

While it does not appear, to the writer at least, that the jurisdiction created by the redress clause has been over-utilised, the impression is gained of a certain judicial hostility to the bringing of actions under it. This is particularly the case where it is perceived that the action aims not merely at vindicating the individual or personal enjoyment of the fundamental rights. Judicial horror was expressed (in private) at the bringing of an action under the Bill of Rights in Trinidad and Tobago, which sought (or seeks) to challenge the entry into this state of English cricketers with South African associations. The political use of rights is incomprehensible to the judges of the region it seems, save for the odd case - in which political use of rights is simply not recognised for what it is. The sentiments of the present Chief Justice of Trinidad and Tobago cited earlier,¹⁰⁴ reflect at the minimum, anxiety at a supposed increase in constitutional motions - and not merely those brought by convicted murderers at the exhaustion of criminal proceedings.¹⁰⁵ It remains to be seen what form of paring down of the redress jurisdiction will take place in the state concerned and in the region as a whole.

JUDICIAL REVIEW AND THE ENFORCEMENT OF FUNDAMENTAL RIGHTS

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1. Judicial Review as Governmental Process

The association of judicial review with enforcement seeks to make the proposition that there is a necessary and inevitable connection between the enforcement of fundamental rights and freedoms and judicial review and to show that their ultimate protection is with the judiciary. Enforcement of fundamental rights and freedoms often entails judicial review as the power of courts to declare legislation invalid because of substantive conflict with the constitution, and especially with provisions of the Bill of Rights. This power of review makes of courts the final arbiter of the meaning of the Constitution and an assumption by judges of a power to pass on the substantive validity of legislation makes of the judiciary potentially at the least, a co-equal branch of government. Through reasoned judgments, seen as a vital part of principled government and as validating judicial review itself, courts legitimate or invalidate particular exercises of the legislative power according as legislation is upheld or struck down.¹ There are also the situations in which the court neither validates nor invalidates legislation and in

¹⁰⁴ *Supra*, note 43.

¹⁰⁵ In 1984 in Trinidad and Tobago, a total of 12 cases was brought under the clause, 3 in 1985 and 6 in 1986. (These figures were kindly supplied by the Registrar of the Supreme Court).

¹ It has been rightly pointed out that this legislating power can only take effect within a system itself perceived as legitimate. See A. Bickel, *The Least Dangerous Branch: The Supreme Court Before the Bar of Politics*, (1963), 30.

so doing, "maintains itself in the tension between principle and expediency."² Principle indicates here reasoned judgment and expediency, the elements of political bargaining and compromise which go into the making of legislation.

At the implementation of the Bills of Rights in the West Indian jurisdictions there was little debate on the matter of judicial review as such. Indirect appreciation of this result of the entrenching of a Bill of Rights was however adverted to in discussions in Jamaica during drafting of the Constitution and in parliamentary debates on this issue by those persons who saw an entrenched Bill of Rights as subversive of the sovereignty of the Jamaica Parliament, on Independence. A report of the Committees of the Jamaican Legislature somewhat blithely asserted that the inclusion of a Bill of Rights would give the courts the right to say that a law was inconsistent with the Bill of Rights and to determine the extent of its consequent voidness. There is little indication however that the Report appreciated the potentially enormous power review would give the judiciary to validate or destroy governmental policy.³

In Trinidad and Tobago, the role of courts in relation to Fundamental Rights was seen as essentially preserving the *common law* from encroachment by future legislation of post-independence governments. This function of preservation would under the new constitutional regime, be entrusted to the courts.⁴ In no state however, was it asked in terms, whether the electorate or anyone at all, wanted courts rather than elected representatives to determine for example, when or whether rents or wages should be frozen or increased; whether and what new offences could be created, or new standards for criminal liability established; whether and in what circumstances abortions should be available to women, these being but a few issues potentially litigable under a Bill of Rights.

The idea that judicial review of legislation is incompatible with representative democracy is at bottom an expression of the tension between the ideals of liberalism and of democracy. In the West Indies, the incorporation of the Bills of Rights into a neo-colonial, albeit independent form of government, was not proceeded by debates about the non-democratic nature of judicial review, perhaps because as already seen, pre-independence legislatures could in principle have been overruled not only by the courts of the territories and the Privy Council, but by the Governor's veto or power of disallowance. The issue is however briefly, and perhaps simply, examined here.

The need to justify judicial review in a democracy is based on the postulate that in a democratic or majoritarian political set up, judges who are unelected and unaccountable to the citizenry should not have *carte blanche* to negative policy decisions of the representatives of the majority as expressed in legislation. The obvious reply is that the existence of a Bill of Rights imports the existence of judicial review. More precisely the argument must be that if the Bill of Rights is law there must be review.

