

CONSTITUTIONAL FUNDAMENTALS

INTRODUCTION

In this chapter, we propose to examine two doctrines which are said to be fundamental to West Indian constitutions, even though these are not mentioned expressly. These are (a) the doctrine of separation of powers, and (b) conventions.

As Caribbean constitutions evolve, these two doctrines provide the mechanisms for containing the stresses and strains of the political process of government. For that reason, they deserve our attention. All constitutions pose problems of continuity and change. The constitutional text crafted at a certain point in time has to accommodate future changes if the constitution is not to break! In the process of that orderly evolution, the doctrine of the separation of powers and constitutional conventions play a pivotal role. To these, we now turn.

SEPARATION OF POWERS

Meaning and purpose

From the principles espoused by Aristotle¹ through to the writings of Montesquieu,² Locke³ and the numerous modern commentators, it is possible to discern a multiplicity of meanings ascribed to the doctrine of the separation of powers. Marshall⁴ captures the spirit of the various viewpoints with the poignant observation that this 'simple phrase' yields a 'cluster of overlapping ideas'. These he classifies into:

- (a) The *differentiation* of the concepts 'legislative', 'executive', and 'judicial'.
- (b) The *legal incompatibility* of office holding as between members of one branch of government and those of another, with or without *physical separation* of persons.

¹ In Aristotle's *The Politics*, 1962, Sinclair, TA (trans), London: Penguin, he distinguishes three elements in a constitution which he classified as deliberative, the magisterial and the judicial.

² Montesquieu, C, *De l'Esprit des Lois* (1748), 1989, Cambridge: CUP, Book V, Chapter 19.

³ Locke, J, *Two Treatises of Government*, Laslett, P (ed), 1960, 1977, London: JM Dent, Second Treatise, XI, para 142 in *Philosophy, Politics and Society*, 1956, Oxford: Blackwells.

⁴ Marshall, G, *Constitutional Theory*, 1971, Oxford: Clarendon, Chapter 5.

- (c) The *isolation, immunity, or independence* of one branch of government from the actions or interference of another.
- (d) The *checking or balancing* of one branch of government by the action of another.
- (e) The *co-ordinate* status and lack of accountability of one branch to another.

For us in the Caribbean, it is fairly easy to adopt the view that there is really no point in debating whether the Westminster export model constitution reflects the doctrine of the separation of powers or not, simply because *Hinds v R* has settled that question by holding that the doctrine is fundamental to these constitutions. But that would be unfortunate because, as we noted earlier, *Hinds* is not free from difficulty. What is more, some would argue that it is strange reasoning to argue that unless Parliament amends the constitution in the manner provided, it cannot take away the traditional area of jurisdiction of a court called the Supreme Court. It is submitted that the more realistic debate would be to explore the implications of the holding in *Hinds*. What is clear is that the Caribbean constitutions adopt a halfway house between the doctrine as understood in the constitutional law of the USA and as applied to the British Constitution. Most commentators would agree that, in the UK, separation of powers means little more than an independent judiciary, there being no separation of powers strictly speaking between the executive and the legislature.

The system of checks and balances that has served Britain well has been rooted in social norms, habits and customs, usually styled conventions. In the case of the USA, however, the Constitution was carefully crafted so as to ensure that the executive branch did not override the legislative branch.⁵ Explaining that 'if men were angels, no government would be necessary', Madison poses and answers the question:

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments as laid down in the Constitution? The only answer that can be given is that all these exterior provisions are found to be inadequate the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

Sir Allen Lewis has commented on the American situation in these terms:

In the United States, however, where also in the 18th and 19th centuries much concern was exhibited about the securing of political liberty and the curbing of arbitrary power, dependence on social convention as the crucial mechanism was not accepted as sufficient. For the Founding Fathers of the political system, social conventions had to be specifically underpinned by specific political institutions provided in advance with legal and political authority of

sufficiently substantial weight to be effective countervailing powers. If there is any country that we associate today with the notions of countervailing powers, of separation of spheres of political and legal authority, each occupied by separate personnel – the so called separation of powers – it is the United States. The framers of their Constitution consciously and elaborately made it an essay in the separation of powers, and provided such rigid checks and balances between the three organs of government that they succeeded in making government extremely difficult.⁶

The implications of this observation will be addressed shortly.

Hinds and its import

Earlier on, we noted that *Hinds* represented the case in which a legislative provision of Jamaica was declared void for infringing that Constitution's prescriptions on the legislative power of Parliament. Much more importantly, the case also settled the point that there is indeed a separation of the legislative and executive powers from the judicial power and that the Supreme Court's jurisdiction is specially protected.⁷ This characteristic jurisdiction was said to comprise:

- (a) unlimited original jurisdiction in all substantial civil cases;
- (b) unlimited original jurisdiction in all serious criminal offences;⁸
- (c) supervisory jurisdiction over the proceedings of inferior courts, that is, of the kind which owes its origin to the prerogative writs of certiorari, mandamus and injunction.

