REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2018-02726**

IN THE MATTER OF THE CONSTITUTION OF TRINIDAD AND TOBAGO

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 14 OF THE CONSTITUTION OF THE REPUBLIC OF TRINIDAD AND TOBAGO ALLEGING THAT THE PROVISIONS OF THE SECTION 4 THEREOF HAVE BEEN, ARE BEING, AND ARE LIKELY TO BE ABROGATED ABRIDGED OR INFRINGED

AND

IN THE MATTER OF SECTION 15 (1) A OF THE LEGAL PROFESSION ACT CHAPTER 90:03

BETWEEN

DIANNE JHAMILLY HADEED

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

First Interested Party

THE REGISTRAR OF THE SUPREME COURT OF TRINIDAD AND TOBAGO

Second Interested Party

Before the Honourable Mr. Justice V. Kokaram

Date of Delivery: Wednesday 31 July 2019

Appearances:

Mr. Christopher R. Rodriguez, Ms. Raisa Ceasar, Ms. Sparkle Kirk instructed by Mr. David R. Francis, Attorneys at Law for the Claimant.

Mr. Fyard Hosein S.C. leads Ms. Rachel Thurab and Mr. Roshan Ramcharitar instructed by Ms. Laura Persad and Ms. Khadine Matthews Attorneys at Law for the Defendant.
Mr. Alvin Fitzpatrick S.C leads Mr. Joseph Sookoo instructed by Ms. Kerlene Alfonso, Attorneys at Law for the First Interested Party.
Mr. Ian L. Benjamin S.C. leads Mr. Pierre A. Rudder instructed by Ms. Michelle Benjamin and Mr. Ryan Grant Attorneys at law for the Second Interested Party.

JUDGMENT ON SUSPENSION OF ORDER

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1. The suspension of the effect of a declaration made by a Court of the constitutional invalidity of a law is not made lightly. It is an exceptional constitutional remedy. It is also a serious matter as it allows a state of affairs found to be unconstitutional to persist for a specific period despite its invalidity. It may also lead to further uncertainty. It is worth emphasising that in this country it is the Constitution[1] and not Parliament that is supreme. Any law made by Parliament can be struck down for contravention of the provisions of the Constitution. It is the Court's duty to uphold the Constitution against contraventions by either the Executive or Parliament and grant such suitable relief to uphold the rule of law and in exceptional circumstances craft creative remedies that hold in the balance the sanctity of the provisions of the fundamental human rights enshrined in our Constitution and the public interest of those impacted by a sudden declaration of invalidity of existing law.

2. We are all Executive, Parliament and Legislature alike enjoined by that common thread that we are subject to the restraints and checks of the Constitution. The Constitution exists for us all, no one is above it. To that extent, even though we speak about the separation of

[1] The Constitution of the Republic of Trinidad and Tobago

See also Cohens v State of Virginia 19 U.S. 264, 5 L. Ed. 257 (1821)

> *"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution"*

powers there must be a degree of comity amongst these powers to ensure the smooth operation of our democracy. To that extent, the Constitutional Court ought to fashion suitable remedies which encourage the co-operation of the Executive and the Legislature to ensure that our society maintains its poise on those pillars of our constitutional fundamentals. A call for action by a Constitutional Court should sound as a clarion call to the other arms of State not to be dissonant by drawing power-lines in the sand, but by embracing the opportunity to collaborate and enlist the joint resources and powerful machinery of the State to serve a greater cause of constitutional justice. This judgment is a call for action.

3. I made that call when I made certain recommendations on declaring the unconstitutionality of section 15(1A) of the Legal Profession Act, Chapter 90:03. I granted my declaration last week in the flowing terms.

    1. "**IT IS HEREBY DECLARED** that Section 15(1A) of the Legal Profession Act, Chapter 90:03 of the Laws of Trinidad and Tobago contravenes the fundamental human rights of the Claimant enshrined in sections 4(b) and (d) of the Constitution of Trinidad and Tobago, and is struck down as invalid and unconstitutional. This declaration for the avoidance of doubt shall take effect prospectively.

    2. The Claimant's claims of a breach of her fundamental human rights enshrined in section 4(a) and the right to protection of the law in section 4(b) of the Constitution of Trinidad and Tobago and her claim of a breach of her legitimate expectations are hereby dismissed.

    3. The parties are to file submissions on the question of costs within fourteen (14) days of this order, in default of which, there will be "no order as to costs"."

4. The order was a prospective one and took effect from that date.[2] The claim highlighted a serious unconstitutional flaw in one of the pathways leading to the admission of attorneys

[2] Rule 43.8 of the Civil Proceeding Rules 1998 provides:

> "**Time when judgment or order takes effect**
>
> **43.8** A judgment or order takes effect from the day it is given or made, unless the court specifies that it is to take effect on a different date.

to the practise of law who are then deemed officers of this Court. It is no small matter. There can be no such thing as a small matter of a minor breach, no small erosion, no minor infraction of the Constitution. I have found that the constitutional rights of the Claimant have been breached by a discriminatory law. However, to fashion an appropriate remedy I volunteered some suggestions to the parties on a way forward which would have had a therapeutic result, that is a result which can reconcile the interests of aspiring attorneys with the legality of their route to practise, a matter which, as prospective lawyers, they no doubt would appreciate.

