Natural Rights, Natural law and Commonwealth Caribbean Constitutions

by

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Constitutional law in the Commonwealth Caribbean has been and continues to be the most essential pillars of the society. This writer asserts that the affiliation felt by Caribbean peoples for their own Constitutions is explained no more, no less, by the Naturalist theory.

Commonwealth Caribbean academics have criticized our constitutions by alluding to the fact that they are not “autochthonous constitutions”. Professor Ralph Carnegie has noted “we in the Commonwealth Caribbean think we have the Westminster model [constitution] and we think that we like it.” It is accepted that the constitutions were not formulated by the people in the Commonwealth Caribbean states, but then the question arises, why then have we, according to Professor Carnegie “think that we like it.” It is respectfully submitted that not only do we think that we like it but we actually do like it.

Academics who stress this notion of autochthony are missing the crucial point to be observed here. To answer the question of why we in the Commonwealth Caribbean like our constitutions, an analysis into the content of the constitution must be advanced. In answering this question the question of the legitimacy of the constitution will also be answered. Mere acceptance by the populace will not suffice to establish legitimacy of the constitution and the state.

The question of legitimacy endeavours to postulate the most convincing reasons for our acceptance of the constitution and by implication

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the institutions that derive that power and authority from it. It aspires to find an ethical justification for the constitution and the state. Therefore in seeking to do this in the realm of moral justification of the state and of constitutional theory it must have at its base the natural law theory. As McIntosh puts it "thus the constitution, conceptualised as constituting the foundation of the state and the legal order, is presumed to vest on certain principles of justice and it is on the constitution's claim to embody justice as its forming ideal that an appeal for the citizens obligation to obey must ultimately rest". That statement is indeed profound since it realises that the content and intention of the constitution is based on a moral principle and seeks an ideal in the concept of justice in order to measure the acts of individuals and especially the state. Therefore, the foundation of the constitution and the state since its encompasses a moral principle and the ideals of justice must be read in terms of that tradition of ideas by the name of natural law theory. This theory is based on the philosophy of law which proceeds from an assumption that law and the constitution as the supreme source of law, is a social necessity based on the moral perspectives of rational persons and that any law that violates certain moral codes found in the constitution, is not valid at all. Human law is thus based on certain universal principles, discoverable through reason or revelation, which are seen as being eternal, immutable, and ultimately based on the nature of human beings. A corollary to this means that through his capacity for reason man is able to appreciate the concepts that underlie the constitution which seeks to regulate behavior among persons generally and the relationship between individuals and the state.

The most obvious of the provisions which seeks to regulate the relationship between the state and individuals is found in Chapter 1 of the St. Lucia Constitution and alike provisions found in the rest of the Commonwealth Caribbean constitutions. The concepts enunciated in the Bill of Rights are closely related to the ideas by the name Natural Law Theory and are enforceable against the state only. This is not to say that these rights and freedoms are not enforceable against ordinary citizens but these are left in the domain of the civil law for e.g. tort, contract, etc. The rights in the constitution are enforceable only against the state. As Lord Diplock stated in Thomas v. A.G of Trinidad and Tobago, enforcement against contravention of a fundamental right and the entitlement to redress was for infringement was "by the state or by some other public authority endowed by law with coercive

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powers. The chapter is concerned with public law not private law. In light of what is just revealed, the notion of having such indigenous constitutions, constitutions should be eschewed since man's capacity for reason will determine whether or not he will hold himself bound by the constitutions. If he accepts it, then the question of due moral legitimacy of the state and the constitution would have been answered.

It is necessary to identify the criteria by which the philosophical notions which are found in the constitution are to be measured. For the purposes of this essay the concept of justice and the idea of human dignity will be used in order to evaluate the actions by the various organs by the State which contravene the ideals and notions that are promulgated in the constitution. These concepts have much do with adjudication since constitutional interpretations demand that they be read in light of the *Natural Law Theory*. This theory was received as a body of unwritten rules depending upon common sense and universal conscience, ascertained by right reason. It must be remembered that natural law does not pertain merely to states and courts of law, it is a body of ethical perceptions or norms governing the life of the person and the life of the people in community quite aside from politics and jurisprudence.\[4\] With regard to the United States constitution it is said that it is not a philosophical treatise at all, but instead a practical instrument of government. We are thus safe in saying that the framers believed in the reality of natural law and had no intention of contravening natural law by the constitution; nor did anyone suggest during the debate over ratification that the constitution might in any way conflict with the old truths of natural law.\[5\]

Even though the constitution does not mention natural law specifically, \[natural rights have been affirmed in the independence constitutions of the Commonwealth Caribbean and affirmed in their preambles by the use of concepts such as the dignity of the human person, faith, fundamental rights and freedoms, free men, free institutions, respect for moral and spiritual values and the rule of law.\] Natural law helps citizens to govern themselves and is also used by courts in constitutional interpretation. This latter point is obvious since natural law concepts or concepts that have links with natural law can be identified, and therefore it is necessary that their interpretation be made using the precepts of natural law. This natural law offers us guidance in our

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3 *Thomas v. A. G. of Trinidad and Tobago* [1982] AC. 113.


