[2020] **JMSC Civ.267**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV02455-7 [1 – 3]

CLAIM NO. SU2020CV02462 [4]

CLAIM NO. SU2020CV02499 [5]

BETWEEN	**EVERTON DOUGLAS**
	NICHOLAS HEATH
	COURTNEY HALL
	COURTNEY THOMPSON
	GAVIN NOBLE
AND	**THE MINISTER OF NATIONAL SECURITY**
AND	**THE COMMISSIONER OF POLICE**
AND	**THE ATTORNEY GENERAL OF JAMAICA**

IN OPEN COURT

Mr. John Clarke, Mr. Isat Buchanan and Ms. S. Richards for Claimants

Mr. Louis Jean Hacker and Mr. Ricardo Madden for 1st and 3rd Defendants

Mr. Wentworth Charles and Mrs. Nesta Claire Hunter watching proceedings for Ministry of National Security and Justice

Ms. A. Whyte and Mrs. Shanique Crooks-Alcott (in-house Counsel) for the Commissioner of Police

Mr. Alexander Williams and Mr. Odeanie Kerr (Amicus)

Heard: July 27, 28 & 29, 2020 and September 18, 2020

Part 57 of Civil Procedure Rules – Writ of Habeas Corpus ad subjiciendum – principles of Law applicable – Constitution of Jamaica; s. 9, 10, 13, 14 & 20 – The Emergency Powers Act; The Emergency Powers Regulations – s. 30, 33 & 38; Separation of Powers Doctrine/Principle whether Executive breached Doctrine – whether Detention of Petitioners unlawful under EPA & EPR as being in breach of Constitution – proportionality – whether measures under EPA reasonably justifiable.

MORRISON, J

[1] "The law of this country has been very jealous of any infringement of personal liberty, and a great safeguard against it has been provided by the manner in which the Courts have exercised their jurisdiction to discharge under a writ of habeas corpus those detained unlawfully in custody" per Lord Herschell in Cox v Hayles

(1890) 15AC 506, 530

> *" My Lords…the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every Judge or every Court inturn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question."*

THE APPLICATION

[2]

(1) The instant Writ for Habeas Corpus is for an order to bring up each Petitioner before the Supreme Court for an examination into the circumstances and reasons for their detention is dated 9 July 2020 and filed on that day. The social protocols engendered by the pandemic of Coronavirus/COVID 19 is reflected in the Practice Directions issued by the Honourable Chief Justice. They must be observed. As a collective, the applicants are persons confined in certain places within the jurisdiction of this court. Mr. Gavin Noble is confined in Negril Police Station in the parish of Westmoreland whilst the other four Petitioners are confined in Tamarind Farm Correctional Centre in St. Catherine. Mr. Hall lives in Westmoreland but was moved by the first Defendant to St. Catherine Correctional Centre. All petitioners are in custody;

(2) The Petitioners have applied pursuant to Section 20 (5) of the Jamaican Constitution, the Supreme Court's inherent jurisdiction and Part 57 of the Civil Procedure Rules;

(3) The Petitioners seek an order for bringing them up before the Court for the purpose of asking the Court to make enquiries into the circumstances and reasons for their detention. The court on making such enquiries, they assert, is permitted by the Constitution, common law and its own inherent jurisdiction to make such orders as it deems fit. One such possible order is for the release of the Petitioners pursuant to section 22 of the Bail Act;

(4) The Petitioners contend that the 'independent and impartial' tribunal was also not seized with any of the actual material, statements, letter or sources which informed the Respondent's decision to detain the objectors;

(5) The Petitioners also submit, in reliance on Section 13 (9) of the Charter of Rights and Freedoms, that the court's jurisdiction has not been ousted. The said section, they note, says as follows:

> (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3) (f) of this section and sections 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.

[3] The first Petitioner, Everton Douglas, from his affidavit dated July 9, 2020, depones that he has been detained from the 26th day of January 2020 under the State of Public Emergency in Kingston East. He is detained for 177 days and counting without being charged.

[4] The second Petitioner, Nicholas Heath, from his affidavit dated July 9, 2020, depones that he has been detained from July 26, 2019 under the State of Public Emergency in South St. Andrew for 361 days and counting, without, being charged.

[5] The third Petitioner, Courtney Hall, from his affidavit dated July 9, 2020, depones that he has been detained from June 22, 2019 under the State of Public Emergency in Westmoreland for 395 days, without being charged.

[6] The fourth Petitioner, Courtney Thompson, has been detained from July 22, 2019 under the State of Public Emergency in St. Andrew South. Again, from his affidavit dated July 9, 2020, he has been detained for 365 days without his being charged.

[7] The fifth Petitioner, Gavin Noble, depones in his affidavit that he has been detained from May 17, 2019 under the State of Public Emergency in Westmoreland for a period of 431 days and counting, without his being charged. His affidavit is dated July 9, 2020.

[8] The detention time of each petitioner is quite remarkable having regard to the fact that none of them have been charged for any offence in law. The matters came up for hearing on July 20, 2020 before me when, owing to the exigency of the matters, and, the short notice given to the Court, they were all adjourned until July 22, 2020. Be it noted that on July 21, that there were no affidavits of the Respondents filed in response to that of the Petitioners. Subsequently, on July 21, 2020, affidavits and a bundle of Exhibit slip were filed by Mrs. Shanique Crooks-Alcott. It appears, in all instances that the Applicants, to varying degrees, were heard by a Tribunal empanelled further to the Emergency Power Regulations. Their individual objections were heard; they were allowed to give evidence and their witness statements were tendered into evidence; that the Legal Affairs Division received the report of the Tribunal; that the Applicants were served with the decision; and, that the Applicants "belittles the jurisdiction by making an application to this Court." This deponent prayed against the sought-after Orders. From the Bundle of Exhibit Slip Mrs. Shanique Crooks-Alcott, Legal Officer of the Commissioner of Police exhibited, in each case, the proclamation dated July 7, 2019, the detention order, the Notice of Objection and, the Report of the tribunal.

[9] All Petitioners have alleged that there is no information that they were engaged in acts to satisfy the requirements of Section 20 (1) and 20(2)(b) of the Constitution. Further, they all allege, that the tribunal which received their case was not seized of the court's power to engage into and determine whether a proclamation, resolution or measures taken under the Section are reasonably justifiable for that purpose within the context of Section 20(5) of the Constitution.

The Petitioners' request in summary is that:

(1) The Court should enquire into and determine whether a proclamation or resolution purporting to have been made or passed under section 20 of the Constitution was made or passed for any purpose specified in that section;

(2) Alternatively, for the court to enquire into and determine whether any measures taken pursuant to Section 20 of the Constitution (specifically section 20 (2) (b) were reasonably justified for that purpose.

(3) Whether there was a situation that exists in their community, parish or country which allows for the alteration of existing laws in relation to criminal cases to permit the Petitioners 'indefinite detention' on mere suspicion of 'criminal offences'.

1. It is further contended by the Petitioners that:

(a) there is no avenue for monetary compensation for infringing rights to liberty although such an avenue is statutorily provided for in the event property rights are infringed.

(b) the JCF continues to, without more, investigate the petitioners to see if they can charge them for the same offences which informs their detentions under the SOE.

(c) In some cases, some of the petitioners were charged and received bail for a criminal offence. The same JCF officers in that particular case imprisoned the petitioner as they use the SOPE to override the decision of the Court.

(4) Whether the Petitioners can be imprisoned, for such a protracted period of time, on suspicion of criminal cases under the State of Public Emergency?

(5) Whether the material detention order can be done under the authority of the Emergency Powers Act and its concomitant Regulation despite explicit provisions and doctrines in our Constitution?

(6) Whether the Detention of the petitioners is reasonably justifiable to deal with a situation which exists in their community.

PETITIONERS' SUBMISSIONS:

[10] The Petitioners rely on Lord Halsbury pronouncement in the case of ***Rev. James Bell Cox v James Hakes and Ors*** [1890] 15 AC 506, 514 where he said:

> *'My Lords, probably no more important or serious questions has ever come before your Lordships' House. For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every Court in turn, and each Court or Judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurer was allowed'.*

[11] The question they pose is, whether the powers provided under the legislative framework for the detention of the Petitioners and, consequently, their further indefinite period of detention were lawfully made.

[12] It seems to me that the answer to the foregoing issues can be found by examining in the **Emergency Powers Act** (EPA). It is of course noted that the **EPA** gives effect to the regulations on whose provisions the police rely. The police's power to detain is pursuant to Emergency Powers (No. 2) Regulations 2019 (EPR). That the Regulations must be interpreted in light of the EPA is, of course, expected.

[13] The Petitioners argue that Section 3 (5) of **EPA** indicates that no regulations issued pursuant to the EPA can seek to amend existing procedures in criminal cases. The Petitioners submit that this is an express provision from this 1938 law which saves the jurisdiction of the court and which ensures that the procedures in criminal cases cannot be abused in the matter proposed by the police.

[14] Further, they contend, that Section 3 (2) (d) of **EPA** gives the Governor General (GG), the author of the material regulations, the power to suspend any enactment. They contend that this power was not exercised by the GG. Against that background, they submit, it is therefore clear that the GG or the Executive did not see it fit to suspend the role of the court pursuant to the **Bail Act** or the **Constabulary Force Act**.

[15] Furthermore, they submit, that the EPR can neither expressly not by implication suspend the court's constitutional or inherent duty.

[16] They observe that the court's role is vital and preserved even by this 1938 EPA. Further, they argue, that it is important to note that pursuant to EPR, the referral to tribunal is not automatic. However, the court's role under the Bail Act is automatic.

[17] It is the Petitioners' further submission that, based on the Petitioners' affidavits, the role of the Tribunal was limited. Further, examination of the material regulation would also note that in all cases the Tribunal was mandated by the regulation which created it to 'deem the petitioners as being in lawful custody'. The tribunal was also not presented with the arrest form, extension of detention papers or any of the actual documents which informs each petitioner's detention.