² See Bickel, *op. cit.*, 69 and *Hinds* for reference to political bargaining.

³ *Report of the Committees of the Legislature*, para. 20 (January 11, 1962).

⁴ See discussion in Ch., 'Existing Law and the Bill of Rights'.

This disposes of the issue of justification for judicial review but not its compatibility with majoritarian rule.

The problem has at its core the dual character of the provisions of Bills of Rights, as declared propositions of law and simultaneously as very open-textured political and moral statements. The meaning of the Bills is therefore simultaneously a matter for judges and a matter for legislators.

An apparent, but not necessarily resolutory meeting point of the two positions, is the consideration that the existence of a Bill of Rights contemplates the placing of certain matters beyond the majority. A main function of Bills of Rights for those (outside West Indian context) who see them in this way is that they protect the 'discrete and insular minorities'⁵, which do not have an effective voice in the political process. But apart from the fact that to function in this way the judiciary must first admit such a function, the argument is bizarrely skewed in the West Indian context. In the region those who could be described as a discrete and insular minority, have traditionally had power and influence. At the same time, the majority are regarded as having access to the political process and are represented in the Parliaments of the region⁶. A possible and tentative conclusion may be this: In so far as the West Indian Bills of Rights have been included in Constitutions negotiated and agreed to by elected representatives (influenced or not by powerful minorities) they are an expression of the popular will and as a consequence, the judicial review which they import, is, at least institutionally inevitable and to this extent not anti-democratic.

The special Act provisions of the Jamaica and Trinidad and Tobago constitutions must be mentioned at this point as an attempt by the Constitution itself to return the legislative power to the legislature as final arbiter of its exercise, subject to procedural review as to the requisite voting majorities. Arguments earlier in this text which conclude that the proviso in the Trinidad and Tobago clause merely states the dilemma of liberal democracy, lead to the conclusion that courts will be virtually compelled to ignore it, and will indulge merely in *procedural* review. The Special Act clauses, to adopt a remark of Alexander Bickel, mark the point at which the *Constitution* "gives the electoral institutions their head"⁷. When a court as in *Morgan*⁸, in the Privy Council, does not over exert itself to interpret the proviso, (which is in any event a

⁵ The phrase occurs in the famous footnote 4 in *Carolene Products Co v. United States*, 304 U.S. 144, 152-53, (1938). The general point was that the court would no longer show its earlier enthusiasm for striking down legislation but would in certain cases - as for example in protecting minorities - give strict scrutiny to legislation.

⁶ This appears ultimately to be the view even of the quasi-Marxist commentators on the Jamaica constitution. See generally T. Munroe, *The Politics of Constitutional Decolonisation: Jamaica 1944-62*, (I.S.E.R., UWI, (1972) 156-166; J. Kelly, 'The Jamaican Independence Constitution of 1962'. Vol. 3, No. 1, *Caribbean Studies*, 18, 46-54.

⁷ Bickel, *op. cit.*, at 132.

⁸ [1988] 1 W.L.R. 295. (P.C.). See Ch., Limitations on the Rights and Freedoms.

political statement), the court stays out of politics and, there is then, "nothing paradoxical in finding that here is where the court is a most political animal"⁹.

2. Review of Legislation and the Redress Clause

In *Collymore v. A-G* (T & T), all three judges of the Court of Appeal took the view that the redress section itself gave the court the power of review. One judgment spoke of the conjoint effect of the enforcement provision and section 2 (now section 5) as dictating judicial review and being simply "a matter of obeying the Constitution."¹⁰ But it was the judgment of Wooding C.J., which best highlights the tension arising from judicial review. For though asserting the power of courts to strike down legislation, it strongly affirms the power of Parliament to enact legislation to specified governmental ends as it thinks fit. It was firstly and correctly asserted that section 2 was a prohibition addressed to Parliament and did not convert the rights set out in Section 1 into a mere code of interpretation or construction, in the light of which legislation should be interpreted by the courts¹¹. Secondly, that as a *consequence* of the first proposition the Supreme Court had been constituted guardian of the Constitution to enable it to declare Acts void and thirdly, that "what is or is not inimical to the peace, order and good government of the country is *not for the courts to decide*". The words quoted refer back to the clause conferring the *power to enact laws* as contained in section 53 of the current constitution.

The second declaration embodies the view that it is from the restrictions on the powers of the legislature that judicial review must logically follow and thence, as a matter of law the power to declare Acts void. The third proposition however, comes very close to a denial of the role given the Supreme Court under the second proposition. If the court subjects the determination of the meaning and scope of a right to Parliament's power to say what is inimical to peace, order and good government, then the right is made subject to the power to legislate and this is no less the case, by the use of a negative formulation of the legislative power. Put another way, if the second proposition translates to the notion that it is the duty of the court to say both what the Constitution means and what the law is, then the third proposition says that it is for Parliament to say what the Constitution requires and what the law is. It is to be noticed too that the statement quoted, differs from the assertion in *Hinds* that the law was, *in the first place*, to be determined by Parliament.¹²

⁹ Bickel, *supra*, note 7.