5 *Ibid* at p.1039

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private lives. As Alexander D'Entreves writes “[T]he doctrine of natural law is simply in fact nothing but an assertion that law is part of ethics.... The lesson of natural law ... [is] simply to remind the jurist of his own limitations”. What natural law provides is the authority for positive law and indeed the constitution, not an alternative to positive law. Hittinger writes:

The business of the judge is litigation, and, on the whole, litigation is not the best context for taking stock of what natural law requires ... [p]roperly understood, natural law provides not only a very narrow and probably misleading theoretical picture of natural justice, but also furnishes an unsteady practical approach of how a body of positive law is to be made congruent with natural law.7

Positivists’ assertion that “law is law” cannot by any means enable us to understand the legitimacy of the state and the constitution and the rationale for obedience to the constitution. This notion made German jurists and lawyers defenseless against laws of arbitrary or criminal content. Positivism simply holds that a law is valid because it is successfully enforced. Positivists were also inclined to contend that some parts of the Bill of Rights contained in the constitution provided for further implementation by the legislature - were not in themselves positive rights to be protected by the courts but merely “directives” or “programs” for the legislature. In Germany during the Nazi regime there was a tendency in stark opposition to American and Swiss constitutional doctrine, to see in the typical provisions of the classical Bills of Rights no limitation on the legislature. Judicial review as it had developed in the United States and which now exists in the Commonwealth Caribbean was unacceptable to most commentators. In their view the judiciary was permitted only to decide whether laws had been correctly passed and promulgated in accordance with the rules for the legislative process. Whether the substantive content conformed to such criteria as justice, liberty, reasonableness and non-arbitrariness was excluded from judicial enquiry.

It is not surprising that under these partly historical, partly

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6 A.P. D’Entreves, Natural Law: An Introduction to Legal Philosophy 108 at p. 120 (1951)
7 Russel Hittinger, The Natural Law in the Positive Law, 55 Natural Law Rev. 22 (1993)
philosophical conditions the judiciary could not claim substantive review of legislation. It could not become the “guardian of the constitution” as the higher laws nor would the people see the as the judiciary the protector of the Bill of Rights. The German society needed change, but whatever were the underlying longings for greater social justice, for a more perfect realisation of human rights, they were for the legal positivist matters of indifference; for he is satisfied if the charge is legal and he is less interested in moral values, when in search of their perfect realisation. Judicial review which would have opened the way to natural law did not find full acceptance, and the proponents of judicial review were often, though not always, open to the theory of natural law. In 1946 the revival of the theory of natural law took hold of the intellectual world. What is to be noted is that all attempts at passive and active resistance to the regime were necessarily grounded on natural law ideas or on divine law since legal positivism as such could offer no foundation.

Therefore, when the first constituent assembly of the Landers met there was a unanimous sentiment in favour of strengthening the judiciary, of creating a guardian of the constitution in the form of a constitutional court — i.e. of establishing judicial review formally and explicitly — and of exempting the Bill of Rights from the emending power generally vested in a qualified majority of the legislature. During the discussion of the Bill of Rights Dr. Wilhem Hogner said “we see these rights as part of the natural law, which is older and stronger than the state which will again and again successfully and forcefully assert itself against the state.” They are valid as a higher law even though human folly has denied them.

The above exposition serves only to emphasise that it is only if read in light of the natural law theory that the human rights contained in the Bill of Rights can be safeguarded and the importance of vesting the Courts as guardian of the constitution and being totally independent of the Executive and Parliament. The importance of the independence of the judiciary for the enforcement of the fundamental rights and freedoms provisions found in the constitutions of the Commonwealth Caribbean will be discussed later.

The question of obedience to the constitution arises again. Positivists claim that this is done simply because they are commanded to do so. They obey the law because they know that it is something that they ought to do. There are, of course, some wicked persons who do not recognise it as their duty to obey the law, and for them sanctions and punishments must be inflicted. But this does not alter the fact that the great majority of the people

8 Quoted in Earl Heyland 113 Tubinger (1950)
obey the law simply because they recognise it to be obligatory on them. The most important of all is the moral quality of the law and the constitution itself. People will respect rules of law which are intrinsically right and just and will expect their neighbours to obey them. If people are to feel a sense of obligation to the law then the law must correspond to what they consider to be just and right, or, at any rate must not unduly diverge from it. In other words, it must correspond, as near as possible, with justice.

