s decision as they were of the view that the legal framework of the National Identity Card Act pursued the legitimate purpose of establishing a sound and secure identity protection system for Mauritius and thus answered a pressing social need affording indispensable protection against identity fraud. Such a purpose was vital for proper law enforcement in Mauritius.

From the above, it is easy to see why the Full Court determined that the mandatory provision of biometric information is an interference with an individual’s private life. It was therefore the Government’s burden to prove that such an interference was demonstrably justifiable in a free and democratic society, but it failed to do so. The court had to balance the competing public and private interests and answer the three (3) critical questions in determining the proportionality of the legislation: Is the legislative objective of NIDS sufficiently important to justify limiting a fundamental right? Does the provision of biometric information meet the legislative objective or is it arbitrary, unfair or based on unreasonable considerations? Lastly, is the provision and storage of biometric information no more than is necessary to accomplish the legislative objective?

From the judgment in Robinson v AG, it appears that the evidence relied on by the Government did not assist in proving that the legislation was proportional. In fact, Sykes CJ dedicated an entire portion of his judgment to analysing the Government’s evidence and made this observation: “No cogent evidence was presented in support of the view that unless implemented in its current form including criminalisation for failing to register was the means that impaired privacy rights the least.”\textsuperscript{12}
The affidavit filed on behalf of the Government exhibited the white paper on the NIDS policy. The white paper indicates that the policy is to provide a reliable means of efficiently verifying the identity of every citizen through a single and authoritative source of trusted identity. It also averrs to issues arising from the non-existence of a national identification system including, inter alia, social exclusion of the poorest due to lack of basic legal identity documents, fraud within social benefit programmes, identity theft and that there are also errors in some official records (incorrect and misspelled names, wrong addresses and missing data fields). The objectives of the Act also include providing a primary source of verification of the identity information of individuals. The Court found that these were not sufficiently important objectives to justify the mandatory provision and storage of an individual’s biometric information. Sykes CJ had this to say:

“The White Paper makes broad statements about social and financial exclusion, fraud and double-dipping in social benefit programmes, identity theft for use of birth certificate and passport of deceased persons. Again, no data indicating the extent of the problem were presented in this hearing. There is no indication of how many instances of the use of deceased persons’ birth certificates and passports to see whether the problem is so severe that requires criminalisation and mandatory taking of biometric data in order to ensure registration. There is no evidence that the passport issuing system has been so compromised that the passport is no longer a reliable document for identification purposes and to stop it, criminalisation of the population is the least harmful means to achieve the objective of registration. Are we using a nuclear weapon to kill a mosquito?”

There are other provisions in the legislation, including authorizing the disclosure of information for the prevention or detection of a crime, which suggest that another legislative objective was to assist with law enforcement; however, it does not appear that the Government presented any evidence of this before the Court. This is in direct contrast to Madhewoo where the government of Mauritius put forward cogent evidence of not only the legislative objective of the Identity Cards Act 1985 but also as to why the measures implemented were necessary.

NIDS was not a new concept. The Government of Jamaica has been deliberating on the introduction of a national identification system since the 1970s. In 1990, the Electoral Advisory Committee made a recommendation to the then Honourable Minister of Justice (who was responsible for electoral matters) for the establishment of a body to implement a National Registration System. By way of Cabinet Decision No. 33/1993, the Cabinet approved the establishment of a National Registration Unit in the Ministry of Health in 1993. In 1995, Cabinet gave approval for the tabling of a National Registration Bill and that Bill was not presented to Parliament until 2000. In 2006, the Bill was withdrawn for redrafting and resubmission at a later date, and in 2011 approval was given for the National Registration Unit to be transferred from the Ministry of Health to the Office of the Prime Minister. NIDS has therefore been in the making for a long time and has had varying purposes over the years. Why then is it that the Government could not produce satisfactory evidence as to its importance and proportionality? In the absence of this important evidence, it was almost inevitable that NIDS would not pass the test for constitutionality.

The Government has indicated that it has chosen not to appeal the decision in Robinson v AG but will instead draft a new bill. It will be interesting to see what this new bill entails and if it is subject to a similar constitutional challenge.
Decriminalizing abortion in British post-colonial Caribbean territories (Part I)

INTRODUCTION

During the period of colonialism, the character and substance of the English common law was imposed upon former territories, some of which currently form the Commonwealth Caribbean. Many of these British post-colonial territories, despite obtaining political independence, have since maintained a legal tradition that upholds “the form, structure, substance and content of the law” as it was dictated in historical England. The 1861 Offences Against the Persons Act (“OAPA”), is one example of English legislation that has been realized across territories and has been retained by many. This legislative remnant has characteristically stifled the ability of many Caribbean states to progressively address the issue of criminalized abortion which, according to some, encourages women to seek out unsafe abortions that inherently place them at great risk.

Under the OAPA, procuring an abortion or attempting to procure an abortion is considered a criminal offence that attaches a penalty of imprisonment. These particular provisions were enacted at a time when society was on the “brink of the beginnings of a modern world”, and had not recognized the legitimacy of women in many respects. Accordingly, the 1861 statute, as described by some, was seen as an instrument that “reflected archaic and highly conservative attitudes to gender norms, female sexuality and fertility control”. Despite the progress made by the United Kingdom (“UK”) to provide modern solutions to women who seek out abortion services consistent with “clinical science and moral values of the 21st century” within its own jurisdiction, the statute itself has survived untouched in many former-British colonies.

The failure to provide legislative relief that “prevents harm to women and prevents or condemns the intentional destruction of foetal life outside of medically controlled circumstances”, exemplifies the contention that exists within post-colonial territories. In fact, contrary to the relative progress achieved by the former colonial power in providing lawful circumstances for abortions to be performed, such progress remains largely unseen in most Caribbean countries. While countries like Barbados and Guyana have taken steps to decriminalize abortion, other Caribbean territories, such as Jamaica, are still struggling to navigate this conversation.
Decriminalizing abortion in British post-colonial Caribbean territories

In identifying a framework that will address the issue of the decriminalization of abortion in Commonwealth Caribbean territories, it would be useful to examine the approaches explored and employed across the United Kingdom in seeking to address the issue. This paper will examine whether the legislative progress and legal landscape of the UK can provide a reasonable framework or justification for Caribbean territories in their efforts to decriminalize abortion. Furthermore, it will seek to reconcile the utility of a public health, human rights and autonomy-based approach in shaping Caribbean jurisprudential developments around the decriminalization of abortion. Finally, given the limitations, this paper will attempt to assess the current laws of Jamaica and Barbados, countries with contrasting positions on the issue of abortion, against the conclusions reached in this paper.

EXPLORING ABORTION AND THE LAW IN THE UK

"The wholesale and indiscriminate transplantation of the English criminal law and the Court decisions into the Caribbean States during the British colonial hegemony and their uninterrupted continuation even after emergence of certain islands into fully independent statehood would call for an inquiry into the English jurisprudence on the subject".

Examining the legislative process embarked upon by the UK in addressing the criminalization of abortion must commence from an assessment of its history. From criminalization to the acceptance of therapeutic abortions to state regulation of therapeutic abortion procedures, the UK has actively sought to reconcile the contention between maternal and foetal interests. This process has arguably demonstrated a gradual shift from an absolute restriction facilitated by the criminal law to a greater relaxation of the law enabled by the legitimacy afforded to modern medical interventions. Scholars have suggested that "the problem of abortion did not present itself in the terms in which it is seen today". The criminalization of abortion, characterized by the adoption and enforcement of the OAFA, represented a move to maintain a status quo consistent with the "punitive values of mid-Victorian Britain". There was a stark lack of public interest in abortion as a social problem. Furthermore, the absence of parliamentary debates around the substance of the legislation during the late 19th century reinforces the position that society in the 1860s had not established an apparatus that enabled an open and objective discussion on any aspects of sex. The OAFA engendered no public or professional comment and the problem of abortion was not, at the time, open for discussion.
The 1861 version of the OAPA, applicable to England, Wales and Northern Ireland ("NI"), therefore, made no exception for therapeutic abortion; identified no defence for medical practitioners and provided that attempts to procure an abortion were punishable by imprisonment. In particular, the 1861 OAPA stipulated that a woman, "being with child . . . who with the intention to procure her own miscarriage . . . unlawfully administers to herself any poison or other noxious thing, or . . . unlawfully uses any instrument or other means whatsoever with the like intent shall be guilty of a felony."\(^\text{13}\)

In considering the substance of the abortion provision, the notion that the OAPA offered no distinction between abortions earlier and later in pregnancy created a gap that would later be filled by the 1927 \textit{Infant Life Preservation Act} (ILPA). While the ILPA did not itself intend to regulate abortions\(^\text{14}\), it sought to close a loophole whereby "someone who killed a baby during the process of spontaneous birth would commit neither the offence of unlawful procurement of abortion nor murder, if the child did not yet have an existence independent of the mother and therefore was not yet a person in being."\(^\text{15}\). The ILPA therefore, established adequate protection for a child killed during birth and supplemented the second phase of English law which induced greater acceptance of therapeutic abortions. Section 1(1) of the ILPA prohibits the intentional destruction of 'the life of a child capable of being born alive . . . before it has an existence independent of its mother'\(^\text{16}\), unless the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother\(^\text{17}\).

The nuances between the OAPA and ILPA raised issues about culpability and the scope of protection afforded to professionals but the latter provided a basis upon which the common law standard, as determined by the \textit{Courts in R v Bourne}\(^\text{18}\), was reasoned. In this case, contrary to the provisions of the OAPA, an obstetric surgeon performed an abortion, on a 14-year-old girl who had been violently raped. This case tested the 1861 OAPA by evaluating the meaning and effect of the word 'unlawfully.' Justice Macnaughten stated that the word 'unlawfully' was not a meaningless word and it was of vital and decisive significance in the case and to the law as it was to be subsequently interpreted\(^\text{19}\). The statutory defence as outlined in the ILPA of an act done in good faith for the strict purpose of preserving the life of the mother influenced the reasoning in the case of Bourne. In directing the jury, the learned judge expressed the opinion that a lawful abortion was in fact permissible if Section 58 of the OAPA imported the meaning expressed by the proviso in Section 1(1) of the ILPA; thereby suggesting that the words of the OAPA should be read as if the offence were qualified by a similar condition\(^\text{20}\). The judge offered that "if the doctor is of opinion on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would be to make the woman a physical wreck . . . the jury is entitled to take the view that the doctor . . . is operating for the purpose of preserving the life of the mother".