[18] They contend that the Court's role is pursuant to the Constitution and is separate and distinct from the tribunal. There are no explicit provisions which indicate that the court's role to entertain habeas corpus is suspended. They rely on ***Julian J Robinson v The Attorney General of Jamaica*** [2019] JMFC Full Court for this proposition: "*The Constitution of Jamaica is premised on the notion that free men in a democracy provide the best arrangement to secure a peaceful stable and productive society. The separation of powers is intended to present a concentration of power which can militate against democracy. The guarantee of individual rights is intended to prevent erosion of the freedoms enjoyed by free men in a democracy. The free and democratic society, thereby created, functions best where there is trust between the average citizen and the state. Corruption, high crime rates,*

unemployment and underfunded social services may undermine that trust. This situation can pose a serious challenge to policy makers. The court is not unsympathetic to this reality. However, the exigency of the moment does not render proportional, or otherwise justify, a breach of rights guaranteed by the Constitution of a free and democratic society. The Constitution provides in section 13 (9) for its own amendment. Save as aforesaid the rule of law necessitates the upholding of the Constitution. We do not doubt the good intentions of the policy makers but chaos and the need for order has, all too often in history, been the justification for policies which curtail freedom and ultimately undermine democracy Judges, as the learned Attorney General reminded us, are not responsible for policy or for the content of legislation. We however interpret and apply legislation intended to implement the policy. It is our sworn duty to ensure that enactments are consistent with, and do not derogate from, the Constitution which is our highest law. It is not within the remit of judges to say whether the premise of the Constitution is right or wrong. It is our duty to uphold the policy of the Constitution as revealed in its words, structure and historical roots. We do this without regard to our popularity which, as judges, we neither crave nor require. In the words of Justice Hiler B Zobel an associate Justice of the Massachusetts Superior Court of the United States, "Elected officials may consider popular urging and sway to public opinion polls. But judges must follow their oaths and do their duty heedless of editorials, letters, telegrams, picketers, threats, petitions, panellists and talk shows. In this country, we do not administer justice by plebiscite. A judge in short is a public servant who must follow his conscience whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to prevalent demands".

[19] The Petitioners contention that the text of our constitution specifically sought, and did by section 13 (9) and 20 (5), to rewrite many of the common law positions which gave deference to the action of the executive and impose an onus on the Petitioners, that new paradigm, even for emergency cases, was introduced in the 2011 Charter. This new paradigm ensures that emergency measures are only permitted when they are reasonably justifiable to deal with a situation that exists during the state of public emergency and only to the extent that the measure or actions is rationally linked and proportional to deal with the said situation. This has been held by the **Julian Robinson v Attorney General** case,supra, to be provable by the violators of the petitioners' right and to a degree commensurate to the breach.

[20] They submit that the famous and celebrated dissent of Lord Atkin in **Liversidge v Anderson [1942] AC 206** has been constitutionally legislated as the preferred position in Jamaica.

[21] They also rely on **A (FC) and others (FC) V Secretary of State for the Home Department** [2004] UKHL 56 to state that, the majority position of deference in *Liversidge v Anderson* to executive decision is replaced by a unanimous position that the new legislative framework requires a rigorous analysis of the executive position especially since it affects the right to liberty. In this case the Petitioners' right to petition a 'tribunal' did not affect their right to petition the court. The Petitioners rely on Lord Nicholls judgment on this point. The relevant portions are:-

> *Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.*
>
> *But Parliament has charged the courts with a particular responsibility……The duty of the courts is to check that legislation and ministerial decision do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.*
>
> *In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of nonnationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exception all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release.*

[22] They submit that all the Petitioners have indicated that the Minister's decision have adversely affected their rights and have trampled on the jurisdiction of the

court. If this is so, it could affect the legality of their detention: See **Clarke v Tingling** [2020] JMFC Full 01, **Missick v Attorney General of Turks and Caicos** and **Bhasin v Union of India** 2019 SCC 1725.

[23] Further, they contend, that they are being treated worse than convicted persons. This leads the question, whether the Respondents gave any due weight to the petitioners' fundamental rights, the role of the court in the constitution and the effect of section 3 (5) of the **EPA** and the **Constitution**.

[24] Furthermore, they submit, that the state gave more weight to the potential loss of property by implementing a scheme under the Emergency Powers Regulation for compensating persons whose property rights were affected whilst implementing no such scheme for persons whose rights to liberty are affected.

[25] They also submit that the right to liberty is one of the most fundamental rights. This right derives its powers – not just from the constitution – but is a natural right. The Petitioners can petition the court to enforce: (a) their common law right to liberty, (b) their constitutional right to liberty, (c) all other constitutional rights which are abrogated, abridged and infringed by any infringement on right to liberty:

See **Robinson v Attorney General, Bhasin v Union of India, Dutta v Chief Commissioner of Tripura, A.K. Roy v Union of India** and **A (FC) v Secretary of State for Home Department** [2014] UKHL 56.

[26] Lastly, they submit, that, the Respondents have a duty to satisfy this court that the proclamation, the extensions and the measures taken thereunder are reasonably justifiably for dealing with the situation that exists in an 'emergency'. It is submitted by the Petitioners that the state should have led evidence as to the 'stage' of the emergency and that the infringement is reasonably justifiable for dealing with the situation which exists during a state of public emergency.

RESPONDENTS' SUBMISSIONS

[27] **The Respondents submit on** Section 20 (1) of the **Constitution** which defines a period of public emergency as:

> *"period of public emergency" means any period during which –*
>
> *(a) Jamaica is engaged in any war;*
>
> *(b) there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or*
>
> *(c) there is in force a resolution of each House of Parliament supported by the votes of a two-thirds majority of all the members of each House declaring that democratic institutions in Jamaica are threatened by subversion;*

That, "*service law*" *means the law regulating the discipline of a defence force or police officers.*

[28] Further, that under section 20 (2) of the **Constitution** the Governor General has to declare a period of public emergency. This was done in the Parishes of St. James, Hanover and Westmoreland and for St. Andrew; North, South, East and West. Section 20 (2) (b) states:

> (2) *A Proclamation made by the Governor -General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor-General is satisfied-*
>
> (b) *that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life;*
>
> (3) *A Proclamation made by the Governor-General for the purposes of and in accordance with this section-*
>
> (a) *shall, unless previously revoked, remain in force for fourteen days or for such longer period, not exceeding three months, as both Houses of Parliament may determine by a resolution supported by a two-thirds majority of all the members of each House;*

(b) *may be extended from time to time by a resolution passed in like manner as is prescribed in paragraph (a) for further periods, not exceeding in respect of each such extension a period of three months;*

(c) *may be revoked at any time by a resolution supported by the votes of a two-thirds majority of all the members of each House.*

(4) *A resolution passed by a House for the purpose of paragraph (c) of the definition of "period of public emergency" in subsection (1) may be revoked at any time by a resolution of that House supported by the votes of a majority of all the members thereof.*

(5) *The court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose.*

[29] That under section 3 of the **EPA** the Governor General has the power to make regulations for the State of Public Emergency for each area. Regulations were made, which are basically the same for each parish/zone in which the State of Public Emergency operates. This includes the making of regulations in relation to the detention of persons. Section 3 states:

3. (1) *During a period of public emergency, it shall be lawful for the GovernorGeneral, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.*

(2) Without prejudice to the generality of the powers conferred by subsection

(1), such Regulations may so far as appears to the Governor-General to be necessary or expedient for any of the purposes mentioned in that subsection-

(a) make provision for the detention of persons and the deportation and exclusion of persons from Jamaica;

(b) authorize on behalf of Her Majesty –

(i) the taking of possession or control or the managing or carrying on, as the case may be, of any property or undertaking;

(ii) the acquisition of any property other than land;

(c) authorize the entering of and search of any premises;

(d) provide for amending any enactment, for suspending the operation of any enactment, and for applying any enactment with or without modification;

(e) provide for charging, in respect of the grant or issue of any licence, permit, certificate *or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;*

(f) provide for payment of compensation and remuneration to persons affected by the Regulations:

Provided that nothing in this Act shall be construed to authorize the making of any Regulations imposing any form of compulsory military service or industrial conscription, or providing for the trial of persons by Military Courts:

Provided also that no such Regulation shall make it an offence for any person or persons to declare or take part in a lock-out or to take part in a strike, or peacefully to persuade any other person or persons to declare or take part in a lock-out or take part in a strike.

(3) In paragraph (d) of subsection (2) "enactment" includes any Regulation.

(4) Any Regulations so made shall be laid before the Senate and the House of Representatives as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid before the Senate and the House of Representatives, whichever shall be the later unless a resolution is passed by the Senate and the House of Representative providing for the continuance thereof.

(5) The Regulations may provide for the trial, by Courts of Summary Jurisdiction, of persons guilty of offences against the Regulations; so, however, that the

maximum penalty which may be inflicted for any offence against any such Regulations shall be imprisonment with or without hard labour for a term not exceeding three months, or a fine not exceeding two hundred dollars, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed;

Provided that no such Regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

(6) The Regulations so made shall have effect as if enacted in this Act, but may be added to or altered by resolution of the Senate and House of Representatives or by Regulations made in like manner which shall be laid before the Senate and House of Representatives and shall be subject to the like provisions as the original Regulations.

(7) The expiry or revocation of any Regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.

[30] That under Section 30 of the Regulations the power is given to an authorized officer to arrest and detain without a warrant. Section 30 of the **EPR** provides:

> *30-(1) An authorized person may arrest, without a warrant, and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has-*
>
> *(a) acted or is acting in a manner prejudicial to the public safety; or*
>
> *(b) has committed, is committing, or is about to commit an offence against these Regulations.*
>
> *(2)Any person detained under paragraph (1), shall be deemed to be in lawful custody and may be detained in any prison or any lockup or in any other place authorized generally or specially by the Minister (whether) within or outside of the community), and an authorized person may, during such detention take photographs, descriptions, measurements and fingerprints of any person so detained and any information obtained may, after the release of such person, be preserved.*
>
> *(3)Where a person is detained under this regulation for a period of three months without a charge being proffered against that person, the person shall be released or shall be brought before a Judge of the Parish Courts to be entered into a recognizance arid find sureties to keep the peace, or to be of good behaviour.*

[31] They do not dispute that all these applicants were initially arrested and detained under section 30 of the regulations. Subsequently, pursuant to section 33 of the EPR, they were detained by virtue of detention orders made by the Minister for National Security. Section 33 of the **EPR** provides:

> *33-(1) The Minister, on the written advice of the Commissioner of Police, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and*

that for any reason thereof it is necessary to exercise control over that person, may make an order (hereinafter referred to as a "detention order") against that person directing that he be detained.

(2) Any person detained under a detention order shall be deemed to be in lawful custody and shall be detained in such place (whether within or outside of the community) as may be authorized by the Minister and in accordance with such instructions as shall be issued by the Minister.

(3) At any time after a detention order has been made against any person, the Minister may, on the written advice of the Commissioner of Police, by a further order, revoke or vary the detention order or may direct that the duration of the detention order be suspended, subject to any of the following conditions, as Minister thinks fit-

(a) imposing upon such person such restrictions as may be specified in the direction in respect of – (i) his place of residence; and

(ii) his association or communication with other persons;

(b) prohibiting such person from being out of doors between such hours as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified;

(c)prohibiting or restricting the possession or use by such person of any articles so specified;

(d) requiring such person to notify of his movements in such manner, at such times and to such authority or person as may be so specified;

(e) prohibiting such person from proceeding beyond such distance from his place of residence as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified,

and the Minister may by order revoke or vary any such direction whenever he thinks fit.

(4) Every person who fails to comply with a condition attached to or restriction imposed by, a direction given by the Minister under paragraph (3), whether or not the direction is revoked in consequences of the failure commits an offence.