The state, in the conduct of its affairs must not infringe the Bills of Rights found in the constitution. The concept of justice can be considered as what right minded members of the community believe to be fair after exercising their capacity for rational thought and reason of which all men are capable. Justice can be considered as an ideal and it rests on the tension or contradiction between what is and what at least some men think it ought to be. It represents or pre-supposes a criticism of an existing reality or state of affairs allegedly in the light of principles or an ideal and state; it is in that sense said to be both transcendent and a guide to action and evaluation. It has been seen as the faithful realisation of existing law, the vindication of it against infraction or disregard. This conception of justice rules out, as a contradiction in terms, the concept of an unjust law or an unjust legal system or procedure; it equates justice with conformity to law. The constitution can be considered as encompassing this concept of justice by which all other laws will be measured to show whether it is a just or unjust law. Justice in itself can be regarded as an exact element in all law, as the idea which is the end of the law and in terms of which any existing set of laws or legal procedures is to be judged, so that there are just and unjust laws, not only unjust applications.

Justice, says Aristotle, consists of treating equals equally and unequals unequally. All men were to be treated equally and impartially. Aquinas regarded such justice as the justice that governs contracts and exchange, justice between individuals as individuals. Any detailed considerations of actual traditions and conceptions of justice in its narrow sense in given societies, however, will force us to recognise elements that go beyond this eternal logic or ethic or rational intellectual activity. A concern for equality, human dignity, material well being, individual well being, individual autonomy and social goods will, all readily, be listed by many people today as necessary requirements for a judge to do a kind of justice, however narrow its sense.

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10 *Ibid* at p. 13
John Stuart Mill wrote that "justice is the name for certain classes of moral rules, which concerns the essentials of human being more clearly, and are therefore of a more absolute obligation than of any other rules for the guidance of life." 11 Another definition of justice is expounded by Kant who saw that justice required that men act externally so that the free exercise of their personal will could be brought under a general law together with the freedom of everyone - consummates the separation between law and justice on the one hand, as concerned only such external behaviour, and morality on the other, as concerned with inner life. Professor H. L.A. Hart believes that the idea of justice "consists of two parts: a uniform or constant feature which can be summarised as "treat like laws alike" and a shifting or varying criterion used in determining when, for any given purpose cases are alike or different."12

If men had the capacity for reason then, logically, he will be able to appreciate that the provisions in the constitution conform to his notion of goodness and the ideals such as justice and equality that he strives for. Thomas Aquinas was of the view that there are a number of true directives of human action every person can easily formulate for himself. In Aquinas' theoretical discourse he opines that natural law can be likened to the first principles and both are known through themselves, not derived, and are self evident. An agent acts for an end which has the note of goodness. So the first principle of practical reason is going to be grounded on the notion of goodness. The good is that which all things seek. Therefore, the good is to be done and evil avoided. The precept is formed by human reason and it is meant to be directive of human action. The addressee is the human agent and the directive is: the perfection, the completion, the good in the sense of the ultimate end is to be pursued and whatever is incompatible with that end is to be avoided. Therefore, if man exercising his capacity for reason was able to encompass these ideals and values in his constitution then it must be that any other man by the exercise for his capacity for reason will appreciate the ideas found therein. Man is a rational agent and therefore, the good or perfection of rational activity is man's end. So human actions in the pursuit of these ends must be rational, deliberate and responsible.

Natural law is thus the dictate of reason. Then if man is to pursue the good in the actions that he does it must be that he will exercise his capacity for reason. Thus, in that quest for the good, man, being a rational creature, will

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11 Representative Government (in Utilitarianism, Liberty and Representative Government) (Everyman Ed) p. 229-230
evaluate the ideals codified in the constitution and evaluate the extent to which they are similar to his needs as argued above and will appreciate them as so being since it is man through the exercise of practical reasonableness was able to create the document. Natural law can thus be based on two theorems: (1) morality comprises observance of rationally demonstrable principles of conduct and (2) whatever be the other requirements of legal validity, no law which controverts these rationally demonstrable principles of conduct is valid or binding as law.

Therefore, Natural Law Theory postulates that there is a necessary moral foundation to law which is universal and is known through reason. Since every man has the capacity for reason every person in the community will be able to appreciate and value the moral standards. Since these moral considerations must inform the making of the constitution they will be accepted by all in the society. Thus the legitimacy of political and legal authority in the state is defined. This enables us to understand obedience and fidelity to law. If those principles are self-evident then no man should question the moral dictates of the constitution which is itself the product of man in the exercise of his practical reasonableness.