This view has since been established as the common law standard that recognizes the intention to preserve the life of the mother as an act which renders an abortion lawful; a position subsequently interpreted to include both physical and mental health\(^\text{21}\). The Bourne case was celebrated for its development of the common law criminal jurisprudence by acknowledging the legality of therapeutic abortions under the 1861 Act.

\(^{13}\) Section 18, OAPA, 1861

\(^{14}\) R v East & District Obstetrician, [1927] 2 KB 351

\(^{15}\) Section 58, ILPA, 1927

\(^{16}\) ibid

\(^{17}\) ibid

\(^{18}\) [1927] 1 KB 467

\(^{19}\) ibid

\(^{20}\) ibid

\(^{21}\) ibid
Despite the evolution driven by Bourne, regulation of abortion through English statutory law did not materialize until the 1967 enactment of the Abortion Act. This Act “confirmed the medicalization of abortion in England, Scotland and Wales … and replaced the common law.” In essence, the Abortion Act not only enacted regulatory conditions which direct the performance of an abortion, but it also outlined the circumstances in which an abortion may be lawfully performed. The provisions of the Act set out that an abortion will be lawfully permitted, up to 24 weeks gestation, where a pregnancy is terminated by a doctor in good faith in circumstances where it would involve risk to the life, physical or mental health of the pregnant woman or any existing children of her family, or the child to be born would suffer from such physical or mental abnormality as to be seriously handicapped. The 1967 Abortion Act therefore, gave strength to the Bourne ruling by embodying the position that a registered medical practitioner shall not be bound by the HPA’s technical conditions.

In further examining the UK legal reform process, the actions of the legislature will be evaluated across three (3) thematic areas, namely public health, human rights and individual autonomy.

PUBLIC HEALTH APPROACH

The conditions that existed in Britain during the early 20th century alongside the changing social attitudes necessitated the regulation of abortion, particularly from a position that acknowledged the importance of individual health and more widely, public health. The Bourne case, arguably the first attempt by the Courts to resolve the issue of lawful abortions by adopting a health-based approach, arguably established the context for which the public health-based approach could be developed.

Using Bourne as a marker, it would be prudent to argue that implicit in its reasoning was the Court identifying that a critical component of the lawfulness of an abortion was the fact that “a person cannot perform the operation, irrespective of good faith, unless he or she is a qualified medical practitioner.” Bourne, regarded as a case of “great significance to the public and, more especially, to the medical profession,” considered that the procurement of an abortion by an illegal abortionist runs contrary to a health-based approach and creates a position that favours acts performed by skilled and qualified professionals. The legitimacy therefore extended to medical professionals as the gate-keepers of access to safe abortions amidst the social context that existed at the particular time represented a shift in thinking that contributed to the demand for a public health-based approach which culminated in the enactment of the 1967 Abortion Act.

The common law standard which recognized the importance of skilled medical professionals was realized by the 1967 Act. It placed medical professionals at the helm of the decision-making process to enable an abortion in circumstances where the physical or mental health of the mother or foetus was at risk. The scope and nature of the 1967 Abortion Act demonstrates the extent to which the UK legislature sought to respond to the growing public health concern. Research suggests that “one of the principal reasons advanced for passing the Abortion Act was that it would reduce the number of illegal abortions which were being carried out before 1967.” It has been claimed that its enforcement directly resulted in a reduction in the number of illegal abortions performed. The liberalization of the law as a public health measure therefore, saw termination being regarded as a safer option as opposed to carrying a risky pregnancy to term, and the establishment of an enabling environment which saw “abortion becoming entrenched as a normal part of routine healthcare” where women were able to access “safe, high quality, state-funded services” ordinarily within the first trimester of their pregnancy.

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13 Grade in E: 661 - 662.
15 Bland et al (1976) 18
16 Bland (in 15)
18 Ibid
19 Bland (in 15) 104
20 Ibid
HUMAN RIGHTS APPROACH

Northern Ireland (NI), a country which only recognizes the standard set out in Bourne, has been consistently pressured to widen the exceptions to include termination of pregnancies that arise as a result of rape or incest or where a woman is pregnant with a child which suffers from a fatal foetal abnormality. It is argued that the existing status quo represents a violation of and interference with a woman’s human rights as well as the country’s international human rights obligations.

In 2013, the Northern Ireland Human Rights Commission (NIHRC) 30 brought judicial review proceedings challenging the compatibility of the law on abortion in NI with UK human rights commitments. The application raised questions about the legality of abortions performed when a woman is faced with a situation where she must endure a pregnancy against her will. Notwithstanding the fact that the NIHRC case does not substantively undertake a human rights-based approach, the extent to which the Courts have relied upon human rights to advance the position that persons in particular situations of vulnerability should have access under the current law is persuasive. This particular issue unveils the necessity of examining decriminalization from a school of thought that inherently upholds a woman’s right to have control over and decide freely and responsibly on matters related to her sexuality, including sexual and reproductive health, free of coercion, discrimination and violence 31. Nevertheless, a critical point in reconciling this divergence was the subsequent attempt by the Supreme Court judges to engage with the question of whether abortion laws in NI infringed the standards set by the European Court of Human Rights, NI, as a member of the European Union, sought redress pursuant to the provisions of the European Convention on Human Rights (“ECHR”).

Despite the overall judgment, aspects of the reasoning proved useful as a majority of the Court did consider that the law in NI is “disproportionate and incompatible with Article 8 of the ECHR—the Right to Privacy—in so far as it prohibits abortion in the circumstances of rape or incest or where the foetus has a fatal foetal abnormality”. The reasoning suggests the current law is an “interference with the right of pregnant women and girls to respect for their private lives”. Lady Hale articulated that while for many women, becoming pregnant is an expression of autonomy, those who become pregnant or who are obliged to carry a pregnancy to term against their will experience one of the greatest invasions of their autonomy and bodily integrity 32. Her submission supports the premise that the “community has an interest in protecting the life, health and welfare of the pregnant woman” 33. This case represents the first of its nature to consider NI abortion laws in substantive terms, and the first to identify a human rights incompatibility 34. It is therefore reasonable to argue that the importance of centring human rights in response to the reduction of harm directly linked to vulnerability allows for a developed view that supports the incorporation of a human rights-based approach in tackling the issue of decriminalizing abortions.

30 IR(D) 2013/001
32 NIHRC in para 21
AUTONOMY APPROACH

According to some schools of thought, there are two main ways of arriving at a decision as to whether an abortion should be performed—a decision made as a matter for medical discretion or where it is made a matter for the woman herself to decide. Legal reform that supports the latter, reinforces the importance of respecting patient autonomy that recognizes women as authors of their lives. Adopting an autonomy-based approach is one that regards autonomy as “decision making by a competent individual which may affect various aspects of their life and physical self, in some aspects, potentially for an indefinite time.” It is a liberal concept “rooted in the idea that individuals should be able to pursue their own goals according to their own values, beliefs and desires.” The right to self-determination, a condition necessary for effective autonomous decision-making in health care, is of particular importance to women who decide whether or not they wish to carry a pregnancy to term. Failure to respect this right has the potential to compromise autonomy. This particular approach recognizes that present day societies are pluralistic and secular and should maintain the personal freedom of individuals as supreme. As suggested by some, legal reform which enables abortions that are consistent with the exercise of patient autonomy is a critical component of mainstream healthcare and current medical practices and would ultimately serve to modernize these archaic laws.

As suggested by some, the 1967 Abortion Act, prima facie, does not permit a doctor to perform an abortion whenever a consenting adult woman requests one and the doctor is willing to perform it. At the time when it was being deliberated, limitations were outlined in an effort to balance the nuance that was created by the choice determination. It has been argued that to expect doctors to act in accordance with the orders of a patient against his or her own judgment would strike at the heart of good medical practice and place their patients at a significant disadvantage especially in relation to the uncertainty associated with the outcomes. However, despite this line of reasoning that dominated the 1970s, there has been a gradual shift in the social and legal developments over the last five decades, which "points away from a model of the relationship between the doctor and patient based upon medical paternalism." The common law articulation of patient autonomy which outlines that "a medical practitioner must comply with clear instructions given by an adult of sound mind as to the treatment to be given or not... whether those instructions are rational or irrational" highlights the shift in medical law. It therefore seems persuasive that the law, in giving greater legitimacy to the right to patient autonomy, calls into question the 1967 approach that relies upon an assessment of a woman’s reasons for desiring to terminate her pregnancy.

Part II of this article shall focus on the contrast of the Commonwealth Caribbean position on legalizing abortion from that obtained within the UK to enable an assessment of the most suitable approach in responding to the issue of discriminating abortion in the region.
Recently, the public’s awareness of and participation in waste management has been raised by the ban on single-use plastic bags. This type of programme would be in line with Jamaica’s national development goals, namely the Vision 2030 National Development Plan, (“Development Plan”) which is Jamaica’s long-term strategic economic plan. The following is an overview of proposed changes to Jamaica’s Municipal Solid Waste Management (MSWM) legal framework which would be consistent with the Development Plan. In particular, it is submitted that an adequate MSWM framework should make provisions for:

i. source separation of waste and/or;

ii. user fees for waste recovery.

Below is an illustration of how these proposals for waste management would align with the Development Plan:

**National Goal No. 4** - Jamaica has a healthy, natural environment

**National Outcome No. 13** - Sustainable management and use of environmental and natural resources

**Strategy** - Integrate environmental issues in economic and social decision-making issues and processes

**Strategy** - Manage all forms of waste effectively - the development of a comprehensive waste management policy and associated standards and regulations; integrate communities and private sector participation in the management of waste; promote awareness among the general public to influence waste management practices.
MUNICIPAL SOLID WASTE MANAGEMENT (MSWM)

Generally speaking, MSWM includes “the collection, transfer, treatment, recycling, resource recovery and disposal of solid waste in urban areas.” Advancements in MSWM should include, among other things:

- The formulation of appropriate by-laws, regulations and standards, and integration of MSWM into the relevant legal framework.
- Practical guidance and tools to assist governments to improve user cooperation and participation, and establish low-cost community-managed collection services.

In Jamaica, the management of solid waste is dealt with under the National Solid Waste Management Act. This Act makes provision for the control and management of solid waste, to include collection, transportation, reuse and recycling, licensing, and enforcement. Solid waste is therein broadly defined to include “solid, semi-solid or contained gaseous or liquid matter resulting from industrial, commercial, mining or agricultural operations or domestic activities.”

Under the Act, the National Solid Waste Management Authority (NSWMA) has the responsibility for regulating and managing solid waste in Jamaica. In particular, pursuant to section 4 of the Act it must: ensure that waste is collected and disposed of in an environmentally sound manner with a view to protecting public health; enforce compliance with the Act; publicly promote the importance of good solid waste management; and operate a licensing scheme for operators of solid waste disposal and management plants.

