

JUDICIAL REVIEW OF LEGISLATION IN THE
WEST INDIAN CONSTITUTIONS

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THE EXISTENCE OF JUDICIAL REVIEW OF LEGISLATION

THE independent West Indian states of Barbados, Guyana, Jamaica and Trinidad and Tobago are no exception to the general rejection by the majority of Commonwealth states of the fundamental doctrine of United Kingdom constitutional law, just as they are no exception to the general trend in patterning their institutions of government on the "Westminster model." None of the constitutions has attempted to perpetuate the doctrine of the legal omnipotence of Parliament acting by its ordinary procedure.¹ All the constitutions with the exception of that of Trinidad and Tobago contain a "supreme law" clause, making law inconsistent therewith *pro tanto* void,² and two, including Trinidad and Tobago, provide that no bill shall become law unless passed in accordance with the constitution.³ Quite apart from these provisions, the constitutions abound with restrictions on the legislative authority of Parliament⁴; and regardless of the view which might have been taken at the time of the drafting of the constitution of the United States,⁵ such restrictions today naturally suggest to the lawyer the existence of judicial review of legislation.

The existence of the right of the courts to declare unconstitutional legislation invalid would seem, however, rarely to be so obvious as not to be worth challenging in litigation. The battle over this issue which was fought in the United States in *Marbury v. Madison*,⁶ in South Africa in *Harris v. Minister of the Interior*,⁷ and in Ceylon in

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¹ Barbados Constitution (S.I. 1966 No. 1455, Sched.), s. 1; Guyana Constitution (S.I. 1966 No. 575, 2nd Sched., as amended in accordance with the 2nd Sched. to the Constitution and by Guyana Acts, 16 of 1968 and 1 of 1969), s. 2; Jamaica Constitution (S.I. 1962 No. 1550, 2nd Sched., as amended by Act 15 of 1971), s. 2 (the adjective "supreme" is absent from the Jamaican provision).

² Guyana Constitution, s. 79 (3); Trinidad and Tobago Constitution (S.I. 1962 No. 1875, 2nd Sched., as amended by Trinidad and Tobago Acts 13 of 1964, 22 of 1965, 25 of 1968 and 15 of 1970), s. 44 (3).

³ See Barbados Constitution, ss. 23 (1) (a), 42, 48, 49, 61 (4); Guyana Constitution, ss. 15 (1), 66, 69, 72, 73, 82 (4); Jamaica Constitution, ss. 24 (1), 38, 48, 49, 64 (3); Trinidad and Tobago Constitution, ss. 2, 36, 38, 50 (3).

⁴ See Beard, "The Supreme Court—Usurper or Grantee?" 27 *Political Science Quarterly* (1912) p. 1 (collected in *Essays in Constitutional Law* (1957), ed. McCloskey).

⁵ (1803) 1 Cranch. 137.

⁶ 1952 (2) S.A. 428.

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Bribery Commissioner v. Ranasinghe,⁷ has been fought again, with the same result, in the Trinidad and Tobago courts in *Collymore v. Attorney-General*.⁸ That the contest should have been considered worthwhile in the Trinidad and Tobago case seems strange, since the wording of the constitution, as it applied to the facts of that case, appears to have been much more explicitly in favour of the existence of a right of judicial review than were the provisions of the constitutions in the other leading cases cited. The plaintiff's complaint was one of violation of human rights: [section 2 of the constitution expressly limited the area of operation of an Act of Parliament in contravention of human rights, while section 6 expressly conferred on the High Court original jurisdiction to hear applications for redress for breaches of provisions of the constitution which included section 2. It is hardly surprising that the Court of Appeal of Trinidad and Tobago rejected the argument that the human rights provisions in question were merely a guide to the interpretation of statutes, and not limitations on the competence of Parliament acting by its ordinary procedure.⁹]

Although no court has yet held an Act of Parliament invalid in any reported post-independence case in a West Indian state, there can, it is submitted, be no real doubt that, in the light of decisions of these and other jurisdictions and of the common understanding of the legal profession, the courts would claim their competence to do so on the grounds of unconstitutionality.¹⁰

