THE JURISPRUDENCE OF THE INDUSTRIAL COURT OF TRINIDAD AND TOBAGO: 50 YEARS DELIVERING SOCIAL JUSTICE

by

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Introduction

In his very significant work entitled "The Evolution of Labour Relations Legislation in Trinidad and Tobago", Chucks Okpaluba stated the following:

> The experience of Trinidad & Tobago in the sphere of labour relations legislation is not only unique; it is also a chequered one. It is an experience that preceded the development of trade unionism and the practice of labour relations in Trinidad & Tobago. ***The crucial date for the commencement of the study of the evolution of labour relations legislation in that territory is 1920*** for the simple reason that it was in that year that such an enactment made its first appearance.[1]

The difficulty with the highlighted sentence in this statement is the author's his use of the adjective 'crucial' to describe the date for commencement of the study of the evolution of labour relations legislation in Trinidad and Tobago. The author may have meant 'official' in relation to 'modern' legislation but could certainly not have meant 'crucial'. Because to accept 1920 as the 'crucial' date for the commencement of the study of the evolution of labour relations legislation in these former plantation colonies would totally erase from consideration the significant, systematic and complex body of laws which regulated the labour relations between slaves, indentured servants and their masters. These plantation economy laws regulating slavery and indentured servitude are the 'crucible' within which those societies were forged and from which the modern labour relations legislation and the institutions were spawned. It is interesting that 'crucial' and 'crucible' share the

[1] C. Okpaluba *The Evolution of Labour Relations Legislation in Trinidad and Tobago* (ISER St Augustine Trinidad 1980) 1 (emphasis added)

same etymology and the use of the word crucial by the author is a classic Freudian slip, as many would want to erase this history as never having existed.

The definition of the word 'crucible' from the Oxford English Dictionary is:

> A ceramic or metal container in which metals or other substances may be melted or subjected to very high temperatures.

This leads to the metaphorical extension of the word to mean:

> A situation of severe trial, or in which different elements interact, leading to the creation of something new.

The word 'crucial', as in 'crucial date', shares the same root as crucible and was originally the adjectival description of the form of a cross. Crucial has come to mean, according to Oxford Advanced American Dictionary, *extremely important, not because of itself, but because it will affect other things – that is, vital to the determination of an outcome*.[2] With this background, in assessing the achievement of the Industrial Court over the 50 years of its existence, we can only do so if we know the crucible within which it was forged and if we accurately identify what were crucial the questions.

Putting these together it is clear that the 'crucial' date for the study of the evolution of labour relations legislation in Trinidad and Tobago, *ergo* the achievement of the Industrial Court, cannot be 1920. It begins with the very reason for the creation of these 'societies' in the West Indies. Simply put, they were constructed for the exploitation of labour. The very personhood of those whose labour was exploited was singularly for the benefit of the economy and the best social life and development of Europe and Europeans. They were not participants in the institutions of

[2] The etymology of crucible is late Middle English from Medieval Latin *crucibulum* night lamp, crucible (perhaps originally a lamp hanging in front of a crucifix), from Latin *crux, cruc-* 'cross'.

social or political governance – they were mere factors of production. This history is the crucial point in any discussion of the evolution of labour legislation in Trinidad and Tobago and consequently of the Industrial Court. It is the *experimentum crucis*, the "guidepost that gives directions at a place where one road becomes two", or more. Many roads met at the time of the creation of the Industrial Court and the Court is the guidepost that gives direction.

Chucks Okpaluba taught at the new Faculty of Law of UWI in the early 70's and contributed significantly to its intellectual development, but like many of us today, we forget the crucible of our existence which accounts for the development of our social, political and economic institutions by which our societies are constituted and reconstituted. George Santayana wrote: "Those who cannot remember the past are condemned to repeat it."[3] This was not a call to live and remain in history but to learn from its lessons in order to advance. In fact the full context of this well-known statement is within the context of achieving progress.

> Progress, far from consisting in change, depends on retentiveness. When change is absolute there remains no being to improve and no direction to set for possible improvement and when experience is not retained, as among savages, infancy is perpetual. ***Those who cannot remember the past are condemned to repeat it.***

This squares very well with the concept of the role of law stated by Oliver Wendell Holmes Jr., American jurist and Justice of its Supreme Court for 30 years, when he famously said:

> The life of the law has not been logic; it has been experience... The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[4]

[3] *The Life of Reason*, 1905
[4] O Wendel Holmes Jr *The Common Law* (1881) p.1

Thus the laws regulating slavery, indentured servants, the Emancipation Act 1834, and the battery of other colonial laws which were meant to subordinate labour into its role as a factor of production are part of the construct. Included as well are the struggles, rebellion and resistance of our ancestors. These are the crucible of who we are today and signal the crucial date for the study of the evolution of labour relations in Trinidad and Tobago, not 1920.