Notwithstanding the possible criticisms that may be levelled against *Hinds*,⁹ it still represents a landmark decision in so far as it establishes and reaffirms one of the constitutional fundamentals of West Indian public law with respect to the independence of the judiciary.

But that apart, a question that may be posed is whether the American model of the separation of powers would have better suited the Commonwealth Caribbean. Sir Allen Lewis provides at least one potent

⁶ Lewis, A (Sir), 'The separation of powers: its relevance for parliamentary government in the Caribbean' [1978] WILJ 4. A vivid example occurred in October 1995 in the USA whereby the gridlock between President Clinton and the GOP-controlled Congress led to a refusal of the Congress to pass the President's budget without significant concessions on the President's part on Medicare and Medicaid. Instead, the Government was sustained on a fortnightly basis by a series of continuing resolutions pending a political accommodation.

⁷ See, on this, Carnegie, AR, 'Floreat: the Westminster model? A Commonwealth Caribbean perspective' (1996) 6 CR 1.

⁸ The words 'substantial' and 'serious' in the Privy Council judgment in *Hinds* must be considered to be mere surplusage.

⁹ See, eg, Richards, S, 'The development of the judiciary in Barbados', 1989, unpublished PhD thesis, University of the West Indies.

⁵ Madison, *The Federalist* No 51, 1788 (US Congress).

reason why the American model would not have been appropriate. In his own words:

Since we have 'written' constitutions, and since we live in an American sphere of influence, the question may be asked whether the doctrine of separation of powers as applied in the United States would not be equally, or more, relevant to the Caribbean, as the British system. In my opinion, it would not. The United States Constitution created what has been described as a subdued executive, with assigned powers defined in writing, unlike the British, which is a residual executive with 'inherent' powers and a 'prerogative'. The restrictions imposed upon the President's authority, the need to obtain consent of Congress to his policy proposals while being unable to enter the chambers to communicate and persuade, the conflicts and tensions which arise when his party has a minority in one or both of the chambers, makes government an almost impossible burden. A hostile Congress can effectively block development by refusing to pass progressive legislation. This is unsuited to the needs of a developing country which needs to move forward at a much faster pace than that at which the developed countries moved over so many centuries. For practical purposes, it is essential, if developing countries are to be moved forward quickly, that there should be the utmost trust and co-operation between the legislature and the executive and the administration to facilitate implementation of the government's economic and social policies.

This viewpoint is unimpeachable. But while it speaks cogently to the economic and social agenda, it ought to be balanced with the equally potent observation that unrestrained power has its dangers too! Pitted against the *obiter dictum* of Deyalsingh J that, at least in Trinidad and Tobago, 'the traditional checks and balances to political power' are 'ineffective',¹⁰ the point assumes some importance far beyond the academic.

The preferred meaning of the doctrine

Recent events in the US Congress provide graphic illustrations of Sir Allen Lewis' foresight!¹¹ That statement addresses the goals of development but leaves other critical concerns untouched. Madison's grand design was to set power against power and thereby avoid tyranny and enhance the probability of good government. But it is debatable to what extent one can truly dichotomise the functions of the principal arms of government. Do their functions not shade into each other? Even within the hallowed enclave of the judiciary, while applying and interpreting law, the judges do *make* law which,

stricto sensu, is the domain of the legislature, if one refers to the basic architectural scheme of the constitutions. So, perhaps, instead of discussing the separation of powers, one should be discussing the concept of separate *institutions* sharing basic powers among them. Even with the judiciary, the constitutions recognise that 'other authority', apart from the courts, may deal in matters of human rights in civil cases.¹²

The formulation of subordinate legislation by unelected officials and the proliferation of administrative agencies vesting wide discretion in public officials mean that these administrators are effectively legislating or settling the executive policy and agenda of the State.

It is submitted that the doctrine of the separation of powers no longer bears the meaning that the early writers conceived of. In the context of the times then, the doctrine addressed the legitimate concern of the day, which was the fear of arbitrary rule. In today's world, it is submitted that the new meaning of the doctrine may be stated in two senses. First, the doctrine helps us to appreciate that in the complexities of modern government, there can only be shared powers among separate and quasi-autonomous yet interdependent State organs. Secondly, the doctrine helps us to appreciate the truism that the system of government which we operate works on the assumption that there is a core function which can be classified as legislative, executive and judicial and that those core functions belong to their respective branches or organs. Thirdly, the doctrine helps us to recognise that government involves the blending of the respective powers of the principal organs of State. Experience shows that we cannot have watertight compartments in government. The essence of the doctrine thus enables us to apply its philosophy to the pragmatic legal settings of the working of government. Saunders J put it succinctly when he said:¹³

... our democracy rests on three fundamental pillars, the legislative, executive and the judicial. All must keep within the bounds of the Constitution. The judiciary has the task of seeing to it that legislative and executive action does not stray outside those boundaries onto forbidden territory. If that occurs and a citizen with standing complains, the court declares the trespass and grants appropriate remedies.