Under section 68 of the Act, the NSWMA has the power to make regulations for:

i. effecting standards, recommended practices and health requirements for solid waste management and disposal facilities;
ii. minimum standards for disposal facilities;
iii. minimization and recycling of solid waste; and
iv. procedures for the issuing of licences.

In line with the strategies under the National Development Plan, the NSWMA has taken steps towards achieving increased environmental management, and utilizes standards in relation to its solid waste management options. Additionally, there are currently three draft regulations related to improving solid waste management practices. One is the National Solid Waste Management (Disposal of Solid Waste Facilities) Regulations, which propose to license all facilities that dispose of solid waste, and provide for the kinds of material which may be disposed of at disposal sites and the method of such disposal. The second draft is the National Solid Waste Management (Public Cleansing) Regulations. They are intended to set out the required storage, transportation and disposal of waste, and provide penalties for breaches of these requirements. Additionally, they are intended to set out the roles and responsibilities of the NSWMA, waste handlers and citizens in respect of this waste management. The third draft is the National Solid Waste Management (Disposal of Hazardous Waste) (Electronic and Electrical Waste) Regulations, which are intended to make provisions for the disposal of hazardous and electronic waste (e-waste). Otherwise, the only regulations passed and in force in Jamaica under the Act relate to littering offences and penalties.

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Not only is an MSWM legal framework important, but there must also be in place mechanisms to enforce compliance. The lack of incentive to comply (due to low penalties, for example) perpetuates a culture of not caring for a healthy environment, and for initiatives such as waste separation at source and the payment of fees for waste management services.

**SOURCE SEPARATION**

Source separation of waste refers to “putting waste out for collection in separate containers.” The advantages of source separation include:

1. reducing the amount of overall waste disposed of at disposal sites (and, in particular, redirecting organic waste away from such sites); and
2. reducing the amount of methane emissions that result from the degradation of these compounds found in organic waste.

One way of improving the level of separation of waste is to engage with the citizens about its importance, as a gateway to making it a household waste management habit, and to convert this habit into a legal obligation.

By way of illustration, in September 2009, India’s Ministry of Environment and Forest issued the Municipal Solid Wastes (Management and Handling) Rules ("the Garbage Handling Rules"). The provisions of these Rules include: prohibition of open waste disposal and provision of covered receptacles; prohibition of littering by ensuring separate waste storage for biodegradable material and recyclable material; collection of waste at pre-set times, including that in slums; treatment of biodegradable waste; and restriction on landfills to only non-biodegradable waste. The Rules also compels individuals and establishments to comply with, among other things, source separation of waste. The said Rules provide that:

It shall be the responsibility of generator of wastes to avoid littering and ensure delivery of wastes in accordance with the collection and segregation system to be notified by the municipal authority.

The Rules, in turn, require the government to promote this compliance and to implement programmes for segregation of waste at source:

In order to encourage the citizens, municipal authority shall organise awareness programmes for segregation of wastes and shall promote recycling or reuse of segregated materials.

The Municipal Authority shall undertake phased programmes to ensure community participation in waste segregation. For this purpose, regular meetings at quarterly intervals shall be arranged by the municipal authorities with representatives of local resident welfare associations and non-governmental organizations.

Indeed, an approach to waste separation that aims to encourage and incentivize, rather than penalize, may be more persuasive to the public. For example, in 2012, the New York Sanitation Department embarked on a pilot project to encourage waste separation to facilitate collection and transfer to composting facilities. This pilot project was mandated by law to be carried out for three years. The project was carried out in select schools, households and residential buildings. The project was voluntary for households but was reinforced through advertisements. Champions of residential communities were selected to assist in reinforcement. The residential committees were tasked with making sure waste was collected in designated bins and delivered to curb. By 2014, there was an increase in the organic waste diversion rate at source. This is an example of community engagement, backed by the force of law. A pilot project of this nature to enforce waste separation therefore requires long-term commitment.
There are currently no rules in force in Jamaica mandating source separation of waste. While there are pending regulations relating to how solid waste must be managed in the future, it is not yet clear what, if any, specific provisions will be made for source separation. Meanwhile, the local authority has organized, over time, activities aimed at incentivizing the public to exercise greater environmental responsibility, including projects to encourage source separation. For example, in 2012 the NSWMA commenced a plastic separation pilot project in select communities. In 2016, the Jamaica Social Investment Fund (JSIF) and the NSWMA commenced a nationwide community composting/waste separation project. Environmental warlords were trained to supervise and monitor execution, and bins were distributed in six (6) parishes to assist with separation of plastic, organic and other waste. This year’s theme for National Solid Waste Day focused on promoting composting in homes and schools. It is submitted that enforcing separation of waste solely under pain of penalties and fines may not necessarily be enough to procure acceptance (and compliance), and that a combination of appropriate regulations along with public education would be necessary.

**USER FEES**

Appropriate penalties or fines (for non-compliance with the relevant standards), or charges or taxes (which act as incentives or disincentives) have the power to modify waste management behaviour. In this regard it is submitted that the concept of the user fee as a charge or tax is worthy of consideration. User fees would allow local government to direct more of its funding away from general waste collection and disposal, and towards other activities aimed at waste reduction and protecting the public health and environment (such as public sensitization and waste processing facilities). However, care must be taken not to impose user fees that the public is not willing, or able, to pay. It has been noted that the income levels in developing countries may not be "enough to sustain successful programs since usually the users do not have the economic capacity to pay for these kinds of services."  

If user fees are to be pursued, one compromise may be to charge fees as a function of the socioeconomic level of different zones. However, care must be taken that user fees are not too low (and thereby regarded as inadequate incentives), as this would only serve to preserve intolerance and resistance towards improving waste management. On the other hand, care must also be taken to ensure that the fees are not so high as to exclude communities for whom the benefit of improved waste management cannot be achieved at their members’ income level. Sweden’s approach to user fees may illustrate an alternative. In order to enforce source separation of waste, they implemented an incentive–based system. Households are not required to separate their waste. However, they are charged one of two waste management fees: one fee against households who decide not to separate waste, and a smaller fee for those who choose to do so. In all the circumstances, the implementation of user fees should be guided, in part, by assessing public perception or rejection of such fees.

**CONCLUSION**

A strong legal framework would underlie a successful regime for source separation of waste and the implementation of user fees. There is a regulatory framework for MSWM in place which has been incomplete for some time but is in progress. The updating of the MSWM legal framework to reinforce separation of waste at source and to introduce user fees, would be timely. These proposed changes have the potential to improve public satisfaction with waste management services, and to enhance citizens’ solidarity in greater environmental consciousness and responsibility, which would go towards fulfilling the NSWMA’s mandate under the Act.

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The term “Corporate Governance” has been defined by the Organization for Economic Co-operation and Development (‘OECD’) as “[involving] a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined”.

At a glance, the above definition does not make any express reference to employment law; however, when one examines the individual relationships referenced above, the connection becomes a bit more apparent. While the relationship between shareholders, stakeholders and the company is usually one of contract, critical aspects among a company’s board, its management and other staff fall almost entirely under employment law.

History has proven that in many cases where there has been a failure of corporate governance by a company, that failure has been as a result of a lack of policy formulation or policy enforcement by the company in respect of its employees. In order to ensure and promote the accountability, transparency and overall management required for the effective continuity of the entity, it is necessary to put in place the sort of contractual provisions and policies that will ensure compliance.

One of the most prominent examples of this is the case of Barings plc (in liquidation) and another v Coopers & Lybrand (a firm) and others Barings Futures (Singapore) Pte Ltd (in liquidation) v Mattar and others [2003] All ER (D) 142. In that case, Barings Bank was a UK-based merchant banking firm that failed after a trader named Nick Leeson engaged in a series of unauthorized and risky trades that went sour in 1995. Barings, having lost over one billion dollars (more than twice its available capital) went bankrupt.

Nick Leeson initially was very successful in speculative trades, making huge profits for Barings and ensuring his upward mobility. Unfortunately, Leeson lost his touch as his speculative range increased. Leading up to 1995, he had been hiding losses from bad trades in a secret account. Leeson was able to accomplish this because of a management flaw in Barings that gave him the responsibility of double-checking his trades, rather than having him report to a supervisor. Instead of reinesting in his speculative gambles, Leeson continued to play increasingly bigger odds in an attempt to recover lost money.

Founded in 1762, Barings was among the largest and most stable banks in the world. However, thanks to unauthorized speculation in futures contracts and other speculative dealings, it ceased operations on February 26, 1995. The direct cause was its inability to meet its cash requirements following those unauthorized trades. Even efforts by the Bank of England to arrange a rescue package could not avert the inevitable collapse.
Regrettably, we do not have the details of the management flaw, (although perhaps it may be referenced in the book entitled “Rogue Trader” that Mr Leeson eventually wrote, after being incarcerated). However, this much is clear, the collapse of Barings Bank was due to a failure of its employment structure. In any working environment, it is the employment structure that governs the powers of an individual employee and sets the checks and balances within which those powers may be exercised.

Had there been a more effective monitoring system in place in respect of the trades being undertaken by Mr Leeson, Barings Bank might have been in operation for another 200 years. An effective monitoring system, in a financial institution would include, but not be limited to, monetary limits on the level of risk to which any individual employee can expose the institution. Such limits should be made clear to the employee in their job description and/or a policy document.

It should be clear which transactions require the approval of another person in the financial institution and, where applicable, the approval of the Board. Such an approval system should be clearly documented and disseminated throughout the institution.

Anecdotally, in Jamaica, we have also seen recently what can happen when the actions of one or more employees in an institution are not properly monitored or supervised. This underscores the need for good employment structures. A good employment structure includes but is not limited to: (i) clearly defined job descriptions; (ii) contracts of employment that clearly define the positions held by the employees; and (iii) an employee handbook that sets out the way in which employees should interface with the company.

If the entity is a regulated entity, an analysis should be done of the regulations and statutory provisions to which the company is subject, and policies formulated to ensure that employees are aware of what they need to do in order for the entity to be compliant with the relevant regulations. Additionally, proper sanctions should be put in place in the event that a breach of a regulation or policy takes place as a result of an act or omission of an employee.