5. This judgment is now being delivered in response to a request by letter dated 26th July 2019 for an urgent hearing made by the Defendant and the Law Association of Trinidad and Tobago (LATT) for a suspension of my order. After hearing Senior Counsel and Counsel and reading their authorities, I am fortified in my view of the Court's therapeutic approach and have devised a pathway forward which I consider to be of immense assistance to all the parties. I have fashioned this additional order bearing in mind the following:

    - The Court's inherent jurisdiction after delivering its order (and retaining jurisdiction);
    - The Court's creative constitutional jurisdiction;
    - The powers of suspension of declarations; and
    - The need for urgent action.

Inherent Jurisdiction

6. The Court's order not having been entered, it still retains an inherent jurisdiction to recall or vary its order. In short, I am not functus until the order is entered or an appeal is filed. In **Re Harrison's Settlement** [1955] 2 WLR 256 Jenkins LJ observed at 266:

    "When a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously."

7. Even after the entry of an order the Court can amend its order to deal with omissions or

accidental slips[3]. But before the order is drawn up and perfected, the Court has, in exceptional circumstances, the liberty to go as far as to change its mind; to reverse a reasoned judgment or make a material alteration. See **Re Barrell Enterprises** [1972] 3 All ER 631. In **Paulin v Paulin** [2009] EWCA Civ 221 the Court of Appeal confirmed the Court's power of recall before the order was perfected but not afterwards. It also considered the boundaries of the Barrel jurisdiction as not being treated as a straightjacket by requiring "exceptional circumstances" but that "strong reasons would be enough to vary the Court's order". See also Re **L and B** [2013] UKSC 8:

> "A judge was entitled to reverse her decision at any time before her order was drawn up and perfected. In exercising that jurisdiction, the judge was not bound to look for exceptional circumstances. A carefully considered change of mind could be sufficient. Every case was going to depend upon its particular circumstance. The starting point was the overriding objective in the CPR to deal with cases justly. A relevant factor had to be whether any party had acted upon the decision to his detriment, especially in a case where it was expected that they might do so before the order was formally drawn up. The discretion had to be exercised judicially and not capriciously. That might entail offering the parties the opportunity of addressing the judge on whether she should or should not change her decision. The longer the interval between the two decisions the more likely it was that it would not be fair to do otherwise."

8. I had issued to the parties a draft of my judgment. The purpose of this was not to indicate that it was a preliminary or draft view but that it is the final view of the Court. It afforded the Court, however, the opportunity to make formal amendments such as typographical corrections, spelling and minor factual matters and to give parties an opportunity to consider the question of costs. See **Robinson v Fernsby** [2003] EWCA Civ 1820. It is not to be interpreted as inviting parties to reargue the case.

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[3] Rule 43.10 of the Civil Proceeding Rules 1998 provides:

> "**Correction of errors in judgments or orders 43.10**
> (1) The court may at any time correct (without an appeal) a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
> (2) A party may apply for a correction without notice.

9. I have been assured by the parties that nothing of the sort is being requested here. They have not sought to reargue the case nor ask this Court to change its mind. What the Defendant and the LATT have asked, the Registrar maintaining a purely neutral stance, is that I give consideration to the impact the declaration may have on the public and to suspend the effect of the order of unconstitutionality, in the case of the Defendant until the filing of an appeal and in the case of the LATT for as long a period necessary having regard to its own recommendations to repeal portions of section 15(1A) of the LPA with a two years sunset provision. The application for a suspension is therefore an appeal to the Court's undoubtedly wide discretion under section 14 of the Constitution.

10. It is an application made against the backdrop of the parties' submissions that regardless of the social and economic consequences, a Court must not shirk from its duty to strike down an unconstitutional law as invalid. The Privy Council in **Marpin v Cable and Wireless Dominica Limited** (2000) 57 WIR 141 commented that a fundamental human right guaranteed by the Constitution "would be a fragile thing" if it could be overridden by general political or economic policy. Basu in his Commentary on the Constitution of India (5th Edition, 1965) (at 226) stated:

> "Judges are bound by their oath to support the provisions of the constitution and to give effect to its commands irrespective of their views of the wisdom of such provision. Hence, where the constitutionality of a statute is properly raised before the court and it is clear that it transgresses the authority vested in the legislature by the constitution, the judges cannot shrink from their duty to declare the statute unconstitutional. The court should not be deterred from this duty by such considerations such as:-
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> (i) That the Executive might take political action in disregard of the court's judgment;
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> (ii) That serious consequences in the economic or social sphere will result from the declaration of unconstitutionality;
>
> (iii) That the violation of the constitution is small in its degree or extent. The duty of the court in this behalf is higher where fundamental rights are involved. It is the

constitutional duty of the courts to be vigilant and to resist even petty encroachment upon the fundamental rights, privileges and immunities of the people.

(iv) That, in the opinion of the court, the impugned statue or other act is highly beneficial;

(v) That the statute has been in operation for a long time."