(5) For the avoidance of doubt, the powers exercisable under these Regulations shall be exercisable in respect of a person detained at a place outside of the community, and while being transported to or from any such place, pursuant to paragraph (2), as if the person were located in the community.

(6) In selecting a place of detention for the purposes of paragraph (2), the matters to which the Minister may have regard include-

(a) the physical accommodations, for such detention, available in the community; and

(b) the likelihood of further prejudice to public safety or public order if the person is detained in the community.

[32] Section 13 (9) of the **Constitution** provides:

(9) *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3)(f) of this section and sections 14 and 16(3) to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster.*

[33] They submit, that the **EPA and the EPR** conform with section 13(9). Furthermore, section 13 (10) of the **Constitution** provides:

(10) *A person, who is detained or whose freedom of movement has been restricted by virtue only of a law referred to in subsection (9), may request a review of his case at any time during the period of detention or restriction, but any request subsequent to the initial request shall not be made earlier than six weeks after he last made such a request, and if he makes such a request, his case shall be reviewed promptly by an independent and impartial tribunal which shall be immediately established pursuant to law and presided over by a person appointed by the Chief Justice of Jamaica from among persons qualified to be appointed as a Judge of the Supreme Court.*

[34] Further, they submit, that Section 38 of the **EPR, in accordance with section 13** (10) of the **Constitution** establishes the Tribunal for review of cases of detention or restriction. Section 38 provides**:**

38-(1) For the purpose of these regulations, there shall be established a Tribunal for the review of cases of detention or restriction to be called the Emergency Powers Review Tribunal.

(2) The Tribunal shall consist of-

(a) one member appointed by the Chief Justice of Jamaica among persons qualified to be appointed as a Judge of the Supreme Court, shall be chairman of the Tribunal; and

(b) two other persons appointed by the Governor-General.

(3) The Chief Justice shall notify the Governor-General of the appointment under paragraph (2)(a) and the Governor-General shall cause to be published in the Gazette a notice of the appointment of the members under paragraph (2)(a) and (b).

(4) Subject to paragraph (5), prior to the commencement of the proceedings of the Tribunal, the Permanent Secretary in the Ministry responsible for national security shall-

(a) enter into an agreement in writing, with the members of the Tribunal, for the remuneration of the members and any other person employed in or about the Tribunal; and

(b) make arrangements for the expenses attendant upon the carrying out of the functions of the Tribunal under these Regulations.

(5) Where an agreement under paragraph (4) (a) provides for the payment of remuneration based on time-based charges or fees, the agreement shall also stipulate the maximum sum that may be paid in satisfaction of the agreement between the parties, which sum shall not be exceeded, unless the Permanent Secretary is satisfied that circumstances have arisen which were not within the contemplation of the parties at the time of entering into the agreement and which justify an amount being paid in excess of the agreed maximum sum.

(6) In the case of the temporary absence or inability to act of-

(a) the chairman of the Tribunal, the Chief Justice may appoint another person from among persons qualified as specified in paragraph (2)(a) to act as chairman of the Tribunal;

(b) any other member of the Tribunal the Governor-General may appoint another person to act for that member.

(7) Subject to paragraphs (4) and (5), the appointment of any person as a member of the Tribunal shall be for such term and shall be subject to such conditions as may be determined by the Chief Justice or the Governor-General, as the case may require, and a person who ceases to hold office as a member of the Tribunal shall be eligible for reappointment thereto.

(8) Subject to section 13(10) and (11) of the Constitution of Jamaica and to the provisions of this regulation the Tribunal may regulate its own proceedings.

(9) Any person who is detained or whose freedom of movement has been restricted by virtue only of these Regulations 9including any person against whom an order is made under regulation 22, 32 or 33 of these Regulations) may make objection to the Tribunal aforesaid.

(10) Any meeting of the Tribunal held to consider any such objection as aforesaid shall be presided over by the chairman, sufficient to enable the objector to present his case.

(11) In respect of the findings of the Tribunal on an objection under paragraph (9), the chairman shall issue such directions as the Tribunal thinks fit to-

(a) the competent authority concerned, in the case of an order under regulation 22;

(b) the Minister, in the case of an order under regulation 32 or 33; or

(c) in any other case, the competent authority by whom such detention or restriction was authorized,

including any recommendations concerning the necessity or expediency of continuing the detention or restriction of freedom of movement (as the case may be).

(12) In keeping with the findings of the Tribunal –

(a) in the case of an order under regulation 22 the competent authority, or in the case of an order under regulation 32 or 33 the Minister, shall –

(i) direct that the order remain in force;
(ii) vary the order (including imposing conditions thereunder);

or

(iii) revoke the order;

(b) in any other case, the competent authority shall comply with the directions of the Tribunal.

(13) The competent authority shall cause to be issued to a person who is detained, or whose freedom of movement is restricted, by virtue of these Regulations, a notice informing the person of-

(a) the grounds there for; and
(b) the person's right to make his objections to the Tribunal aforesaid.

(14) The competent authority shall cause a person who is detained, or whose freedom of movement is restricted, by virtue of these Regulations, to be furnished as soon as practicable after the detention or restriction (as the case may be) with the necessary particulars that person to present his case to the Tribunal.

[35] Pursuant to section 38 (9) of the **EPR,** the person who is detained in custody may make an objection to the Tribunal. The Tribunal, pursuant to section 38 (8) to (12) meets and determines whether or not the detention order issued by the Minister should remain in force, varied or revoked. It is not in dispute that all the applicants went before the respective Tribunals, some even twice, with their Attorneys and a decision was made for the detention order to remain in force.

Therefore, it is submitted that the applicants are being held pursuant to the decision of the Tribunal.

[36] The Respondents submit that the Tribunal, is a body established under the **Constitution,** by members appointed by the Chief Justice and is not a crown servant within the meaning of the **Crown Proceedings Act**. Counsel for the applicants knows and appreciate that the tribunal is not a crown servant as he commenced proceedings before the court, naming the Tribunal in Claim **No. SU2020CV01719 Nicholas Heath v COP, MNS, Tribunal, and AG.**

[37] The Tribunal being the decision maker which found that the detention orders for the applicants should continue, is not named in these proceedings. Therefore, they submit that, the various tribunals which found that the detention orders continue, in relation to each applicant, needs to be heard by the Court in relation to whether or not a writs of habeas corpus are to be issued and further or not they should be released. CPR 57.3 (1) (b) provides:

> The court may –
>
> (a) forthwith make an order for the writ in form 23 to issue; or
>
> (b) adjourn the application and give directions for notice to be given (i) to the person against whom the issue of the writ is sought; and (ii) to such other person as the court may direct.

[38] Further, and/or in the alternative, they submit that based on the orders sought and the affidavits in support filed by the applicants, it is clear and obvious that the applicants are asking the Court to pronounce on the constitutionality of the respective states of emergency. This, it is humbly submitted, cannot be done on an application for a writ of habeas corpus but is more properly suited for a Constitutional/Full Court. Therefore, grounds (a) (b) and (f) as sought by the applicants should fail.

[39] In relation to grounds (c) and (e), they submit that, the applicants were provided with all the relevant statements by the police officers, and the report of the tribunal after the respective hearings, therefore it cannot be said that there is no information present or has ever been present to justify their respective detentions.

[40] In relation to ground (d), they submit that, until there is determination regarding the constitutionality of the states of emergency, the decision of the review tribunal, which was properly constituted, is legal and binding.

[41] Based on the above affidavits and the relevant law, the issue for consideration in this application by this Court is whether the Petitioners are lawfully detained.

[42] At the end of their presentations I indicated that I preferred the submissions of the Petitioners attorneys-at-law. The Respondents attorneys-at-law, while setting out the Constitution, the law and the Regulations, failed to counter the point-by-point discussions made in that regard. They defended their stance rather cursorily, if not, perfunctorily.

The Law and Analysis

THE CONSTITUTION OF JAMAICA

The Constitution of Jamaica was amended in this wise in 2011:

[43] An Act to amend the Constitution of Jamaica to provide for a charter of

Fundamental Rights and Freedom and for connected matters received, the Governor General assent on 7th April 2011. By a process of public consultation and due deliberation, the Constitutional Commission established by Parliament recommended that Chapter III of the Constitution of Jamaica should be replaced by a new Chapter which provides more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica. To that end, Chapter III of the Constitution was repealed and, the Charter of Fundamental Rights and Freedom, came into being. It gave rise to the imperious recognition

of a corpus of rights that had hitherto been less than rigorous. The newly inserted Section 13 (i) of the Constitution reads:" whereas (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms; (b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and (c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter. "This Chapter, it continues, guarantees the rights and freedoms as are set out in subsection (3) and (6) of this section and in section 14, 15, 16 and 17; and "**Parliament** *shall pass no law and no organ of the state shall take any section which abrogates, abridges or infringes those rights". (My emphasis).*

[44] In this context the word abrogate means to repeal or do away with a law, right or formal agreement ; abridge means to shorten a piece of writing without losing the sense and, infringe means to actively agree the terms of Law/agreement"

[45] The relevant sections of the Constitution in my view, are Section 13 (8) (b), Section

9, Section 10, Section 14 (1) to section 20 (1);

[46] Under the EPA they are, where relevant, in aliquot part, it says that:-

"This Act may be cited as the Emergency Powers Act…"

It defines certain terms such as a "***period of public emergency***" to mean any period during which there is in force a Proclamation by the Governor-General declaring that a state of public emergency exists;

"Proclamation" means a Proclamation, effective for the purposes of subsection (4) of section 26 of the Constitution of Jamaica, which is issued upon the Governor-General being satisfied.

(a) that a public emergency has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity whether similar to the foregoing or not; or

(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community, or any substantial portion of the community, of supplies or services essential to life.

1. (1) During a period of public emergency, it shall be lawful for the Governor-General, by order, to make Regulations for securing the essentials of life to the community, and those Regulations may confer or impose on any Government Department or any persons in Her Majesty's Service or acting on Her Majesty's behalf such powers and duties as the Governor-General may deem necessary or expedient for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to the Governor-General to be required for making the exercise of those powers effective.

[47] The Proclamations, Rules and Regulations made under Section 3 of the EPA are vitally relevant here:

30 —(1) An authorized person may arrest, without a warrant, and detain, pending enquiries, any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has—

(a) acted or is acting in a manner prejudicial to the public safety; or

(b) has committed, is committing, or is about to commit an offence against these Regulations.

(2) Subject to paragraph (3), a person shall not be detained under paragraph (1) for a period exceeding 7 days, except with the

authority of a police officer not below the rank of Deputy Superintendent on whose directions such person may be detained for a further period not exceeding seven days.

(3) Where a police officer not below the rank of Senior Superintendent is satisfied that any necessary enquiries, pursuant to these Regulations, cannot be completed within the further period of seven days mentioned in paragraph (2), he may direct that the person be detained for a further period not exceeding the period of public emergency.