Policies should also address the steps that should be taken if a breach of a regulation by the entity occurs and whether a breach may also have a criminal law implication. For example, the individuals with the responsibility to inform the regulator that a breach has taken place should be clearly identified.
CORPORATE GOVERNANCE IN DEPOSIT-TAKING INSTITUTIONS

Having policies in place that ensure good corporate governance is even more essential in regulated entities than it is in other private sector companies. A ready example is that which obtains in the banking sector. The Banking Services Act 2014 ("the Act") sets out the parameters to ensure that stringent measures are implemented to regulate a bank's internal operations, which of necessity should guide the policies of a bank unless it wishes to run afoul of its regulator. By way of illustration, a few examples of provisions of the Banking Services Act that should have a direct impact on the policies and procedures of a bank are set out below.

Unsecured Credit Facilities

Pursuant to section 58(1) (d) of the Act, a bank shall not grant unsecured credit facilities to: (i) any connected persons; and (ii) any officer or employee of the bank or any immediate relative of such officer or employee in excess of an amount equivalent to one year’s salary of such officer or employee.

In order to ensure compliance with the above section, a bank, of course, must act through its employees. The employees who are charged with approving loans issued by the bank must be trained to identify who would be a connected person for the purposes of section 58 and aware of the loan limit set out in section 58.

There should be a policy by the bank that clearly sets out the employee’s obligations in reviewing a loan application that has the potential of breaching section 58 and any sanctions for breaching such policy.

Unsafe Practices

Pursuant to section 75 of the Act, financial holding companies must ensure that their policies and regulations mirror and reflect the conditions in respect of the regulations provided for in Part A of the Fifth Schedule of the Act.

For instance, the bank will face sanctions if the bank has, inter alia, (i) breached the provisions of its memorandum or articles of association; (ii) given false statements concerning the affairs of the bank; (iii) has refused or neglected to make returns or to produce books, records or documents to an authorized officer; or (iv) contravened any provision of the Proceeds of Crime Act, the Terrorism Prevention Act, the United Nations Security Council Resolutions Implementation Act or regulations thereunder or any other Act which imposes obligations on a bank. This is an instance where, in order for the bank to be compliant with the law, it must have employment policies that create contractual obligations on the part of its employees to ensure compliance. The employees should be knowledgeable of their duties and the effects of a failure to properly execute those duties on the institution. These policies should also contemplate the obligation to report a breach of the internal policies, ethical standards and the overall guidelines in respect of unsafe practices, and to whom such reports are to be made.

Converting a legal obligation into a policy for the purposes of effective governance

The critical question an employer should ask surrounds whether a legal obligation is best suited within the employment contract or in a policy document. If the obligation is one that is unlikely to change and is central to the performance of the employee’s job, then it may be better placed in the contract of employment to ensure that the employee can in no way argue that he was not aware of his obligations.

If it is an obligation that may change over time and, although important, is not an essential term, then it may well be placed in a policy of the employer. The benefit of a policy, if properly structured, is that it can be modified by the employer without the need for the agreement of the employee. This is in contrast to a contract of employment that can only be modified with the agreement of both parties.

The dangers of the placement of an obligation in a policy is that it immediately raises the question of whether the employee was aware of the policy and, even if they are aware of the policy, are they aware of what might be the current version of the policy? Is the existence of the policy and a breach of the policy addressed in your disciplinary policy?
The second question an employer should ask is how best can the legislative or procedural obligations be translated into a policy and, if so, in what format? Are the obligations so extensive that it should be best referenced in a policy as “the employee is required to comply with the provisions of the Act” or should the provisions of the legislation be set out almost verbatim and included in a contract?

The decision of McDonald-Bishop J. (as she then was) in the case of Alexander Okuonghae v University of Technology, Jamaica [2014] JMSC Civ, 138 is instructive. In that case the applicability of policy and procedure was in the context of the employee’s rights as against those of the employer. The Court of Appeal decision of Branch Developments Limited t/a Iberostar Rose Hall Beach and Spa Resort v Charmaine Taylor [2016] JMCA Civ 10 elucidates the danger of reliance on policy rather than express contractual provisions in the case of an employer seeking to ensure compliance by an employee. The Court, in determining whether an employer had the right to apply a policy to an employee held:

“The question of the true legal significance of a layoff was explored in McLean v The Raywal Limited Partnership. In that case, the plaintiff was laid off from her employment by the defendant and given a date upon which she should return. At the time of her employment over 12 years before, there was in existence an employee handbook which included provisions, in keeping with the cyclical nature of the defendant’s business, for laying off staff. However, the plaintiff was not advised of the provisions of the handbook in the written offer of employment given to her; nor was she provided with a copy of the handbook or required to confirm in writing that she acknowledged the existence of the handbook or that it was part of her contract of employment. Although there was a subsequent change in the terms of her employment so as to include the layoff provisions in the employee handbook in the plaintiff’s contract, Whitaker J. held, in keeping with previous binding authorities, that the altered terms were unenforceable against her (given that there was “no obvious or certain improvement in compensation or other terms of employment” in consideration for the change in the terms of her employment).”

The above decision sets out many important principles for enforceability of employment policies against employees. These include:

a) Has the employee been provided with a copy of the policy?

b) Did the employee sign acknowledging that they have received a copy of the policy?

c) If the terms of the policy were amended, was that amendment communicated to the employee? (In this instance, there is also the question of an increase in consideration to accommodate increased contractual obligations).

ENFORCEMENT OF POLICY,
THE IDT PERSPECTIVE

The case of National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings [2017] JMCA App 3, a decision of Sykes J, as he then was, was affirmed by the Court of Appeal and the Privy Council, refused permission to seek judicial review of the Award of the Industrial Disputes Tribunal in the dispute between National Commercial Bank Jamaica Limited and Peter Jennings. The Award of the Tribunal raises some questions relating to the inter-play between our current system of employment law and corporate governance.

In the Peter Jennings case, one issue that arose in the determination of this case was whether the Bank had properly sanctioned the employee for approving loans for loan for which the Bank had concerns. During the course of the evidence before the Tribunal, it came to light that the employee was not the only one involved in the process of approving the relevant loans and that there was a loan approval system in place involving multiple employees at the Bank.
It was stated in the decision at paragraph 13, that:

“At all material times, Mr. Jennings ensured that he wasn’t involved in the due diligence and pre-approval process, which was handed over to Patria Coke, an experienced underwriter, who by the time that these matters arose, had been promoted to Personal Banker. This was in strict compliance with NCB’s written credit risk policy as follows:

“for purposes of checks and balances, there will always be a clear separation of responsibilities, thus the person approving a credit facility cannot be the same person checking the documentation or the security and cannot be the same person approving the service request or the disbursement.”

In handing down its decision the Tribunal found:

“While there is clear evidence that less than adequate due diligence was applied in each of the questionable loans there is no evidence that this was a deliberate act on the part of anyone. On the other hand, the evidence was that the Branch was short staffed and tried to utilise its available human resource in the best manner, to offer quality customer service and at the same time achieve, maintain and surpass the established branch targets….. The Tribunal does not support the contention that the Branch Manager of a large Branch is expected to peruse every detail of a loan application, although as he has admitted, the buck ultimately stops with him.”

This raises an interesting question. The Bank had a clear concern, hence, it put in place a disciplinary hearing. However, the Bank’s own policy appeared to be an impediment to the Bank’s attempt to apportion fault to a single individual for the concerns it had regarding the approval of the subject loans. The Tribunal also took into account the human resources made available to ensure compliance with the Bank’s policy.

If it is alleged that there is a breach of policy, is it necessary to charge every employee involved in the process set out in the policy with the breach in order to justify a dismissal? If one extrapolates from the Peter Jennings Award, despite not being binding on the Tribunal itself, then the answer would be “yes”.

Further, if a financial institution or any other company wishes to sanction an employee for a breach of policy, the institution will need to bring evidence that it provided sufficient resources for compliance with its policy to be reasonably affected.

In conclusion, it can be seen from the above, that good governance cannot exist without a good employment law structure, and in creating and maintaining a good employment structure, an employer has to be aware of the terms that should be set out in the contract of employment, employment policies, how such terms and any amendments thereto should be communicated to the employees in order to ensure compliance and the systems that need to be in place in order to enforce compliance.
On December 8, 2017, the National Identification and Registration Act ("NIRA") became law despite a flurry of petitions, protests, and letters from citizens and civil society groups including Jamaica Coalition for a Healthy Society and the Jamaica Bar Association. On April 12, 2019 our Full Court of the Supreme Court ruled that the NIRA is "unconstitutional, null and void insofar as it is intended to make compulsory the taking of biometric and other data so as to provide a national identification number and card for every citizen and resident of Jamaica. The involuntary nature of the policy infringes guaranteed constitutional rights. Furthermore, the statute seeks to prevent access to services both public and private, or to make possible the denial of such services, to citizens who fail to obtain the said national identification." 5

This paper does not consider the constitutionality of the former legislation and was originally written several months prior to the constitutional challenge. The original short paper was modified for the purposes of this publication to examine the policy considerations and assess the former legislation from a policy perspective with a view to assessing whether the steps taken by the Government of Jamaica would achieve its stated objectives. It is hoped that this analysis will encourage a different approach, which I believe is essential as an enabler for the Government of Jamaica to provide more efficient services to citizens.

BACKGROUND

Sykes, CJ noted in paragraph 1 of his judgment that: "The issue is not whether a national identification system in and of itself violates the Charter [of Fundamental Rights and Freedoms] but whether the provisions challenged are in violation of the Charter." 3 Critically, the Court acknowledged that there was no disagreement concerning the benefits of a national identification system, which enjoyed bipartisan support over the years. The proposal for a national identification system ("NIDS") dates back to a 1994 Electoral Committee recommendation; was announced by the Golding administration in 2007; and was one of the "first 100 day" targets in the current Jamaica Labour Party government's general election manifesto. 4 Some say it dates even further to the Michael Manley administration. 5

1 National Identification and Registration Act ("NIRA").
The National ID System as a Component Of e-Governance

BENEFITS OF A NATIONAL ID SYSTEM

A National Identification Number (“NIN”) is the cornerstone of the e-Governance puzzle, i.e., the ability to streamline government and private services to provide greater efficiency and access for citizens. It also ensures that the government has accurate data on its citizens that it can use for planning purposes. For example, Estonia’s digital national ID system is used for travel within the European Union; as a national health insurance card; proof of identification when logging into bank accounts; digital signatures; and internet voting. The reason Estonia pursued e-Governance is the same reason we need to – we similarly have a small population; lack of adequate resources to provide optimal in-person government services; and there is a need to keep the costs of providing government services low.

The introduction of a National Identification System was a key target in the Government of Jamaica’s 2013 National Security Policy. It was identified as being necessary for anti-money laundering and counter-terrorism financing because it would enable all financial transactions to be linked to individuals.