A description and commentary by Professor Bereton of the situation in relation to Emancipation Act paints the picture graphically:

> As we saw, the Act of Emancipation was passed by the British Parliament in 1833 and it became law on August 1, 1834—Emancipation Day. But while this did technically mark the abolition of slavery, all the formerly enslaved, except children under the age of 6 on August 1, were declared to be 'apprentices' obliged to work for their former owners without wages for three-quarters of the defined working week. This so-called apprenticeship, which the Act said would last for 6 years, really postponed freedom for a few more years. Although the apprentices did have some rights not enjoyed by the enslaved, the system had much more in common with slavery than with freedom.
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> * * *
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> So when hundreds of new apprentices gathered in the area of Woodford Square on August 1, they were in an angry mood. 'Point de six ans! (Not six more years!)', they shouted, complaining loudly that they were not given 'full free'. The militia was called out, the soldiers were called from the barracks, over 50 of the 'ringleaders' were sentenced to floggings and in some cases jail. Partly because of the resistance by the people all over the Caribbean to this disastrous apprenticeship scheme, partly through pressure from abolitionists in Britain and in the colonies, it was ended by the government in London two years early, in 1838.
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> On August 1, 1838—the real Emancipation Day—apprenticeship ended and the former apprentices gained 'full free' status. In Trinidad, 20,656 apprentices were freed on that day.

But they were freed with nothing.

The authors Deakin and Morris states:

> Labour Law stems from the idea of the subordination of the individual worker to the capitalist enterprise; it is above all the law of dependent labour.[5]

In the Caribbean, our history makes this statement even starker than the condition the authors describe from the British perspective. What this means that the journey for us is more distant and gruelling and the challenges more arduous than that faced by other societies from which we take the cue to our laws. The imperatives upon which our societies were built cannot be forgotten or downplayed. Professor Elsa Goveia makes the point that the slave system, as well as the institution of indentured servitude, had become more than an economic enterprise which could be abandoned when it ceased to be profitable. It had become the very basis of organised society throughout the British West Indies and therefore it was believed to be an indispensible element in maintaining the existing social structure and preserving law and order in the community.[6] This is important to assessing what the Industrial Court of Trinidad and Tobago has achieved in its jurisprudence over the last 50 years and it is therefore important to say a little more. All the contemporary academics of the new University of the West Indies were agreed that change had to be radical if it was to be effective and this radical change would neither come from the colonial ruling class nor the local middle class who succeeded them. I like the description given by Professor Goveia of the dilemma which labour faced way into the 20th Century up until the time of the introduction of the Industrial Court.

[5] S Deakin & G Morris *Labour Law* 6th edn (Hart Publishing) p.1
[6] E Goveia *Slave Society in the British Leeward Islands at the End of the Eighteenth Century* (Westport, Connecticut: Greenwood Press, 1980

> But, though they were now less physically oppressed, their life chances in the free society, as compared with those of other groups, were not very substantially different from what they had been before. The old community based on slavery had been destroyed. But the emergent free society could only offer them a confused amalgam of opposing social values – on the one hand, practical subordination in a particularistic social structure still based on racial inequality, and on the other, universalist claims to equal status before the law without regard to class or race. As Lord Harris said in 1848, the effect of emancipation was that 'a race has been freed but a society has not been formed.' New guiding principles of order and coherence had still to be decided on.[7]

Times changed but things remained the same – The Industrial Stabilisation Act 1965

In 1965 when the Industrial Stabilisation Act was passed, Trinidad and Tobago as well as the other British West Indies territories had been through several political processes and had to face the challenges of modernisation in a world that had drastically changed from the manner in which the dominant First World states strategized to relate to the other states in the world. We moved through several types of British colonial rule, from party politics, Universal Adult Suffrage, the developing labour movement, political independence to the emergence of executive power in the hands of a coloured, black and Indian middle class. But meaning and self-worth and a sense of ownership did not trickle down to the labouring class. As Professor Rex Nettleford, himself a long time Director of the Trade Union Education Unit of the university at Mona, remarked:

> The paradox of Caribbean life is that the more things change the more they remain the same. The vault-like ascent by the society from slavery into freedom and then from colonialism into constitutional independence is yet to be matched within the society by a corresponding progress from cultural inferiority of the vast majority to cultural self-confidence.