Therefore, the constitution as a document that establishes the state and its various organs, setting limitations to the activities of state and individual rights provides for a just and well organised form of community in which all of its members have the chance to realise the good in their lives. Since what is good is equally and unconditionally good in all its manifestations no practically reasonable person can claim that his good is better than other’s good as such. Hence a good society enables humans universally a full and equal opportunity to realise whatever seems to them the best life plan consistently with others having that same opportunity. This is consistent with the concept of justice explained above.

The central precept of the Natural Law Theory is that there are objective moral principles that are ascertained through the use of reason. A corollary to this is that there is a necessary and moral foundation to law. These objective moral principles are ideas which individuals must confront by their very existence in society. It is imperative, therefore, that human laws should accord with these principles. These objective principles provide a very strong criteria by which individual laws and more importantly the foundation of the legal system can be adjudged. These principles are obviously principles of right and good and they should constitute the foundation of any reasonably just legal order. Lloyd has opined that “[v]iews as to the content of these principles have sometimes been diverged but the essence of natural law theory is said to be the constant assertion that there are objective moral principles which depend
on the nature of the universe and which can be discovered by reason." Natural law is not only the foundation of morality of the constitution and of all social and political institutions, it is also the paramount standard by which these institutions could be judged. Political and Christian society must be based on justice. And justice, disclosed to man in the precepts of natural law must prevail over any other command or authority. St. Thomas opined:

"St. Augustine says: "There is no law unless it be just". So the validity of law depends upon its justice. But in human affairs a thing is said to be just when it accords aright with the rule of reason. And, as we have already seen, the first rule of reason is the natural law. Thus all humanly enacted laws are in accord with reason to the extent that derive from the natural law. And if a human law is at variance with the natural law, it is no longer legal, but rather a corruption of law." \(^{14}\)

Unjust laws are not properly laws since according to Aquinas "they do not bind legal conscience." \(^{15}\)

Natural Law Theory aims to answer the question of what is law?. An answer to such a question using the precept of the theory would entail an enquiry into the "goodness" of the legal system. Thus by concentrating on such normative questions about the legitimacy, natural law theory is able to be used as a critical standard by which legal systems can be evaluated. All human laws must be created in such a way that they provide the optimum conditions for the attainment of the common good. These laws must be constantly evaluated in light of the principles natural law which specify the proper path toward the ultimate state of perfection and which provide humans with a proper basis for the morality of law. The important question of the nature of law is what the law ought to be in order for it to be a true reflection of such principles. This leads to another important tenet of the natural law theory - the necessary connection between law and morals. This is because the question of what the law ought to be is an important question of morality, since it is ultimately based upon the value judgements of persons in society.

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13 Freeman, M.D.A. *Lloyd's Introduction to Jurisprudence* (1996) at p.80
14 Cited in Freeman, *supra*, n.13 at p.156
15 *Ibid*
which are properly reached after the use of reason.

Thomas Aquinas is rightly looked to as the major proponent of natural law as he postulates the view that there are a number of true directives of human action that every person can formulate for himself(Aquinas notes that “[l]aw is a rule or measure of action in virtue of which one is led to perform certain action and refrain from the performance of others.”). But the rule and measure of human action is reason which direct action to its appropriate end...” The question is posed: what is the appropriate end of the Law? This is answered by Aquinas when he states that “Since every part bear the same relation to its whole ... and since one man is part of that perfect whole which is the community, it follows that the law must have as its proper object the well being of the entire community” and when he asserts that “law, strictly understood, has as its principle object the ordering of the common good”.

The good is the first thing grasped by the mind in its practical function of directing man’s actions. A person acts for an end which has the note of goodness. So the first principle of practical reason is to be grounded on the notion of goodness.

The precept is formed by human reason and it is meant to be directive of human action. Thus the directive can be put thus: the perfection, the completion, the good in the sense of the ultimate end, is to be pursued and whatever is compatible with that end to be avoided. Natural law is the dictate of reason. Precepts of natural law are rational directives aiming at the good for man. The human good, man’s ultimate end is complex but the unifying thread is the distinctive mark of the human, i.e., reason; so too law is the work of reason. It is obvious that all natural law precepts are general injunctions to pursue the ultimate end or the common good, and conjoining it with the truth that man’s end is given, we can see how it can be claimed that natural law precepts are valid everywhere and at all times.

Law, according to Aquinas must be linked with reason. A law is a rule and measure of the nature of human activities. The rule and measure of human acts are to be thought in terms of law and in terms of our reason. Reason directs us to the fulfillment of our ends. Man’s laws should be thought of as “ordinances of reason for the common good, made by those who have the care of the community, and are promulgated.” The natural law is “promulgated” by the laws of nature, which are what we will see is known as the law of God...
by the very fact that God has instilled it into man’s mind so that it can be
known naturally. The natural law is thus the product of God’s wisdom. We
can better comprehend that wisdom by studying human nature and the natural
law.