11. In my judgment I did take into account the public interest and for that reason the Court offered its own solution to the parties in "Part IV- Remedy" of its judgment. In fact, in every case, not only restricted to public law matters, there is a public interest to be served in the amicable resolution of disputes, that is to say, in finding the most practical and efficacious method of arriving at consensus with the least and minimal harm and disruption to the lives of litigants. The reason that this Court has fashioned of late therapeutic options which is one aspect of an umbrella jurisprudence that I have coined "peace jurisprudential approaches", is to ensure that the Court maintains a holistic view of disputes, seeks to deal with a multitude of interests of those persons directly and indirectly affected by disputes and strive for reconciliation beyond the resolution of disputes, to search for peace as an outcome and not simply a procedural end to a dispute. This is such a fitting case for such an approach, even though it is a public law matter traditionally viewed as the "no go zone" for mediators. I have strived to demonstrate in my judgment that what is required now going forward to deal with no doubt the many persons who would be affected by the ruling, is to form a platform of dialogue to ensure that in the shortest possible time the necessary remedial steps can be taken by the Legislature to deal with the question of discrimination and the quantitative and qualitative issues raised in my judgment. No doubt this is a matter not restricted to the parties but the external student bodies and the Council of Legal Education and of course the Legislature. Anxiety should spur them into immediate action. Concern for prospective applicants to be admitted to the Bar should be the driving force to translate the dreary feet of any bureaucratic monolith into quicksilver. Constitutionality should be the axis of their endeavour. I turn to consider the wide breath of constitutional remedies.

Section 14 remedies: Creative Constitutional Remedies

12. An order suspending a declaration is but one creative judicial mechanism to give effect to the rule of law under the Constitution. Professor Drayton placed the constitutional courts in its proper social, historical and political contexts. He stated that the task of building a society lies with us in making such value judgments to fulfilling the rights promised in our Constitution. We must become our own founding fathers and mothers: "our task, one in which legislators' judges and citizens must share, is to create a constitutional identity which we can claim as our own precious heritage... Laws can only move from external constraints to inner inspirations if they are grounded in justice and embody the personality of all citizens... The duty of the judge is to be the witness of the present in the work of giving laws their meaning."

13. Constitutional motions are sui generis and the redress clause of section 14 of the Constitution provides a potent vehicle a new remedy to those complaining of breach of the fundamental law. A Constitutional Court has at it disposal in addition to all the traditional forms of relief, new forms of relief that can be conceived and formulated. **TTT v Rambachan**, H.C 4789/1982, **Gairy v AG of Grenada** GD 1994 CA 7 and **Maya Leaders Alliance and Others v The Attorney General of Belize** (2015) CCJ 15 AJ are perfect examples.

14. I had earlier commented in **BS v Her Worship Magistrate Marcia Ayers-Caesar, The Attorney General of Trinidad And Tobago** Claim No. CV2015-02799 at paragraph 304:

> "The Court's approach in granting relief must be an acknowledgment that it is administering the supreme law. It is protecting the fundamental rights consistent with the vision of the Nation, society and democracy that the Constitution contemplated. The Court was entrusted with the task of fleshing out rights and ergo granting the appropriate relief to remedy the wrong. Whether it is the "cutlassing" of the statute to commute death sentences to life imprisonment (Thomas) or ordering compensation orders or giving directions for discovery (Rambachan) or the establishment of funds as a step to complying with agreed obligations (Maya Leaders Alliance) or liberty to apply to

the aggrieved to apply to the Court for further or consequential relief (Suratt), there should be no limit to the innovation and creativity of the Court in granting relief when it has already been emboldened to make critical value judgments on the state of the Republic."

15. In **Doucet-Boudreau v Nova Scotia (Minister of Education)** [2003] S.C.J. No. 63 the Court found that the government violated parents' rights under section 23 of the Canadian Charter of Rights and ordered the province to use their best efforts to provide school facilities and programmes by particular dates. The judge retained the jurisdiction to hear reports on the status of their efforts. The Court of Appeal upheld the order on the basis that a purposive approach to remedies in a constitutional context requires both the purpose of the right being protected and the purpose of the remedies provision be protected.

    "To do so, courts must issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms."[4]

16. The creativity implicit in this constitutional remedy is demonstrated in its power to suspend orders. In a review of remedies of Constitutional Courts in the Commonwealth, Po Jen Yap[5] observed in **"New Democracies and Novel Remedies"** that "In vindicating their countries' commitments to human rights, the judiciaries have in turn issued novel constitutional remedies when they deem certain legislative actions incompatible with their enshrined bills of rights. It can be viewed as the Court's response to the challenges implicit in their political systems which require the shaping of novel constitutional remedies to "ameliorate the challenges they face operating within their environments". In some jurisdictions, Courts are more managerial or catalytic "as they play a more critical role in shaping policy by issuing constitutional remedies, which are completely foreign to the rest of the common law world, so as to mitigate the deficiencies found within their political systems." Some novel remedies fashioned in the Commonwealth for varying political cultures have been:

    - Engaging Orders ordering the State to engage with the public on the progress being

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[4] **Doucet-Boudreau v Nova Scotia (Minister of Education)** [2003] S.C.J. No. 63 *Per* McLachlin C.J. and Gonthier, Iacobucci, Bastarache and Arbour JJ

[5] The University of Hong Kong, Faculty of Law **"New Democracies and Novel Remedies"**

made on certain public projects.