¹⁰ (1967) 12 W.I.R. 5 at 8B; 22 C; 35 B-D.

¹¹ See, Ch. 2, under heading, 'The Documentary Origins of the Bills' for an account of the sections concerned.

¹² [1977] A.C. 195 at 212C.

When a judgment, in the face of an assertion of the judicial guardianship of the Constitution, makes the concession to the legislature embodied in the third proposition, it virtually denies the claimed role of guardianship of the Constitution.

Collymore too, provides another focus of interest on the phenomenon of judicial review, as it was in the judgment of Phillips, J.A., that a historical genesis for the review power was most clearly adumbrated. This matter has implications for the actual exercise of the review power and the accompanying task of constitutional interpretation. The historical genesis adverted to resides in the fact that colonial courts could, as part of a system of control of non-sovereign colonial legislatures which culminated in appeals to the Privy Council, examine legislation to see whether it was within the competence of the legislature.¹³

The learned Justice of Appeal stated first that legislation was invalid which offended against prohibitions contained in the Bill of Rights. Once this was conceded, then "even without express provision, a power of judicial review of parliamentary legislation must reside in the Supreme Court of this country", since "English jurisprudence has always recognised that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject matter) may be examined by any tribunal before whom the point is properly raised. The term 'unconstitutional' used in this connection means no more than *ultra vires*."¹⁴ The principle of English jurisprudence so well recognised in 1907 could be no more than that the power of interpreting colonial statutes and of deciding upon their constitutional effect and validity is a common and inherent right appertaining to all Her Majesty's courts of law, before which a question could be properly submitted for adjudication¹⁵. The inherent right of colonial courts was directed to ensuring conformity with or non-repugnance to imperial legislation and policy.

In relation to Trinidad and Tobago, the matter was explained by Charles Reis in this way:

¹³ The role of appeals to the Privy Council as the historical background to judicial review in all the former British colonies including the United States, has been the subject of considerable academic work. See, e.g., J.H. Smith, *Appeals to the Privy Council from the American Plantations*, (Columbia University Press, (1950); D. Swinfen, *Imperial Control of Colonial Legislation*, (Oxford : Clarendon) (1970). Chs. 4 and 5; L. Beth, *The Judicial Committee of the Privy Council and the Development of Judicial Review*, (1976) 24 *Am. Jo. of Co. Law* 224.

¹⁴ *Supra*, note 10 at 22, citing *Baxter v. Com. of Taxation* (1907) 4 C.L.R. 1087 at 1125.

¹⁵ Alpheus Todd, *Parliamentary Government in the British Colonies*, 53 (1880) cited in *Swinfen, op. cit.*, at 42. This was achieved in two ways, by disallowance and by the decision of the local judiciary in the first instance and ultimately of Her Majesty's Imperial Privy Council to declare and adjudge a colonial statute to be *ultra vires* and void.

Any executive or administrative act done in excess of the power conferred by law is invalid as being *ultra vires*. This rule cannot be used to question the validity of an Act of Parliament. [I]n regard to ordinances, it may be used to question the validity of the ordinance by ascertaining whether the Legislative Council had authority to pass it¹⁶.

While neither *Baxter's* case, nor the passage cited would have contemplated rights-based challenges to legislation, post-independence West Indian courts have used 'Baxter type' precedents in the absence of the express conferral of the power of judicial review of legislation, to assume or perhaps continue a tradition of review, and to extend its reach to the substantive concerns of fundamental rights and freedoms, despite the fact that pre-independence West Indian courts did not in *practice* strike down legislation, or better, were not invited so to do.

3. Legislative Review and Constitutional Interpretation: Judicial Perceptions in the Commonwealth Caribbean

In so far as the cases reveal a judicial attitude to the task of reviewing legislation, the prevailing approach seems to be one in which judges see themselves as doing a mechanical act of measuring law against Constitution, a job best described thus: "The court has one duty only, to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former".¹⁷ This expresses what is here called the constructionist approach to review and interpretation.

One result of this constructionist perception is the denial of a judicial concern with legislative policy. The Jamaica Court of Appeal in *Hinds* for example, thought it necessary to emphasise that a particular conclusion did not indicate that there was agreement or disagreement with policy, for "with such matters the court is not concerned"¹⁸.