This does not mean, of course, that it is no longer possible to quibble as to the exact status in each of the constitutions of the doctrine of parliamentary sovereignty. The concept of sovereignty is never notable in any of its guises for its clarity of meaning, and this has led judges on occasion to try and reconcile the existence of judicial review of Acts of Parliament with the sovereignty of Parliament.¹¹ Thus the Privy Council in *Bribery Commissioner v. Ranasinghe* took the trouble to assert that there was no inconsistency between calling a Parliament "sovereign" and holding it bound by the limitations of its constituent instrument, arguing in effect that the definition of Parliament may change for certain purposes without Parliament ceasing to be sovereign in the sense of being able to pass any legislation without recourse to any other agency.¹² On this latter

⁷ [1965] A.C. 172.

⁸ [1970] A.C. 538 (P.C.); (1967) 12 W.I.R. 5 (C.A. of Trinidad and Tobago).

⁹ 12 W.I.R. 5, 8-9, 21-23, 35-36.

¹⁰ In addition to the *Collymore* case, legislation has been challenged unsuccessfully in *Thompson v. Forrest* (1967) 11 W.I.R. 296 (Jamaica) and *Petrie v. Att.-Gen.* (1968) 174 W.I.R. 292 (Guyana). See also *R. v. Ogle* (1968) 11 W.I.R. 439, 442.

¹¹ [1965] A.C. 172, 200. Cf. *Harris v. Minister of the Interior* 1952 (2) S.A. 428, 464. Cf. Barbados Constitution, s. 49; Trinidad and Tobago Constitution, s. 48.

argument, the constitutions of Barbados and Trinidad and Tobago might be admitted to incorporate a doctrine of parliamentary sovereignty. In Jamaica¹² and Guyana,¹³ however, this reconciliation is hardly possible, since certain types of constitutional change require a referendum. For what this sort of abstract conceptualism is worth, therefore, it may be concluded that Barbados and Trinidad share a doctrine of parliamentary sovereignty with the United Kingdom, while Jamaica and Guyana have completely abandoned any vestiges of the doctrine.

THE POSITION OF THE COURTS

Notwithstanding that the direct issue of the competence of the courts to pass on the validity of Acts of Parliament on constitutional grounds appears to admit of a clear answer in the West Indian states, it is possible to raise questions, relating to the possibility of frustrating judicial review by less direct means, the solutions to which do not so immediately present themselves.

The effectiveness of judicial review, for instance, must depend to a great extent on the independence of the judiciary and the security of the courts' jurisdiction. In the constitutions of the West Indian states, the provisions relating to the appointment and tenure of the higher judiciary appear to provide safeguards of judicial independence comparable with those of other Commonwealth states.¹⁴ The position seems less satisfactory, however, in relation to the monopoly in the courts of final jurisdiction in constitutional matters. What is the value of judicial review of legislation as a means of protecting the constitution, if the legislature is able either to oust the courts' jurisdiction or to create a new court, subservient to the legislature, to overrule the ordinary courts?

The question of the possibility of ousting the jurisdiction of the courts arises because of the piecemeal effect of those provisions in the constitution which confer an entrenched jurisdiction on the courts. Thus there are provisions, such as the section of the Trinidad and Tobago constitution applied in the *Collymore* case,¹⁵ which guarantee the jurisdiction of the High Court in cases where an infringement of the human rights provisions is alleged. Where appeals are concerned, Barbados and Guyana guarantee appeals in human rights cases all the way to the Privy Council; in Jamaica and Trinidad and Tobago,

¹² Constitution, s. 49.

¹³ Constitution, s. 73.

¹⁴ Barbados Constitution, ss. 81, 84, 89, 112; Guyana Constitution, ss. 87, 88, 89, 90, 93, 115; Jamaica Constitution, ss. 97 (3), 98, 100, 101, 103 (4), 104, 106, 107, 111; Trinidad and Tobago Constitution, ss. 74 (2), 75, 76, 78 (2), 79, 80, 83, 89.