[7] Id. 331-332

The labour unrest and tension by workers, which led to the State of Emergency and the push of the ISA through the legislature was symptomatic not of lawless agitation but a far larger struggle for meaning and self-worth in the matrix of a society that was deemed theirs. Professor M G Smith best sums up the workers' position, writing about that time:

> It is evident that despite universal suffrage and party politics in several contemporary Caribbean societies, despite unionization and more liberal industrial laws, educational provisions and the like, the majority of the people remain as poorly integrated and as remote and distinct from their superiors as ever, primarily on cultural, linguistic and social grounds, including race and colour, education, wealth and economic activity.[8]

Those at the helm of power misunderstood that this was in truth a campaign for a voice. Dr Eric Williams recognised this as did the politicians who were contending for power and needed the mass support. Okpaluba tells us that,

> The unionists were at that stage encouraged by politicians for Dr Eric Williams has been quoted as having said in 1955 that the employers must "…understand that the day when West Indians were content merely to hew wood and draw water for private investors is gone forever. The worker today requires inducements, incentives and guarantees just as the investor does…"[9]

However, by 1963, when the power base of the new leaders of government was solidified, the Minister of Finance in his budget speech stressed the antithetical position of the country's economy through its industrialisation effort to workers' organisation and workers' say in the matrix of economic power.

> The trade union movement, quite rightly, today occupies a position of power as never before in our history. It would be a pity if this

[8] M G Smith *Culture, Class and Race in the Commonwealth Caribbean* (Mona, Jamaica: Department of Extra-Mural Studies, UWI 1984)
[9] C Okpaluba at 69

> power were turned into a privilege. For the value of the movement will ultimately depend upon its willingness to resolve the inevitable contradictions between its own group interests and the community interest.
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> A ruthless policy of higher wages and salaries and other benefits in a developing country is incompatible with either continuing economic growth or rising levels of employment. It could impair capacity to compete in external markets and weaken the balance of payments.[10]

The individual worker, and more so the collective activities of workers, were now being seen as enemies of the state and the enemy of economic development. It was lost on the politics of the time. But development economics and people-centred polices will only succeed if the citizens of our states **subjectively** experience improvement in their human well-being and are contributors to the effort. Objective economic and social indices, the language of economic and international agencies which has become the linguistic accoutrements of our rulers, may measure change and indicate progress of a kind but will not ensure stability. Only a subjective assessment by the people whose lives are affected will ensure social and political stability and real progress.

Subversive activities and communism scare were rampant before the passing of the Act and was the catalyst for its enactment. It was in this atmosphere that the ISA was tabled for the first time on March 12, 1965, read for the second time on March 18, which not co-incidentally was the same date on which the *Report of the Commission of Enquiry on Subversive Activities* was presented to Parliament. And, by March 20, 1965, the ISA received the Governor-General's assent and was promulgated immediately. The State of Emergency of March 9 was lifted on March 25, 1965.

[10] Quoted by C. Okpuluba, id. 71

Thus Okpaluba supports Dr Zin Henry's conclusion that the ISA "was conceived and introduced not merely as a policy instrument of industrial relations, but also as a measure for containing alleged subversive activities and political agitation by trade union leaders through trade union organisations."[11]

In this climate was born the Industrial Court of Trinidad and Tobago – an institution that was given the proverbial basket to carry water to extinguish the flame of dissensus and discontent in the arena of labour relations and leverage objective economic progress through industrial stability. The structure of the Act was the strategy to achieve that end and it was a poor choice. Okpuluba concluded that:

> [T]he scheme of the Industrial Stabilisation Act as an instrument of industrial regulation was a total failure. All aspects of industrial relations regulated by the Act proved unworkable as they were completely misconceived. In the final analysis, the ISA could be described as no more than a 'law and order' type of legislation.

Far from being unifying, it was perceived that the objective of the Act was to be "a neutralising force of the powers of a united labour movement." The labour movement was not consulted. It was not to be participatory – the hallmark of good governance and stability. "[Y]our Government have not sought to obtain the views of the Labour Movement on the most far-reaching piece of labour legislation to be brought forward n your time of office", the Trade Union Congress wrote to Prime Minister Dr Eric Williams. This methodology of enactment explains the suspicion with which the ISA was greeted and it was unfortunate that the Prime Minister whose studies presumes and understanding of the angst of the disenfranchised and the long road to achieving a society built on social justice would have countenanced this unfortunate beginnings.

[11] Okpaluba 80

Employment – the Most Critical Component of Democratic Governance

Nonetheless, the establishment of the Industrial Court of Trinidad and Tobago must be considered the most important institutional construct in modern democratic governance in the Commonwealth Caribbean from the point of view of the history of these states which I have recounted. But the most important reason is that employment and labour law stands for a sense of co-ownership of the State which is shared with fellow citizens. While our history is one that recounts a society that was exclusively built for the exploitation of labour and controlled by depriving it of a voice in the institutions of governance, resulting in a lack of correlation between the significance of the contribution that is made by labour to the society and its influence or position in society, yet employment by its very nature is the most important, immediate and unavoidable participation in society. Because when one moves outside of one's immediate family and community through employment, one automatically moves into the sphere of the national society and where you give to get. The fairness of the exchange is a crucial description and measure of how much you are valued in your own society.