Identification that can be biometrically verified is also useful for preventing corruption, as in the case of India where the World Bank stated that the:

“Aadhaar digital ID is saving approximately USD 1 billion (Rs 650 crores) a year by reducing corruption and leakage for the Indian government.”

JAMAICA’S CURRENT PROBLEM

The Office of the Prime Minister (“OPM”) noted in 2016 that:

“Jamaica does not have a national identification database which can reliably verify the identity of its citizens... There are a number of identity systems being utilized by various public sector entities... given the diversity of those systems, they are not connected or inter-related and provide limited scope for data sharing and authentication of personal identity.”

Prime Minister Andrew Holness noted at a June 2017 briefing on e-Governance that government agencies have different databases and software, essentially creating data silos that cause difficulties for citizens.

We have all faced difficulties obtaining services from the government, and many of these problems are consequent to the lack of a single database that all agencies can use to verify the identity of the person they are serving. You are likely listed in databases at the Registrar General’s Department, the Tax Office, the Electoral Office of Jamaica, the National Insurance Scheme, the National Health Fund, each using a different numeric system, and they each require you to bring documents from the other to prove who you are in order to obtain services from them. This is results in lost hours, poses a huge security risk, and creates serious inefficiencies.

*Data from: [Estonia’s National ID System](https://www.eestonia.com/)

*Jamaica’s National ID System Policy was announced on November 2012.

*Prime Minister Andrew Holness noted at a June 2017 briefing on e-Governance that government agencies have different databases and software, essentially creating data silos that cause difficulties for citizens.

*We have all faced difficulties obtaining services from the government, and many of these problems are consequent to the lack of a single database that all agencies can use to verify the identity of the person they are serving. You are likely listed in databases at the Registrar General’s Department, the Tax Office, the Electoral Office of Jamaica, the National Insurance Scheme, the National Health Fund, each using a different numeric system, and they each require you to bring documents from the other to prove who you are in order to obtain services from them. This is results in lost hours, poses a huge security risk, and creates serious inefficiencies.
The intended framework had a primary objective of achieving e-Governance. According to the Prime Minister:

"in creating NIDS as the first step towards achieving the digital society, we will be making the delivery of public services far more efficient and that will contribute to greater inclusion (and) greater economic growth and job creation as well."11

Section 15 of the NIRA provided for the establishment of a consolidated national database, the National Civil and Identification Database. All citizens and persons ordinarily resident in Jamaica were required to enrol in the Database (section 20) and would be provided with a NIN. The database compiles citizen and resident information, so they can prove their identities (or have their identities authenticated), obtain National Identification Cards, and allow the government to generate statistical information (section 17).

Without the NIN, a person would not be able to receive goods or services from a public body (section 41). Private sector entities would have been permitted, under section 41(2), to impose a similar requirement for the production of the NIN prior to providing goods or services. Section 41 would force public bodies (and their separate databases including the Tax Registration Number database and the National Insurance Scheme database) to coordinate and communicate with the Authority in order to verify the NINs presented by individuals.

However, the Act did not compel the public bodies to coordinate, communicate, and integrate their databases, which is e-Governance. It simply created another database. The legislation failed to specify that the database may (or ought) to be used to coordinate the activities of government entities to provide more efficient services.

In contrast, Estonia has no centralised or master database – all information is held by respective entities and uses a central blockchain technology platform called “X-Road” to connect databases.12 X-Road has operated without interruption in Estonia since 2001, and 99% of their government interactions are electronic – i.e., they are not on paper and there is no paper redundancy.13 According to Estonia’s Information System Authority as of July 1, 2019, in the last calendar year the X-Road saved 1,407 years of working time, assuming that every request saved 15 minutes and 5% of requests were submitted by humans.14 The focus was not on creating a national ID system, but on creating e-Governance which has a necessary component of having a national ID system. Our NIDS project should have followed the establishment of an empowered e-Governance entity and the launch of technology such as X-Road.

Since it is impossible to build a perfectly safe environment, trust in the data manager is essential. The Information System Authority of Estonia has the information technology resources and trust to engage stakeholders in government to push forward the e-Governance policy. It is not the same entity that issues IDs. This provides a ‘check and balance’ on all databases, including their national ID database. Estonia’s Chief Information Officer Taavi Kotka famously displayed his personal ID card during an international presentation and encouraged viewers to try and breach their security protocols. He could take this apparent ‘risk’ because in Estonia the focus is not on a national ID number, but a digital ID. The digital ID can be linked to a photo ID which has a chip that carries embedded files using 2048-bit public key encryption, or even a mobile phone.

In the case of Jamaica, it appeared that the OPM would remain the coordinating entity for both the identification programme and e-Governance. The Registrar General’s Department was to be rebranded and placed under the remit of the OPM. It would have been better for the NIRA to be supplemented by an independent authority responsible for the information technology components and e-Governance implementation, for example e-Gov Jamaica Limited or another suitable entity.

THE WAY FORWARD

In 1997 when Estonia set out to achieve full e-Governance,

“...the general population did not have the internet or even devices with which to use it. It took great courage to invest in IT solutions and take the information technology route.”15

Jamaica already has widespread internet penetration, and virtually full mobile phone penetration. We need a sure commitment to e-Governance, coordinated by a single entity with the resources to make the best use of the new national identification system. More importantly, we need to build trust among the stakeholders through open dialogue and stakeholder engagement. Broaden policy and legislative changes will be required to achieve the ultimate purpose of the NIDS, which is e-Governance. The NIDS is an enabler for citizens to more securely and easily access government and social services. In that regard, the Government should continue to pursue e-Governance, with better communication on security, privacy, and the positive impact it will make for our country.

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12 X-Road. Available at: https://x-road.ee/solutions/interoperability-services/x-road/
14 X-Road. Available at: https://x-road.ee/solutions/interoperability-services/x-road/
15 End (p.13)
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WHAT’S NEW- AN OVERVIEW

“Santa Clarke” Comes to Town: An Overview of the 2019/2020 Budget Changes

In March 2019, during the budget debate for the fiscal year 2019/2020, Dr. The Honourable Nigel Clarke, Minister of Finance and the Public Service, announced what has been described as some of the most revolutionary changes to Jamaica’s revenue policy in recent years. Dr. Clarke, or as he was affectionately referred to afterwards in the media, “Santa Clarke”, made his presentation to the Parliament of Jamaica.

Effective April 1, 2019, the Minimum Business Tax, which was sixty thousand dollars (J$60,000.00) payable by “specified taxpayers” each year pursuant to the Provisional Collection of Tax (Minimum Business Tax) Order of 2014, was abolished. Asset tax payable by non-financial institutions has also been abolished, and the Honourable Minister announced that the General Consumption Tax (“GCT”) threshold would be increased from three million dollars (J$3,000,000.00) to ten million dollars (J$10,000,000.00).

The implications of such a regime change may impact the ease of doing business in Jamaica as well as land transactions.

The removal of the minimum business tax, may increase business participation in Jamaica. The definition of “Specified Taxpayer” encompassed a wide cross-section of the entrepreneurial sector, and included companies incorporated pursuant to the Companies Act, and entities registered under the Friendly Societies Act, Building Societies Act, or the Industrial and Provident Societies Act, as well as individuals who operate a trade, business, profession or vocation with a gross revenue of three million dollars (J$3,000,000.00) and above. Now, the biannual payments in June and September of J$30,000.00 that may have been an obstacle to small and medium sized enterprises will no longer exist.

As it relates to the increase of the GCT threshold, this is a further reduction in the taxes that may have previously prevented many Jamaicans from conducting business in Jamaica.

The removal of the asset tax payable by non-financial institutions is yet another obstacle removed from doing business in Jamaica.

However, the most popular announcements, at least for conveyancing practitioners, were those surrounding the Transfer Tax and Stamp Duty regimes. Transfers of land were abruptly halted and some Agreements for Sale were cancelled after these announcements and the reasons are clear.
WHAT’S NEW- AN OVERVIEW

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However, the most popular announcements, at least for conveyancing practitioners, were those surrounding the Transfer Tax and Stamp Duty regimes. Transfers of land were abruptly halted and some Agreements for Sale were cancelled after these announcements and the reasons are clear.

Pursuant to the Provisional Collection of Transfer Tax (Transfer Tax) Order 2019, Section 3 of the Transfer Tax Act has been amended, effective April 1, 2019, to reduce transfer tax from 5% to 2%. This change opens the real estate market to more Jamaicans who previously may have been discouraged from participating in the acquisition of real estate due to the transaction costs incidental to transfer tax and stamp duty. In fact, transfer tax in Jamaica at one time was as high as 7 1/2% owing to the introduction of the Transfer Tax Act in 1971, which was clearly a significant obstacle to transferring land in the country.

In addition to the reduction in transfer tax and stamp duty payable, there was an increase of the value of estates that are exempt from paying transfer tax from J$100,000.00 to $10,000,000.00. This means a zero rate of transfer tax will be levied on up to J$10,000,000.00 of the market value of the deceased person’s estate at the time of his or her death. Now, families that previously were unable to afford the transfer tax payable in order to administer their loved one’s estate can now find it a little easier as some of the financial burden has been lifted.

More Jamaicans can participate in the economy in ways which previously were discouraging owing to the high taxes and costs involved, especially in land transactions. Now, all Jamaicans can conduct their businesses without the expense of the Minimum Business Tax. There are reduced expenses for beneficiaries of estates, allowing the assets to be freed for use by beneficiaries.

Pursuant to The Provisional Collection of Tax (Stamp Duty) Order 2019, ad valorem stamp duty on Agreements for Sale has been replaced with a flat stamp duty fee of five thousand dollars (J$5,000.00) where the purchase price is or exceeds J$500,000.00. Where the purchase price of the property is less than J$500,000.00, the stamp duty levied is J$100.00. Thus, instead of paying the usual 4% of the assessed value of the property in the transfer of land, for instance, persons transferring land may now be obligated to pay J$5,000.00 to stamp the Agreement for Sale in transactions for the sale of land for at least J$500,000.00.
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Opinion on Policy
Wigton IPO and the winds of change

The successful divestment of the Wigton Windfarm Limited ("Wigton") by way of a public listing on the Jamaica Stock Exchange was a great success. The Government of Jamaica raised $5.5 billion, Wigton’s value surged, and avenues for growth and expansion of the business opened up. The success of the initial public offering ("IPO") points the way forward for future divestments.

So, let us discuss the Wigton example as a template for further public offerings of State-owned entities, a few of the benefits of divestment by way of the Stock Exchange, and some of the hurdles likely to present to thwart other such successes. I will also highlight some other opportunities for public listings in the hope that the momentum generated by Wigton’s success continues.