Similar disavowals occurred for example, in *Seereeram*¹⁹, despite the court's declaration that it was dealing with an issue of substantive due process; in the extraordinary *Gulf Rentals*²⁰ case in which, in the total absence of a due process clause a substantive due process approach was taken where legislation was seen to take property against a person's free will; and in *Banton & Ors v. Alcoa*²¹.

But total avoidance of matters of policy and of the relation between judiciary and legislature as arms of state, cannot be attained even by the West Indian judiciary

especially in view of the formulation of certain rights in the Constitutions. Thus reference by the Court of Appeal in *Hinds* itself to 'goings on' in the community at large, involved a consideration of legislative policy and in some sense, approval thereof where the law was validated. The willingness of courts to accept extrinsic evidence as to the policy which legislation seeks to promote is an indication of its preparedness to accept or not that its task does involve assessment of policy. Practice has varied, reflecting again the understanding of the nature of the task involved in review. In *Morgan*²² for example, evidence as to economic conditions was admitted, as was evidence of similar legislation in other states, going to proof that legislation of the kind challenged could be found in states having respect for rights. Section 13 (T & T), mandates a consideration of legislative policy. Similar type evidence was rejected in *Seereeram*, accepted by the Court of Appeal in *Mootoo*²³ and rejected again in *Gulf Rentals*²⁴. A variety of devices may be seen as attempts in fact to deal with legislative policy and the legislature. Thus, the presumption of constitutionality is stressed, even where, as in *Gulf Rentals*, the presumption is not actually applied. A finding that legislation is not *seriously unconstitutional*, as a reason for not declaring it invalid, is a most striking form of acquiescence in the legislative judgment, first given expression by the Privy Council²⁵. Finally, courts may cope with legislative policy and the legislature by declining to review, by showing that the facts do not directly raise the issue. This was the approach taken in *Antigua Times* by the Privy Council but abandoned, as noted by the dissenter, in *Hinds*²⁶.

In the reviewing of legislation, courts have found it possible to declare that some provisions only, offend the constitution and to cut these away leaving the rest of the Act in force. The decision to administer judicial surgery suggests a surmise on the part of the court that the legislature would regard it as preferable to have a truncated version of the supposed expression of its will, rather than total invalidation. To this extent the court exhibits deference to the legislature, but also participates in the legislative process, making of it a joint enterprise, between court and legislature. Severance then, involves speculation about Parliamentary intent. *Prima facie*, Parliament never intends to enact part only of its statutes, so there may well be said to be a presumption *against* severance. The provision of a severability clause in the enactment itself can therefore rebut the presumption where part of an enactment has been held to be beyond a Parliament's power²⁷.

22 Civil Appeal No. 11 of 1983. (February 20, 1984).

23 (1977) 28 W.I.R. 304 (C.A.).

24 *Supra*, note 20.

25 See, *Francis v. C.O.P.* [1973] A.C. 761; *Robinson v. Sealy* Civil Appeal No. 2992 of 1973 (unreported); *Sh Luce v. A-G* (STL)(1975) 22 W.I.R. 536.

26 *Supra*, note 12. The appellants in *Hinds* had no involvement with the division of the Gun Court struck down by the majority.

27 See, *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R., 1,368-72; *Carter v. Carter Coal Co.*, (1936) 298 U.S. 238, 312-313, 321-322; *Adison v. Holly Hill Fruits Products* (1944) 322 U.S. 607, 618, 619.

16 C. Reis, *The Government of Trinidad and Tobago* (1947) 45.

17 *United States v. Butler* 287 U.S., 62-3 (1935).

18 (1974) 22 W.I.R. 368, 389.

19 (1975) 27 W.I.R. 329.

20 No. 538 of 1982 (BDS) (March 31, 1983).

21 (1973) 17 W.I.R. 275.

The West Indian supremacy clauses in providing for *pro tanto* voidness, operate as general severance clauses and so permit severance, once invalidity of a section or sections of an Act is established and the test set out below is found to apply. The Privy Council in *Hinds*, relying on *A-G (Alberta) v. A-G (Canada)*,²⁸ spoke of the assumption that "the legislature would have enacted what survives without enacting the part that is *ultra vires* at all". After surgery, the court found the remaining sections to "constitute a practical and comprehensive scheme ... which it can be assumed Parliament would have enacted" had it been aware of the limitations on its power to create the unconstitutional scheme²⁹.

The severance power as conceived in *Hinds* was used in *Farrell v. A-G (ANT-B)*,³⁰ to remove from The Industrial Court Act (1976), a clause seen as divesting the Supreme Court of its supervisory and appeal jurisdiction. The fact that the various provisions of an Act, provide each other with 'mutual aid' does not prevent the application of severance³¹.