Moreover, employment is the major instrument for the creation and distribution of the economic resources of the state. It is perhaps the most significant space where the ordinary citizen finds meaning of citizenship, self-expression, self-worth and dignity – and ultimately self-existence - within the State when the citizen not only participates but is rewarded. ***Employment and labour law stands for a sense of co-ownership of the State shared with fellow citizens.*** When viewed in this manner labour law and industrial relations are pivotal to social change and the Industrial Court as the regulatory institution stands at the apex of transformation and change.

The signal function of the Industrial Court is one of reconstituting relationships in a society where the radical changes which were necessary for the transformation of the society into one in which everyone finds and equal place – to paraphrase the notable words of the national Anthem. After close study and following the work of the Court for many decades, it is no exaggeration that nowhere in the world has the effect of an institution such as the Industrial Court of Trinidad and Tobago been so deeply transformational of the individual sense of civic ownership. But the revolution is unheralded and the feat of the Court in overcoming the seemingly insurmountable obstacles which were laid in the path of the Court by the manner in which it was set up as well as the shortcomings in the first Act, not recognised.

The Industrial Court of Trinidad and Tobago over the last 50 years is a testament to modern democratic governance and orderly change. It has not accomplished this suddenly or in a single action but on a case by case basis, identifying the issues, relating them to real life and \the social values of Trinidad and Tobago and then fashioning remedies to suit. In this manner, the industrial Court has built an intellectual tradition of protective norms to govern the employment relationship and has created the normative framework for the institutions of the labour market. This is remarkable when one thinks that in most of the Commonwealth Caribbean states and even in the UK, there are predetermined norms found in Labour Codes and such the like, the Industrial Court did not have that kind of pre-packaged assistance.

> The I.R.A. lays down some, but not all, principles and practices of good industrial relations, e.g. the principle of majority rule of trade unions, good faith bargaining, binding nature of collective agreements, an important role of the Court is to lay down and define such principles and practices so that workers, trade unions and

> employers will be aware of the principles which are applied by the Court.[12]

The Industrial Court is Democracy and Good Governance in its Very Best Expression

The jurisprudence of the Industrial Court has been built with each ordinary citizen having the ability to put forward the contribution of their own circumstances as a consideration in promulgating the rules and conventions which govern this critical aspect of citizenship. Professor Levi explains how this is a high form of democracy, which we must bear in mind as we construct new institutions to carry forward our social, political and economic development:

> What does the law forum require? It requires the presentation of competing examples.[13] The forum protects the parties and the community by making sure that the competing analogies are before the court. The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. In this sense the parties as well as the court participate in the law-making. In this sense, also, lawyers represent more than the litigants.
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> Reasoning by example in the law is a key to many things. It indicates in part the hold which the law process has over the litigants. ***They have participated in the law-making. They are bound by something they helped to make. Moreover, the examples or analogies urged by the parties bring into the law the common ideas of the society.*** The ideas have their day in court, and they will have their day again. This is what makes the hearing fair, rather than any idea that the judge is completely impartial, for of course he cannot completely be. Moreover, the hearing in a sense compels at least vicarious participation by all the citizens, for the rule which is made, even though ambiguous, will be law as to them.[14]

[12] *Union of Commercial and Industrial Workers v. El Dorado Consumers Co-operative Society Limited* TD 72/2000

[13] By 'competing examples' one means merely the particular situation in which the litigants before the Industrial Court have found themselves and on which they are urging the Court to rule, thereby creating a rule for the particular circumstance.

[14] Edward Levi *An Introduction to Legal Reasoning* (University of Chicago Press 1949) p. 5

The rule-making in industrial relations by the Industrial Court is therefore even more democratic and participatory than enactments made in Parliament which are usually the function of a decision of Cabinet carried out by the legislative drafting department of the Parliamentary Counsel. The Industrial Court, by having to bring to bear its broad standard of adjudication in accordance with "equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations" necessarily reasons inductively. The inductive process of reasoning rather than the deductive has the great potential of looking at specific instances and drawing from them logical inferences and lessons that is based on the unique and shared experiences of the Republic of Trinidad and Tobago.

In this task the Industrial Court has neither been shy or modest and quite rightly so. Because if it does not do it, experience has shown that it will be done for us based on the shared experience of other foreign peoples. Sound logical inferences are fully accepted as the basis for judicial activism. Because it is reasoned – unlike parliamentary legislation, which requires no compelling reason or any at all, gives legitimacy and a justification for the rules and principles that the Industrial Court has laid down over the past 50 years, sometimes controversially. But the point that the rule making is participated in by the ordinary citizen, both employee and employer, and their advocates who skilfully advance the respective interests, accords with the most critical feature of good governance in the creation of institutions – participation. The Industrial Court has been the epitome of transparency and accountability the other two ingredients of good governance.