(4) Any person detained under paragraph (1), shall be deemed to be in lawful custody and may be detained in any prison or any lockup or in any other place authorized generally or specially by the Minister (whether within or outside of the community); and an authorized person may, during such detention take photographs, descriptions, measurements and fingerprints of any person so detained and any information so obtained may, after the release of such person, be preserved.

(5) Where a person is detained under this regulation for a period of three months without a charge being proffered against that person, the person shall be released or shall be brought before a Judge of the Parish Courts to be entered into a recognizance and find sureties to keep the peace, or to be of good behavior.

33—(1) The Minister, on the written advice of the Commissioner of Police, if satisfied that any person has been concerned in acts prejudicial to public safety or public order or in the preparation or instigation of such acts and that for any reason thereof it is necessary to exercise control over that person, may make an order (hereinafter referred to as a “detention order”) against that person directing that he be detained.

(2) Any person detained under a detention order shall be deemed to be in lawful custody and shall be detained in such place (whether within) or outside of the community) as may be authorized by the Minister and in accordance with such instructions as shall be issued by the Minister.

(3) At any time after a detention order has been made against any person, the Minister may, on the written advice of the Commissioner of Police, by a further order, revoke or vary the detention order or may direct that the duration of the detention order be suspended, subject to any of the following conditions, as the Minister thinks fit—

(a) imposing upon such person such restrictions as may be specified in the direction in respect of—

(i) his place of residence: and

(ii) his association or communication with other persons;

(b) prohibiting such person from being out of doors between such hours as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified;

(c) prohibiting or restricting the possession or use by such person of any articles so specified;

(d) requiring such person to notify of his movements in such manner, at such times and to such authority or person as may be so specified;

(e) prohibiting such person from proceeding beyond such distance from his place of residence as may be so specified except with the authority of a written permit granted by such authority or person as may be so specified, and the Minister may by order revoke or vary any such direction whenever he thinks fit.

(4) Every person who fails to comply with a condition attached to or restriction imposed by, a direction given by the Minister under paragraph (3),

whether or not the direction is revoked in consequences of the failure, commits an offence.

(5) For the avoidance of doubt, the powers exercisable under these Regulations shall be exercisable in respect of a person detained at a place outside of the community, and while being transported to or from any such place, pursuant to paragraph (2), as if the person were located in the community.

(6) In selecting a place of detention for the purposes of paragraph (2), the matters to which the Minister may have regard include –

(a) the physical accommodations, for such detention, available in the community; and
(b) the likelihood of further prejudice to public safety or public order if the person is detained in the community.

38— (1) For the purpose of these Regulations, there shall be established a Tribunal for the review of cases of detention or restriction to be called the Emergency Powers Review Tribunal.

(2) The Tribunal shall consist of—

a) one member appointed by the Chief Justice of Jamaica from among persons qualified to be appointed as a Judge of the Supreme

Court, who shall be chairman of the Tribunal; and

b) two other persons appointed by the Governor-General.

(3) The Chief Justice shall notify the Governor-General of the appointment under paragraph (2)(a) and the Governor-General shall cause to be published in the Gazette a notice of the appointment of the members under paragraph (2)(a) and (b).

(4) Subject to paragraph (5), prior to the commencement of the proceedings of the Tribunal, the Permanent Secretary in the Ministry responsible for national security shall -

a) enter into an agreement in writing, with the members of the Tribunal, for the remuneration of the members and any other person employed in or about the Tribunal; and

b) make arrangements for the expenses attendant upon the carrying out of the functions of the Tribunal under these Regulations.

(5) Where an agreement under paragraph (4)(a) provides for the payment of remuneration based on time-based charges or fees, the agreement shall also stipulate the maximum sum that may be paid in satisfaction of the agreement between the parties, which sum shall not be exceeded, unless the Permanent Secretary is satisfied that circumstances have arisen which were not within the contemplation of the parties at the time of entering into the agreement and which justify an amount being paid in excess of the agreed maximum sum.

(6) In the case of the temporary absence or inability to act of –

(a) the chairman of the Tribunal, the Chief Justice may appoint another person from among persons qualified as specified in paragraph (2)(a) to act as chairman of the Tribunal;

(b) any other member of the Tribunal the Governor-General may appoint another person to act for that member.

(7) Subject to paragraphs (4) and (5), the appointment of any person as a member of the Tribunal shall be for such term and shall be subject to such conditions as may be determined by the Chief Justice or the Governor-General, as the case may require, and a person who ceases to hold office as a member of the Tribunal shall be eligible for re-appointment thereto.

(8) Subject to section 13(10) and (11) of the Constitution of Jamaica and to the provisions of this regulation the Tribunal may regulate its own proceedings.

(9) Any person who is detained or whose freedom of movement has been restricted by virtue only of these Regulations (including any person against whom an order is made under regulation 22, 32 or 33 of these Regulations) may make objection to the Tribunal aforesaid.

(10) Any meeting of the Tribunal held to consider any such objection as aforesaid shall be presided over by the chairman and it shall be the duty of the chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the chairman, sufficient to enable the objector to present his case.

(11) In respect of the findings of the Tribunal on an objection under paragraph (9), the chairman shall issue such directions as the Tribunal thinks fit to –

(a) the competent authority concerned, in the case of an order under regulation 22;

(b) the Minister, in the case of an order under regulation 32 or 33; or

(c) in any other case, the competent authority by whom such detention or restriction was authorized, including any recommendations concerning the necessity or expediency of continuing the detention or restriction of freedom of movement (as the case may be).

(12) In keeping with the findings of the Tribunal –

(a) in the case of an order under regulation 22 the competent authority, or in the case of an order under regulation 32 or 33 the Minister; shall –

(i) direct that the order remain in force;

(ii) vary the order (including imposing conditions thereunder); or

(iii) revoke the order;

(b) in any other case, the competent authority shall comply with the directions of the Tribunal.

(13) The competent authority shall cause to be issued to a person who is detained, or whose freedom of movement is restricted, by virtue of these Regulations, a notice informing the person of –

(a) the grounds therefor; and

(b) the person's right to make his objections to the Tribunal aforesaid.

(14) The competent authority shall cause a person who is detained, or whose freedom of movement is restricted, by virtue of these Regulations, to be furnished as soon as practicable after the detention or restriction (as the case may be) with the necessary particulars to enable that person to present his case to the Tribunal.

HABEAS CORPUS

[48] Under the Civil Procedure Rules 2002 and, as amended in 2006, Part 57 deals with Habeas Corpus Applications. Section 57.1 deals with applications for the issue of writ of Habeas Corpus and proceedings upon such a Court. Section 57.2 says that "An application for Habeas Corpus ad subjiciendum must be made to the Court." That, such an application must be supported by evidence on affidavit and that the evidence must be given by the person restrained. Further, that the application must be heard in open court.

[49] Section 57.3 deals with the Powers of the Court. In particular, the court may order under Section 57.3(2) that the person restrained be released and that such an order, under Section 57.3(3) is sufficient warrant to any person for the release of the person under restraint.

[50] Section 57.4 deals with the service of the court. Section 57.5 with the section of the writ with the cause of detention endorsed therein and Section 57.6 with the Powers of the Court on hearing the writ.

[51] The procedure for Habeas Corpus application is different than it is for Judicial Review which is governed by Part 56 of the Civil Procedure Rules. In particular, under this part the Constitution of the court is laid out. According to Section 56.8

(1). "In any matter involving the liberty of the subject and in any criminal cause or matter on application for judicial review…must be made to a full court. Under the Habeas Corpus Application there is no such constitution of the Court. I offer the view that the Court's original jurisdiction is allowed in determining the matter. I am fortified in this view by Francis Alexis in Changing Caribbean Constitutions:

" Consistently, the Constitution itself gives the Judiciary protected jurisdiction over certain matters. These are …questions whether the Bill of Rights has been infringed by the State, questions whether some functions vested in certain

functionaries by the Constitution or any other law have been exercised by them in accordance with the Constitution or such other law." At p. 128 the learned author says",…The description by the Constitution…of the Court manned by this Judiciary as "supreme"… vests that court with certain characteristic attributes. The description affords the court unlimited original jurisdiction in all serious criminal matters, unlimited original jurisdiction in all substantive civil cases, and inherent supervisory powers of control over inferior courts and tribunals…"

[52] Importantly, he notes that, "This, in the natural course of constitutional reasoning, imports certain consequences. Parliament could not by an ordinary Act take away from the Supreme Court its characteristic jurisdiction and give it to a body whose members are not exercised by the Constitution the kind of protection of tenure, procedure for removal of salary and other conditions of service given the Judiciary by the Constitution. This is forbidden by the separation of powers doctrine: - the doctrine that, in this context the powers and jurisdiction of the Judiciary may not be encroached upon or usurped by the Legislative or the Executive."

[53] It is important that I trace the historical development of Habeas Corpus. It means a command of the Court to the custodian that the institutionalized body of the detainee be brought before it. It is a recourse in law through which a person can report an unlawful detention or imprisonment to a court and request that the court order the custodian of the person detained to bring the prisoner to court to determine whether the detention is lawful. The writ of habeas corpus is known as the great and efficacious writ in all manner of illegal confinement. It is a summons with the force of a court order. It demands of the custodian that the detainee be brought before the court and that the custodian present proof of authority allowing the court to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond their authority, then the prisoner must be released. Any person, including the prisoner, may petition the court, or a judge, for a writ of habeas corpus. It is a procedural

remedy. It is a guarantee against any detention that is forbidden by law. It is the most efficient safeguard of the liberty of the subject. The jurist Albert Dicey wrote that the British Habeas Corpus Acts "declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty. The Respondent official must prove that authority to do or not do something.

[54] The question is, is the Act of Parliament incompatible with the constitution and thus unlawful. The question for the court is the legality of the imprisonment. The writ is issued for both parties to be present to decide the legality of the detention. If, and only if, the detention is held to be unlawful, the prisoner can, and usually is, released or bailed by order of the court.

[55] The writ of Habeas Corpus as a practical remedy is part of Jamaican English law inheritance. In Canada although the rights exists in common law, it is enshrined in Section 10 (1) of the Charter of Rights and Freedoms. It states that, "[e] veryone has the right on arrest or detention to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful. To be successful, according to Mission Institution v Khelp, 2019, SCC 24, [2019] 1 S.C.R. 502 an application for Habeas Corpus must satisfy the following criteria. First the Petitioner must establish that he/she has been deprived of liberty. Once that has been established the Petitioner must raise a legitimate ground upon which to question its legality. If the detention has raised such a ground, the onus shifts to the respondent authorities to show that the deprivation of liberty was lawful. A superior court always has the discretion to grant the writ even in the face of an alternative remedy: May v Ferndale. In other jurisdiction such as India and Ireland the Respondent is given the opportunity to justify the detention. The onus of proof is on the Respondent and the standard of proof to which the onus is discharged is on a prima facie basis or on a balance of probabilities.