- Suspension orders with "bite" which are a delayed declaration of invalidity coupled with a remedial reading in provision that takes effect automatically in the event of legislative default upon the expiry of the suspension period imposed by the Court.

- Judicial Directives by the Court reading words into the impugned legislation in lieu of a declaration of rights incompatibility. See **Jason Jones v The Attorney General of Trinidad and Tobago** Claim No. CV2017-00720. To that extent, a Court's response in shaping the suitable remedy under its wide section 14 jurisdiction must respond to the prevailing local climate, the responsiveness of the other arms of State to change and the political exigencies unique to our own culture.

The Power to Suspend the Effect of Declarations in Constitutional Law

17. The Court having granted a declaration, it is accepted by the parties that the Court has no jurisdiction to grant a stay of a declaration. Jones JA in **The Attorney General of Trinidad and Tobago v Ryan Reno Mahabir** Civil Appeal No. S 192 of 2016 pointed out at paragraph 26, citing with approval **Cukurova Finance International Limited and another v Alfa Telecom Turkey Limited** [2011] ECSCJ No 257:

> "26. …….a declaratory judgment cannot be stayed. It is elementary that a declaratory judgment merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against Culurova. While the declaratory judgment may be the ground of subsequent proceedings in which the right, having been violated, receives enforcement, in the meantime there is no enforcement or any claim to it. The Court of Appeal made no determination of the rights of the parties requiring enforcement by making the declarations sought by Alfa so Cukrova's application in relation to the declarations made by the Court of Appeal must be refused"

18. The Court, however, has the power to suspend the effect of a declaration. This jurisdiction has been developed primarily in Canada and other parts of the Commonwealth.[6] The origins

[6] South Africa notably in its Constitution provides:

of the jurisdiction in Canada began with the decision in **Manitoba Language Rights (Man.),** [1985] 1 S.C.R. 721**.** The Court found that the legislative assembly had ignored the constitutional requirement that all provincial statues be enacted in both official languages of English and French. The Court feared that an immediate declaration of invalidity of all its laws would naturally plunge the province into a state of lawlessness. The immediate nullification of the offending statutes would undermine every State action, agency, public and private right consisted under those laws. There was an imminent social disaster. It was a legal result which created a public emergency and required the fashioning of the unique measure of suspending the declaration of invalidity: "It is only in this way that legal chaos can be avoided and the rule of law preserved."[7] It was fashioned to avert an obvious and glaring constitutional crisis.

19. In **Schacter v Canada** [1992] S.C.J. No. 68, equally an immediate difficulty would have arisen concerning benefits to be conferred on parents. However, the Legislature had moved to amend the law and suspension was not necessary. Lamer CJ noted at paragraph 79, 81 and 83:

> "**79** A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, supra) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic

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"172. Powers of courts in constitutional matters.-(1) When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency
(b) may make any order that is just and equitable, including
(i) an order limiting the retrospective effect of the declaration of invalidity;
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[7] **Manitoba Language Rights (Man.),** [1985] 1 S.C.R. 721, paragraph 107

in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

81 A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

83 The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public."

20. In **British Columbia Civil Liberties Assn. v Canada (Attorney General)** [2019] B.C.J. No.8 there was an application by the Crown to extend the suspension of a declaration of constitutional invalidity of the provisions of the Corrections and Conditional Release Act authorizing the administrative segregation of inmates. The government had signalled its intention to replace the legislation and to reform the administrative segregation regime. While it was probable that the legislation would be passed, the time and final form of the legislation was uncertain. The State argued that there would have been a "legislative vacuum" if the existing legislation ceased to have effect before Parliament introduced another statute in its place.

21. At the hearing to extend the suspension, the Court indicated that if the suspension was to be extended, the Court wanted some assurance that "concrete" progress was being made towards improving the situation of the inmates.

22. The Court made the following observations:

“**11** As the parties have pointed out, suspensions of declarations of constitutional invalidity are a court-created mechanism for ensuring that the striking down of legislation does not create a regulatory vacuum and result in chaos. The Supreme Court of Canada first granted a suspension of a declaration of invalidity in ***Re Manitoba Language Rights***, [1985] 1 S.C.R. 721. In that case, the Court had determined that virtually all of Manitoba's legislation was unconstitutional because it was enacted only in English. To preserve statutory law in Manitoba while the government undertook diligent efforts to translate statutes and to enact official French versions of legislation, the Court suspended the declaration of invalidity. The Court considered that unless the suspension was granted, Manitoba would face "chaos and anarchy."

16 Where a court suspends a declaration of invalidity to allow a government to amend legislation, it does so in the expectation that the government will act with dispatch in correcting the situation. Suspensions of declarations of invalidity represent temporary reprieves. Out of respect for the rule of law, governments must ensure that unconstitutional legislation is not maintained for any longer than is necessary and give significant legislative priority to amending or replacing laws that have been declared unconstitutional.