Within their constitutional parameters the legislature and the executive are responsible for enacting and implementing such policy measures as in their wisdom they consider to be most appropriate for the people. The judiciary has to be careful that it too does not stray from its function and usurp the authority and role reserved for the other two pillars.

I reiterate that there is a fine line which the court must tread in these circumstances. On the one hand it must protect the citizens and guarantee

¹⁰ *Rambachan v Trinidad and Tobago Television Ltd*, Suit No 4782 of 1982, H Ct Trinidad and Tobago.

¹¹ The gridlock in the US Congress in 1995 over the balancing of the budget within seven years has already led to two shut-downs of the Federal Government, with non-essential Federal employees being furloughed. US Congressional records indicate that there have been at least nine other partial shut-downs of the Federal Government since 1981 over budget disputes between the President and Congress.

¹² *Bata Shoe Co Guyana Ltd v Commissioner of Inland Revenue* (1976) 24 WIR 172, p 204.

¹³ *Benjamin et al v Min of Information et al*, Suit No 56 of 1997, decided 7 January 1998, H Ct Anguilla.

them the rights and freedoms which the Constitution proclaims. On the other hand, the court should not intrude into the preserve of the other branches of the State.

For our democracy to operate effectively, it has been said that it is necessary that a certain comity should exist between the three branches. Each should respect the role and function of the other. The court is subject to and must enforce laws passed by Parliament that are *intra vires* the Constitution. The executive should respect and obey the decisions and accept the intimations of the court. If this comity does not exist, then the wheels of democracy would not turn smoothly. A jarring and dangerous note will resonate from them.¹⁴

That somewhat graphic description by Saunders J aptly captures the import of the decision in *J Astaphan & Co (1970) Ltd v The Comptroller of Customs and AG of Dominica*¹⁵ by the OECS Court of Appeal. In that case, the appellant, as importer of goods into Dominica, paid to the Comptroller of Customs sums of money in excess of the estimated duties on vehicles shipped into Dominica. This happened because the appellant was anxious to clear its goods at a time when the invoice and other necessary shipping documents relating to the consignment had not arrived and the appellant was unable to make perfect entries of the goods. An eventual claim for a refund of the excess was resisted on the grounds that the Customs (Control and Management) Act¹⁶ permitted the forfeiture of the excess payment. In this appeal, the appellant applied for Declarations and Orders predicated on the unconstitutionality and invalidity of s 27(3), (4) and (6) of the Customs (Control and Management) Act.¹⁷ The

argument was that the 'further sum' under the Act purported to be either a tax or duty or a penalty. If it was a tax or duty, then s 27(4) is inconsistent with the basic principle of separation of powers implicit in the Constitution. If the 'further sum' purported to be a penalty, s 27(4) either contravened s 6 of the Constitution (which protected the individual from compulsory acquisition of his property without constitutional authority therefor) or was inconsistent with the basic principle of separation of powers.

In a singularly lucid exposition, Floissac CJ endorsed the accepted view in reliance on *Hinds v R*¹⁸ and *John v DPP*¹⁹ to the effect that the separation of powers is implicit in the Westminster export model constitutions. Acknowledging the symbiotic nature of the relationship between the principal state organs, he said:

The power to impose taxes and duties is inherently a legislative power constitutionally vested in the Legislature. If the 'further sum' which s 27(4) of the Customs (Control and Management) Act has authorised the proper officer

¹⁴ See a most informative article by Barendt, E, 'Separation of powers and constitutional government', which supports the symbiotic theory of avoidance of tyranny and the promotion of efficiency in government as the sound basis of the doctrine of the separation of powers, in [1995] PL 599.

¹⁵ Civil Appeal No 8 of 1994. I am grateful to Mr AW Astaphan, of Counsel, for drawing my attention to this very important case.

¹⁶ Chapter 69:01 of the Laws of Dominica (rev edn, 1990).