¹⁵ See Barbados Constitution, s. 24; Guyana Constitution, s. 19; Jamaica Constitution, s. 25; Trinidad and Tobago Constitution, s. 6.

the guaranteed right of appeal in human rights cases extends as far as the Court of Appeal. In all cases except Barbados, there is an entrenched right of appeal to the Privy Council against a final decision of the Court of Appeal involving a question as to the interpretation of the constitution, without any limitation to the human rights provisions.¹⁶ Strangely, this guarantee of a right of appeal without limitation to human rights is not complemented by a similar provision relating to original jurisdiction; the basic jurisdictional provision provides in all the constitutions no more than that the Supreme Court shall enjoy such jurisdiction as may be conferred by the constitution or by any other law.¹⁷ If the jurisdiction conferred by the constitution for the purpose of this clause is no more than that which has been expressly conferred, it would seem to follow that an ordinary Act of Parliament could deny to the courts jurisdiction to adjudicate, for example, on legislation purporting to alter the entrenching clauses of the constitution. If this is the law, the foundations of judicial review appear to be less firmly based than is desirable; and it is little comfort to reflect that the great tradition of judicial review in the United States has succeeded in developing in spite of a similar disability,¹⁸ since the tame parliamentary majorities normal in West Indian states are not a characteristic of the American system of government.

Complementary to the question whether the jurisdiction of the courts in constitutional cases can be taken away by the legislature acting by its ordinary process is that whether the legislature can, without formally depriving the courts of any jurisdiction, effectively accomplish this result by subordinating the courts established by the constitution to a political and time-serving court of last instance. This is the device which failed in the famous *High Court of Parliament* case, when the Appellate Division of the Supreme Court of South Africa read into the South Africa Act stringent requirements as to the criteria of a "court."¹⁹ This particular instance of judicial creativity may be less necessary in the West Indian constitutions by virtue of provisions substantially common to all which guarantee

¹⁶ Barbados Constitution, s. 87; Guyana Constitution, s. 92 (1); Jamaica Constitution, ss. 25 (3) and 110 (1) (c); Trinidad and Tobago Constitution, ss. 6 (4) and 82 (1) (c). See *Pierre v. Mbanejo* (1964) 7 W.I.R. 433 and *Pierre v. Mbanejo* (No. 2) (1964) 7 W.I.R. 476, where the Trinidad and Tobago Court of Appeal denied the existence of a right of appeal since it had come to no final decision on the point of interpretation. The court's reasoning ignores the obvious objection that the court had made a final decision on the meaning of the words "may apply to the High Court for redress" in s. 6 (1) of the Constitution. Cf. *Petrie v. Att.-Gen.* (1968) 14 W.I.R. 292, 297.

¹⁷ Barbados Constitution, s. 80 (1); Guyana Constitution, s. 83 (1); Jamaica Constitution, ss. 97 (1), 103 (1); Trinidad and Tobago Constitution, s. 73.

¹⁸ U.S. Constitution, Art. 3 (2); *ex p. McCordle* (1868) 7 Wall. 506. Cf. *Petrie v. Att.-Gen.*, *supra*, esp. at p. 296H.

¹⁹ *Minister of the Interior v. Harris* 1952 (4) S.A. 769.

in both criminal and civil cases determination by an independent and impartial tribunal.²⁰

(The efficacy of parliamentary devices to evade constitutional review by the courts is capable of being related to that aspect of the principle of the separation of powers which prohibits usurpation of the judicial function by the legislature.) Although this prohibition has been held by the Privy Council to be entrenched by implication in the constitution of Ceylon in *Liyanage v. R.*,²¹ the reasoning there used may not be applicable to the West Indian constitutions. To the extent that the decision in *Liyanage* rests on the absence from the Ceylon constitution of any provision which could have removed from the courts a jurisdiction that they previously enjoyed,²² the express establishment of the higher courts by the West Indian constitutions,²³ in contrast with the silence of the Ceylon constitution, may preclude reliance on the theory of the survival of an attribute of the pre-independence courts.