[56] S. 63 (3) of the Criminal Justice (Administration) Act says that the writ of habeas corpus means a writ of habeas subjiciendum . It is any or several common law writs issued to bring a party before a court or Judge. It is the right of a citizen to obtain a writ as a protection against illegal restriction or imprisonment. It allows a prisoner to indicate that his or her constitutionally guaranteed rights to a fair treatment have been infringed upon.

THE SEPARATION OF POWERS DOCTRINE

[57] It is a basic principle of English and of Jamaican Constitutional law that the rights and obligations of individuals should be determined by judicial bodies which are not subject to the control or directions of the Legislative or the Executives: Per.

Lloyd G. Barnett in the Constitutional Law of Jamaica, p. 337.

[58] In Jamaica the position of the Judiciary is protected by the express provisions and necessary implications of the Constitution which is written and supreme. “From a constitutional point of view the power to lay down authoritative interpretation of the Constitution is by the utmost importance. For there is the general provision vesting this power those courts which are by the constitutional provision. It is clear, however, that this must be the intention of the Constitution for if it were otherwise the Legislative and Executive would be in a position to disregard the provisions of the Constitution and make their own tribunals to determine the constitutionality of their actions”.

[59] In **Bribery Commissioner v Ranasinghe** [1965] AC 172, the Respondent had been prosecuted for a bribery offence before the tribunal which convicted and sentenced him to a term of imprisonment and a fine. The tribunal was appointed by the Governor-General on the advice of the Minister of Justice and not by the Judicial Service Commission in which the Constitution vested the power to appoint judicial officers.

[60] The Privy Council held that the Bribery Commissioners who comprised the tribunal were 'judicial officers' and the statutory provision requiring their appointment otherwise than by the Judicial Service Commission was consistent with the Constitution, and since it had not been formed in accordance with the prescribed amendment process it was ultra vires and invalid.

[61] This case highlighted the importance of securing the independence of the judiciary and of maintaining a dividing line between the judiciary and executive, as well as to the dangers of the executive being free to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus by eroding the 'courts' jurisdiction render the provisions relating to the appointment of judicial officers valueless.

[62] Judicial power, the court said, shall be vested only in the Judicature. It would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive of the legislature. There exists a separate power in the judicature which under the Constitution as it stands cannot be or infringed by the executive or the legislature.

[63] The Jamaican Constitution allows for temporary suspension of rights upon the declaration of an official State of Emergency by the Governor-General. However, the State of Emergency cannot last longer than fourteen days. Parliament can mandate the extension of the State of Emergency by a two-third majority of its members. Notwithstanding, the State of Emergency cannot last for more than three months. In order to achieve that drastic end, the Governor-General would have to justify that something has happened in the nation that affects the Government's ability to function. Alternatively, that owing to a loss of social control of its citizenry, the government and its law enforcement organ are rendered unable to govern in a normal way.

[64] The proposed enactment was never met with approval. The enactment, it was said, appears to protect constitutional rights or to reinforce confidence in legal institutions. That without alarm is that the enactment does not retain the fundamental independence of the judiciary and thereby breaches the hallmark principle of the separation of powers between the legislative and judiciary branches of governance. The legislative branch cannot impose changes upon the judiciary based on its own interests. Whatever reforms the government seeks to undertake it might not undermine the validity of the constitution.

[65] In **Liyanage v The Queen** [Privy Council Appeal no. 25 of 1965], the court discussed why the legislature not interfere with judiciary powers. The Board

started its discussion by noting that '*The first is that the Ceylon Parchment is limited by an inability to pass legislation which is contrary to fundamental principles of justice'.*

[66] Observes Lord Pearce at page:

> .."*The importance of security the independence of judges and marinating the dividing line between the judiciary and the executive" (and also, one should add, the legislature) was appreciated by those who framed the Constitution. These provision manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that the judicial power shall be vested only in the judicature….The*
>
> *Constitution's silence as to the vesting of judicial power is consistent with its remaining where it has lain for more than a century, in the hand of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.*

[67] The Privy Council concluded this point by noting:

> *"If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took measures to deal with it, thinking, one must presume, that it had the power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution.* ***What is done one, if it be allowed, may be done again and in a lesser crises and less serious circumstances.*** *And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution."*

[68] The doctrine of Separation of Power has been reviewed by numerous decisions of the Board. I find that the text of our Constitution lends itself to protection of this common law concept as well as guarantees our citizens the protection of law.

[69] It is my view that the Emergency Powers Regulations 30 and 33 being reviewed gives unfettered discretion to the Police/Minister in relation to the committal of persons to penal institutions/jail for offences which are criminal offences.

[70] Regulation 30 and 33, violates the basic structure of the Constitution regarding separation of powers, the rules of law and the protection of fundamental rights.]

The historical development of the doctrine

The identification of the three elements of the constitution derives from Aristotle (384-322 BC). In The Politics, 20 he proclaimed the following:- "There are three elements in each constitution…if these are well arranged, the constitution is bound to be well arranged, and the difference in constitutions are bound to correspond to the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element." [103] Thus, the constitutional seeds of the doctrine were sown early, reflecting the need for a government according to and under the law, a requirement encouraged by some degree of separation of functions among the institutions of the state.

The constitutional historian FW Maitland traces the separation of powers in England to the reign of Edward 1 (1272-1307). Viscount Henry St John Bolingbroke (1678-1751), in Remarks on the History of England, advanced the idea of separation of powers, stating that, since this division of power, and these different privileges constitute and maintain a government, it follows that the confusion of them tends to destroy it..

The clearest expression of the demand for a separation of functions was made by Baron Montesquieu (1689-1755), who expressed the view that liberty cannot exist when there is a merger between the executive and the legislature. He stated that liberty would be impossible if there were no division between the judicial arm on the one hand and the executive and the legislative arms on the other.21 The contemporary doctrine

The doctrine of the separation of powers no longer bears the meaning conceived of by the early writers. In the context of the times then, the doctrine addressed the legitimate concern of the day, which was the fear of arbitrary rule. In today's world, the new meaning of the doctrine may be stated in two senses. Firstly, the doctrine helps us to appreciate that in the complexities of modern government, there can be shared powers among separate and quasi-autonomous yet interdependent sate organs. Secondly, the doctrine helps us to appreciate the truism that the system of government in which we operate

works on the assumption that there is a core function which can be classified as legislative, executive and judicial and that these core functions belong to their respective branches or organs. Thirdly, the doctrine helps us to recognize that government involves the blending of the respective powers of the principal organs of the *state.*

The Doctrine and the Jamaican Constitution

The Constitution of Jamaica is fundamentally concerned with the protection of the principle of constitutionalism which rests not only on the existence of an independent and impartial judiciary but also on the protection of its powers and jurisdiction from usurpation by the executive and the legislature. Such exclusiveness, a sis accorded to the judicial power, derives not from any abstract doctrine of the separation of powers but from the provisions of the Constitution itself.

It is a basic principle of Jamaican constitutional law that the rights and obligations of individuals should be determined by judicial bodies which are not subject to the control or directions of the legislature or the executive. In Jamaica, the position of the judiciary is protected by the express provisions and necessary implications of the Constitution, which is written and supreme*.*

[71] I note with anxiety that the Governor-General's discretion is limited in the manner outlined there as well as by virtue of the provisions of the Jamaican Constitution.

[72] On the 18 June 2020, a single judge, Mrs. Justice Tanya A. Lobbon-Jackson struck down portions of regulation 4 (6) of the Emergency Powers Regulation (see [39] in **Missick v Attorney general of Turks and Caicos** CI 48/20. The rationale for the decision:

[36] Given the legislative frame work previously outlined, Regulation 4(6) ought not to attempt to alter the existing law, where there is no evidence to suggest that it is necessary, proportionate to the threat of the pandemic or urgent to do so, as required by Article 7 of the 2017 Order or indeed reasonably justifiable as required s. 20 of the Constitution.

[73] I find that a similar rationale is needed for any regulation which purports to rewrite criminal justice laws and procedure.

[74] The court noted in its written judgment the Conditions for making Regulations:

> …*the Article 7 (the constitution) requirements of necessity, proportionality and urgency have not been fulfilled in relation to the Regulation. The questions would then arise- Is the sitting of the court outside the boundaries of the Turks and Caicos Island necessary for the purpose of preventing, controlling or mitigating any aspect or effect of the state of public emergency?*
>
> *Is the effect of so constituting the court, proportionate to that aspect or effect of the state of emergency; and was the need for this provision urgent.*

[75] In relation to the answers to those questions, each party contends that the opposite is true. Not only should the Regulations be compliant with Article 7 but also with s. 20 of the Constitution, which empowers the Governor to make emergency regulations which are 'reasonably justifiable" in the circumstances of any situation arising. The Plaintiffs contend that regulation fails the test because the circumstances prevailing at the time did not satisfy the test of necessity, since the Learned Judge had already elected, prior to the making of Regulation 4(6) to adjourn the proceedings until June 22, 2020. The purpose of the adjournment was to protect himself, the parties to the case, the court staff and the public at large against the threat of COVD 19.

[76] The Plaintiffs also submitted that there was no urgency in making the said Regulations, because there was no reason to believe that a delay until the airports were open would have any effect on the proceedings being continued. It was also argued that the making of the Regulations was not justifiable as the consequence of its operational effect would be the conduct of the proceedings in a way not conducive to the principle of protection of law of fair and public trial. **Bhasin v Union of India** 2019SCC 1725 the India Supreme Court defined the term emergency.