The Framework of Industrial Relations Act

But much credit must also be reserved for the ideological framework of the Industrial Relations Act which replaced the ISA. The IRA has been a work in progress and there has been great sensitivity to legislative reform and amendment to improve the legislation. Again, in no other legislative area in Trinidad and Tobago has there been such monitoring and re-evaluation to ensure that the legislation is producing the required effect. While the monitoring is informal, this is typical of democracies and in this case it is effective. Professors Seidman states:

> In the largest sense, democracy itself constitutes a gigantic, if somewhat unsystematic, monitoring and evaluation system. Constituents whose toes a law's implementation pinches can and frequently do complain to their legislative representatives. [15]

This has been the experience of the IRA and it is a model of democracy in this regard.

The pivotal core of the jurisprudence of the IRA is described by s.10(3) of the Act:

> Notwithstanding anything in this Act or in any rule of law to the contrary, the Court in the exercise of its powers shall –
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> (a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;
>
> (b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

In addition, the jurisdiction to give relief to an employee who has been dismissed adds significantly to the ability to weave a jurisprudence that fits within the unique moral values and legitimate expectations of citizenry which employment represents as discussed above in constructing a just society. Section 10(5) in giving the Court the power to exercise a wide

[15] A Seidman, R Seidman & N Abeysekere *Legislative Drafting for Democratic social Change* (2001) p 114.

discretion to make an award provides the platform for filling in the grid of moral values that must underlie any national law:

> An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice.

In our ex-colonial states based on the English common law, the doctrine of precedent and the slavish adherence by our judges and attorneys to the value of case law precedents from elsewhere continues to be the route whereby the values of societies that are not our own creep in to undermine the sovereignty of our self-definition of our society.

Additionally, and this is key, the way is paved for cognitive accessibility to the court by the ordinary citizen which the eccentric complexity of the rules and procedure of the regular courts to which they have unyieldingly clung, which elevates form over substance does not provide. Therefore it is critical to the success of the Act that sections 9(1) and 10(6) of the Act restrict the intrusion of the methodology and ideas of the regular courts into the jurisprudence being forged by the Industrial Court. Section 9(1) provides:

> In the hearing and determination of any matter before it, the Court may act without regard to technicalities and legal form an shall not be bound to follow the rules of evidence stipulated in the Evidence Act, but the Court may inform itself on any matter in such manner as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, but in any such case the parties to the proceedings shall be given the opportunity, if they so desire, of adducing evidence in regard thereto.

Section 10(6) ousts the jurisdiction of the regular courts to question the judgment of the Industrial Court in language that is pellucid and strong.

> The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of food industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called into question in any Court on any account whatsoever.

This interdiction is repeated with respect to any proceedings before the Court, except in limited circumstances. Section 18(1) provides:

> Subject to subsection (2), the hearing and determination of any proceedings before the Court, and an order or award or any finding or decision of the Court in any matter (including an order or award) –
>
> (a) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatsoever; and
>
> (b) shall not be subject to prohibition, mandamus or injunction in ay Court on any account whatever.

The dispensation of justice in the Industrial Court without the plank of older tradition on which to rely becomes a pragmatic exercise. The task is rendered even more complex by its super-wide jurisdiction and broad objectives stated in the IRA. The doctrinal structure of industrial relations jurisprudence embraces a close consideration of many disparate issues, considerations and sectorial concerns. Ideas must be drawn from many areas. Indeed in a phrase the ultimate function of the Industrial Court is in fact a reconstitution of relationships in the society, not only the relationship between persons in diverse roles but also the relationship between organisations, government and governmental institutions, within the context of economic efficiency and fundamental social and economic rights, voluntary sources and particular institutions as well as

the overarching concern with meeting international standards which our country has committed itself to as a matter of international law.

The Industrial Court stands at the apex of many strands that must be fused into, and become, to use Professor Goveia's words, "new guiding principles of order and coherence" and yet do so without disruption. The background is the complex economic, political and social environment and constructs in Trinidad and Tobago. Within this is the divide between individual labour law and collective labour law. Then the various strands which affect their regulation:

1. Law of contract
2. Common law
3. Regulatory legislation
4. Collective bargaining
5. The business enterprise
6. Workplace custom and Practice

Charting the Jurisprudence

The road to charting the jurisprudence depends a great deal on the leadership of the Court. Despite the imperfections of the ISA, the appointment of Sir Isaac Hyatali as the first President of the Industrial Court was a master stroke of genius of the jurisprudence of the Court. The initial business was to disabuse everyone that the Court lacked independence from the Executive and to establish that it is committed to justice to all citizens. In his first Annual Report he repeated that ***"publicly and emphatically that this Court is an independent Court – free from the control, directions or influences of the Executive, members of Parliament, political parties and***

personalities and all pressure groups and combines, guided or misguided that may appear on the scene now or hereafter". He continued:

> Let all citizens of our county be assured of this and let them also be assured that those who seek justice at our hands will not do so in vain.