17 Nonetheless, factors such as the complexity of regulation, political crises, and inevitable delays in democratic institutions mean that it is not always feasible to enact legislation within the period of an initial suspension. We have been directed to a number of cases in which extensions have been granted to suspensions of declarations of invalidity, including *R. v. Feeney*, [1997] 3 S.C.R. 1008; *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2010 BCCA 168 and 2010 BCCA 338; *Carter v. Canada (Attorney General),* 2016 SCC 4; and *Procureure générale du Canada c. Descheneaux*, 2017 QCCA 1238

18 In *Carter*, the Supreme Court of Canada indicated that suspensions of declarations of invalidity ought not to be extended without a strong rationale. It also suggested that extensions should be as short as is feasible:

> [2] ... To suspend a declaration of the constitutional invalidity of a law is an extraordinary step, since its effect is to maintain an unconstitutional law in breach of the constitutional rights of members of Canadian society. To extend such a suspension is even more problematic. The appellants point to the severe harm caused to individuals by the extension. Extraordinary circumstances must be shown. The burden on the Attorney General who seeks an extension of a suspension of a declaration of constitutional invalidity is heavy. In this case, the length of the interruption of work on a legislative response to the Court's decision due to a federal election constitutes such a circumstance. Parliament was dissolved on August 2, 2015 and officially resumed on December 3 of that year. This four-month delay justifies granting an extension of the suspension of the declaration of invalidity, but only for four months."

23. The Court granted the extension of the suspension having recognized that the government appeared to have been acting in good faith to change the legislation and there was a risk of serious harm if the legislation was immediately struck down.

24. In the Hong Kong Final Court of Appeal case of **Koo Sze Yiu v The Chief Executive of the Hong Kong Special Administrative Region** FACV Nos 12 & 13 of 2006, covert surveillance under conditions was found to be incompatible with freedom and privacy of communication under Art 30 of the Constitution of Basic Law. A temporary validity order was granted by the lower Courts to allow the unconstitutional section to remain valid and of legal effect for a period of six months. That order was appealed. Mr. Justice Bokhary PJ allowed the appeal to set aside the temporary validity order but substituted suspension of the declarations of unconstitutionality to postpone their coming into operation. His commentary at paragraphs 28, 33, 35, 40, 41, 49 and 50 is useful to note:

> "28. The rule of law involves meeting the needs of law and order. It involves providing a legal system able to function effectively. In order to meet those needs and preserve that ability, it must be recognised that exceptional circumstances may call for exceptional judicial measures. Temporary validity or suspension are examples of what courts have seen as such measures.

33. A point to be noted in regard to the difference between temporary validity and suspension is as follows. Where temporary validity is accorded, the result would appear to be twofold. First, the executive is permitted, during such temporary validity period, to function pursuant to what has been declared unconstitutional. Secondly, the executive is shielded from legal liability for so functioning. Looking at the decided cases involving scenarios such as a virtual legal vacuum or a virtually blank statute book, it may be that the courts there thought that, absent such a shield, there would be, even after corrective legislation, chaos between persons and the state and also between persons and persons.

35. This leaves the question of suspension, which would not involve the shield to which I have been referring. The judicial power to suspend the operation of a declaration is a concomitant of the power to make the declaration in the first place. It is within the inherent jurisdiction.

40. In *Re Spectrum Plus Ltd* Lord Nicholls of Birkenhead pointed out (at p.694 F) that the decision in *Re Manitoba Language Rights* involved having regard to "unwritten postulates such as the principle of the rule of law". Sometimes the danger to be averted by suspension will be of such a magnitude that suspension of a declaration of unconstitutionality would not offend against the rule of law.

41. Whether or not to suspend in any given case is a question to be decided with that in mind. And it will be decided by an independent judiciary after a full, fair and open hearing, and with reasons given. Suspension would not be accorded if it is unnecessary. And it would not be accorded for longer than necessary. As Lord Mansfield CJ so neatly put it in *Proceedings against George Stratton and others, for deposing Lord Pigot* (1779) 21 State Trials 1045 at p.1231, "necessity will not justify going further than necessity obliges".

49. I would allow the appeal to set aside the temporary validity order. In its place I would, to afford an opportunity for the enactment of corrective legislation, substitute suspension of the declarations of unconstitutionality so as to postpone their coming into

operation, such postponement to be for six months from the date of Hartmann J's judgment of 9 February 2006.

50. The Government can, during that period of suspension, function pursuant to what has been declared unconstitutional, doing so without acting contrary to any declaration in operation. But, despite such suspension, the Government is not shielded from legal liability for functioning pursuant to what has been declared unconstitutional."

25. In **R (National Council for Civil Liberties) v Home Secretary** [2018] EWHC 975 (Admin) Singh LJ noted that the Court would not grant a remedy which would have the effect "whether expressly or implicitly, of causing chaos and which would damage the public interest": [8]

"93. Nor do we consider that any coercive remedy is either necessary or appropriate. This is particularly so in a delicate constitutional context, where what is under challenge is primary legislation and where the Government proposes to introduce amending legislation which, although it will be in the form of secondary legislation rather than primary, will be placed before Parliament for the affirmative resolution procedure to be adopted.

94. On the other hand it would not be just or appropriate for the Court simply to give the Executive a *carte blanche* to take as long as it likes in order to secure compliance with EU law."