Aquinas notes that natural law is man’s participation in the eternal law
governing, as it is known through reason. When man exercises his capacity
for reason correctly ascertained he will understand the fundamental principles
of God. Thus having correctly his capacity for reason, man, in positing law,
must draw these precepts from natural law which will be naturally known to
him.

Finnis was able to capture the essence of the natural law theory. In
his Natural Law and Natural Rights he attempted a restatement of the theory.
The essence of his restatement is that there are certain basic goods for human
beings, which are objective values in the sense that every reasonable human
being must assent to their value as objects of human striving. These self-
evident values are obvious, but, unprovable though that proposition is, anyone
who sets out to deny this seriously cuts the ground from under his own feet.

Finnis rejects the conceptual apology for natural law as propounded
by Aquinas. His central thesis consists of two major propositions. First: there
are certain “human goods”, i.e., the basic values of human existence, that are
self evident, and that can be secured only through law. Second: these goods
may be achieved through practical reasonableness, and this too necessitates
law. The human goods constitute a catalogue of forms of human flourishing,
exemplifying the conditions that are required by individuals if they are to attain
their full potential. Finnis is thus seeking in his categorisation of human goods
to provide a rational basis for morality and the justification of law.

The human goods are, according to Finnis, ‘basic’ because any other
value will be seen as merely subordinate to them, and objective, which may be
evidenced by anthropological research which reveals its universality. These
goods are self-evident in that it needs no demonstration and neither can they be
demonstrated. Finnis asserts that “[t]he principle concern of a theory of natural
law is to explore the requirements of practical reasonableness in relation to the
good of human beings who, because they live in community with one another,
are confronted with problems with justice and rights, of authority, law, and
obligation.”20 He continues thus “[a]nd the principal jurisprudential concern
of a theory of natural law is thus to identify the principles of the rule of law
and to trace the ways in which sound laws ... are to be derived from unchanging principles - principles that have their force from their reasonableness, not from any originating act or circumstances." Finnis then answers the question of the grounds for the rulers' authority by stating that "[t]he ultimate basis of a rulers authority is the fact that he has the responsibility, of furthering the common good ..."

Therefore, human well-being and the flourishing of the individual requires a legal system that will exemplify the 'rule of law' as derived from natural law. The rules of such a system would ensure clear, coherent and stable regulations, accountability of those who administer the law, and an administration that is carried out in a manner which is seen to be consistent with promulgated principles.

In his reinterpretation of the writings of Aquinas, Finnis argues that the normative conclusions of natural law are not based on observations of human nature or any other nature. Rather they result from a reflective grasp of what is self-evidently good for all human beings and from a practical understanding by experiencing one's own nature and personal inclinations. He argues that objective knowledge of what is right is made possible by the existence of what he calls 'basic forms of human flourishing' which are objective 'goods' distinct from any moral evaluations of goodness. These are generally things which for most people would make life worthwhile and they are self evident, - ie they would be 'obvious to anyone acquainted with the range of human opportunities.' Natural law, then, is a set of principles of practical reasonableness to be utilised in the ordering of human life and the human community in the process of creating optimum conditions for humans to attain the objective goods. These conditions constitute the common good.

These objective goods are attainable only in a community of human beings where there is a legal system which facilitates the common good. Rulers have the authority to work for the common good, and unjust laws which work against the common good may be valid but do not accord with the rulers authority. Finnis is able to list some objective goods namely life, knowledge, liberty, property, etc. Therefore, any reasonably just legal order would seek to secure these basic goods that are essential to human flourishing. These basic goods constitute moral claims that individuals have by virtue of the fact that they are human, claims against individuals generally and more importantly, claims against the State. The reason for this is that it is the State that is

\[\text{\footnotesize 21  \hspace{1cm} Ibid}\]
\[\text{\footnotesize 22  \hspace{1cm} Ibid at p.178}\]
burdened with the regulating of the various aspects of social life in the community and is therefore best poised to disregard those claims. Any orderly human society, which is properly established, would recognise these claims and provide mechanisms for their enforcement. These moral claims are called natural rights since they are derived from the precepts of natural law. This leads to an understanding of the reason why such claims are called human rights since they are claims by human beings and are necessary conditions for protecting interests which are intrinsic to us as human beings.