The constructionist approach seeks then, to avoid engaging in something of legislative policy, but cannot do so completely. The other major consequence of the constructionist perception of the review task is that the Constitution itself becomes a statute, albeit a 'super-statute' for interpretation by the courts. The legislation being reviewed bears a relationship to the Constitution analogous to that of a bye-law to principal legislation; or the legislation of a union state to the Federal constitutive document. Without more, the 'super-statute' understanding of the Constitution deploys the rules of statutory interpretation which have evolved for and which govern, ordinary statutes. In this way, a view of the Bills of Rights is established, more apt for the *constitutive* provisions of the constitutions than for the Bills which are characterised by broad and open-ended language.

*Collymore*³², was perhaps the first exemplification of the constructionist approach to constitutional interpretation. Looking merely at the meaning of the word 'association' and not at the 'right of freedom of association', the matter became, in the words of the Privy Council, "simply a question of construction"³³. In the specific context of trade union challenges to legislation, the approach has been used in *Banton*³⁴ and *Ali*³⁵ in relation to collective bargaining. A reasoned response, whether favourable or not to the applicants, in terms of the meaning and place of the right to freedom of association, as part of the fundamental law of the state, would have illustrated or approached a non-constructionist mode of constitutional interpretation.

The foregoing applies equally to other rights. Thus where as in *Seereeram*³⁶, property was 'construed' to include 'money' and property could not be taken without compensation, an *expressly* substantive conception of due process was found infringed where (again expressly) legislation was actually described by the court as not being unreasonable, the classic understanding of substantive due process.

While construction (and its devices) has most often been used to restrict the enjoyment of rights and to narrow the content of a given right, it does not necessarily determine a particular result and this may commend it to those who desire the 'neutrality' of a 'legal' decision in the determination of constitutional litigation. Thus, to take one example, all the judgments in the *Hector*³⁷ litigation, whether striking down or upholding the impugned legislation, construed it. The ascertainment and assessment of the meaning of the right, and the impact on it of the challenged legislation barely figured in these judgments. But if only because construction is *not* always available to courts in reviewing legislation so as to enforce fundamental rights, one must come to the inevitable and unresolved issues as to just what values or theories should inform constitutional litigation in the area of guaranteed rights. Should judges be guided by the supposed intentions of framers; by the traditions of the society? Should they attempt to search for and articulate the moral perceptions of the society in which they operate, to the extent to which that is ever possible?

Even the criterion of reasonableness which itself suggests no particular value has, as deployed in United States due process adjudication, been seen as good reason for rejecting judicial review under a Bill of Rights³⁸. Once however, judicial review is a fact of constitutional life, the search for constitutional values, however elusive, is itself ineluctable. Judicial subjectivity is the danger and the value judgment and predilections of the individual are seen to intrude in the judicial process in a manner more apparent perhaps, than in 'constructionist' review. This has been best so far illustrated in West Indian case law in the decision in *Gulf Rentals* in which the introduction of 'reasonableness' and 'free will' as principles informing the understanding of the right to property and the proper restraints thereon, illustrate the 'objection' to judicial review just described.

The construction approach may be contrasted with a mode of constitutional adjudication in which general principles, rules and understandings are used to give meaning to Bill of Rights provisions. The Privy Council has in two cases given indications on interpretation of the Constitution. In *Hinds*, the Privy Council, by looking at the structure of the Constitution as distinct from any particular provision of the Constitution, and informed by the history and evolution of the so-called Westminster Model Constitutions, was able to find that the separation of powers doctrine formed part of the Constitution(s) of West Indian states. Whatever the technical difficulties of this

28 [1947] A.C. 503, 518 (emphasis added).

29 *Supra*, note 12 at 299F.

30 (1979) 27 W.I.R. 377.

31 *Carter v. Carter Coal Co.*, *supra*, note 27 at 322.

32 See discussion of this case in Ch., 'Freedom of Assembly and Association'.

33 [1970] A.C. 538 at 546E (P.C.).

34 *Supra*, note 21.

35 *A-G. (GUY) v. Ali & Ors*, [1989] L.R.C. (Const.) 474.

36 *Supra*, note 19. See Ch., 'The Right to Property'.

37 See Ch., 'Expression as Crime'.

38 The reference here is to the wholesale invalidation of legislation during the United States Supreme Court's 'Lochner Era'. See, Ch., 7 "Due Process of Law - Section 4a".

particular 'implied' or 'extracted' constitutional principle, this aspect of *Hinds* provides a perspective of the Constitution from which the judicial task becomes something other than a series of sections for construction. *Hinds* may be seen as going, albeit in a limited way, beyond the constructionist mode.