26. From a review of the authorities in the Commonwealth the following principles emerge:

    a. Suspensions of the constitutional invalidity of a law are a Court created remedial device by which a Court strikes down a constitutionally invalid law but suspends the effect of its order which that law retains for a temporary period.

    b. It is an exceptional judicial remedy required in exceptional circumstances. It is one of the suite of innovative constitutional remedies crafted by Courts in the Commonwealth against the backdrop of their unique political systems.

    c. It is granted sparingly and in circumstances mindful to ensure that the supremacy

[8] **R (National Council for Civil Liberties) v Home Secretary** [2018] EWHC 975 (Admin), paragraph 92

of the Constitution is not eroded.

d. It is to be distinguished from the temporary validity of an unconstitutional law. Temporary validity permits the Executive to function pursuant to what has been declared unconstitutional and is shielded from legal liability of so acting. "Looking at the decided cases involving scenarios such as a virtual legal vacuum or a virtually blank statute book, it may be that the courts there thought that, absent such a shield, there would be, even after corrective legislation, chaos between persons and the state and also between persons and persons."[9] The power of suspension does not involve the shield of liability.

e. The Court must exercise care that the upshot of granting a suspension of a declaration of unconstitutionality will itself offend the rule of law.

f. It can be used by the Court as a mechanism of a limited form of supervision.

g. A variation of a simple order of suspension can be a suspension with sanctions or with conditions.

h. Without creating an exhaustive list of circumstances in which a suspension can be ordered, it would be warranted: if striking down the legislation would pose a danger to the public; threaten the rule of law; would result in the deprivation of benefits from deserving persons without thereby benefiting the individual whose rights have been violated.

i. However, notwithstanding the circumstances in which a suspension may be seen as desirable, the main purpose of granting suspensions is to provide an opportunity for the Legislature to bring the impugned legislation into line with its constitutional obligations or corrective legislation consistent with the Court's ruling on the constitutionality of the invalid law.

j. A difficulty will always arise when reading in is not appropriate as it forces the matter back to the legislative agenda at a time not to the choosing of the

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[9] **Koo Sze Yiu v The Chief Executive of the Hong Kong Special Administrative Region** FACV Nos 12 & 13 of 2006, paragraph 33

Legislature and may be seen in itself an interference with the institution of the Legislature. See Lamer CJ in **Schachter v. Canada** [1992] S.C.J. No. 68

k. An application for a suspension must always be based upon evidence or whether the grave and serious impact is immediately apparent from the nature of the order.

l. The Court is guided by the general principles of balancing the relative advantages of making or refusing to suspend a declaration of invalidity not only on the parties themselves but on the broader society taking into account the limits of the Court's own jurisdiction. The Courts should also give express attention to the prejudicial effects of a suspended declaration balancing these against the prejudice inflicted of an immediate declaration.

m. The Court must consider all the circumstances including whether issuing a suspended order serves a pressing and substantial purpose; is there a rational connection with that purpose; the impact on the Constitutional rights being infringed; the minimally impairing measures that can be employed to achieve the objective; weighing the specific benefits of the suspension with the supremacy of the Constitution.

n. The mere presence of a problem or inconvenience arising from an immediate declaration should not create an automatic assertion favouring suspension.[10]

The Need for Urgent action

27. To suspend a declaration of constitutional invalidity of laws is no light matter. I endorse fully the statement of John Mativo J in **The Law Society of Kenya v The Kenya Revenue Authority** [2017] eKLR:

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[10] **Doucet-Boudreau v Nova Scotia (Minister of Education)** [2003] S.C.J. No. 63 **Jason Jones v The Attorney General of Trinidad and Tobago** Claim No. CV2017-00720 **The Attorney General of Trinidad and Tobago v Ryan Reno Mahabir** Civil Appeal No. S 192 of 2016 **Manitoba Language Rights (Man.),** [1985] 1 S.C.R. 721 **Schacter v Canada** [1992] S.C.J. No. 68, **Lee Carter v Attorney General of Canada** [2016] 1 S.C.R. 13, **British Columbia Civil Liberties Assn. v. Canada (Attorney General)** [2019] B.C.J. No. 8, **Koo Sze Yiu v The Chief Executive of the Hong Kong Special Administrative Region** FACV Nos 12 & 13 of 2006, **Rousselon Freres Et Cie v Horwood Homewares Ltd** [2008] EWHC 1660 (Ch), **Ahmed and others v HM Treasury; al-Ghabra v HM Treasury; R (on the application of Youssef) v HM Treasury; (No 2); Note [2010] UKSC 5**

"38. It is an established principle of law that the relief sought (suspension) ought to be granted cautiously and sparingly, most judiciously and ensuring the supremacy of the constitution is not eroded and that the remedy of suspension of a declaration is aimed at mitigating the time-span effect of the declaration. Also, suspension of invalidity is generally granted where the matters in question are complex or where the declaration of invalidity would disrupt law enforcement process. In short, it is granted to grant parliament time to enact the appropriate legislation."

28. I also consider that any party requesting such an exceptional measure must act in a manner that is mindful of the impact of the request on the rule of law. In short, there must be compelling evidence of the deleterious circumstances that would warrant this exceptional remedy.