¹⁷ Section 27 reads as follows:

- (1) Without prejudice to s 26, where on the importation of any goods the importer is unable for want of any document or information to make perfect entry of those goods, he shall make a signed declaration to that effect to the proper officer.
- (2) Where a declaration under sub-s (1) is made to the proper officer, he shall permit the importer to examine the goods imported.
- (3) Where an importer has made a declaration under sub-s (1), and submits to the proper officer an entry, not being a perfect entry, in such form and manner and containing such particulars as the Comptroller may direct, and the proper officer is satisfied that the description of the goods for tariff and statistical purposes is correct, and in the case of goods liable to duty according to number, weight, measurement or strength that number, weight, measurement or strength is correct, the proper officer shall, on payment to him of the specified sum, accept that entry as an entry by bill of sight and allow the goods to be delivered for home use.
- (4) For the purposes of sub-s (3), the specified sum shall be an amount estimated by the proper officer to be the duty payable on such goods, together with such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty. [cont'd]

¹⁷ [cont'd]

- (5) If, within three months from the date of making an entry by bill of sight under sub-s (3), or such longer time as the Comptroller may in any case permit, the importer makes a perfect entry, and that perfect entry shows the amount of duty:

- (a) to be less than the specified sum, the Comptroller shall pay the difference to the importer; or
- (b) to be more than the specified sum, the importer shall pay the difference to the Comptroller.

- (6) Where no perfect entry is made within the time limit laid down by sub-s (5), the specified sum paid shall be deemed to be the amount of duty payable on the importation of the goods.

- (7) Notwithstanding any other provision of this section, where, at any time after the importation of goods, the Comptroller is satisfied that in respect of such goods it is impossible for the importer to make perfect entry in respect of those goods, the Comptroller may, subject to such conditions and restrictions as he may see fit to impose, permit the goods to be entered at a value which is, in his opinion, the correct value of the goods, and the entry shall be deemed to be a perfect entry.

¹⁸ [1977] AC 195, p 212 (*per* Lord Diplock):

It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by three organs of government. Thus, the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judiciary, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judiciary. Nevertheless, it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judiciary respectively.

¹⁹ (1985) 32 WIR 230, p 234 (*per* Lord Roskill):

Their Lordships do not doubt for one moment that the Constitution of Dominica, like other similar Constitutions, takes for granted the basic principle of separation of powers and they emphatically endorse what was said in this connection by the Board in *Hinds, Hutchinson, Martin, Thomas v R* (1975) 24 WIR 326, p 331, in the majority opinion by Lord Diplock.

to demand is a tax or a duty, the Legislature of Dominica has delegated or transferred its legislative power of taxation to the Executive (that is, the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers

I concede that the delegation of transfer of legislative power by the Legislature to the Executive is not per se inconsistent with the principle of separation of powers. There is no such inconsistency if the Legislature retains effective control over the Executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.

I also concede that the Legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the Executive. To that extent, the Legislature retains ultimate control over the Executive in relation to the exercise by the Executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the Executive. If the basic principle of separation of legislative and executive powers is intended to be meaningful and effective, the basic principle should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates *ex post facto*. There must be some Parliamentary control at the time of the exercise of the power.

He concludes thus:

For these reasons, I am firmly of the opinion that if the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing guidelines or a policy for its exercise, the Legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with the basic principle of separation of powers.²⁰

The court held, therefore, that insofar as s 27(4) of the Customs (Control and Management) Act amounted to a surrender or abdication by the legislature of part of its legislative power, it was inconsistent with the basic principle of separation of powers and was unconstitutional and void to that extent.

²⁰ See, also, *Devi Das v Pinjeb* (1967) 3 SCR 557, p 565, where Subba Roa CJ said:

An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive. It may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature.

But, the judgment went further to address the separation of powers doctrine against the principles of compulsory acquisition.

In that instance, too, s 27 of the Act ran into serious difficulties. In the present case, Floissac CJ said,

The appellant did not commit any breach of the law. Section 27 of the Customs (Control and Management) Act does not provide that an importer commits an offence if he is 'unable for want of any document or information to make a perfect entry' of imported goods. Accordingly, the further sum is not a penalty and is therefore not caught or protected by s 6(a)(ii) of the Constitution. The result is that the compulsory exaction or acquisition from the appellant of the further sum of \$80,624.61 contravenes s 6 of the Constitution and is consequently invalid.

However, assuming that the appellant committed an offence and that the further sum is a penalty, the question of the basic principle of separation of powers recurs. Admittedly, the power to prescribe a fixed or mandatory punishment or a range of discretionary punishments for a criminal offence is a legislative power constitutionally vested in the Legislature. But, the power or discretion to select and inflict a punishment which is subjectively considered to be appropriate to the circumstances of a particular case is a judicial power or discretion which is constitutionally vested in the Judicature and which cannot legislatively be vested in, usurped by or transferred to the Legislature or the Executive.