PROCEDURAL PROBLEMS

The potential dangers of the insecurity of the courts' final jurisdiction, which have been discussed above, would probably only arise in the context of a concerted attempt by a majority of Parliament to emasculate the courts; and it is, of course, always worth bearing in mind that should matters ever come to such a pass, the society would be likely to be approaching those unsettled political conditions in which law, and particularly constitutional law, would be likely to have only a minimal significance. The same could not be said, however, of other possible difficulties in the way of judicial review which arise from technical common law rules and whose effect might be unfortunate if they were applied to the special legal context of a "controlled" ²⁴ constitution.

One such technicality is the old chestnut concerning the competence of the courts to go behind what appears on its face to be an Act of Parliament.²⁵ Since the West Indian constitutions contain no

²⁰ Barbados Constitution, s. 18 (1) and (8); Guyana Constitution, s. 10 (1) and (8); Jamaica Constitution, s. 20 (1) and (2); Trinidad and Tobago Constitution, s. 2 (e) and (f).

²¹ [1967] 1 A.C. 259.

²² *Ibid.* at pp. 286-288.

²³ See e.g. Barbados Constitution, s. 80 (1): "There shall be for Barbados a Supreme Court of Judicature, consisting of a High Court and a Court of Appeal, with such jurisdiction, powers and authority as may be conferred upon those courts respectively by this Constitution or any other law" (italics supplied). See also Guyana Constitution, s. 83 (1); Jamaica Constitution, ss. 97 (1), 103 (1); Trinidad and Tobago Constitution, s. 73.

²⁴ To use the terminology of Lord Birkenhead L.C. in *McCawley v. R.* [1920] A.C. 691, 704.

²⁵ *Edinburgh & Dalkeith Ry. v. Wauchope* (1842) 8 Cl. & F. 710, 725.

unalterable provisions, the fundamental objection to an unconstitutional law must amount, it is submitted, to no more than that the appropriate procedure for amending the constitution has not been followed. In relation to those instances of constitutional amendment where no agency outside Parliament is involved in the procedure, such as is necessarily the case in Barbados and Trinidad and Tobago, there is obviously a colourable argument, based on English precedents, that the courts cannot go behind the Act to look for a defect in procedure. *Bribery Commissioner v. Ranasinghe* recognised that the Ceylon constitution covered this point by express provision by making the Speaker's certificate conclusive.²⁶ In *Harris v. Minister of the Interior*, the court was able to discover the non-compliance with the constitutional procedure on the face of the instrument.²⁷

This problem has recently been given new life in relation to constitutions such as those of the independent West Indian states by the attitude taken by the Privy Council in the recent Sierra Leone case of *Akar v. Att.-Gen.*²⁸ In that case, the plaintiff successfully challenged the validity of a purported amendment to the constitution of Sierra Leone.²⁹ The entrenching section of the constitution imposed two requirements by which the validity of the amendment was to be tested.³⁰ The first requirement was that the amendment should have been passed by two successive sessions of the House of Representatives between which a dissolution of Parliament had intervened: no problem arose as to the evidence by which the failure to comply with this prescription was established. Although the existence of this defect in the attempted amendment of the constitution was sufficient to determine the decision in the case, the Privy Council commented also on the question whether, as the entrenching section also required, the purported amendment was to be treated as having obtained a two-thirds majority in the House of Representatives. The printed copy of the Act was indorsed merely as having been "passed" without any indication as to the majority received. Despite the fact that the court was also considering in the same case the effect of another amendment to the constitution, passed in the same year, whose indorsement expressly recited that the provisions of the entrenching section of the constitution had been complied with,³¹ the Privy Council refused to accede to the argument that it should be presumed that the Act which was not so indorsed had not complied with the requirement of a two-thirds majority.³² Moreover, the Board did not suggest any way in which such non-compliance might otherwise be established.

²⁶ Ceylon Constitution, s. 29 (4); [1965] A.C. 172, 195.

²⁷ 1952 (2) S.A. 428, 469.

²⁸ Act No. 12 of 1962.

³¹ Act No. 39 of 1962.

²⁹ [1970] A.C. 853.