29. However, what has the Court been faced with? There is no formal application made by the Defendant save for a letter request dated 26th July, 2019[11]. In short, there is again yet no evidence submitted before the Court as to who has been impacted by the declaration, what immediate classes of persons or numbers, what companies or entities, what is an appropriate duration for a stay based on the state of the "industry" under the previous section 15(1A) of the LPA. For the Defendant to complain meekly that it cannot conduct a

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[11] The letter from the LATT stated:

"Dear Madam,

<u>Re:CV2018-02726 Dianne Jhammily Hadeed v The Attorney General and The Law Association of Trinidad and Tobago (First Interested Party) and the Registrar of the Supreme Court (Second Interested Party)</u>

Reference is made to the matter at caption. This letter is issued jointly by the Defendant and the First Interested Party with notice to the Second Interested Party. The Attorneys-at-Law for all such Parties have been copied to the email, by virtue of which this joint letter has been dispatched, in order that they may confirm their consent by return email.

The Parties referred to above have considered the draft judgment delivered on the 25th July, 2019 by the Honourable Mr. Justice Kokaram. We respectfully request that the captioned matter be scheduled for an urgent hearing on Monday 29th July, 2019 in the morning period in order that we may make further submissions before the Honourable Mr. Justice Kokaram in relation to the said draft judgment delivered on the 25th July 2019 and specifically, on the issue of whether the effect of same may be suspended.

Please be advised that the Claimant has not consented to join in this letter but her Attorneys-at-Law have nonetheless been copies. Kindly communicate the contents of this letter to His Lordship as a matter of urgency."

survey of who may be affected is an ill-advised response to a serious matter. A reference to the many upset publics is not enough. The LATT and the Defendant have correctly argued that section 15 (1A) is a discrete section and that the remaining portions of section 15 can survive without it. What that means is not that there is chaos or anarchy or a legislative vacuum but simply that all persons are required to obtain an LEC before being admitted to practise. A matter which is consistent with the CLE Act, the CLE Agreement and the rule of law. There is no disaster in the interim. It remains open to the Legislature to remove the discriminatory effect of section 15(1A) or bring section 15(1A) in line with its obligations under the CLE Act or CLE Agreement and preferably both.

30. The Defendant made a very alarming statement that it is entitled to ignore its international obligations when enacting its own law. If that is the case then it begs the question why are we here in the first place. Section 15(1A) by that argument could have accommodated "any person" or "CARICOM national" as argued by the Claimant.

31. The Defendant itself seemed ambivalent as to the purpose for requesting the suspension. On the one hand, it was for the purpose of pursuing an appeal. On the other hand, it was for the purpose of considering taking instructions to determine whether the Defendant would consider the recommendations I made in my judgment. Not one small step…not even one inch taken by the Defendant to set about restoring the constitutionality to any alternative pathway to accommodate the persons who have been affected by the order, nor to even consider it as a viable option. The firm response has been to signal its intention to appeal, and even then not even any instruction to request an expedited hearing of the appeal. To its credit, the LATT indicated its intention if an appeal is filed to request an expedited hearing. However, the LATT is in no better position than this Court in making recommendations for reform. Its recommendations for reforming section 15(1A) were made some three years ago. The question of aligning section 15(1A) in line with constitutional requirements does not seem to be on the front burner for the Defendant on the application for a suspension.

32. No doubt any party has the right to appeal my judgment. But if that is so, the question of suspending my order should be better dealt with by the Appellate Court who would have

the management of the appeal and can predict how long it will last, how long the suspension may be necessary and have before it (one can only hope) a proper application with evidence to answer those questions of the length and purpose of the suspension.

33. The law that has been submitted to me suggests that the suspension of a declaration of constitutional invalidity is a matter that is done with grave reticence. Even so the cases that suggests it is done pending an appeal are in the minority. The literature suggests that the suspended declaration is a novel remedy recognising the need for positive government action to enforce rights and can involve the Court in the exercise of a form of supervisory jurisdiction. It is to reinforce the curative powers of the Legislature to make such orders for the good governance of our society. The suspension order should therefore be retained and utilised in this jurisdiction by our own Constitutional Courts as the "carrot and stick" to encourage the Legislature to take positive action to select among the various options to satisfy constitutional standards.

34. In an article submitted to me by the Defendant "Mandatory Relief and Supervisory Jurisdiction: When is it appropriate, just and equitable."[12] it refers to Chris Hansen's three reasons for government non-compliance with constitutional standards. They are "incompetence, inattentiveness and intransigence", to use a more charitable language for the third category "lack of capacity". Each type of political environment calls for different responses by the Court varying from general declarations with possible reporting to the public, mandatory relief with reporting to the Court or detailed mandatory interdicts reinforced by contempt proceedings.