In *Fisher v. Minister for Home Affairs*,³⁹ the Privy Council declared that the Constitutions were not necessarily to be construed as for ordinary statutes. Since the section of the Constitution concerned in that case was part of a chapter conferring and recognising fundamental rights and freedoms, formalism, (or legalism, the word actually used) was to be avoided. This enjoins the court to consider or indeed establish, the principle(s) informing the constitutional provision, which, in *Fisher* were, the unity of the family and that young children should not be separated from such unit. This clearly is not construction as ordinarily understood. In addressing the problem of the meaning of a constitutional provision, the court recognised to a degree, the two kinds of approach described here, in asserting that traditional interpretation (or construction) did not preclude argument from principle. It was said:

Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition or effect to those fundamental rights and freedoms with a statement of which the constitution commences.⁴⁰

The passage in fact illustrates the tension between the supposed neutral, black-letter approach to construction, as assumed applicable to the Constitution, and the need which at some time is inescapable to take a value or policy based approach to the meaning and impact of constitutional provisions. But one must yet conclude that the thrust of the passage is still that of 'construction', albeit tempered by flexibility and the principle of taking into account the need to enforce the conferred fundamental rights and freedoms⁴¹.

So far, West Indian courts, though normally taking the constructionist mode in reviewing legislation, have not been much occupied with ascribing meaning to specific provisions of the Bills of Rights. The greater effort has gone into analysing or construing the statute, which suggests that the meaning and effect of the fundamental right has been

39 [1980] A.C. 319 (P.C.)(Bermuda).

40 *Ibid.*, at 329, E-F.

41 It could of course be argued that 'construction' is the escape route, and the result is that a value or policy is denied, (or indeed expressed) through the device. But the value or device thus informing the decision does not express an approach to judicial review.

regarded as self-explanatory or in some way apparent, importing further, a literal understanding of the statement of the right.

4. Judicial Review and Constitutional Interpretation: A Case Study

*A-G (GUY) v. Ali and Others*⁴², provides a striking exemplification of the possible and opposed modes of review and interpretation, remarkable in that they occur in a single judgment - that of the then Massiah J.A.

The legislation considered, the Labour (Amendment) Act (1984), amended the Constitution to exempt from the protection of the property clause, laws providing for the regulation of wages as defined in the newly amended property clause. Then section 7 provided for a wages freeze, creating the issue whether the freeze fell within 'regulation of wages' under the property clause as amended. The second matter before the court was the validity of section 28C of the Labour Law as set out in the amending legislation. This made the Guyana Trade Union Congress, the body to enter into enforceable agreements binding on all public sector employees to whom they applied. These agreements could override those made by individual unions. The Congress had not been consulted about its new powers and duties and considered this a 'breach' of Article 11 of the Constitution. This states that co-operatives, trade unions and so forth "are entitled to participate in the decision making processes of the state". The constitution was at the time of the litigation silent as to the status in law of the Directive Principles of which Article 11 formed a part. Finally, the court had been invited to find that freedom of association as a constitutionally conferred right, embraced the right of trade unions to engage in collective bargaining.

It was in the refutation of the last proposition that the constructionist approach to constitutional interpretation was extensively and exhaustively articulated to culminate in a warning against, the "apparently compulsive urge to classify a variety of rights as fundamental though they may lack the essential attributes for such categorisation"⁴³. At the outset of this part of the judicial exercise, the principal plank of the constructionist, the 'plain meaning' doctrine, had been stated and was buttressed by an observation from *Seereeram* to the effect that the 'principle of flexibility' in interpreting a constitution was not to apply where words were plain and unambiguous. Construction was to proceed 'irrespective of consequences'⁴⁴. This view, unless it means irrespective of a finding of illegality must betray an irresponsible attitude⁴⁵.

42 *Supra*, note 35. The discussion was prepared using the typescript of the judgments.

43 At page 27 of the typescript. Compare, *Hope* (1979) 26 W.I.R. 233, 304 and *Nielsen* (1982) 32 W.I.R. 254, 280. (See now, *supra*, note 35 at 499b).

44 *Supra*, note 19 at 333.

45 Compare, e.g., Justice White in *Miranda v. Arizona* thus: [I]t is wholly legitimate ... to inquire into the advisability of [a decision] in terms of the long range interests of the country. [T]he court has a duty to assess the consequences of its

The 'plain meaning', a totally fictitious notion, is most often found by recourse to dictionaries and is accompanied by the condemnation of reading into provisions of Acts or Constitutions, "words which are not there, [for] in the absence of clear necessity it is a wrong thing to do."⁴⁶ The *primacy of the ordinary cannons of construction*, it was asserted, was unquestionable and at the same time these were not yet in competition, but "were anastomotic, their utilitarian value depending on the precise situation then under investigation".