³⁰ Sierra Leone Constitution, s. 43.

³² [1970] A.C. 853, 867-868.

The potential danger that can be posed to the effectiveness of judicial review by the unwillingness of the courts to cast, by a presumption such as that rejected in *Akar's* case, the burden of proof on the party upholding the validity of the purported constitutional amendment can more readily be appreciated when attention is drawn to the statutory provision in Barbados which renders inadmissible any evidence as to the proceedings of the Houses of Parliament in the absence of the permission of the Speaker or, where appropriate, the President of the Senate.³³ Barbados attempts to meet the difficulty by an ordinary statutory provision requiring that a statute amending the constitution be indorsed with a recital of compliance with the entrenching section.³⁴ This example, however, has not yet been followed in the other states³⁵; and, in any event, the provisions of an ordinary statute necessarily lack the entrenched character needed to secure the process of judicial review of legislation from evasion by procedural stratagem.

X Another point which can be put as a question of procedure is the question of anticipatory review after a measure has passed through all parliamentary stages except that of the Royal or Presidential Assent. It is hard to see how the substantial effectiveness of judicial review could turn on this question, but there is no doubt that such anticipatory challenge often appears to be particularly advantageous to a litigant. The provisions of the West Indies constitutions which might seem relevant differ from state to state. The Jamaican constitution specifically prohibits certain measures from being presented to the Governor-General for assent before the requirements for constitutional amendment have been satisfied,³⁶ and the Barbados constitution may be read in the same sense.³⁷ The Guyana and Trinidad constitutions, however, do not use language which similarly invites judicial review in advance of the completion of the purported legislative process.³⁸ The different wording might be conceded to determine the issue, but for the presence also in each of the Jamaica and Barbados constitutions of provisions invalidating *pro tanto* laws inconsistent with the constitution³⁹: there seems to be a suggestion,

³³ Legislature (Privileges, Immunities and Powers) Act 1963 (No. 6), s. 16. The provision is more comprehensive than that of the Jamaican Act 1953 Rev. Cap. 216, s. 11.

³⁴ Interpretation Act 1966 (No. 10), s. 6, as amended by Interpretation Act 1970 (No. 32), s. 2.

³⁵ The Trinidad and Tobago Constitution Amendment Act 1968 (No. 25) bears certificates of the majorities required from the Speaker of the House of Representatives and the President of the Senate. This contrasts with the absence of a similar certificate from, e.g., the printed copy of the Guyana Constitution Amendment Act 1969 (No. 1).

³⁶ ss. 37, 49, 50, 60 (2).

³⁷ s. 58 (2).

³⁸ See Guyana Constitution, s. 79 (3); Trinidad and Tobago Constitution, s. 44 (3).

³⁹ Barbados Constitution, s. 1; Jamaica Constitution, s. 2.

in recent authority relating to the construction of section 2 of the Colonial Laws Validity Act, that a provision for merely *pro tanto* invalidation is somehow inconsistent with a right of anticipatory challenge.⁴⁰

Yet another possible area of procedural difficulty lies in the field of remedies. Where public law remedies are concerned, the heritage of the common law is one of archaic complexity, and it would be unfortunate if this legacy were to frustrate the effective operation of judicial review of legislation.

In this regard, the provisions for the enforcement of the human rights clauses might have appeared, in the absence of authority, to be sufficiently comprehensive to enable the courts to surmount many of these difficulties.⁴¹ The provisions in question all require sufficient *locus standi*,⁴² and, except in Trinidad and Tobago, also require the court to be satisfied that no other adequate means of redress was available to the applicant,⁴³ but otherwise the terms of the sections in question, by conferring on the court power to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement" of the human rights provisions, might have been considered apt to remove the obstacles placed in the way of litigants by the technical rules of procedure. The apparent comprehensiveness of the human rights enforcement sections has, however, been restricted by judicial decision.