Even where there was no provision for reinstatement of workers in the ISA, as President of the Court, Sir Isaac boldly led the Court to exercise that jurisdiction and was unrestrained in his criticism of the judgment of the Court of Appeal which ruled this ultra vires. Sir Isaac tirelessly campaigned to have amendments made to the Act and, to a large degree, much of the improvements to the legislation leading ultimately to its repeal and replacement by the IRA was foundationally laid by Sir Isaac Hyatali. He was clear on the role of the Court to promote 'social justice' from the first years of its existence.

> The large number of trade disputes that have been and are continuing to be referred to the Court reflect either confidence in ***its dedication to the cause of dispensing social justice*** without fear, or favour, affection or ill will….[16]

The current President, Her Honour Mrs. Deborah Thomas-Felix, has continued to lead the Court in the path of this noble tradition of creating jurisprudence for the Industrial Court which is tailored to meet the values of every citizen of the Republic and safeguarding the economic viability of the country. In her first Annual Report as President she summed up the role of the Industrial Court.

> The Industrial Court, as the final arbiter of employment issues in this country continues to serve as an invaluable instrument for social justice. This Court, from my perspective, continues to be the glue of human dignity, equity and fairness which permeates into this mosaic

[16] Annual Report 1966-1967 p. 16 para 19

> of employment relationships in Trinidad and Tobago and holds it together. It is therefore important for us to always remember the history of the Court and the importance of its role in this society.[17]

Like her first predecessor, she takes the platform of President of the Industrial Court to be a voice in relation to issues and trends which affect the employment of citizens of Trinidad and Tobago. For example, in 2013, she expressed "deep concern regarding the widespread use of short-term and fixed-term contracts of employment in the public sector." The President clearly appreciated that principles that may pass as fair and just in some other and larger jurisdiction, is not necessarily so in Trinidad and Tobago. In this small state the Government is a major employer upon whom the citizen depends and it is critical to social inclusion. Justice therefore is crucial in this area of employment relations.

> Given the importance of the Government as employer and the role of the public sector in national development, we should strive for employment and human resources policies and practices that would foster an efficient and productive public sector that delivers high-quality services and supports good stewardship.[18]

In this regard, we are kindred spirits. I observed some time ago:

> The public service occupies a distinct, obvious and critical role in Caribbean life: political, social, cultural and economic. It is well known that in all these societies, a government job is perhaps the most important channel of participation in the democratic governance of the state by ordinary people who would typically be without status, power or influence. Government is by far the largest and most reliable employer. A government job is a source of status at every economic level and also a source of economic stability to an impoverished family or community. The district constable or police officer, the teacher or nurse, the postmistress or clerk, even the labourer or domestic servant employed to government is the link

[17] The Industrial Court of Trinidad and Tobago *Annual Report October 2011 – September 2013* at p.6

[18]

> to participation in the official society both from a democratic and a cultural perspective.[19]

The Rights-Based Approach

The question becomes the precise manner in which the Industrial Court has exercised this generous jurisdiction to give credence to the claim that it has forged a jurisprudence of social justice which has impacted society. The President of the Court has recently stated:

> I believe that social inclusion, equity and fairness are necessary precursors for building a stable industrial relations environment and by extension a vibrant and prosperous economy. The challenge I daresay for this country and many countries is how to achieve sustainable inclusive growth and development for all citizens. It is my respectful view that, economic growth will be irrelevant if it does not take into account the betterment of each and every section of the society. Sustainable inclusive growth can only be achieved when we combine policies for economic development with those of social justice and inclusive growth for all groups particularly those which are most vulnerable.

In reviewing the jurisprudence of the Industrial Court, this objective has been advanced by taking the modern rights-based approach to the resolution of conflicts and the dispensation of justice. This is in keeping with the modern movement of international society. The strong provisions of the Industrial Relations Act of Trinidad and Tobago, the history of agitation and the personnel of the Court has led to the development of a jurisprudence of rights-based approach to the adjudication of employment relationship disputes.