If one were to establish a legal order in keeping with Natural Law Theory the above aspects must necessarily be incorporated to ensure that such an order can be seen as objectively just. The question arises as to how will these be incorporated into the legal order? Since the constitution sits at the base of the legal order it is evident that the constitution would specify the basic goods which are critical to having a good life. By securing those claims in the constitution, these claims would turn them into constitutional rights. This codification in the constitution does not in any way mean that they are created by the constitution, the obvious reason being that these rights precede the constitution as they are moral claims that are intrinsic to us as human beings. A legal system that does not seek to secure these moral claims would be making a weak claim to legitimacy. Codification in the constitution, simpliciter, will not suffice. There must exist other factors which will complement their specification in the constitution, such as an effective separation of powers between the various organs of the State which will guarantee the total independence of the judiciary. These measures are necessary to ensure that the moral claims are not trumped by the State at will.

Given the above criterion that a just constitution should contain in order to secure the moral claim of individuals it will be evident that West Indian constitutions contain provisions which attempt to secure the above mentioned. They contain a Chapter on Fundamental Rights and Freedoms and provisions which secure the independence of the judiciary and their security of tenure - measures which provide for the vindication of these human rights. Therefore, West Indian constitutions can indeed be read in the tradition of ideas by the name of the natural law theory. The theory offers a critical standard by which such constitutions can be evaluated.

Therefore, in constitutional adjudication there must be some evaluation of the content of the moral claims. It follows that there must be some moral reasoning when such claims arise for consideration by the courts. In constitutional adjudication moral questions are answered expressly or implicitly, unfortunately it is more often the latter than the former.
judges are called upon to provide answers to legal questions they either claim that they are not interested in the underlying questions and answer them implied in the answers that they give to the legal question or it may be that they are not competent enough to even recognise the underlying moral question that begs an answer to it directly.

The constitution embodies the fundamental human rights which can be considered as the elements which are necessary for man to achieve a fulfilling life. Thus man in the exercise of his practical reasonableness will be able to appreciate them as such. Leo Strauss has emphasised that "the article concludes that fundamental human rights can be adequately upheld by reference to man's natural inclinations to natural rights and, ultimately, to the natural law itself."23

What is needed is the development of a society so that it is primarily open to man's true proximate ends and to his final end. Certainly, a legitimate and ordered society will need to tolerate certain kinds of actions which are not obviously related to man's true ends but insofar as this is done, it is not because of error as such, but in the view of the proper limits of political jurisdiction and for the sake of the dignity of the human person.24

An exposition of the fundamental human rights with regard to upholding the idea of human dignity will now be advanced. Judges are called upon to explicate vague norms like due process, equality and liberty. At some point they will have to develop their own views about how these norms are to be properly understood and related. It is naive to believe that such normative concepts e.g. liberty or due process, are so enshrined with one meaning. Using the American example, did the authors of the Fourteenth Amendment intend that "equality" should condemn the "separate but equal doctrine affirms in Plessy v. Ferguson but later rejected in Brown v. Board of Education.26 Thus the methodological principle as stated by Mr. Justice White is that "decisions that find in the constitution principles or values that cannot be fairly be read into that document using the people's authority"27 Such was the approach taken by Georges J. in Thornhill v. A.G. of Trinidad and Tobago.28

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23 Leo Strauss, Natural Rights and History (Chicago, 1953) 49
24 Midgley E.B. F. The American Journal of Jurisprudence - Natural Law and Fundamental Rights
25 (1896) 163 U.S
26 (1954) 347, US 483
476 US, 747, at p.787
that the constitution can be interpreted to create new rights including the right to counsel. This was clearly an instant where the constitution was interpreted liberally so that a right to counsel was found. Implicitly, Georges J. was answering a moral question that all individuals are equal and that discrimination based on a morally irrelevant criteria such as having been accused of committing a crime was not to be tolerated. This interpretation did fall within the ambit of the limitation set out by Mr Justice White above. Using Professor Lly's interpretation: "Judges should confine themselves to the enforcement of norms that are stated or clearly implicit in the written constitution."  

It can be argued that human dignity can be considered as a basic moral status constituted by the fundamental moral claim - right not to be unjustly devalued or disparaged. What must be emphasised is that a number of constitutional provisos incorporate the moral right which can be identified as essential to the moral claim of human dignity. Therefore, such commands are authoritative as they are found in the constitution and impose legal constraints on the organs of the state in the exercise of their powers.

Immanuel Kant claims that human beings in the phenomenal world possess only an extrinsic value. He frequently speaks with derision of all natural inclinations and desires. In his mind they are corrupting and debase us. Kant claims that it is against moral law that it is so degrading. And it is moral law that defines the way we regard ourselves: as rational beings [as such], or pure intelligence. The moral dignity of supersensuous existence consists precisely in the motivation from duty or from respect for the moral law that is exemplified in the constitution. As personalities we are not bound by natural laws, we can determine for ourselves what must be done and act ordinarily. This is Kant's meaning when he affirms that it is a sublime thing in human nature to; be determined by actions directly by the moral law [embedded in the constitution]. However, there are problems with this theory one being the need for us to see ourselves as disembodied rational substances in order to explain moral decision making.