Other residual issues

Questions rather than answers

This is the one area of the law in which it is possible to raise a number of questions without attempting to provide answers, for there appears to be no single true answer. Is judicial review of legislation required by or inconsistent with the doctrine of the separation of powers?²¹

Without the power of judicial review, would West Indian constitutions have been adequate to ensure a system of checks and balances?

Are the checks and balances of West Indian constitutions illustrations or contradictions of the separation of powers doctrine?

Is judicial review of legislation a participation in the legislative function of government?

Is partisan politics an essential part of the separation of powers doctrine? Or, conversely, does partisan politics interfere with the successful operation of the doctrine?

²¹ *Op cit*, Marshall, in 4, p 99, persuasively argues both ways.

Would it be a violation of the separation of powers doctrine to transfer political questions to the executive and legislative bodies?

Finally, when issues such as Sunday shopping, pollution, pornography or abortion become too 'political', why is the matter referred back to the judiciary?

The Chief Justice acting for the Governor General

The Constitution of Barbados provides that, whenever the office of Governor General is vacant or the holder of the office is absent from Barbados or is for any other reason unable to perform the functions of her office, those functions shall be performed:

- (a) by any person for the time being designated by Her Majesty in that behalf who is in Barbados and able to perform those functions; or
- (b) at any time when there is no person in Barbados so designated and able to perform those functions, by the holder of the office of Chief Justice; or
- (c) at any time referred to in para (b) when the office of Chief Justice is vacant or the holder thereof is absent from Barbados or is for any other reason unable to perform those functions by the President of the Senate.²²

In the past, the President of the Senate acted as Governor General, but in recent times it is the Chief Justice who has so acted.

From the viewpoint of the doctrine of separation of powers, one may feel some sympathy with the view of the majority of the Constitution Review Commission when they said:

On a majority vote, the Commission has come to the conclusion, *and so recommends*, that so as to make a distinction between the executive and the judiciary functions of government patently clear, and so also to establish beyond any doubt the independence of the judiciary (of which the Chief Justice is head) from political influence, s 29(1)(b) should be amended to delete the provision for the Chief Justice to perform the functions of Governor General.²³

A residual argument can also be proffered in support of the majority view. It is indisputable that the volume of present-day litigation far outweighs the numerical capacity of the judiciary at present. With no increase in numbers in judicial personnel in sight, it must put strains on the administration of justice if the head of the judiciary must take on extra responsibilities outside the bench. Nothing in this discussion is meant to reflect on the Chief Justice

²² Constitution of Barbados, s 29(1).

²³ Paragraph 48; two Commissioners Hoyos and Alleyne dissented from this recommendation.

personally. The debate is purely about the merits or demerits of the principle involved.

CONVENTIONS OF THE CONSTITUTION

Have conventions survived the constitutional text?

One central issue in West Indian public law is whether constitutional conventions have been superseded by the written constitutional text. Professor Carnegie recently bemoaned the fact that 'conventions of the constitution did not die the death that might be expected given the adoption of a written constitution'.²⁴ It is submitted that that lament raises a critical question for West Indian public law: what truly is the meaning of 'conventions' and why should they die merely because of the written text?

In the UK, with no written constitutional text, conventions which have developed over time play a critical role in the process of identifying the meaning of various constitutional rules. These understandings, habits, customs and practices which are not written down in any authoritative sense are nevertheless obeyed by the political directorate, although they are not enforceable in the courts or by Parliament.²⁵ A reasonable explanation for this would lie in these unchallenged usages qualifying for constitutional status. Of the attributes claimed for conventions, three may be singled out.

First, they help in the interpretation of the law. Secondly, they help to regulate the relationship between the different branches of government. And, thirdly, they act as useful tools in adjusting the strict letter of the law to meet the imperatives of the times.²⁶

Accordingly, the traditional treatment of this topic has been to identify the major conventions of the British Constitution, classify them into some order of importance, discuss their relationship with the law and consider the effect of

²⁴ Carnegie, AR, 'On comparing American and West Indian constitutional law', unpublished paper. See, also, Ghany, HA, 'Parliamentary crisis and the removal of the Speaker: the case of Trinidad and Tobago' (1997) 3 J of Legis Stud 112, pp 112-38.

²⁵ Dicey, AV, *Introduction to the Study of the Law of the Constitution*, 8th edn, 1931, London: Macmillan, p 23 (see, now, 10th edn, 1959).