In *Caroni (1975) Limited v Association of Technical Administrative Supervisory Staff*, [20] de la Bastide CJ made clear the breadth of the jurisdiction of the court:

[19] L. Jackson *The Fourth Estate: Towards a Caribbean Constitutional Ideology of the Independent Public Service* (unpublished)
[20] (2002) 67 WIR 223, 225-226

The wording of s 10(6) is very explicit. However reluctant this court may be to accept that its jurisdiction has been ousted by an Act of Parliament and that it is thereby denied the opportunity of investigating an alleged injustice and correcting it, if found to exist, the intention of Parliament is too clear in this instance to be deflected by any presumption of law or canon of construction. It is clearly the duty of this court to give effect to it. We must not be tempted to do otherwise by pictures painted of the gross injustices which may be perpetrated if we recognise and accept the restriction which Parliament has imposed on our right to interfere. In any case, s 10(6) does not oust any pre-existing jurisdiction of the Court of Appeal. The Industrial Court is a comparatively recent creation of statute, and so is the right given to appeal from it to the Court of Appeal. The intention of Parliament, clearly expressed in s 10(6), is that the question whether the dismissal of a worker is in any case harsh and oppressive and contrary to the principles of good industrial relations practice, should be reserved to the Industrial Court. What distinguishes a dismissal that is harsh and oppressive from one that is not, is a matter which the Act clearly regards as grounded not in law, but in industrial relations practice. The practice, which is not codified in our jurisdiction, is to be determined and applied to the facts of each case by the Industrial Court. The policy of the statute is obviously to entrust that function only to judges of the Industrial Court who come equipped with experience of, and familiarity with, industrial relations practice. This is a qualification which judges of the Supreme Court do not necessarily or even ordinarily have. It is considerations like these which presumably underlie the prohibition in s 10(6) against the Court of Appeal reviewing the decision of the Industrial Court that the dismissal of a particular worker does, or does not, have the quality which triggers the grant of the remedies of compensation and reinstatement.

A harsh and oppressive dismissal is something which, according to the Act, may be identified only by the Industrial Court.

It does not matter whether the party challenging the decision of the Industrial Court on this issue claims, not merely that the decision was against the weight of the evidence, but goes further and claims that no reasonable judge properly directed could have come to the same conclusion, having regard to the evidence. In the latter case, the ground of appeal has graduated from a question of fact to a

> question of law; but it is nonetheless barred by the prohibition contained in s 10(6). This is not to say that a decision of the Industrial Court as to whether a dismissal is harsh and oppressive is so sacrosanct that it can never be challenged on any ground whatever. If, for instance, there has been some procedural irregularity which involves a breach of the rules of natural justice, then clearly an appeal would lie to the Court of Appeal, notwithstanding s 10(6). In such a case it would be the process by which the Industrial Court reached its opinion and not the opinion itself, that was challenged.

But the proof of the pudding is in the actual adjudication by the Industrial Court itself – the use of an understanding of the rights-based approach as the interpretative lens through which disputes are resolved. Workers do not merely have a claim or remedy as *Fernandes* seem to say they have a right to property in their job. In *Union of Commercial and Industrial Workers v El Dorado Consumers Operative Society Ltd,*[21] Ramsubeik C summed up the approach and commitment of the Court.

> The idea still persists in some quarters that it is possible to terminate a worker's employment by merely giving him the required notice under the contract of employment. This was true under the common law but termination of workers by notice alone is insufficient under the Act. This whole question was discussed as long as 1965 in Trade Dispute No. 2 of 1965 between the Civil Service Association and the Marketing Board but such submissions continue to be made.
>
> In addition, an employer must have an acceptable reason for terminating the worker's employment. Under the common law, the employer had the right to terminate without assigning a reason for the termination. This is not acceptable under the Act. An employer must have a valid reason for dismissal which must be connected with the worker's conduct or capacity to perform the work.
>
> Additionally, an employer must inform a worker of the true reasons for his dismissal. There was no requirement under the common law for an employer to give a reason for a worker's termination. He just

[21] TD 72 of 2000

> had to inform him of the termination. By the principles of good industrial relations practice, however, an employer must give a worker the true reason for his dismissal.
>
> An employer must also give a worker an opportunity to be heard before a dismissal becomes effective. In Trade Dispute No. 68 of 1980 between Trinidad and Tobago Television Co and Communication, Transport and General Workers' Union, His Honour Mr. J.A.M. Brathwaithe said: "It is an understatement to say the common law rights of an employer have been circumscribed. For all practical purposes they have almost been completely eroded out of existence".

In *Fernandez (Distillers) Ltd v Transport and Industrial Workers' Union* Wooding CJ emphasised the historical common law prerogative of the employer as owner of the worker singularly as a factor of production without any recognition of a right of the worker to his work. In forceful language Wooding CJ said:

> And I cannot too strongly stress that the issue was *not* whether the company could justify the legality or propriety of the dismissal.

This is in stark contrast to the recent decision of the Industrial Court in *Trinidad and Tobago National Petroleum marketing Co Ltd v Oilfields Workers' Trade Union.*[22]

> It is noteworthy that this country does not have a labour code to give detailed guidance to employers, workers and trade unions regarding the day to day conduct of their relationships. Instead the legislature has provided overarching principles and has emphatically positioned the Industrial Court as guardian of the national standards of what constitutes good industrial relations principles and practice. Thus, the importance of the role of the Industrial Court in issuing guidance to shape the industrial relations jurisprudence in the country cannot be overemphasised.