[77] The Court in **Ramlila Maidan** incident further enunciated upon the aforesaid distinction between a "public order" and "law and order" situation:

> *"The distinction between "public order" and "law and order" is a fine one, but nevertheless clear. A restriction imposed with "law and order" in mind would be least intruding into the guaranteed freedom while "public order"may qualify for a*

greater degree of restriction since public order is a matter of even greater social concern…"

The Court observed that is keeping this distinction in mind, the legislature, under the relevant section, has empowered the District Magistrate, or any other Executive Magistrate, specially empowered in this behalf,to direct any person to abstain from doing a certain act or to take action as directed, where sufficient ground for proceeding under this section exists and immediate prevention and/or speedy remedy is desirable. ***By virtue of the relevant section, which itself was introduced by an Act. The Code of Criminal Procedure (Amendment) Act, the District Magistrate has been empowered to pass an order prohibiting, in any area within the local limits of his jurisdiction, the carrying of arms in any procession or the organising or holding of any mass drill or mass training with arms in any public place, where it is necessary for him to do so for the preservation of public peace, public safety or maintenance of public order.***

[78] In view of the above, 'law and order', 'public order' and 'security of State' are distinct legal standards and the Magistrate must tailor the restrictions depending on the nature of the situation. If two families quarrel over irrigation water, it might breach law and order, but in a situation where two communities fight over the same, the situation might transcend into a public order situation. **The Magistrate cannot apply a straitjacket formula without assessing the gravity of the prevailing circumstances; the restrictions must be proportionate to the situation concerned.**

[79] Bearing in mind the principles mentioned earlier in the Judgment, I am now turn to Section 20 of the Constitution:

It defines *"court" as any court of law in Jamaica other than a court constituted by or under service law and*

(a) in sections 13(3(a), 14 and 16 (1), (2), (3), (5) (6), (7) and (9) (excluding the provision thereto) of this Constitution includes, in relation to an offence against service law, a court so constituted; and

(b) in section 14 of this Constitution includes, in relation to an offence against service law an officer of a defence force, or the Police Service Commission or any person or authority to whom the disciplinary powers of that Commission have been lawfully delegated;

"period of public emergency" means any period during which

(a) Jamaica is engaged in any war;

(b) there is inforce a Proclamation by the Governor-General declaring that a state of public emergency exists; or

[80] Section 20 (5) of the Constitution states:

> *"The* ***court shall be competent to enquire into and determine whether a proclamation or resolution purporting to have been made or passed under this section was made or passed for any purpose specified in this section or whether any measures taken pursuant thereto are reasonably justified for that purpose".***

[81] It is my view when one looks at Section 13 (9) of the Charter, that the court's jurisdiction has not been ousted. The said section reads;

"13 (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (3)(f) of this section and section 14 and 16(3), to the extent that the law authorizes the taking, in relation to persons detained or whose freedom of movement has been restricted by virtue of that law, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists during a period of public emergency or public disaster".

[82] In the case of **Rev. James Bell Cox v James Hakes and Ors** [1890] 15 AC 506, 514 Lord Halsbury L.C. said:

> *'…For a period extending as far back as our legal history, the writ of habeas corpus has been regarded as one of the most important safeguards of the liberty of the subject. If upon the return to that writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody. If release was refused, a person detained might make a fresh application to every judge or every Court in turn, and each Court or Judge was bound*

to consider the question independently and not to be influenced by the previous decision refusing discharge. If discharge followed, the legality of that discharge could never be brought in question. No writ of error or demurrer was allowed'.

[83] The issue for determination is that whether the cause on the return is sufficient?

[84] The return on the writ indicates petitioner is detained under State of Public Emergency. I hold that this return is deficient and that for all the reasons indicated by this Court hereto and which include the following:

(i) There is no valid state of public emergency;

(ii) The detention at the will of the executive is violative of our constitution;

(iii) The detention for criminal offences violates the Emergency Power Act;

(iv) The Emergency Power Act is inconsistent with the constitution;

(v) The material legislative framework is inapplicable to the material proclamation in this matter;

(vi) The detention order did not apply the reasonably justifiable test;

(vii) The detention is impermissible.

[85] The Petitioner indicates in the writ filed on the 9th July 2020 and served on the Defendants, including the Attorney General, that he questions whether there is a state of emergency and has petitioned this court to determine the question pursuant to the court's power under **section 20 (5) of the Jamaican Constitution.**

[86] The Defendants' response is to simply indicate the Claimant is detained under the State of Public Emergency. They provide a proclamation. The proclamation does not spell out any situation or information that could provide the background to the Public Emergency. The Defendant's response to this issue ends there.

[87] This response the Petitioner says is woefully short since the acceptance that the accused man is in their custody also imposes a duty on the Defendant to show either at common law or under the Constitution why there is an emergency in keeping with the language of either common law or the Constitution.

[88] To support this contention, I quote excerpt from a book entitled the Introduction to the Study of the law of the Constitution (hereinafter 'Law of the Constitution') by the celebrated constitutional theorists A.V. Dicey. At page 397 he notes what the concept of liberty meant even in time of 'war' He said:

> *"We must constantly bear in mind the broad and fundamental principle of English law that a British subject must be presumed to possess at all times in England his ordinary common-law rights, and especially his right to personal freedom, unless it can be conclusively shown, as it often may, that he is under given circumstances deprived of them, either by Act of Parliament or by some well-established principle of law. Hence if anyone contends that the existence of a war in England deprives Englishmen of any of their rights, e.g. by establishing a martial law, or by exempting military officers from the jurisdiction of the civil Courts, the burden of proof falls distinctly upon the person putting forward this contention."*

[89] It is important to note that the English concept of parliamentary supremacy would inform Professor Albert Venn Dicey statement that an Act of Parliament could override the right to freedom. In our constitutional framework – this would be replaced with the Constitution.

[90] The term 'martial law' as used by Professor A.V. Dicey and other great scholars was used to describe some of the affairs that would now fall under a period of public emergency as defined by our Constitution.

[91] The Constitution at Section 20 (1) states:-

"*period of public emergency" means any period during which*

(a) Jamaica is engaged in any war;

(b) There is in force a Proclamation by the Governor-General declaring that a state of public emergency exists; or

[92] The Constitution at **Section 20 (2)** states:

(2) A Proclamation made by the Governor General shall not be effective for the purposes of subsection (1) unless it is declared that the Governor General is satisfied

(a) that a public emergency has arisen as a result of the imminence of a state of war between Jamaica and a foreign State;

(b) that action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or deprive the community, or any substantial portion of the community, of supplies or services essential to life;

(c) that a period of public disaster has arisen as a result of the occurrence of any earthquake, hurricane, flood, fire, outbreak of pestilence, outbreak of infectious disease or other calamity, whether similar to the foregoing or not.

[93] It can ordinarily be presumed that a state of public emergency exists simply because the Governor General indicates one exists. However, natural rights are not suspended on the mere words of the sovereign despite the assumed first blush reading which may lead someone not steeped in constitutionalism to such an erroneous view.

[94] Natural rights are suspended by the existence of a series of events. The proclamation actions of the executive is merely to formally indicate that martial law exist.

[95] Again, Dicey's Introduction to the Law of Constitution indicates what is martial law.

At page 398 he notes:

*" **Martial law**", in the sense in which the expression is here used, means the power, right, or duty of the Crown and its servants, or, in other words, of the Government, to maintain public order, or, in technical language, the King's peace, at whatever cost of blood or property may be in strictness necessary for that purpose.*

..Hence martial law comes into existence in times of invasion or insurrections when, where, and is so far as the King's peace cannot be maintained by ordinary means, and owes its existence to urgent and paramount necessity. This power to maintain the peace by the exertion of any amount of force strictly necessary for the purpose is sometimes described as the prerogative of the Crown, but it may more correctly be considered, not only as a power necessarily possessed by the Crown, but also as the power, right, or duty possessed by, or incumbent upon, every loyal citizen of preserving or restoring the King's peace in the case, whether of invasion or of rebellion of generally of armed opposition to the law, by the use of any amount of force whatever necessary to preserve or restore the peace. This power or right arises from the very nature of things. No man, whatever his opinions as to the limits of the prerogative, can question the duty pf loyal subjects to aid, subject to the command of the Crown, in resistance, by all necessary means, to an invading army. Nor can it be denied that acts, otherwise tortious, are lawful when necessary for the resistance of invaders.

[96] The proclamation notes that the Governor-General has the power to make proclamation **declaring** that a State of Public Emergency (SOPE) exists by virtue of **section 20 (1) of the Constitution of Jamaica.**

[97] It may be observed that the Governor-General is not creating a State of Public Emergency but declaring the existence of one.

[98] I place reliance on two cases to help in understanding the term emergency as used in our constitution.

[99] The first case is Claudette Clarke v Greg Tinglin [2020] JMFC Full 01. The Full Court was dealing with a scenario in which a public emergency was declared in May 2010. A prominent citizen, Keith Clarke, was killed during this emergency. The Minister of National Security granted a good faith certificate to impugned

members of security forces which could be interpreted a certain way. The Full Court was not petitioned to determine whether an emergency existed.

[100] The Full Court, however, noted in ***Clarke v Tinglin*** (ibid) at paragraph [124] that:

> *"I find that I must have regard to the circumstances that have given rise to this matter. There can be no denying that the circumstance, as they obtained in May 2010, were extreme. It is in the context of such a period of extreme crises that the Act vests the Governor General with the power to make Regulations for securing the essentials of life to the community."*
>
> *Continuing at paragraph 154, "the circumstances that existed on the Island in May 2010, in what could be described as a period of extreme crisIs…."*

[101] None of the parties seem to have challenged in Court the existence of an emergency in May 2010 or the declaration of SOPE during that period.

[102] The case of **Phillip v Eyre** 1870 LR 6 QB 1 was a case which showed when it was 'proper' to declare martial law where there was an open rebellion to overthrow the government. **Phillip** was arrested and first imprisoned at his house and then forcibly taken to a place called 'Uppuck Camp' then to another place called Ordinance Wharf and finally to Morant Bay. He was flagged. He sued Eyre in 1867.

[103] In 1870 court examined the general condition of a Governor in a case of open rebellion. It noted at page 15 that the duty of the Governor is to do their best and utmost in supressing the rebellion: See further quotes on page 15-17:

> *"Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion, Tindal, C.J., stated the law as to private citizens:" In the first place, by the common law every private individual may lawfully endeavour, of his own authority and without any warrant or sanction of the magistrate, to supress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he may see coming up from joining the rest; and not only has he the authority, but it is bounden duty, as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against evildoers to keep the peace….*

> *"If the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in supressing a riotous and tumultuous assembly and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law… This Perilous duty, shared by the governor with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences.*
>
> *….It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of his paramount duty, to exercise de facto powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act…*
>
> *….If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may have honestly committed under information which turns out to be erroneous or treacherous. The very efficiency of his measure may diminish the very danger with which he had to cope, and the danger once past, every measure he adopted may be challenged as violent and oppressive, and he and everyone who advised him, or acted under his authority, may be called upon, in actions at the suit of individuals dissatisfied with his conduct…."*

[104] The ***Phillip v Eyre*** cases was examined in Dicey's **Law of Constitution** where it is noted that the true nature of the material Act of Indemnity is essentially the legislation of illegality. Dicey noted that the need for such an Act shows that the doctrine of political necessity or expediency is baseless. Eyre's escape from liability in the Phillip v Eyre case was based on the principle of parliamentary

supremacy and that the Jamaica Legislative Assembly granted him by 'positive law' indemnity.

[105] Professor A.V. Dicey indicates in his Law of Constitution that he has four conclusions on the issue of martial law:

1. First, martial law cannot exist in time of peace
2. Secondly, the existence of martial law does not in any way dependent upon the proclamation of martial law
3. Thirdly, the Courts have, at any rate in time of peace, jurisdiction in respect of acts which have been done by military authorities and others during a state of war
4. Fourthly, the protection of military men and others against actions or persecutions in respect of unlawful acts done during a time of war, bona fide, and in the service of the country, is an Act of Indemnity .