In *Pierre v. Mbanefo*,⁴⁴ the applicant was denied redress because the Court of Appeal of Trinidad and Tobago held that the originating summons taken out by the defendant was not a permissible means of setting the process of the court in motion in the absence of statutory authorisation of that mode of proceeding; and, by implication, that the constitutional provision recognising the right of application to the court for redress did not constitute such authorisation. In the more recent Guyanese case of *Jaundoo v. Att.-Gen.*,⁴⁵ however, the Privy Council rejected the view of Bolders C.J. at first instance and Stoboy C. in the Court of Appeal that the particular relief claimed by the plaintiff could not be sought by originating motion. The Board did not dispute that section 19 (6) of the constitution,

⁴⁰ *Rediffusion Ltd. v. Att.-Gen. (Hong Kong)* [1970] A.C. 1136, *per* Lord Pearce (dissenting for different reasons) 1169.

⁴¹ Barbados Constitution, s. 24; Guyana Constitution, s. 19; Jamaica Constitution, s. 25; Trinidad and Tobago Constitution, s. 6.

⁴² See the words "in relation to him" in Barbados Constitution, s. 24 (1); Guyana Constitution, s. 19 (1); Jamaica Constitution, s. 25 (1); Trinidad and Tobago Constitution, s. 6 (1). See also *Collymore v. Att.-Gen.* [1970] A.C. 538, 549.

⁴³ Barbados Constitution, s. 24 (2); Guyana Constitution, s. 19 (2); Jamaica Constitution, s. 25 (2).

⁴⁴ (1964) 7 W.L.R. 433. See above, note 16.

⁴⁵ [1971] 3 W.L.R. 13 (P.C.); (1968) 12 W.L.R. 221 (C.A. Guyana).

which authorises Parliament to make provision with respect to the practice and procedure of the High Court in relation to the jurisdiction conferred upon that court in human rights matters, would have permitted Parliament so to restrict applicants for redress for violations of human rights to particular forms of procedure; but in the absence of any such provision by Parliament, it was open to the applicant to choose any of the methods by which the court could be approached.

But although the *Jaundoo* decision may have freed the human rights enforcement provisions of the constitutions from one type of restrictive judicial interpretation, overruling *sub silentio*, it is submitted, the decision in *Pierre v. Mbanefo*,⁴⁴ it also establishes that the principle whereby coercive remedies may not be granted against the Crown⁴⁵ remains unaffected by the unqualified wording of those provisions. In this respect, the Board upheld the decision of the Guyana Court of Appeal. The reasoning of the Privy Council does not go substantially beyond the technicality that the sovereign's courts cannot coerce the sovereign; but it may not unreasonably be suspected that the reluctance to issue a *brutum fulmen* is the more substantial motive behind the patent indifference of the Privy Council and the Guyana Court of Appeal to the unambiguous words of the constitution.

Where constitutional issues other than those relating to human rights are concerned, the silence of the constitution on the question of the courts' jurisdiction can hardly produce any better result than in the instance where the jurisdiction is expressly conferred; and that silence poses the additional hazard that, as has been argued above, the jurisdiction of the courts, already hampered by some of the paraphernalia of the technicalities of procedure,⁴⁷ may also be at the mercy of an ordinary Act of Parliament.

THE FUNCTION OF THE JUDICIARY

It is submitted that the foregoing analysis of the provisions of the West Indian constitutions directly relevant to judicial review of the validity of legislation shows that, notwithstanding the clarity of the intention to provide for such review, there are enough potential lacunae in the system to pose the threat that, should the constitutions be judicially interpreted by following mechanically the usual canons of statutory interpretation, the courts might in the process abdicate all too easily the responsibilities conferred on them by the constitution. Rather than permit this result, it is to be hoped that

⁴⁴ The principle appears *mutatis mutandis* to survive Guyana's change to republican status: [1971] 3 W.L.R. 13, 21-22; Republic Act 1970 (No. 9), s. 4 (1).

⁴⁷ Cf. *Re Mahara* (1966) 10 W.L.R. 149.

the courts will eschew narrow positivist analysis for a more constructive view of their function of making a reality of their guardianship of the constitution. There are no difficulties in the texts of the constitutions which cannot be satisfactorily resolved if the efficacy of the process of judicial review of legislation is regarded as an overriding principle of the interpretation of the constitution.