If one accepts that all men are equal, which is a constituent instrument of the concept of human dignity why have African American and South African Blacks have been made to endure a most grievous injustice under

30 Critique of Pure Reason (1956) at p. 98.
31 Foundations of Metaphysics of Morals (1959) at p. 176
32 Ibid at p. 58
slavery and segregation viz., the systematic devaluation of their humanity on the basis of skin colour, sexism, the attitude or theory that women are inferior to men and are, therefore appropriately assigned to lesser moral and legal status, constitutes an assault on human dignity. Like the practices of slavery and segregation, it betrays arbitrary disdain for an entire group of people for their possession of a morally irrelevant property. Consequently sexist practices impugns the very humanity of women.

Therefore, the moral right that characterises the status of human dignity is a claim right or a right sensu stricto\textsuperscript{33} which imposes correlative duties. The duty of dignity is obvious: we must not devalue, disparage, debase or vilify human beings for possessing any morally irrelevant property. This is an obligation of moral respect. Provisions in the constitution which prohibits the state from depriving the citizen of life, property, liberty without due process of law. This due process clause is designed to protect all citizens from arbitrary political decision making. As such it constitutes a necessary condition for the morally acceptable exercise of power (which we all deserve).

As T. M. Scanlon puts it, due process:

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aims to provide some assurance of nonarbitrariness by requiring those who exercise authority to justify their intended actions in a public proceedings by adducing reasons of the appropriate sort and defending these against critical attack.\textsuperscript{34}
\end{quote}

The guarantees of due process are true bulwarks against arbitrary legislation. \textsuperscript{35} Constitutional morality mandates the creation of institutions, including due process which minimizes to the greatest extent possible the role of prejudice and whim in government and decision-making. Thus the power of the state to impose purposeless, irrational rules and regulations is, accordingly, limited "no matter by what organ it acts". Thus the executive, the legislature and even the judiciary should observe due process. The case of Collymore v. Attorney General of Trinidad and Tobago \textsuperscript{36} established that the courts are to be considered as the guardians of the constitution. Wooding C.J. opined that: "the supreme court is constituted and is the guardian of the constitution, so it is not only within its competence, but its right and duty to make both the Constitution and the Constitution Act, 1967, binding on the Legislature and all branches of the Government of Trinidad and Tobago."

The moral right to human dignity must be joined to the right to equal protection of the law. As I shall argue, these two rights are necessarily connected. The act of depriving a citizen of a legal right is not an injustice if it is done by a properly constituted representative of the people, in particular if the act of deprivation is constitutional provision of a law for the security of the state. This dignity is appreciably violated when these actions are carried out by the assembly without due process, and this would allow the exercise of cruel and unusual punishment in the context of extraneous pressures. The state has no right to possess the whole person of the individual; it are also subject to the limits of due process. The constitution is a contract involuntarily entered into by the individuals. It involves not the individual's consent, but the support of a powerful and potentially abusive government.

According to the United Nations, human rights belong to all individuals. The right of every individual to respect for his personality is a fundamental human right. The concept of the dignity of human person is a fundamental principle of customary international law, as is the right to be treated with respect for one's human dignity. Article 22 of the American Convention on Human Rights affirms the right of every person to his or her honour and to respect for his or her personal and family life. Article 23 of the American Convention states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and that no one shall be subjected to arbitrary arrest or imprisonment. Article 24 of the American Convention states that no one shall be subjected to ex post facto law, nor shall he be selectively subjected to any punishment, whether capital or otherwise. Article 25 of the American Convention states that every person has the right to a fair and public hearing within a reasonable time by a court established by law and impartial and independent judges. Article 26 of the American Convention states that no one shall be deprived of his or her liberty except in accordance with established legal procedures. Article 27 of the American Convention states that every person has the right to a private and family life, without interference except in cases provided for by law. Article 28 of the American Convention states that every person has the right to freedom of thought, conscience and religion. Article 29 of the American Convention states that no one shall be subjected to arbitrary restriction on the exercise of his or her freedom of speech or of expression. Article 30 of the American Convention states that every person has the right to the protection of the law against the violation of his or her person, freedom, property or other right.