First off, the Wigton listing represented a policy initiative of the last People’s National Party ("PNP") Administration (2011-2016) completed under the current Jamaica Labour Party ("JLP") Administration (2016-present). Bearing in mind the country’s history of sharp ideological divides sometimes focused on matters such as the nationalization of key industries and companies, and latterly, on privatization and divestments, this is noteworthy. Having a virtual political consensus that the Jamaica Stock Exchange is an appropriate method of divesting Government entities has opened up the space for further divestment devoid of ideologically-inspired rancour. Wigton’s success has also gone some way to give additional objective validation to this consensus. Might Air Jamaica still be proudly flying if we had arrived at this point earlier?

Opinion on Policy

Wigton IPO and the winds of change

Although it had been decades since a Jamaican Government achieved a divestment by way of publicly listing a company, this method of divestment was not unknown. There is a wealth of history on privatizations by public offerings; over the years, privatizations have been deployed sporadically, in places as diverse as Canada, France, Hungary, Japan, Malaysia, Poland, Thailand and the United Kingdom. Governments have expressed a number of rationales to pursue this specie of privatization. Proponents have emphasized:

1. Raising revenue to improve Government’s finances;
2. Improving the management of assets;
3. Spurring economic growth and greater investment;
4. Increasing competition and efficiency in enterprise;
5. Decreasing government interference in business;
6. Promoting more widespread share ownership;
7. Easing problems with public sector wage determination;
8. Encouraging employee and/or citizenship share ownership;
9. Lessening politicization of the economy, and

None of the above reasons, if achievable, is likely to strike a fair-minded Jamaican as unnecessary.

That said, Wigton was a somewhat easier opportunity than some other potential divestment cases. Along this line, we ought not overlook that Wigton is a “clean energy” company, and in that respect, has an easily recognizable inbuilt positive social and environmental component.

Behind this use of the stock market to inject capital lies a clearly articulated policy imperative to source greener energy for the electricity grid.

One lesson then, is that highly-developed forward-thinking policy objectives could have similarly salutary effects. I think especially of waste management, sewerage treatment, water provision, and housing policy. Where there are highly-visible and well-defined policy objectives it is more likely that a Government will expend the energy to see the divestments through with the aim of achieving those aims.

Other potential projects will undoubtedly be more controversial and will carry the freight of increased political and economic risk. Part of the challenge of extending the use of the capital markets therefore, is to show that other enterprises deserve the same, or similar, nourishment. As it stands, our approaches to all the social needs mentioned above are helplessly idealistic in aspiration, noted in voluminous papers tucked away in “File 13”, and safely vague enough to never excite any action. All of which is to say that, as it was with Wigton, tighter policy, buttressed by specific targets.

Since Wigton, the Government has announced that the Jamaica Mortgage Bank will be next in line for divestment by a public listing. It has obvious potential for divestment, and so is a good choice. Also note however, that in the excitement following Wigton, one Minister announced the nuptials of Caribbean Alumina Partners (CAP) and Jamaica Bauxite Mining (JBM) with the view to listing them. Thankfully that idea has fallen into a mud-lake, likely never to ever be seen again. The problem? Not every company is suited for the stock market, and heavily indebted loss-makers will generate even less excitement as a politician’s promise.

So, what are some of the other entities that could use this treatment? The Government owns twenty per cent (20%) of the Jamaica Public Service Company (JPSCo), which is profitable and prime for divestment. If one believes that properly regulating monopoly utilities, rather than owning them, is the optimal governmental role, then the listing of the JPSCo shares should be appealing.

The Central Wastewater Treatment Company (Soapberry Treatment Plant) is one that, to my mind, cries out for divestment on the Stock Exchange. Consider that there was a time not too long ago when marine life was choking to death on septic effluent in Kingston Harbour. The Soapberry facility has changed that, and once more marine life is returning. One need not be a complete lunatic or otherwise mentally deficient to poke one’s toe into the water. The Soapberry Treatment Plan is profitable, its services are in demand, and like Wigton, it fulfils an excellent social and environmental function. This is a business we want to be supercharged by the capital markets.

We continue to dump far too much waste and sewerage into the precious public asset that is Kingston Harbour, something that another treatment plant could alleviate. Taking Central Wastewater Treatment Company public could, at a stroke, inject capital into Government to be spent on pressing projects, and capitalize the newly fully-privatized company, now armed with the intention and capacity to expand. Best of all, we would come closer to staunching the flow.

How about Petrojam, now famous for more than merely processing oil products? One benefit of divestment by way of a public listing is that “corruption risk” is generally severely reduced in such companies. Management is more accountable and freed of the sometimes-cumbersome public sector rules and regulations, while benefiting from the auditing and reporting to which publicly listed companies are subject.

And why not the National Water Commission? Well, here we peer into the dark soul of our political life. The National Water Commission, admittedly, could be a step too far, not least because proper management would cut off an important avenue for the politically connected to get jobs and contracts so quickly that it could cause social upheaval.

With all that said, if I had my druthers for a project to get the same treatment as Wigton, it would be the National Solid Waste Management Authority. With a proper empowering regulatory framework that included appropriate tip fees for the delivery of waste, and a power-purchasing agreement to facilitate connection to the national grid, a Waste-to-Energy plant could monetize and revolutionize Jamaica’s waste management. So far, every administration has come into power promising to do this, but none has laid the policy framework or done much more than name “enterprise teams”.

The conversion of waste to energy is tried and proven technology, so it’s not a guess and spell type of thing. As people’s standard of living improves, they consume more. As they consume more, they typically create more waste. Using that waste to create energy is just common sense. Harnessing, if at all possible, the capital markets to do that, would be an outstanding achievement.

I have singled out my favourites, but that does not exhaust the list of potential candidates for privatization through public listing. The Government of Jamaica owns, or owns pieces and parts of Sprood Ltd., Ethanol Jamaica, Things Jamaica Ltd., and Factories Corporation of Jamaica, all of which are prime for listing.

68 http://jamaica-gleaner.com/article/business/20171004/two-hunting-private-partners
It will not necessarily be smooth sailing. Even well-formulated policy with the best of intentions may not immediately translate into positive outcomes; especially where there are strong institutional challenges to navigate. For instance, the Prime Minister himself chaired a sub-Committee of Cabinet to steer the Wigton divestment into being. While this represents a feather in the PM’s cap, it points to a larger cluster of problems, for it simply is not feasible for the Prime Minister to personally steward every listing - not unless we are content with achieving one every two (2) to four (4) years.

The problem seems to be twofold. On the one hand, it is true that an inordinate amount of red tape and bureaucracy generally attends any such effort. There are, after all, many stakeholders who have to be satisfied or placated, and the bland term “Government-owned” is generally shorthand for a hotbed of entrenched management, union activity, embedded contractors, and established uneconomic practices. These are significant headwinds for any project to face.

Secondly, there is the general but pronounced issue of accountability. Someone must ultimately take responsibility for the potential failure of any public offering, and market forces, by their very nature, do not guarantee that every listing will be a success.

A few words to plug a personal preference. Of the many divestment models available, the idea of giving each citizen a few shares, plus the option to purchase more up to a specified amount at a set price is attractive. The Provincial Government of British Columbia used this approach for its divestment of British Columbia Resources Inc., the sawmill and mining behemoth that eventually went bust. I freely admit that this may be old idealism creeping into my thinking.

Add to that, I prefer limiting the percentage of ownership by any one human or corporate person for a set time period, and the “bottom-up” allocation, as was implemented for the Wigton IPO. These mechanisms, I believe, serve a wider policy objective of democratizing ownership, giving each citizen a stake, and facilitating broad ownership. Admittedly, these are ideals.

Details, refinements, and careful tailoring driven by empirical research and economic reality would have to be made.

Owing to the success of Jamaica’s Precautionary Stand-By Arrangement with the International Monetary Fund (IMF) over the last six years, there is right now an extraordinary amount of money sloshing around in search of good investments. At the same time, the stock market’s performance has been outstanding. These factors, along with the levers we have been discussing, afford the opportunity for broad-based ownership and massive value creation, along with a litany of other benefits. With Wigton we have taken the first step. Why stop there when the wind of positive change is finally at our back?


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The Compulsory Acquisition (Shares in Petrojam Limited) Act, 2019 (No 1 – 2019)
The subject of much public debate, this Act lays out the strategy for the Petroleum Corporation of Jamaica to compulsory acquire all shares in Petrojam Limited, belonging to other persons.

The Ballast Water Management Act, 2019 (No 2 – 2019)
This Act focuses on water taken unto ships to improve their stability and applies to Jamaican and Foreign Ships in Jamaican waters with the intention to protect the environment.

The Appropriation Act, 2019 (No 3 – 2019)
This Act authorizes the expenditure of the government for the financial year ending March 31, 2020 in compliance with the Constitution.

The Protection of Plant Genetic Resources for Food and Agriculture (Amendment) Act, 2019 (No 4 – 2019)
This Amendment creates an Advisory Task Force to advise the Minister on policy and legal measures for the conservation and suitable use of plant genetic resources and on how to share the benefits of these measures equitably.

The National Contracts Commission (Validation and Indemnity) Act, 2019 (No 5 – 2019)
This Act validates acts done by the National Contracts Commission and persons acting in support of the Commission from February 11, 1999 to the date when the Public Procurement Act of 2015 came into effect, that is April 1, 2019. The Act also indemnifies persons who are liable to have legal proceedings instituted against them stemming from these acts.
Case Notes from Court of Appeal

I. Robert Dunbar v R [2019] JMCA App 2

Facts
The appellant, Mr Dunbar was charged with breaches of the Money Laundering Act (now repealed). The prosecution had applied to the judge in the Parish Court proceedings to allow a witness to give evidence by video-link; this witness was incarcerated overseas. Mr Dunbar opposed this application. It was nevertheless granted by the Parish Court judge.

Mr Dunbar then applied to the Supreme Court for permission to apply for judicial review of the Parish Court judge’s decision. This application was heard by the Supreme Court judge who refused this as well as an application for permission to appeal.

Issue
Whether or not leave to appeal should be granted.

Principles
I. Rule 1.8(7) Court of Appeal Rules 2002 (as amended) - general rule is that permission to appeal in civil cases will only be given if the Court or the court below considers that an appeal will have a real chance of success.

II. Appellant must show that s/he has a realistic chance of success in the substantive appeal (see Duke St John Paul Foote v University of Technology Jamaica (Utech) and another [2015] JMCA App 27A.