In considering the validity of section 28C, a constructionist chord was struck in the declaration that the words and meaning of Art. 11 were clear - as indeed they are. This fact however, could hardly determine the article's character as binding law, nor was the happy decision that section 28C was invalid in the light of Art. 11., a matter of construction. The section was given meaning in light of a value, albeit one stated in the Constitution itself, and the determination that the Article was law,⁴⁷ was itself based on the general value of participatory democracy, particularised in the article, in relation to the role of trade unions. Recourse to '*plain meaning*' notwithstanding, this was no exercise in construction; new law was made, thus highlighting an inevitable feature of judicial review, its conferral of law making power on the judiciary.⁴⁸

The striking down of section 7, is the point of greatest interest in the context of the present discussion⁴⁹. The section, as stated above, froze wages, and would have been constitutionally valid, if under the amended property clause, it was a law regulating wages. The learned judge started on construction at its lowest form, recourse to a dictionary, but then determined that to adopt the dictionary definition of 'regulate', as 'control by rule'; 'subject to restrictions' and so forth would be "too simplistic and semantical" and "not the correct approach in this matter". Having previously stated that the section "seized wages" and created a situation "strange to the common law," the

action. (384 U.S. 436 (1966), 531, 537).

46 *Per* Lord Mersey in *Thompson v. Gold & Co.*, [1910] A.C. 409, 412, and cited by Massiah J.A.

47 The argument was that the Article needed no legislation for its implementation as it was self-executing.

48 It was observed in *Miranda v. Arizona*, *supra*, note 45: [W]hat the court has done is to make new law and new public policy. [T]his is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

49 In so far as section 7 was retrospective it could indeed have taken away *already accrued* rights and wages, which can plausibly be deemed property, where the concept is seen to embrace benefits under a contract. The section which altered the constitution and which created the new subsection of the property clause, was not itself retrospective. In so far then, as the legislation reached monies which became due before the section was enacted, the court in effect dealt with their 'seizure' under the *unamended* property clause.

judgment made a retrospective survey of wage-regulating legislation in Guyana from the 1930's, to conclude that the philosophical basis" for wage regulation was "the desire to restrict the power of management and to redress ... the disequilibrium inherent in the employment relationship"⁵⁰. Section 7, lacked the requisite 'welfare' element and so was not 'regulating' and did not fall within the constitutional provision. The section was therefore struck down.

Now, to say that legislation freezing wages is not legislation regulating wages is, especially for an arch-constructionist, in plain terms and with the customary respect, a result-oriented piece of judicial fudging. Moreover, it is highly unlikely that the demand for a 'welfare element' in the law, sought in fact to enforce that value *as part of the right to property*.

In the consideration of the association arguments, Massiah J.A., chose to give meaning not to the 'right to associate', but to the *word* 'associate'. In the case of the amended article of the Constitution he refused merely to consider the word 'regulation' and concerned himself with a supposed philosophical basis for wage regulation. It is nevertheless difficult to characterise this part of the judgment as principled, because the discovered philosophical basis of the regulation of wages, was so obviously a device for procuring a particular result. This contention is thrown into clearer relief when the preliminary observation that the supposed seizure of wages was "strange to the common law", is compared with the "redressing [of] the disequilibrium in the employment relationship", which latter was decidedly, itself strange to the common law. Massiah J.A., may well then have been asserting, *sub silentio*, the only apparent 'theory' of Bill of Rights adjudication in the West Indies, namely that of fidelity to the common law. The common law contemplated neither collective bargaining nor the seizure of property.

Much of the foregoing leads to a wider and explicitly 'political' issue in judicial review. A frequent objection to substantive review (in non-West Indian contexts) is that it usurps functions which properly belong to the political sphere and the political process. This perception can however accommodate constitutional litigation in areas in which for whatever reason the political process is sluggish or unable to effect needed change⁵¹.

Now considering *Ali* and judicial review in the West Indies, the 'solution' for economic legislation, necessitated no doubt by politico-economic mismanagement, is the removal of the Government, by the ballot box, to be sure. Perhaps then, the decision in

50 This could of course have been the 'philosophical basis' for recognising collective bargaining which was already established in trade union law and practice as part of the right to freedom of association, if such a result had been sought by the learned judge.

51 This argument is associated with the proponents of so-called process based theories of judicial review. They believe that the selection and accommodation of substantive values, should be left to the political process, and that review should extend only to laws resulting from a process regarded as insufficiently democratic. See generally, L. Tribe, 'The Puzzling Persistence of Process Based Constitutional Theories', 89 *Yale L.J.* 1063, (1980).