\textsuperscript{33} Judith Jarvis Thompson, The Realm of Rights (Cambridge Mass, Univ. Press )

\textsuperscript{34} T. M. Scanlon, Due Process (1984)

\textsuperscript{35} (1967) 12 WIRS

\textsuperscript{36}
make binding declaration, if, and whenever warranted that enactment made by Parliament *ultra vires* is void if it abridges, infringes or abrogates or authorises the abridgement, infringement or abrogation of the fundamental rights and freedoms. "..."36 Even the judiciary must observe the proper procedures and the Privy Council has held in *Maharaj v. A.G. of Trinidad and Tobago*37, that the state has to pay damages for the wrongful act of a judicial member in its capacity as an organ of the state.

Provisions found in the Fundamental Rights Chapter provide that all citizens shall enjoy equal protection of the law. Therefore, arbitrary government discrimination is presumably condemnable under the standard of equal protection. If constitutional due process is designed in part to forbid injustice qua capricious legislative deprivation of life, liberty or property, then by parity of reasoning we should agree that constitutional equality is designed in part to prohibit injustice qua capricious legislative classification. Other provisions which have the effect of incorporating moral commands of human dignity which is binding on the state. It forbids distinctions on the freedom of assembly and the exercise of religion.

One of the provisions establish the respect for private and family life and thus limits the government’s power to invade citizens privacy in ways that exhibit unjust scorn for them. There is also a provision for the prohibition of cruel and unusual punishment serves in part to condemn the infliction of extraordinarily harsh or painful penalties on the convicted solely because they possess a property perversely identified as a matter of human inferiority. There are also provisions protecting individuals from slavery and forced labour. This constitutes a fundamental precept of human dignity, and its condemnation of involuntary servitude can function to protect the unfairly despised from further abuses of public power.

The very institution of rights held against the state, where the rights belong equally to each and every citizen, embodies the idea of moral dignity which is a fundamental concept arising from the natural law theory, the Bill of Rights constraining the exercise of legal power against citizens is itself an affirmation of moral dignity derived from the natural law theory as has been suggested by Ronald Dworkin:

> The institutional rights against the Government is not a gift of God, or an ancient ritual or a

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36 *Ibid* at p. 9
37 [1978] 2 WLR 902.
national sport. It is a complex and troublesome practice that makes government job serving the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our government for respecting them, must have some sense of what the point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophies of different schools, supposes that there are ways of treating a man and these are inconsistent with recognizing him as a full member of the human community, and hold that such treatment is profoundly unjust.

The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves, so that if some have freedom of decision whatever the effect on the general good, then all men must have the same freedom.¹³⁸

Both ideas expounded by Dworkin are important but it is essential to note that they derive from the same moral command that all individuals in society be treated with some moral respect. That being universal means that the government is not to use arbitrary power against its citizens. Various aspects of well-being of the members of the community will have to be taken into consideration. This is what Finnis refers to as the common good. Another related question is the manner in which these rights are enforced by the Judiciary which will ultimately depend upon the extent to which they can be said to be independent. The courts as the guardians of the constitution must necessarily involve themselves in a process of constitutional interpretation of the provisions found in the constitution. Since,
as asserted before, the constitution inevitably rests on a moral foundation, the courts in their quest to achieve justice and uphold the concept of human dignity will involve itself in some moral reasoning. This must be correct since the courts will, in effect, be answering underlying moral questions in their effort to adhere strictly to the legal rules. The courts in the Commonwealth Caribbean must eschew their restrictive approach to constitutional interpretation and avoid "the austerity of tabulated legalism." This is not to say that the courts are to venture into a jurisprudential enquiry into moral questions but they must apply the legal rules in such a way that is consistent with the underlying moral questions even if this means jettisoning some aspect of the legal rules by changing precedent and not be bound by stare decisis.

When examining the situation in Germany above it was evident that the courts were confined to examining whether the legislation was passed according to the established "laws". Their moral content was not examined at all and such laws, according to Aquinas, could not bind conscience. The independence of the judiciary is directly related to the concept of the separation of powers doctrine that Lord Diplock, delivering the judgement of the Privy Council in the Hinds case\(^9\) declared was implicit in the Westminster model constitutions. It is imperative that the other organs do not have any influence upon the judiciary in this respect. To this end Commonwealth Caribbean constitution contain provisions which specifically ensure that this is adhered to. Though they do not fully contain an effective separation of powers in that the Executive is to form part of the Legislature, they do provide for an independent Judiciary which is essential for the safeguarding of the rights and freedoms of the individuals from the exercise of arbitrary power by the State.

Therefore, Commonwealth Caribbean constitutions can be read in light of the natural Law theory since their content is based on moral considerations which is an essential aspect of the natural law theory. It is based upon moral claims that are enforceable against the State and seeks to codify these so that individuals rights can be protected against arbitrary exercise of power by the State. The concepts contained in these constitutions are self evident and all men are capable of appreciating it as such.\(^3\)

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