III. The Evidence (Special Measures) (Criminal Jurisdiction) (Judicature) (Supreme Court) Rules 2016 came into force on the 17th May 2016 but did not appear to have been brought to the Parish Court judge’s attention.

IV. Nevertheless, the procedure adopted by the Parish Court judge did not conflict with the rules, there was no injustice and her decision and reasons showed that she carefully examined all the relevant issues.

V. It is an established principle that the court is unlikely to grant relief by way of judicial review if a viable alternative remedy exists.

VI. The judicial review mechanism can be employed even where there are appeal procedures provided by Parliament but in circumstances where there would be an injustice as there would be unfairness to the aggrieved party (see Lord Scarman p 330 In Re Preston). The Court found that this principle did not apply to the circumstances of this case.
Case Notes from Court of Appeal continued...

VII. The correct approach to challenging the decisions of a Parish Court judge is by way of an appeal rather than by way of judicial review. A ruling of a Parish Court judge is amenable to certiorari only if the judge acts in excess of jurisdiction or without jurisdiction. Challenges on the basis of an error in law ought to be mounted by way of an appeal. (Brown and Others v Resident Magistrate, Spanish Town Resident Magistrate’s Court, St. Catherine (1995) 48 WIR 232).

Application for leave to appeal decision denying the application for leave to apply for judicial review, refused. Costs were not awarded against Mr Dunbar because the case involved judicial review and a decision of a court.

2. Wint (Worrell) v R [2019] JMCA Crim 11

Facts

In what could be described as one of the ‘worst of the worst cases’, Wint was convicted for the offence of wounding with intent. The evidence was that while gambling, a dispute arose between himself and the complainant over JMD 50.00. He thereafter stabbed the unarmed complainant several times resulting in debilitating injuries to the complainant’s brain and lung. Wint had previous convictions for unlawful wounding in 1998 and malicious destruction of property for which he received a suspended sentence in 1995. The other three (3) convictions for larceny and ganja were not referred to by the trial judge. Wint was sentenced to 25 years imprisonment at hard labour. The judge clearly considered the general principles of sentencing but failed to indicate how he arrived at the sentence. Wint appealed against his conviction and sentence. He abandoned the appeal against conviction however, but continued his challenge against the sentence.

Issues

I. Whether the sentence was manifestly excessive and outside the range of sentences as per the Sentencing Guidelines for judges of the Supreme Court and Parish Court of December 2017.

II. Whether the trial judge failed to take into consideration some of the factors relevant to sentencing of convicted persons.
Case Notes from Court of Appeal continued...

Principles

I. The sentence imposed by a sentencing judge who has heard evidence, seen the witnesses and the accused, and has assessed his antecedents, ought not to be disturbed by the Appeal Court unless the trial judge has erred as a matter of principle.

II. In order to arrive at an appropriate sentence, the following steps should be taken (Evrald Dunkley v R (unreported) Court of Appeal, Jamaica, Resident Magistrate’s Criminal Appeal No 55/2001):
   a. Determine whether a custodial sentence is appropriate;
   b. Determine the length of the sentence as a starting point, that he would impose for such an offence;
   c. Consider any factors that will serve to influence the length of the sentence (mitigation, etc.).

III. In Meisha Clement v R the starting point was described as a notional point within a broad range from which the sentence should be increased or decreased to allow for aggravating or mitigating features” (R v Saw and Others [2009] EWCA Crim 1, in Meisha Clement v R). In the sentencing guidelines the phrase ‘a broad range’ was replaced by ‘the normal range’ (see 7.1 of Sentencing Guidelines). It is essentially the sentence which the sentencing judge considers “appropriate for the offence before adjustment” (see 7.3 of Sentencing Guidelines).

IV. To select the appropriate starting point the Judge should make an assessment of the intrinsic seriousness of the offence. This includes taking into account the offender’s culpability in committing it and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence.

V. The sentencing judge ought not to impose a statutory maximum when searching for an appropriate sentence, unless it is a case which falls into the category of the worst example of that offence likely to be encountered. The maximum period will not normally be an appropriate starting point for sentencing purposes.

VI. For a list of usual starting points see Sentencing Guidelines Appendix A. This list is only a guide so the starting point “in each case must be the product of the sentencing judge’s fresh consideration of what the particular case requires” (see 7.6 of Sentencing Guidelines).

VII. Factors to be considered when making an assessment as to the seriousness of a particular offence include (Meisha Clement v R):
   a. The offender’s culpability in committing the offence; and
   b. The harm that the offence has caused, intended to cause or might foreseeably have caused.
Case Notes from Court of Appeal continued...

VIII. Some aggravating factors commonly considered in the jurisdiction (Meisha Clement v R):

a. Previous convictions for same or similar offences;
b. Premeditation;
c. Use of a firearm (imitation or otherwise) or other weapon;
d. Abuse of a position of trust;
e. Whether the offence was committed whilst on bail or on probation, or whilst serving a suspended sentence;
f. Prevalence of the offence in the community; and
g. The intention to commit a more serious harm than actually resulted from the offence.

IX. Aggravating factors may relate to both the offence and the offender.

X. Caution must be exercised to avoid double counting in relation to the aggravating factors as a consideration of the these may have been done in relation to the starting point. Not advisable to use aggravating factors to adjust the starting point upwards.

XI. Mitigating Factors (Meisha Clement v R) include:

a. Age;
b. Good character;
c. Reparation or restitution (in the appropriate case);
d. Whether provocation is a feature;
e. Capacity for reform;
f. Incidental losses the offender suffered (e.g. loss of employment);
g. Time spent on remand;
h. Role in the commission of the offence;
i. Co-operation with the police;
j. Personal characteristics;
k. Any pleas of guilty; and
l. Any delay in trial and sentence.

XII. The approach to sentencing in the Sentencing Guidelines (see “The Sentencing Process” at paragraph 6) is similar to that suggested in the case Meisha Clement v R.

XIII. Pre-Sentencing Guidelines approach to sentencing (Meisha Clement v R):

a. Identify the range of sentences usually imposed for such offences or like offences in similar circumstances (See 6.1, 6.2 of Sentencing Guidelines);
b. Identify the appropriate starting point (See 6.3 (i) of Sentencing Guidelines);
c. Consider any relevant aggravating features (See 6.3 (ii) of Sentencing Guidelines);
d. Consider any relevant mitigating features (including personal mitigating features of the offender) (See 6.3 (iii) of Sentencing Guidelines);
e. Consider where appropriate any reduction for a guilty plea (See 6.3 (iv) of Sentencing Guidelines);
f. Give credit for time served (See 6.3 (vi) of Sentencing Guidelines);
g. Decide the appropriate sentence (See 6.3 (v) of Sentencing Guidelines); and
h. Give reasons (See 6.3 (vii) of Sentencing Guidelines).
XIV. Section 20 of the Offences Against the Person Act indicates that the offence of wounding with intent has a maximum penalty of life imprisonment.

XV. Appendix A of the Sentencing Guidelines lists the normal range for wounding with intent as “5-20” years. The usual starting point is “7” years.

XVI. A sentence is not disproportionate, merely because a lesser sentence might have been given for a different but equally serious offence.

XVII. The maximum sentence for wounding with intent is the same as for murder and manslaughter.

XVIII. The range of sentences for wounding is different from that for murder and manslaughter as detailed below:
   a. Wounding with intent: “5-20” years;
   b. Manslaughter: “3-15” years;
   c. Murder: “15 years -life”; and
   d. Attempted Murder: “10-20” years.

The result is that the sentence for the offence of ‘wounding with intent’ will not always be less onerous than that in a case of murder or manslaughter. This depends on how close to the top of the range a particular case falls, in terms of its intrinsic seriousness.

XIX. The court may lawfully impose a sentence at the top of or above the range, in unusual or exceptional cases. In Regina v Earl Simpson (1994) 31 JLR 397, the maximum sentence of life imprisonment was imposed in an assault occasioning grievous bodily harm. The appellant in that case had thrown acid on his pregnant girlfriend.

XX. In deciding whether or not a case can be considered the ‘worst of the worst’ reference should first be made to the range of cases actually encountered in practice. Then the question must be asked whether the particular case comes within the broad band of that type. The sentencing judge should not use his/her imagination to conjure up unlikely worst possible kinds of case (see Lawton LJ in Ambler (1975) CSP A1-4C01 in Blackstone’s Criminal Practice 2002 E1.17 page 1787).

XXI. Sentencing is a mechanism whereby society via the court system registers abhorrence of certain types of crimes (Regina v Alfred Mitchell (1995) 32 JLR 48).

XXII. The court thought this was an exceptional case and it was appropriate not to use the usual starting point of seven (7) years given the intrinsic seriousness of the case. Serious factors included – the near fatal harm, complainant unarmed, applicant expressed a desire to inflict fatal harm, previous sentencing decisions on equally or similarly serious cases.

XXIII. Previous convictions relating to relevant offences ought not to be ignored. In Daniel Roulston v R Court took into consideration previous convictions for rape committed in other jurisdictions.

XXIV. The Criminal Records (Rehabilitation of Offenders) Act details the process by which convictions may be considered spent and applications may be made for them to be expunged for certain offences.
Case Notes from Court of Appeal continued...

XXV. Criminal Records (Rehabilitation of Offenders) Act Section 20A (2) indicates that the applicant would not be eligible to be treated as a rehabilitated person since based on his previous convictions, he would have committed three indictable offences (unlawful wounding, malicious destruction of property and simple larceny). His convictions would not be capable of being treated as spent.

XXVI. The duty to protect the interest of the public and to punish and deter criminals, is never spent.

XXVII. The previous good character of the offender carries little weight in sentencing in very serious cases (Blackstone’s Criminal Practice 2002, paragraph B2.42, page 181)

XXVIII. It is for the sentencing judge to determine, given the circumstances of the particular case, the value to be placed on a particular aggravating or mitigating factor.

XXIX. In this case the court felt that a starting point of 25 years was too far outside the norm. Instead a starting point of 19 years was appropriate.

XXX. Full credit was and is to be given for time spent in custody awaiting trial and conviction.

XXXI. In this case consideration was also given to the fact that the complainant was the initial aggressor.

The application for leave to appeal was granted, and the hearing of the application treated as the hearing of the appeal. The appeal against sentence was allowed. A sentence of 19 years and 10 months’ imprisonment was substituted.