Ali, was a judicial surmise as to the effect to be produced by the ballot box, if the system were able to effect change through that means. One recalls too, the remarks of the Privy Council in *Mootoo*, (set out below) that some legislative infringements of rights were a matter for the ballot box⁵². This may then leave it to the Courts and indeed to litigants, to determine what governmental policies are to be cured by enforcement of rights through the redress action and which by political processes. This in turn, raises questions about the ability of either the ballot box or the courts to function in any given state, and as to the initiatives courts could or should take if political processes for whatever reason fail.

5. Conclusion

It has been asserted here, that the task of judicial review involves, or will at some point involve the articulation and identification of values for determining both the meaning of the constitutional provisions and the perception of the review task itself. It may be that the formulation of the Bill of Rights sections (save that of Trinidad and Tobago) give restricted scope for principled exposition of the meaning of rights, particularly in the reviewing of legislation. But the detailed setting out of criteria for restraining rights, does not obviate the need to put content into the right-conferring subsections. Nor do the 'commands' of the phrase 'reasonably required' state the principles that determine that a law is reasonably required to attain a stated goal.

It is conceivable that the frequency of the phrase "reasonably required", has given rise to a general rationality test of the constitutionality of legislation. The postulated generalised rationality test *may* perhaps explain Lord Diplock's 'reasonable legislator' in *Hinds*, not so much as an explication of 'reasonably required', (especially as that phrase does not occur in the constitutional provision there considered and which permitted closed courts) but as a yardstick for the measuring of statutes against the constitution⁵³. This would mean that legislation is not to be invalidated unless premised on a (presumed) interpretation of the constitution by the legislature, so manifestly unreasonable that the legislators must have known the legislation to be unconstitutional⁵⁴.

After declaring that *prima facie* it was for Parliament to determine what was in the interest of public safety and public order, as part of its power to make laws for peace, order and good government - a conditional concession to the notion that policy is for Parliament as the representatives of the people - Lord Diplock immediately thereafter, asserted that "considerations of public policy ... lie outside the field of the judicial

power... ". The solution to this conundrum as given in *Hinds* may be summarised thus: (1) Parliament makes conditional determinations of constitutionality (in *Hinds*, as to whether or not *in camera* sittings were reasonably required). (2) The courts could strike down this determination on the basis of bad faith or misinterpretation of the Constitution. 'Parliamentary bad faith' is as opaque a concept, as is the relation between it and 'misinterpretation'. The reference to misinterpretation must, however, itself be an assertion of the courts' power to substitute its interpretation for that of the legislature and one is brought back to the proposition that the striking down of legislation and indeed its validation, is governmental action.

An interesting recognition of a need for accommodation between judiciary and legislature as necessitated by the exercise of the review power was made by the Privy Council in *Mootoo v. A-G (Trinidad & Tobago)*, in the citing of a nineteenth century United States authority thus:

[N]or do we mean to be understood that whenever the legislature shall overstep the bounds of their authority, the case will be such that the courts interfere to arrest their action. There are many cases of unconstitutional action by the representatives of the people which can be reached only through the ballot box; and there are others where the line of distinction between that which is allowable and that which is not is so faint and shadowy that the decision of the legislature must be accepted as final⁵⁵.

The passage suggests that by some form of judicial intuition courts must determine just which legislative judgments (including unconstitutional ones) are to be left to the democratic process. The text has suggested that some conception or theory of the review task must operate in order to effect this choice.

Not surprisingly, and to some extent excusably, there has been great ambivalence and uncertainty as to an appropriate judicial stance, or even as to the need for one, in the Commonwealth Caribbean. One suspects, however, that to the extent that judicial review for constitutionality is informed by any theory or principle at all, it is that of the preservation of the integrity of the common law so that this, combined with the techniques of construction, constitutes judicial review in the Commonwealth Caribbean. If true, this means that as for Britain, the phrase 'judicial review' is merely a flattering way of describing statutory interpretation⁵⁶. As yet, judicial review in the Commonwealth Caribbean has not expressly identified a theory or theories of review or its informing values or principles. It may well be that, what is done in a given case is in fact determined by the particular Bill of Rights provision and the individual judge's unexpressed view of the role of the judiciary in the system of government.

52 [1979] 1 W.L.R. 1335, at 1339; (1979) 30 W.I.R. 411.

53 See Ch., 'Limitations on Rights and Freedoms'.

54 One might for example ask whether the judgment in *Gulf Rentals*, (having abandoned the question of penalty and forfeiture) found that the legislation was so unreasonable that it expressed legislative bad faith. It does *not* appear that the learned judge took the view of Diplock's test, described in the text.

55 *Supra*, note 52 at 1339, citing Cooley, *Constitutional Limitations* (8th ed., 1927) Vol. 2, p. 1026.

56 Lord Scarman, 'Fundamental Rights, The British Scene', 78 *Colum. L.Rev.* 1575, 1585 (1978).