[106] **The first principle,** that martial law cannot exist in time of peace was opined by A.V. Dicey to be best explained by the old maxim 'a state of war cannot exist, or in other words, a state of peace always does exist when and where the ordinary Courts are open'. The learned Professor noted that the maxim is not a rigid rule but it is sound principle. The maxim is not rigid because some tribunal, in a time of war, may be permitted to conduct ordinary course in a district in which martial law has been proclaimed and that this permission is not conclusive proof that war is not there raging. He notes however that 'At a time and place where the ordinary civil Courts are open, and fully and freely exercise their ordinary jurisdiction, there exists, presumably, a state of peace, and where there is peace there cannot be martial law.

A.V. Dicey cited Thayer, **Cases on Constitutional Law** to further explain the full meaning and effect of the maxim:

If in, foreign invasion or civil war, the Courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for civil authority, thus overthrown, to preserve the safety of the army and society , and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the Courts are reinstated, ***it is a gross usurpation of power. Martial rule can never exist where the Courts are open, and in the proper and unobstructed exercise of their jurisdiction.*** *It is also confined to the locality of actual war.*

[107] **The second principle**, in relation to emergency law outline in Dicey's Law of the Constitution is that the existence of martial law does not in any way dependent upon the proclamation of martial law is best explained by a verbatim quote in relation to this point from the learned Professor of Constitutional law. He notes:

> **"*The proclamation of martial law does not, unless under some statutory provision, add to the power or right inherent in the Government to use force for the repression of disorder, or for resistance to invasion. It does not confer upon the Government any power which the Government would not have possessed without it. The object and the effect of the proclamation can only be to give notice, to the inhabitants of the place with regard to which law is proclaimed, of the course which the Government is obliged to adopt for the purpose of defending the Country, or of restoring tranquillity."***

[108] **The Third principle** in relation to emergency law outlined in Dicey's Law of the Constitution, is the Courts jurisdiction to determine the question as to whether there was a state of war at a given time and place. The Courts also have the jurisdiction to split justice for acts done during the emergency. Any arrest or imprisonment would be susceptible to lawsuits. The authorities would have to defend same by proof of emergency.

It is important to note that Dicey cited **Forsyth**, p. 199 on page 406 of his work to make the germane point on the clash between emergency laws and the role of court. We quote the point below:

> *"The question, how far martial law, when in force, supersedes the ordinary tribunal can never…arise. Martial law is stated by Lord Hale to be in truth no law, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to supersede the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded."*

[109] **The fourth principle** in relation to emergency law outline in Dicey's Law of the Constitution is the need for an Act of Indemnity to protect military men and others against actions or precautions in respect of unlawful acts done during a time of war, bona fide, and in the service of the country. The Professor notes that a man who does only necessary action is not in need of any act of Indemnity. 'A man, on the other hand, who does a legal wrong, whilst performing a moral duty which is not a legal duty does require an Act of Indemnity for his protection…"

[110] It is important to recall that the Jamaican Constitution has its genesis "**At the Court at Buckingham Palace,** the 23rd day of July 1962. In light of the English birth of our Constitution, it is not implausible that the English concepts of fundamental rights and manner for suspension of same was passed on to us in such a document. This court may therefore, have regard to English common law, which

is still a part of our law to the extent that it is not amended or abolished by statute or the constitution, in understanding the terms used in either of those instruments.

[111] The above shows the concept of emergency as understood in the United Kingdom and applied to situations in Jamaica, It shows that for an 'emergency' the impugned conduct must in fact cause the ordinary course of law to be diverted from and that the life of the nation to be threatened.

[112] This is the Petitioners' complaints of the one on which I wish to lay emphatic stress. The writ confirms that the Claimant is essentially detained at will of the executive. The Defendant's produce no timeline within which such detention will end.

[113] To respond to this state of affairs, I observe that there is nothing within our constitutional framework which permits a Minister to issue a detention order. The Emergency Powers Act does not permit the Minister to issue a detention order.

[114] The executive indicates that the Petitioner is detained pursuant to a state of Public Emergency.

[115] It is noteworthy that the text of our constitution specifically sought and did by Section 13 (9) and 20 (5), to rewrite many of the common law positions that gave deference to the action of the executive and impose a onus on the Petitioners.

[116] A new paradigm, even for emergency cases, was introduced in the 2011 Charter. This new paradigm ensures that emergency measures are only permitted when they are reasonably justifiable to deal with a situation that exists during the state of public emergency and only to the extent that the measure or actions is rationally linked and proportional to deal with the said situation.

[117] This has been held by the **Julian Robinson v Attorney General** case, supra, to be provable by the violators of the petitioners' right and to a degree commensurate to the breach.

[118] It is my view that the famous and celebrated dissent of Lord Atkins in **Liversidge v Anderson [1942] AC 206** has been constitutionally legislated and is the preferred position in Jamaica.

[119] In **A (FC) and others (FC) v Secretary of State for the Home Department** [2004] UKHL 56, the majority position of deference in *Liversidge v Anderson* to executive decision is replaced by a unanimous position that the new legislative

framework requires a rigorous analysis of the executive position especially since it affects the right to liberty. In this case the petitioner's right to petition a 'tribunal' did not affect their right to petition the court. Lord Nicholls judgment on this point bears repeating relevant portions are:-

> *"Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law. It deprives the detained person of the protection a criminal trial is intended to afford. Wholly exceptional circumstances must exist before this extreme step can be justified.*
>
> *But Parliament has charged the courts with a particular responsibility… The duty of the courts is to check that legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various consideration involved, the primary decision-maker must have given insufficient weight to the human rights factor.*
>
> *In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of nonnationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period. With one exceptions all the individuals currently detained have been imprisoned now for three years and there is no prospect of imminent release."*

[120] It is to be noted that all the Petitioners have indicated that the Minister's decision has adversely affected their rights and has trampled on the jurisdiction of the court. That being the case it has affected the legality of their detention.

[121] Further, the use of the phrase "*including any recommendations concerning the necessity or expediency' of continuing the detention"* in **regulation 38 (11)** of the Emergency Powers Regulation 2019 is antithetical to sections 13 (2), 13 (9), 12 13 (10) 13 (11) and 20 (5) of the Charter. This phraseology is also significantly

different from the phraseology employed in **regulation 33 (1)** of the EPR which is more consistent with the constitutional requirements.

[122] In ***Attorney General v Reynolds*** (1979) 43 WIR 108 , Lord Salmon examined the Emergency Powers Regulations, regulation 3 (1), Section 3 of the Order in Council and section 14 of the Constitution. It is noted at 117:

> *The law laid down by section 3 of the Order in Council 1959 (as it originally stood) and by section 14 of the Constitution had the same purpose, namely to ensure that measures could immediately be taken 9during a state of public emergency0 to arrest and detain persons whom it was necessary to arrest and detain in order to secure public safety or public order. The difference between the two laws was that the* ***first law gave an authority absolute discretion, and indeed the power of a dictator, to arrest and detain anyone*** *while section 14 of the Constitution allows a law to be enacted conferring power to arrest and detain only if it was reasonably justifiable to exercise such a power.*

[123] In relying on the above case, I am to say that, it is this very real difference that makes the Emergency Powers Act (and all actions taken subsequently to it) out of tune with the Constitution.

[124] In ***Attorney General*** v *Reynolds, supra, at page 118 it is noted*:

> *It is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a constitution such as the present, one of the principal purposes of which is to protect the fundamental rights and freedoms.*

[125] The Privy Council in looking at the regulation noted that it could only be saved by applying the court's reconstruction of the word in the Order in the Council to the regulation. The Board noted as follows:

> *Their lordships considers that it is impossible that a regulation made…on the Order in Council which (on its true construction) conformed with the Constitution on that date, could be properly construed as conferring* ***dictatorial powers on the Governor****, and that is what the regulation would purport to do if the words "if the Governor is satisfied" means "if the Governor thinks that, etc". No doubt* ***Hitler thought that the measures (****even the most atrocious measures) which he took were necessary and justifiable, but no reasonable man could think any such thing.*

[126] Be it observed, that the Privy Council was prepared to indicate that the regulation was problematic merely because it could lead to an interpretation that it confers an absolute discretion upon the executive. The Board notes at 120d

"No doubt that passage supports the argument that the words "The Secretary of State is satisfied, etc" may confer an absolute discretion upon the executive. Sometimes they do, but sometimes they do not."

[127] Pursuant to **Section 14 (1)** of the Constitution, the Claimant is entitled to fair procedure for depriving him of his liberty and this laxly worded Regulation is void for vagueness as providing too general a power to the Minister.

[128] In ***Charles v. Phillips & Sealey*** (1967) 10 WIR 423, AM Lewis CJ, discusses at page 432-433, the difference between necessary or expedient and demonstrably justifiable. He ultimately held that the demonstrably justifiable test was required in St. Christopher, Nevis and Anguilla:

> "*This raises the question whether the order of 1959 contains the kind of provision contemplated by s 14 of the Constitution and which alone will render it or acts done under it not inconsistent with or in contravention of the Constitution.*
>
> ***The contents of a law relating to emergency measures of a kind which do not fall within the exceptions listed in s 3 of the Constitution, in order to be validated under s 14, must be such as authorise the taking of measures that are reasonably justifiable for dealing with the situation that exists in the state during the period of public emergency.***
>
> *The authority to take the measures that are reasonably justifiable must be contained in the law itself. But the Order of 1959 mentions no measures and contains no such authority. It merely authorises the Governor to make such laws as he considers necessary or expedient. As learned Crown counsel readily conceded, the two concepts are entirely different.*
>
> ***The one gives dictatorial powers to the Governor, enabling him to act by decree and to issue orders which, once made in good faith are beyond challenge.*** *The other make justiciable by an objective test the measures which the law authorises. What appears to the Governor to be necessary or expedient may not on an objective test be reasonably justifiable in the particular situation which exists. Many things have been done in the name of expediency which are quite unjustifiable on the known facts. Before the Order of 1959 could qualify to fall within the ambit of s 14 it would require drastic amendment by the Governor under s 103 (2) and (3). Admittedly, no such amendment has been made.*
>
> *If, as I think, the Order of 1959 does not fall within the ambit of s 103 (2) and is not, for the purposes of s 14, a law enacted by the legislature, the position is no better for the Crown.*
>
> *For its provisions, and in particular s 3 (1), must nevertheless be construed in such a manner as to bring it into conformity with the Constitution, and in particular with Cap 1 thereof. An exception must inserted, to wit: "Save as otherwise provided by the*

Constitution." So construed, it would empower the Governor to make such laws, not consistent with the Constitution, as appear to him to be necessary or expedient We were informed that there is no scope for the exercise of such powers within the protective provisions of ss 1 to 13 in areas not presently covered by legislation. In so far as deprivation of personal liberty is concerned he would be limited by the provisions of s 3 (1) of the Constitution and could not validly legislate to authorise measures, such as preventive detention, which do not fall within the excepted cases in that section."