[22] TD 717 of 2013 and IRO 23 of 2013 (Consolidated)

In that case 68 workers were dismissed – equivalent to the discharge weapon of mass destruction in such a small society. In rejecting the dismissal of the workers as a product of arrogance and intransigence and a violation of natural justice, the court insisted that "industrial common sense causes us to examine the extent to which Management's own action or omission call into question the reasonableness of the decision to suspend the workers and then to dismiss them." The Court ordered the reinstatement of all the workers without loss of pay, benefits or seniority and also an award of damages. While the matter is the subject of an appeal before the Court of Appeal, in reliance on what we have said above, whatever conclusion the Court of Appeal come to would be irrelevant to the vindication of the rights of the workers in the Industrial Court and the role and function of the Industrial Court. The perception of the workers was that they matter and have a voice to assert their position in the institutional arrangements of the state.

The overall conclusion is that the Court has adopted a rights-based approach to the rights of employees to a proprietary interest in their employment.

Sharma CJ has said of the role of the Industrial Court:

> [25] What is of critical importance is the fact that in addition to conferring this jurisdiction on the Industrial Court. The legislature expressly ousted the Court of Appeal's jurisdiction in certain matters considered essential to determining good industrial relations practice. These matters are ones considered to be questions of fact and determinations based on the evidence which the members of the Industrial Court are best qualified to answer. This is consistent with the fact that the legislature vested the Industrial Court with the responsibility of ensuring that good industrial relations practices are maintained in employment relationships.[23]

[23] *Caribbean Development Company Limited v National Union of Government and Federated Workers Union* Carilaw TT 2003 CA 61, per Sharma CJ [24]-[25].

This is important because as Michael Freeman notes about rights in another context:[24]

> Rights are important because they recognize the respect the bearers are owed. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and integrity. Rights affirm the Kantian principle that we are ends in ourselves and not means to others' ends. It is, therefore, important that, as Ronald Dworkin so eloquently reminded us, we see rights as 'trumps'. They cannot be knocked off their pedestal because it would be better for others, or even society as a whole, were these rights not to exist.

The property interest of the worker in his job has been enhanced by the Industrial Court acting under the IRA while taking care of the multiplicity of other motivations for the Act. All rights, including property rights are a balance between the public interest and the individual and the question is always the margin of appreciation or proportionality with regard to the burden on the individual employee. In this regard the cases have shown that the Industrial Court has not hesitated to act where the burden on the worker was excessive in relation to the options available to the employer and the manner in which it has been exercised in the process.

Indeed, one can be bold enough to say that without the provision of social rights in the Constitution, a credible argument can be put forward that the work of the Industrial Court under the IRA has resulted in an effective constitutionalisation of employment law. This conclusion is more tempting when it is coupled with the panoply of legislative regulatory norms of the employment relationship which is backed up by a strong remedial regime, protected from the common law interference of the courts. The provision of the substantive rights and the provision of broad discretionary remedies to vindicate these rights have effectively created property rights

[24] M. Freeman What's Right with Rights *Int. J.L.C.* 2006, 2(1), 89-98, 89

in employment and the requirement of good governance – participation, transparency, accountability, fairness, reasonableness and proportionality.

Conclusion

The Industrial Court over the last 50 years has been from beginning to end the stalwart of good governance and social justice in the Republic of Trinidad and Tobago. As a home grown institution and not the replica of a precedent to be found elsewhere it is a model for democracies not only in this region but throughout the world. One can easily measure the quantitative effect of the Court by looking at the state of industrial relations today compared with the turbulent times of 1965. On the other side, it is difficult to measure the mostly qualitative impact as regards the feelings of the citizen in terms of participation and as this current President of the Court consistently reminds us "social inclusion". It is fitting to close with the words of the first President Sir Isaac Hyatali who so well established the firm foundations for the achievements of the Court, quantitative and qualitative. This shows that the achievements are not new but occurred from the very start of the Court's existence.

But let Sir Isaac Hayatali tell us himself:

> Having regard to the results achieved since then [the period preceding the Act], there is justification for observing that true economic and other cherished foundations of the Country have been preserved and fortified by the establishment of an impartial judicial system to settle in a peaceful and civilised manner trade disputes. which it was the fashion to resolve theretofore by costly and ruinous industrial warfare. Indeed the industrial peace which has reigned in the society even since the enactment of the Act eloquently bespeaks the extent to which its objects have been achieved and needs no further elaboration from me.

Final words indeed! The Industrial Court eloquently speaks for itself with regard to its achievements and no needs no further elaboration from me.