²⁶ The literature on this is legion and not all of it is helpful. But, the following texts may be consulted: Barnett, H, *Constitutional and Administrative Law*, 2nd edn, 1998, London: Cavendish Publishing; Munro, C, *Studies in Constitutional Law*, 1987, London: Butterworths, Chapter 3; Jennings, WI (Sir), *The Law and the Constitution*, 5th edn, 1959, London: Hodder & Stoughton, p 80 *et seq*; Wheare, KC, *The Statute of Westminster and Dominion Status*, 5th edn, 1953, Oxford: OUP, p 10; Marshall, G and Moodie, GC, *Some Problems of the Constitution*, 5th edn, 1959, London: Hutchinson, p 26; de Smith, SA, *Constitutional and Administrative Law*, 5th edn, by Street, H and Brazier, R, 1973, London: Penguin, p 52 (see, now, 8th edn, 1998); Allen, M, *et al*, *Cases and Materials on Constitutional and Administrative Law*, 1994, London: Blackstone, Chapter 4.

codifying conventions in West Indian constitutions. The following conventions are generally treated as some of the relevant British conventions to be considered in the context of West Indian constitutions:

- (a) The Queen must always assent to a Bill passed by Parliament.
- (b) The Queen acts on the advice of ministers even though executive power resides in her.
- (c) The Cabinet is collectively responsible to Parliament for the conduct of the government.
- (d) Except in exceptional cases, the Queen summons and dissolves Parliament on the advice of the Prime Minister.
- (e) Parliament must meet annually in order to raise taxes.
- (f) Legislation involving tax must be introduced only in the lower House.
- (g) The Queen appoints as Prime Minister the person who commands the support of the majority of the House of Commons.
- (h) The Queen appoints and dismisses ministers on the advice of the Prime Minister.
- (i) The government must resign if defeated on a vote of no confidence in the lower House on a major policy question.
- (j) The House of Lords, when sitting as an appellate body, is staffed only by the Law Lords.²⁷

The debate has also not been helped by the ambivalent attitude of the courts, whereby conventions may not be applied and yet may not be ignored either!²⁸ Furthermore, the courts have sometimes taken conventions into account when interpreting legislation.²⁹

All of this has led to some highly artificial distinctions between rules and practices.³⁰ In this regard, Griffith was able to castigate several constitutional

textbooks dealing with conventions as full of 'unreal distinctions and their word puzzles'.³¹

In groping our way to an acceptable definition of conventions in West Indian public law, it is necessary to debunk the notion that conventions only apply to the unwritten constitution.

To the extent that even countries with written constitutions do sometimes rely on conventions, we may conceive of conventions as representing the history and tradition behind the legal norm in the sense of helping our understanding of the law in context. In that sense also, conventions may be regarded as the political rules which underlie governmental practice. These rules apply irrespective of whether they are codified or not.³² Naturally, these rules are heavily accentuated in the UK, where there is no single written text of the Constitution. As a legal system evolves, so do the historical traditions surrounding that evolution become important. As Marshall and Moodie put it:

Many constitutions include a large number of additional rules to clarify the meaning and application of their main provisions, but in a changing world it is rarely possible to eradicate or prevent all doubts on these points by enactment or even by adjudication. The result is often to leave a significant degree of discretion to those exercising the rights or wielding the powers legally conferred, defined, or permitted.³³

Conventions thus help to regulate the exercise of such discretionary power. In the present day political culture, where State officials are taking on wider and wider discretionary powers, the importance of conventions becomes more, not less, pronounced. Admittedly, West Indian constitutions lack rules and standards by which to determine when and how a practice, usage or tradition becomes part of the constitutional text. And while many would agree that the constitutional text does in fact settle the basic question about the legitimacy or otherwise of governmental action, yet the text is surely based on values of what is acceptable behaviour in public officials at any given time. The text inevitably, therefore, contains gaps that need to be filled from time to time with these basic societal and political values of political expediency.

²⁷ This list is by no means exhaustive. Other less important conventions relate to the doctrine of ministerial responsibility to Parliament, collective cabinet responsibility, the non-participation of the Queen and the judiciary in politics and the procedure which guarantees fair play to both parties in debates in the House.

²⁸ *Re Amendment to the Constitution of Canada* (1982) 125 DLR 3d 1; *AG v Jonathan Cape* [1976] QB 752; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; *British Coal Corporation v R* [1953] AC 500.

²⁹ *Allingham v Minister of Agriculture* [1948] 1 All ER 784; *Carltona v Commissioner of Works* [1943] 2 All ER 560.

³⁰ See, eg, Alder, J, *Constitutional and Administrative Law*, 1989, London: Macmillan, p 32, where he states: 'Conventions are rules and have binding force. Practices are merely regular habits of behaviour and are not binding at all. ... However, conventions and practices may merge into each other. It is easy to jump from observing a practice to believing that the practice has binding force. Indeed some people argue that the only difference between conventions and practices is that practices are "less" binding than conventions. This seems fruitless. It is surely preferable to say that different conventions may be binding to different degrees, but that practices are not binding at all.' See, also, *op cit*, Munro, fn 26, p 52.