Unfortunately, the adoption of such a principle might seem to call for a spirit of judicial assertiveness which would be out of line with traditional theories of the judicial function in constitutional interpretation. Judges have frequently paid lip-service at any rate to doctrines of judicial restraint such as that which prescribes that a case should not be decided on a constitutional point where another ground of decision presents itself.⁴⁸ But it is difficult to believe that the jurisprudence of judicial review of legislation which has accumulated in common law countries could ever have reached such massive proportions if these principles of judicial self-restraint had been applied as consistently as the reverence paid to the theory might suggest. These doctrines of judicial restraint are, it is suggested, hardly likely to prejudice seriously the course of judicial review in the West Indian states as long as the judiciary, albeit adhering to such doctrines of the Privy Council and the Supreme Court of the United States, nevertheless emulates also the disregard of those doctrines which it is arguable that those courts sometimes demonstrate in practice.⁴⁹

Does the record of the judiciary to date furnish enough material from which to deduce the existence of a common pattern of behaviour in constitutional cases? The cases actually challenging the validity of legislation are so few that they can hardly be capable of providing substantial evidence of a trend; but, even if those cases were to set the pattern for the future, they light no clear path either towards judicial caution or towards judicial aggrandisement. The Privy Council decision in *Collymore's case*,⁵⁰ that industrial stabilisation legislation was valid because the right to strike was not protected by the Trinidad and Tobago constitution's guarantee of freedom of assembly, might arguably have been reached by a court consisting of

⁴⁸ Cf., e.g., *Att.-Gen. (Canada) v. Att.-Gen. (Ontario)* [1937] A.C. 326, 349. Such doctrines are particularly highly developed in the United States: see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936). Cf. note 43, *supra*.

⁴⁹ See *Karlapper v. Wijesinha*, where the Privy Council decided a constitutional point in addition to a procedural point which would, on the Board's own showing, have been sufficient for the decision: [1968] A.C. 717, 745; [1968] *Annual Survey of Commonwealth Law* 80. Contrast also the ratio of the U.S. Supreme Court's decision in *Morgan v. Virginia*, 328 U.S. 373 (1946) with the rationes of *Mitchell v. U.S.*, 313 U.S. 80 (1941) and *Boynton v. Virginia*, 364 U.S. 454 (1960). See also *Bickel* in 75 Harv.L.R. (1961) 40, 57; *Pollak* in 49 Calif.L.R. (1961) 15, 38-40.

⁵⁰ [1970] A.C. 338. See [1970] P.L. 105 (Zellick).

daring innovators as well as one consisting of those to whose feet fear had given wings.⁵¹ The decision of Smith J. in the Jamaican case of *Thompson v. Forrest*⁵² at first sight seems to be a signpost in the direction of caution, in so far as the decision has the consequence that universal adult suffrage is not constitutionally protected in Jamaica, and that what is required by the constitution is merely that those enjoying the right to vote by the ordinary law should be enabled to exercise that right; but undesirable though the result may be, the reasoning by which it was arrived at can scarcely be faulted for failing to give the words of the constitutional provisions their natural English interpretation. Section 37 of the constitution, with which the impugned law was alleged to be inconsistent, lists the conditions to be satisfied before a person could be "qualified" for registration as an elector; section 38 provides that the electoral law should ensure, as far as practicable, that any person "entitled" to vote should have a reasonable opportunity of so doing. The constitution does not provide in terms what constitutes "entitlement" to vote, and section 39, dealing with qualifications for membership of the Houses of Parliament, uses the term "qualified" in a sense manifestly incapable of being equated with the term "entitled." In concluding that section 37, on qualifications for voters, conferred no entitlement to vote, Smith J. was merely concluding that the term "qualified" ought to bear the same meaning in sections 37 and 39.

Cases raising constitutional points other than the validity of legislation may also, of course, provide an indication of the likely stance of the courts where the validity of legislation is in question. If regard is had to such cases, there is more evidence to draw on. It would hardly be expected, of course, that any pattern would not be subject to exceptions; but with that qualification, the corpus of case law to date may be considered to leave the impression on balance that judges in the Privy Council and in the West Indian courts are not at all anxious to fulfil a creative role in constitutional cases.