35. In fashioning the appropriate constitutional remedy, the Court must be mindful of the nuances of its unique socio-political culture. Although I am an eternal optimist, the Defendant has a track record of two extremes of, on the one hand, dragging its feet to rectify or implement legislation in conformity with its constitutional obligations and on the other, of acting in lightning speed to enact legislation for specific limited purposes. On one extreme is **Oswald Alleyne and others v The Attorney General of Trinidad and Tobago**

[12] By Kent Roach and Geoff Budlender

[2015] UKPC 3, a matter in which the Privy Council chastised the government for dragging its feet in implementing necessary legislation to conform to its constitutional obligations of protection of the law. They were sanctioned by the Privy Council in an unusual order of damages for failing to comply with the orders of the Court which were assessed in the total amount of $54 million dollars for spending over fifteen years to enact the necessary regulation which were the subject of an order of the Court[13]. Even when the necessary regulations were enacted, the Privy Council commented on its defectiveness. In **Sanatan Dharma Maha Sabha of Trinidad and Tobago v The Attorney General of Trinidad and Tobago** [2009] UKPC 17 the Privy Council again criticised the State for failing to carry out the orders of the Court. In **Kenneth Suratt and others v The Attorney General of Trinidad and Tobago** Civil Appeal No. 64 0f 2004 the Court of Appeal commented that even though the Equal Opportunities Act 2000 was patently unconstitutional or unworkable and with evidence of appropriate advice being sought and careful consideration given to the course of action to be taken. The criticisms the Court of Appeal made was with respect to the length of time that passed with no attempt to repeal or amend the statute.

36. On the other extreme in **Steve Ferguson et al v The Attorney General of Trinidad and Tobago** [2016] UKPC 2, it took Parliament all but one day (12th September 2012) to pass the bill repealing section 34 of the Administration of Justice (Indictable Proceedings) Act 2011 after the DPP issued a press release on 11th September 2012 criticising section 34 and the timing of the proclamation to bring it in force echoing the public outcry that the section would entitle the appellants to be discharged from their fraud and corruption cases without a trial.

37. While of course each case depends on its own facts, the silver lining for this Court must be that when it comes to enacting the necessary legislation: "where there is a will there is way". To this end I repeat what I have said in Court to the parties that I would only be prepared to suspend this order if there is the legislative will to embrace this opportunity to fix the problem.

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[13] **Oswald Alleyne and 152 others v The Attorney General of Trinidad and Tobago** Claim No. CV2018-00447

38. I repeat what I have stated in my judgment:

> "The fundamental message is that a remedy is needed for the wider question of the shortages of spaces in the law school and the responsiveness of the CLE to the demands of Caribbean education. In my view, a Court should not simply make a declaration and move on. A strict view of the separation of powers may suggest that is the case. However, judging from "the therapeutic lens" provides the Court with the sensitivity and insight that the impact the law has on those that are reliant on the benefits of the law."[14]

39. It is manifestly obvious that section 15(1A) is but a piece of the larger question of Caribbean legal education and modernising the system of certification. I have considered the request for the suspension of the order. I reject the reasons advanced by the Defendant for the need for the suspension as being to advance its appeal. That takes us nowhere closer to solving this problem. Nor does it create any certainty with respect to the length of this suspension. Further, it serves as absolutely no impetus to the Legislature to do anything with respect to section 15(1A) for possibly the next three years. It goes against the grain of the majority of the authorities that speak to the grant of an exceptional remedy for the purpose of giving the Legislature time to bring its legislation in line with its constitutionality.

40. However, as I have said at the beginning, the submissions and authorities have only buttressed this Court's view on a more just result. One in which holds firmly in the balance the constitutional rights upheld of Ms. Hadeed with the rights of those impacted who acted in compliance with section 15(1A) and ultimately the rule of law. Mindful, of course, that the Court has absolutely no evidence of who has been immediately impacted and how. Mindful that there are no present statistics of the capacity of the law school, the waiting periods, the capacity of its six (6) month programme, its flexibility of its syllabus to accommodate the intake of LPC or BVC students. Mindful that section 15 of the LPA adequately on its face accommodates all persons pursuing their BVC and LPC and therefore no immediate prejudice or danger arises.

[14] **Dianne Jhamilly Hadeed v The Attorney General of Trinidad and Tobago and Interested Parties** Paragraph 228

41. Taking into account therefore all the circumstances, the purpose of granting a suspension will be limited to providing the Legislature time to rectify section 15(1A) and maintaining the advantage of doing so balanced with the impact on the rule of law. I am minded to make an order which I hope entices the State into action.

42. My declaratory order would be suspended pending the filing with this Court an undertaking in writing of the Defendant's commitment to finding a legislative solution to the issue of the unconstitutionality of section 15(1A) of the LPA mindful of the recommendations made by this Court and the establishment of a working Committee comprising such persons as the representatives of the Attorney General's office, the Defendant together with the CLE, LATT and other stakeholders or howsoever suitably constituted to examine the matters set out in Part IV of my judgment or as determined by it; the submission of a work plan of the Committee; and a report of its consultative processes and discussions on the issues of current quantitative and qualitative demands on admission to the practise of law.

43. This document which includes the said undertaking and the work plan which I shall describe as the "Commitment to Consensus Building" (CCB) shall be filed and served on or before 4th October, 2019 in default of which the suspension is lifted. A non-confidential document is to be filed for inspection by the public upon request to the Registrar. The Registrar gives the undertaking not to process any application or submit any report to the Court pursuant to section 15(1A) of the LPA until further order.

44. If the CCB is filed in compliance with the order, the Defendant shall also file and serve an application to continue the suspension which will come up for the Court's consideration.

45. If an appeal is filed the suspension will be lifted and the Defendant will make an application on or before 4th October, 2019 to the Court of Appeal for any further suspension of this order.

46. As I said at the beginning of this judgment, it is time for action. Indeed, the judgment calls for legislative change. I look forward to receiving the CCB.

Vasheist Kokaram

Judge