³¹ Griffith, JAG, 'Comment' [1963] PL 401.

³² In the election of the US President, the electoral college is duty bound to give effect to the popular vote. However, in the light of recent experience, there appears to be no convention that the US President's nominees to the US Supreme Court should necessarily command acceptance by the Senate. To quote Prof Karl Llewellyn: 'Wherever there are today established practices "under" or "in accordance with" the Document [Constitution], it is only the practice which can legitimise the words as still being part of our going Constitution. It is not the words which legitimise the practice.' Llewellyn, K, 'The Constitution as an institution' (1934) 34 Columbia L Rev 1, p 12.

³³ *Op cit*, Marshall and Moodie, fn 26, p 167.

Codification of conventions in West Indian constitutions

A cursory examination of West Indian constitutions reveals that the principal conventions which we identified earlier on have been more or less incorporated into the text of those constitutions. It seems to be the agreed view of legal commentators that, though stated expressly, these rules were intended to be understood as conventions rather than laws.³⁴ For example, s 65(1) of the Constitution of Barbados provides that whenever the Governor General has occasion to appoint a Prime Minister, she shall, acting in her discretion, appoint the member of the House of Assembly who, in her judgment, is best able to command the confidence of a majority of the members of that House.³⁵ That section not only captures the spirit of the convention relating to the appointment of a Prime Minister by the monarch, but also records the modern practice that the Prime Minister must be a member of the lower House.

Also, where necessary, these conventions have been adapted to suit the local circumstances. So important differences can be discerned in the provisions which directly constitute the office of the Leader of the Opposition, unlike the case in the UK.³⁶ Also, in the appointment of judges, the process has largely been depoliticised.³⁷

Reference is made to the non-justiciability clauses in Caribbean constitutions as further evidence in support of the view that these clauses were to take on the character of conventions rather than laws. These clauses relate to the exercise of the Governor General's functions as well as to those of the Service Commissions.³⁸ But, even in this regard, the courts have adopted the salutary rule that where the error or matter complained of is so serious as to go to jurisdiction, then the decision of the functionary is reviewable. This

³⁴ Barnett, L, *Constitutional Law of Jamaica*, 1977, Oxford: OUP; Carnegie, AR, *Constitutional Law Lecture Notes*, unpublished, University of West Indies; DeMerieux, M, 'The codification of constitutional conventions in the Commonwealth Caribbean constitutions' (1982) 31 ICLQ 263.

³⁵ Apart from Guyana, which provides differently, all the remaining Constitutions provide similarly to Barbados. See: Antigua and Barbuda, s 69(4); the Bahamas, s 73(2); Belize, s 40(2); Dominica, s 59(4); Grenada, s 58(4); Jamaica, s 70(1); St Kitts and Nevis, s 52(4); St Lucia, s 60(4); St Vincent and the Grenadines, s 51(4); Trinidad and Tobago, s 76(3). For Guyana, see Arts 103–05.

³⁶ See on this, the Constitutions of Antigua and Barbuda, s 79; the Bahamas, s 82; Barbados, s 74; Belize, s 47; Dominica, s 66; Grenada, s 66; Guyana, Arts 110 and 184; Jamaica, s 80; St Kitts and Nevis, s 58; St Lucia, s 67; St Vincent and the Grenadines, s 59; Trinidad and Tobago, s 83.

In the UK, the office of the Leader of the Opposition is only indirectly recognised by the Ministers of the Crown Act 1937, s 5.

³⁷ This does not apply to the appointment of the office of Chief Justice. Barbados is the only jurisdiction which mirrors the British example of total politicisation of the appointment process for all Supreme Court judges. See the Barbados Constitution, s 81(1).

³⁸ See, eg, Barbados Constitution, ss 32(5) and 106.

means that such clauses will not prevent the courts from reviewing the exercise of such powers. And there is a fairly established line of cases to support that proposition.³⁹

Non-codified conventions

Professor Carnegie has listed elsewhere a number of conventions in West Indian constitutions which have not been codified.⁴⁰ These cover the conventions whereby:

- (a) the Queen invariably accepts the 'advice' of the Privy Council sitting in an appellate judicial capacity;
- (b) the Governor General is required to signify his assent to legislation or otherwise; and
- (c) 'standards of propriety' expected of a minister of government are generally agreed upon.