In *D.P.P. v. Nasralla*,⁵³ the Privy Council extended to common law rules the protection the constitution of Jamaica gave to pre-existing laws from challenge on human rights grounds.⁵⁴ The constitution admittedly defined "laws" as including unwritten law, but the Privy Council omitted to use such judicial leeway as might have been given by the "unless the context otherwise requires" proviso

to the interpretation clause.⁵⁵ In *Pierre v. Mbanefo*,⁵⁶ *Re Maharaj*⁵⁷ and *Jaundoo v. Att.-Gen.*,⁵⁸ the Trinidadian and Guyanese Courts of Appeal have sidestepped the consideration of substantial constitutional issues by nonsuiting litigants on niceties of procedure. In the Jamaican case of *Re Fisher*,⁵⁹ Hercules J. took a non-justiciability clause at its face value in a manner uncharacteristic of recent English decisions.⁶⁰ As against these instances, it seems possible to cite only the decision of the Jamaica Court of Appeal reversed by the Privy Council in *Nasralla's* case, and the view taken more than once by the Guyana Court of Appeal that the coming into force of the constitution has given civil servants a tenure of office capable of judicial protection.⁶¹ In one of the Guyanese cases, the Crown's right of dismissal at pleasure was regarded by one judge as inconsistent with the constitutional protection of property rights,⁶² while in another case a civil servant was held, in the face of an explicit non-justiciability clause in the constitution to have been invalidly dismissed.⁶³

Although it is conceivable that some of the cases already decided may turn out in future retrospect to have been points of crucial decision, it seems in the last resort difficult to conclude otherwise than that the position is still doubtful. Time may also reveal what the sparseness of the case law makes difficult to ascertain at present, that different judicial stances may become habitual in different jurisdictions, and that different solutions may regularly be found in the different states to hardly distinguishable problems of construction.

⁵⁵ Jamaica Constitution, s. 1 (1). See also Trinidad and Tobago Constitution, s. 105 (1). Contrast Barbados Constitution, s. 26 (1), and Guyana Constitution, s. 18 (1), confining the saving provision to "written" law.

⁵⁶ (1964) 7 W.I.R. 433. See *supra*, p. 283.

⁵⁷ (1966) 10 W.I.R. 149.

⁵⁸ (1968) 12 W.I.R. 221 (reversed [1971] 3 W.L.R. 13). See *supra*, p. 283.

⁵⁹ (1966) 9 W.I.R. 465.

⁶⁰ See *Webb v. Minister of Housing* [1965] 1 W.L.R. 755; *Anisimic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147. See also the following Guyanese cases: *Re Langhorne's Application* (1969) 14 W.I.R. 353; *Re Saran's Application* (1969) 14 W.I.R. 361; *Re Chichester* (not yet reported), Civil Appeal No. 29, 1969.

⁶¹ *Nobrega v. Att.-Gen.* (1967) 10 W.I.R. 187, 208 (reversed by the Privy Council [1969] 3 All E.R. 1604); *Re Chichester*, *supra*.

⁶² *Per Cummings J.A.* (1967) 10 W.I.R. 187, 208.

⁶³ *Re Chichester*, *supra*. The issues posed by such non-justiciability clauses were silently sidestepped in *Re Maharaj*, *supra* (see Trinidad and Tobago Constitution, s. 63 (2)) and *Thompson v. Forrest*, *supra* (see Jamaica Constitution, s. 38 (2)).

⁵¹ Cf. *Cummings J.A.* dissenting in *Jaundoo v. Att.-Gen.* (1968) 12 W.I.R. 221 at 261.

⁵² (1967) 11 W.I.R. 296.

⁵³ [1967] 2 A.C. 238.

⁵⁴ Jamaica Constitution, s. 26 (8) and (9). See also Barbados Constitution, s. 26; Guyana Constitution, s. 18; Trinidad and Tobago Constitution, s. 3.