Facts

The appellant and respondent, drivers of a motorcycle and Toyota Townace Minibus respectively, were involved in a motor vehicle collision. They had been travelling in the same direction. The appellant had attempted to pass the line of traffic and a collision occurred when he attempted to go around the minibus. The appellant was injured when he was thrown off his motorcycle. Thereafter the appellant filed a claim seeking damages for personal injuries. Following the trial, judgment was granted in the respondent’s favour. In the judgment it was suggested that the appellant was apparently ignorant of aspects of the Road Traffic Act. Details of the conduct of the appellant were outlined including his breaches of the Road Traffic Act and code. Without setting out in detail the reasons for the decision, the judge concluded that the appellant was responsible for causing the accident by failing to obey the rules of the road and Road Traffic Act.
Case Notes from Court of Appeal continued...

Issue

I. Whether the trial judge failed to make critical findings of fact and determinations as to the credibility and reliability of the parties.

Principles

I. An Appeal Court is reluctant to upset findings of fact by a judge without a jury where there is no evidence that s/he has misdirected him/herself in law. Instead credence should generally be given to these findings of fact as the trial judge had the opportunity to see the demeanor of the witnesses and hear the witnesses directly (Watt (or Thomas) v Thomas [1947] AC 484).

II. The Court listed the following principles concerning the provision of reasons by a judge:

   a. The duty to provide reasons is a part of due process and fairness;
   b. The judge must explain why s/he has reached the decision;
   c. The scope of the duty to give reasons depends on the circumstances and the subject matter of the case;
   d. Failure to supply adequate reasons for a decision may constitute a good free-standing ground of appeal, even in cases where it was open to a judge to arrive at the conclusion in question;
   e. A trial judge must identify and record those matters which are critical to his/her decision;
   f. Where there is conflicting evidence on matters, and those matters are vital in the analysis as to liability, the conflicts must be resolved by the judge;
   g. In straightforward fact-finding exercises there is no need for elaborate distillation of each and every point. What is required is a straightforward explanation of the key factors that the judge has considered and his or her reasons for preferring one part of the evidence over another;
   h. Where oral evidence has been given by the key players, it will often be important to give a short appraisal of the witness’s credibility and, where testimony of one is preferred over another, a short statement of the reasons why this is so;
   i. An unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision.
   j. The failure to supply adequate reasons for a decision may justify the setting aside of a judgment with the remitting of the case for retrial.

III. While there was no need to outline and analyse well-known legal elements of negligence, in this case there was no analysis of the evidence of the respondent and no identification and record of the matters critical to the decision. There should have been an outline and resolution of the critical factual matters for determination with an indication of how the decision in question was arrived at. As all road users have a duty of case to each other, the conduct of both parties should have been properly assessed.

IV. A breach of the Road Traffic Act or the rules of the road does not create a presumption of negligence. (see Powell v Phillips [1972] 3 All ER 864).

Contributors

Kathryn A. Williams – Kathryn is an Associate at Livingston, Alexander & Levy and is a member of the Firm’s Litigation Department. She practices in general civil and commercial litigation matters including property disputes, contractual disputes, personal injury and employment law. Kathryn graduated from the University of the West Indies in 2014 with a Bachelor of Laws degree with First Class Honours. In 2016, she obtained a Legal Education Certificate from the Norman Manley Law School where she graduated on the Principal’s Honour Roll and received several awards including the Most Outstanding Year II Student and the Norman Manley Memorial Prize. Throughout her studies, Kathryn held executive positions on student bodies and was actively engaged in numerous community service and outreach activities. She is also a member of various non-governmental and civil society organizations. Kathryn was admitted to practice in Jamaica in December 2016 and is the current Co-Chairperson of the Social Affairs and Outreach Committee of the Jamaican Bar Association.

Christopher E. Harper – Over the last four years, Christopher has spent the majority of his time engaging children and young people on matters related to their human rights while advocating on their behalf, amplifying their voices and encouraging them to become positive agents of change. As a graduate of the University of the West Indies and the Norman Manley Law School Christopher has established himself as an attorney-at-law with particular interest in human rights and social justice. Christopher has recently completed a Master of Laws in Human Rights Law at the Queen Mary, University of London and remains steadfast in his efforts to understand the challenges that have restricted progress in many local, regional and international spaces and hopes to employ the strategies necessary to combat such issues. Throughout his life as an advocate and having worked in partnership with organizations like the Jamaica Youth Advocacy Network (JYAN), the Caribbean Vulnerable Communities Coalition (CVC) and UNICEF Jamaica.

Kristina Exell – Kristina was called to the Jamaican Bar in 2009, practising mainly at the Civil Bar. She is a Tutor at the Norman Manley Law School Legal Aid Clinic where her focus area is civil litigation. She has also been an Adjunct Tutor at the Faculty of Law of the University of the West Indies, Mona Campus. In 2017, Kristina obtained the Master of Business Administration from ESAN Graduate School of Business in Lima, Perú, where she completed her thesis on the management of wastes through public-private partnerships for composting in developing economies. She is a member of the Civil Practice and Procedure Committee of the Jamaican Bar Association and is currently serving as Convener.

Emile G.R. Leiba – Emile currently serves as the President of the Jamaican Bar Association and is a Partner and the co-head of Litigation at DunnCox, Attorneys-at-Law. Emile practices in Employment Law and Civil Litigation specializing primarily in Commercial Litigation and is a member of the Bar Council, Executive and Social Affairs Committee of the Jamaican Bar Association. Emile has also served as Honorary Counsel to the Little Theatre Movement of Jamaica and is an Associate Tutor in Civil Procedure and Practice at Norman Manley Law School.
Contributors continued...

**Marc Francis Ramsay** – Marc was admitted to practice in Jamaica in 2011 and is also called to the Bar in Barbados and Belize. His practice focuses on mergers and acquisitions, finance, property, foreign direct investment, and corporate governance for local and international clients. Prior to establishing RamsaySmith, Attorneys-at-Law, Marc served as Consultant to the Caribbean Council in London, UK, as Crown Counsel - International Legal Affairs and Consultant to the Government of Belize, and as an Associate at a boutique international law firm based in Kingston, Jamaica where he instructed in the landmark Caribbean Court of Justice Original Jurisdiction case Shanique Myrie v Barbados. He is a Professionally Accredited Corporate Secretary has served on several company and government boards. He has been advisor to the award-winning Norman Manley Law School Jessup International Law Mootin team for several years and lectured at the Faculty of Law, University of the West Indies in public international law, advanced legal writing, and governance.

**Rochelle R. Haynes** – Rochelle is a recent graduate of the Norman Manley Law School and graduated on the Principal’s Roll of Honour. She holds an LLM (with Distinction) in International Business Law from Queen Mary, University of London and an LLB(Hons.) from the Faculty of Law, UWI Mona.

**Daniel Thwaites** – Daniel is a graduate of the St. George’s College and holds a B.A. in Philosophy from Queen’s University at Kingston, Ontario, and an M.A. in Philosophy from the University of London. He also hold an LL.B. from Oxford University and an LL.M. from the University of Miami School of Law. He was the 1993 Caribbean Commonwealth Rhodes Scholar. Daniel is the managing partner of Thwaites, Lundgren & D’Arcy in Harrison, New York and he writes a weekly newspaper column for the Sunday Gleaner.

**Janelle Knibb** – Janelle is the Deputy Registrar of the Supreme Court of Jamaica.
Endnotes

1 [2019] JMFC Full 4
2 Sections 4 and 20 (1)
3 Section 20 (11)
4 Sections 15 and the Third Schedule
5 Section 45
6 Robinson v AG supra at paragraphs 111 – 131 per Sykes CJ
7 R v Oakes [1986] 1 SCR 103 and paragraphs 84 – 106 Robinson v AG (supra)
9 [2008] SCJR 30562/04
10 [2016] USKPC 30
11 Maharajah Madhews v The State of Mauritius and anor 2015 SCL 177
12 Robinson v AG (supra) at paragraph 216
13 White Paper 01/2016 at paragraphs 3.1 – 3.3 no hyperlink?
14 Robinson v AG (supra) at paragraph 227
15 White Paper 01/2016 at paragraphs 2.3 – 2.6
16 The Jamaica Gleaner, "Government will not appeal NIDS Court ruling, says Chuck", 22 nd May, 2019
    accessed on 10 th September, 2019
20 Peter Schübeler, Karl Wehrle and Jurg Christen, 'Conceptual framework for municipal solid waste management in low-income countries' (Urban management and infrastructure working paper no. 9, SKAT (Swiss Centre for Development Cooperation) 1996)
22 Schübeler (n 2) 12
23 National Solid Waste Management Act, s. 2 (1) ("solid waste management"); s. 23; s. 55 - 60
24 National Solid Waste Management Act, s. 2 (1) ("solid waste")
25 Agency of the Ministry of Local Government and Community Development
27 <https://jis.gov.jm/media/1M-Arscotts-Sectoral-Debate-Presentation-Final-Draft-for-Print.pdf>&gt; accessed 10 August 2019
28 His Excellency the Most Hon. Sir Patrick Allen, Governor General, ' Throne Speech 2019 ' (Gordon House, Kingston, 14 February 2019)
30 Hon. Desmond McKenzie, ' Creating Institutional Change in Local Government ' (Sector presentation, Gordon House, Kingston, 28 May 2019)
32 National Solid Waste Management (Public Cleanliness) Regulations (2003)
36 <https://openknowledge.worldbank.org/handle/10986/26286 License: CC BY 3.0 (IGO)>
37 Municipal Solid Wastes (Management and Handling) Rules 2000, para i (3) of Schedule II
39 Municipal Solid Wastes (Management and Handling) Rules 2000, para 2 of Schedule II
42 Composting refers to a process carried out in organic material when, in the presence of oxygen, the waste is partially decomposed and the resulting material (compost) can be used as organic fertilizer and soil enhancer:
43 Natália Giraldo Gómez, 'Operational guideline for composting projects in developing countries' (Master Graduation Thesis, Politecnico di Milano 2014) 28
44 These activities would involve the use of Economic Instruments - tools aimed at affecting behaviour by changing financial incentives in order to improve the cost-effectiveness of environmental management. These tools may raise revenue (taxes, tipping fees); provide revenue (grants, subsidies); or act as non- revenue incentives (licensing campaigns, competitions); Natália Giraldo Gómez and others. Selection, design and implementation of economic instruments in the solid waste management sector in Kenya: The case of plastic bags (United Nations Environment Programme; Division of Technology, Industry and Economics 2005) ch 2
45 National Solid Waste Management Authority, The Compactor (1 st Quarter Apr-Jun 2012)
48 Observed on June 6 of each year
50 User fees require waste producers to pay for the collection, transportation and disposal of their waste: Nuhuir ( n 15) 28
51 Giraldo Gomez (note 14) 23
52 Teodora Al Seadi and others, Source separation of MSW ( IEA Bioenergy 2013) 35-38