Other non-codified conventions which appear to have been given recognition seem to be:

- (a) the practice of appointing two trade unionists as Senators in Jamaica;⁴¹
- (b) the fact that political members of the Barbados Privy Council do not participate in Civil Service appeals;⁴²
- (c) the recognition of rules to deal with conflicts of interest of ministers in Grenada;⁴³
- (d) the practice whereby no Bill is passed into law without the mace being in its place;
- (e) the practice whereby the Speaker vacates the chair whenever the House goes into Committee.⁴⁴

³⁹ *Re Sarrai's Application* (1969) 14 WIR 361; *Re Langhorne's Application* (1969) 14 WIR 353, *Evelyn v Chichester* (1970) 15 WIR 410; *Re Arthur and Hermanstynne* (1972) 19 WIR 20, *Thomas v AG* [1982] AC 113. *Re Alva Bain*, Suit No 3260 of 1987, went the other way. For earlier comments on this case, see above, Chapter 2.

⁴⁰ *Op cit*, Carnegie, fn 34.

⁴¹ *Op cit*, Barnett, fn 34, p 210.

⁴² Barbados Constitution Review Commission Report, 1978, Bridgetown, Barbados: Government Printing Office, Appendix II, p 85.

⁴³ Grenada Constitution Review Committee Report, 1985, St Georges, Grenada: Government Printing Office, p 46.

⁴⁴ Some of these rules with reference to the mace and the Speaker also find expression in the standing orders of the respective Houses.

A West Indian perspective

It is possible to view conventions from a purely West Indian approach, rather than from the viewpoint of the British Constitution. Indeed, as constitutions grow, they develop their own conventions. This growth occurs irrespective of the political practices which have been written as part of the fundamental laws of the Caribbean territories.

From the beginnings of responsible government in the Caribbean, one can discern certain practices which could pass for established conventions, practices such as:

- (a) the Governor in colonial times calling on the majority leader to be the Chief Minister or Premier;
- (b) the majority party dominating the process for the election of Speaker;
- (c) in Trinidad and Tobago since 1976, the majority leader consulting with the Leader of the Opposition in coming up with an agreed Presidential candidate;
- (d) the appointment and removal of the Governor General always being on the advice of the Prime Minister; and
- (e) in Barbados, the appointment of Dr R Haynes as Leader of the Opposition in circumstances that were not foreseen by the Constitution and for which Britain had no precedent.⁴⁵

All the conventions which we have discussed, both codified and uncoded and developing, arise from usage, tradition and agreement, at times tacit and at other times express. But they are adhered to once developed and recognised, not because the courts will enforce them, but because political expediency and respect for tradition demand their observance. In an evolutionary constitutional setting such as pertains in the Commonwealth Caribbean, each constitution will continue to evolve its own conventions as well as play a fundamental role in the institutions of government.

The convention that Her Majesty does not get involved in partisan politics was recently tested in Barbados when a motion of no confidence in Prime Minister Erskine Sandiford, though carried, was nevertheless short of a single vote to involve a revocation of the Prime Minister's appointment.⁴⁶ Did convention nevertheless require the Prime Minister to resign? Opinions

⁴⁵ Other examples may be gleaned from Sir Fred Phillips' book, *West Indian Constitutions: Post Independence Reform*, 1985, New York: Oceana.

⁴⁶ Barbados Constitution, s 66(2), provides that 'if the House of Assembly by a resolution which has received the affirmative vote of a majority of all the members thereof resolves that the appointment of the Prime Minister ought to be revoked and the Prime Minister does not within three days of the passing of the resolution either resign or advise the Governor General to dissolve Parliament, the Governor General shall, by instrument under the Public Seal, revoke the appointment of the Prime Minister'.

differed. Those who thought that the matter was covered by a constitutional convention thus called on the Governor General to intervene to dismiss the Prime Minister from office.

The Governor General did not intervene. However, the Prime Minister subsequently advised a dissolution of Parliament. Important constitutional and political events such as the one that occurred in Barbados should help to nurture the idea that each of the Caribbean constitutions will evolve its own conventions as part of its organic growth. This development will supplement the codified conventions and provide a peculiarly Caribbean focus to the evolving rules which clarify the meaning and application of the main constitutional provisions. Recently, requests by the judiciary to the government for the extension of their tenure beyond retiring age⁴⁷ have caused so much controversy that perhaps the case could be made for the evolution of an uncoded constitutional convention which says that the judiciary may not exercise the option of extension beyond tenure. The justification for such a convention, if it was so recognised, would be premised on the pedestal that a request for extension has the potential of compromising judicial independence. Jamaica recently eliminated the difficulty by providing for a fixed tenure for all its judges.

CONCLUSION

We may conclude this chapter with the observation that, though some of the provisions of West Indian constitutions reflect what may be conventions within the British constitutional system, seen in the context of the Caribbean historical experience, it is submitted that there is no need to ask the question with which we began; whether 'conventions of the constitution did not die the death that might be expected given the adoption of a written constitution'.

⁴⁷ Eg, *Sookoo v AG of Trinidad and Tobago* (1985) 33 WIR 338.