[129] In ***Herbert v Phillips & Sealey*** (1967) 10 WIR 435, in the Court of Appeal of the West Indies Associated States at page 446-448, PC Lewis JA, stated that where the relevant Orders empowered the Administration to make such laws as appear 'necessary or expedient for saving the public safety' that his law conflicts with the constitution and is unconstitutional.

'…*The* question *remains whether the power given to the Governor to make such laws as appear to him to be "necessary or expedient for the purposes mentioned in s 3 (1) of the Order of 1959 can be said to be in conformity with that provision of s 14 of the Constitution which requires that the measures taken during a period of emergency should be "reasonably justifiable" for dealing with the situation existing during the emergency. It may conceivably be argued that powers which are necessary to deal with the situation during a period of emergency may possibly be held to be reasonably justifiable, but can if be convincingly contended that if the Governor considers it expedient to make laws during such a period that such laws are ipso facto reasonably justifiable? I think not.*

"The word "expedient" when used in describing a course of conduct by anyone conveys the idea of something done which is conducive to special advantage rather than to what is universally right, the subordination of moral principle for the sake of facilitating an end or purpose, an act which is politic rather than just. Therefore, a law which has its basis in expediency would principally be concerned with attaining the immediate objective of the legislator and would not necessarily have any regard to the interests of those whom it is intended to affect; it would not be tested by the opinion of the community as to its justice or reasonableness. On the other hand where it is predicated of a law that it should be "reasonably justifiable," this connotes the idea that given the particular circumstances with which the law is intended to deal it may when tested by the opinion of the ordinary man be susceptible of acceptance as satisfying the requirement of s 14 of the Constitution of being "reasonably justifiable."The concepts of expediency and reasonable justification cannot be equated; indeed,, they are in conflict with each other; and the latter requirement considerably restricts the type of law which the Governor may make. It follows therefore that the content of any law based on these two conflicting concepts must differ materially. The test laid down in s 14 of the Constitution is an objective one and those who proposed the Order of 1959 must show that this order when read and construed as required by s 103 (1) of the Constitution can be brought into conformity therewith. In my view it is impossible

to do this and I accordingly hold that sub-s (1) of s 2of the Order of 1959 is clearly inconsistent with s 14 of the Constitution."

[130] Based on the foregoing, it is clear that in St. Christopher, Nevis and Anguilla – the test for detention in a case with identical provisions which speaks to expedient or necessary is whether such detention is reasonably justifiable.

[131] The ***Charles v Phillips & Sealey*** held that the EPA was in conflict with the Constitution and the ***Herbert v Phillips & Sealey*** held that the EPR was in conflict with the Constitution.

[132] Based on the foregoing, the tribunal, per s.13(2), 13 (9) and 20 (5) of the Charter, should apply the constitutional test of reasonably justifiable when examining whether to give any directions for the continued detention of the Applicant.

[133] I hold that the tribunal should not give a direction for the detention of the Petitioner/Applicant in circumstances which conflicts with his constitutional rights unless the derogations of those rights are demonstrably justified in a free and democratic society. The 'expediency or necessary test' should not replace the Constitutional test.

[134] A further reason why the test outlined in regulation 38 (11) of the EPR is unconstitutional is that it conflicts with the basic structure of the Constitution by unlawful imposing a standard which is opposite to the constitutional standard present in above sections.

[135] Furthermore, regulation 38 (11) violates the principles of separation of power, protection of the law and, the rule of law. This principle was established as applicable to our Constitution by the Privy Council on 1 December 1975 in **Hinds v The Queen** [1976] 1 ALL E.R. 353.

[136] Based on the foregoing, it is my view that the 'emergency' must be defined in the proclamation to facilitate the court's carrying out its role or some evidence led

by the violators of the basis of the emergency'. All of my holdings are based on a balance of probabilities.

[137] Based on the above analysis, the Respondents' submissions are rejected.

[138] In applying the principles of *Law of the Constitution:*

Primarily, such a public emergency may then be seen to have, in particular, the following characteristics:

(1) *It must be actual or imminent.*
(2) *Its effects must involve the whole nation.*
(3) *The continuance of the organised life of the community must be threatened.*
(4) *The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate".*

[139] It is my view that it is the duty of the Respondent to satisfy this court that there is in fact a public emergency in Jamaica.

[140] The answer to the foregoing issues can be found in the **Emergency Powers Act (EPA).** The **EPA** gives effect to the regulations on whose provision the police rely. The police's power to detain is pursuant to **Emergency Powers (no. 2) Regulation** 2019 ["EPR]" – regulation 30. The said regulation must be interpreted in light of the **EPA**.

[141] Again, in ***Julian J. Robinson v The Attorney General of Jamaica,*** supra, the Full Court said in fulsome resonance to an applicative reader:

"*The Constitution of Jamaica is premised on the notion that free men in a democracy provide the best arrangement to secure a peaceful and productive society. The separation of powers is intended to prevent a concentration of power which can militate against democracy. The guarantee of individual rights is intended to prevent erosion of*

the freedoms enjoyed by free men in a democracy. The free and democratic society, thereby created, functions best where there is trust between the average citizen and the state. Corruption, high crime rates, unemployment and underfunded social services may undermine that trust. This situation can pose a serious challenge to policy makers. The court is not unsympathetic to this reality. However, the exigency of the moment does not render proportional, or otherwise justify, a breach of rights guaranteed by the Constitution of a free and democratic society. The Constitution provides in section 13 (9) for temporary suspension of rights in times of emergency. It also provides in section 49 for its own amendment. Save as aforesaid the rule of law necessitates the upholding of the Constitution. We do not doubt the good intentions of the policy makers but chaos and the need for order has, all too often in history, been the justification for policies which curtail freedom and ultimately undermine democracy. [374] Judges, as the learned Attorney General reminded us, are not responsible for policy or for the content of legislation. WE however interpret and apply legislation intended to implement the policy. It is our sworn duty to ensure that enactments are consistent with, and do not derogate from, the Constitution which is our highest law. It is not within the remit of judges to say whether the premise of the Constitution is right or wrong. ***It is our duty to uphold the policy of the Constitution as revealed in its words, structure and historical roots****. We do this without regard to our popularity which, as judges, we neither crave nor require. In the words of Justice Hiler B Zobel an associate Justice of Massachusetts Superior Court of the United States: "Elected officials may consider popular urging and sway to public opinion polls. But judges must follow their oaths and do their duty heedless of editorials, letters, telegrams, picketers, threats, petitions, panellists and talk shows. In this country, we do not administer justice by plebiscite. A judge in short is a public servant who must follow his conscience whether or not he counters the manifest wishes of those he serves; whether or not his decision seems a surrender to prevalent demands. (This was a quote in "The Literature of the Law "by Brian Harris page 20).*

[142] The Petitioners submit, and I accept, that the state gave more weight to the potential loss of property by implementing a scheme under the Emergency Powers Regulation for compensating persons whose property rights were affected whilst implementing no such scheme for persons whose rights to liberty are affected.

[143] Further, that the rights to liberty is one of the most fundamental rights. This right derives its powers from the Constitution. The Petitioners can petition the court to enforce: (a) their common law right to liberty, (b) their constitutional right to liberty, (c) all other constitutional rights which are abrogated, abridged and infringed by any infringement on the right to liberty. In this respect see: **Robinson v Attorney General , Bhasin v Union of India, Duta v Chief Commissioner of Tripura, A.K. Roy v Union of India and A (FC) v Secretary of State for Home Department** [2014] UKHL 56. I so hold.

[144] Furthermore, the Respondents have a duty to satisfy this court that the proclamation, the extensions and the measures taken thereunder are reasonably justifiably for dealing with the situation that exists in an 'emergency;. It is my view that the state should lead evidence as to the 'stage' of the emergency and that the infringements are reasonably justifiable for dealing with the situation which exists during a state of public emergency.

[145] This court is empowered and bound to enquire into and determine the existence of an emergency by virtue of **section 20 (5) of the Constitution**. In carrying out this function the court is not bound by the doctrine of 'deference' to the executive branch or 'marginal appreciation' to the executive.

In the final analysis, I am unhesitant in holding that:

1. A single judge has the jurisdiction to entertain this application, pursuant to the court's inherent jurisdiction and **section 20 (1) of the Constitution**. A single judge (Lord Mansfield) discharged James Somerset in 1772. A single judge in Turks and Caicos Island declared aspects of the Emergency Powers Regulations unconstitutional on 18 June 2020 in ***Missick v Attorney General***. Also in Herbert v Phillips and Charles v Phillips & Sealey, supra confirms the proposition as stated above. In the latter case the Court of Appeal accepted that the Court of first instant had original jurisdiction to hear the matter.

2. The situation which led to the detention of the objector does not qualify as an emergency or satisfy the situation in **sections 20 (2), 20 (5) of the Constitution**.

3. The Claimant's constitution rights and **the constitution** itself is being breached by the current detention and executive detention system.

4. **The Emergency Powers Act**, in its current form, does not apply to the current constitution since it: (a) makes references to section 26 of the Constitution which was repealed; (b) it does not qualify as a law for the purposes of section 13 (9); (c) the EPA is in conflict with the Constitution (d) there is no saving laws or modification clause to assist the court.

5. **The Emergency Powers Regulation,** in its current form, does not apply to the current constitution since it: (a) was passed pursuant to powers

   from a legislation that cannot be utilized to pass the EPR; (b) the EPR is in conflict with fundamental rights, principles and values implicit in the Constitution (we identified 68 such conflicts – any one which would suffice as sufficient basis to strike the EPR).

6. **The Detention Order** is unlawful since**: (a)** it was passed on the strength of the impugned EPA & EPR; **(b)** the reasons for detention are 'criminal offences' in breach of EPA section 3 (5); (**c)** the imprisonment of the claimant for criminal cases without a proper review breaches the separation of power doctrine; (**d)** the detention order failed to show it considered it 'necessary to exercise the control' test outlined in the EPR, **(e)** the detention order failed to show it applies the standard of reasonably justifiable.

7. **The Proclamation** contained no material information to detail the actual situation that caused the declaration by the Governor General. This,

therefore, mean the Defendants would fail to displace an onus placed on them to show the emergency actually exists in the material case.

8. **The detention of the Claimant** is not a measure that the Defendants attempted to show the court is reasonably justifiable to deal with any situation that exists during a state of emergency;
9. The use of **detention order** for **criminal offences** breach the separation of power doctrine and cannot be countenanced.
10. There is no justification presented by the Defendant to facilitate a **proportionality** assessment of any legitimate objective behind the

    Claimant's detention. This, I find to be the egregious overstepping of the bounds of the power of the Executive.

[146] Based on the foregoing, I am to rule that the detention of each Petitioner is unlawful.

[147] I make the following orders pursuant to rule 57.6