

“SUPREMACY OF THE CONSTITUTION”

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introduction

The concept of the “Supremacy of the Constitution” is the fundamental foundation of the legal system in the Commonwealth Caribbean. I very much welcome the Judicial Education Institute’s invitation to focus on this concept because, to my mind, this concept is also fundamental to our economic and political systems, although our communities usually complacently take it for granted. I say this because, as Professor Dr. Selwyn Ryan has said in his book “The Judiciary and Governance in the Caribbean” published last year,

“The new global investment movement has also given rise to a need on the part of would be investors to know more about the macro-economic environment of the countries in which they plan to invest. This is particularly so because of the experiences which many have had and continue to have, particularly in Africa, Asia, Latin America, the Pacific countries and the former Soviet bloc. Before deciding whether to take major investment risks, business-

men are becoming more anxious to know about the democratic, bureaucratic, regulatory and judicial environments which characterise these societies. They need to know whether accountability and transparency obtain in matters of public procurement, whether agreements and contracts signed would be honoured, whether the information they have about the economy is sound, and whether they would be called upon to bribe judges as well as politicians, their cronies, and other gate keepers in order to get at what they deem a level playing field. As a former American Ambassador to Trinidad and Tobago said to a Chamber of Commerce meeting, "what they hear in response to all these questions helps them decide whether to pursue business" (*Trinidad Express*, 27 March 2000).

"The general view of would be judicial reformers is that if capital is to flow freely and safely in this globalised world, one needs judiciaries that are professionally competent and independent of state operatives ... [and] who are incorrupt and predictable ..."

The Constitutions in the Eastern Caribbean expressly declare their supremacy in a supreme law clause of which s. 2 of the St. Kitts & Nevis Constitution is typical:

"The Constitution is the supreme law of St. Christopher and Nevis and subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The jurisprudence emanating from the Commonwealth Caribbean in general, and the Eastern Caribbean in particular, constitutes an impressive and important contribution to the global corpus of law illustrating the Supremacy of the Constitution and relatedly, the Rule of Law, the Separation of Powers and the Independence of the Judiciary. Our contribution in this regard as a region is disproportionate to our size geographically and in terms of population, perhaps because the Eastern Caribbean has no general savings law clause shielding pre-independence laws from challenge, in contrast to Barbados, Jamaica and Trinidad & Tobago. While some may say that the number of significant constitutional law cases emanating from the Commonwealth Caribbean is out of sync with the region's modern history of stable parliamentary democracy and generally enviable standards of good governance, it may also be that the disproportionate volume and importance of the region's constitutional jurisprudence is an important reason for that modern history and those standards. No doubt those standards were part of what prompted noted Afro-American activist Randall Robinson

in a recent speech in St. Kitts to describe the Commonwealth Caribbean nations as the "jewels of the Black world."

I propose to take a brief look at some of the principles, concepts and cases which constitute a jurisprudential contribution of which our Caribbean judges, litigants, lawyers, governments and wider communities can indeed be proud, and all the more so in light of the horrific history of our region less than two centuries past.

In less than a generation, the power and responsibility of the Courts to strike down laws which contravene the provisions of Commonwealth Caribbean Constitutions have become well-settled and commonplace. Perhaps this is simply due to a widespread, albeit unexpressed, recognition of the philosophical point made by the U. S. Supreme Court in *Marbury v. Madison* (1803) 5 U.S. 137 that:

"It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must of necessity, expound and interpret the rule. If two laws conflict with each other the Court must decide on the operation of each."

And where there exists an entrenched Constitution, even in the absence of clear Constitutional expressions of such power, judicial review of legislation must follow as night follows day.

At this stage in our development, I do not propose to dwell on the historical background but instead I would wish to make full use before your Lordships today of my licence as an advocate (in contrast to the restraint you can expect from your judicial colleagues scheduled to present at this Programme) to focus on what I subjectively consider the most current and pressing aspects of the Supremacy of the Constitution. To my mind, prominent among these topics are:

- (1) Separation of Powers; and
- (2) Judicial Remedies.

I will make reference to a number of recent Privy Council decisions. Although it would be obvious that this is both necessary and appropriate as constituting current law from the pinnacle of our judicial system, I feel it is important to refute any notion that constitutional freedoms and rights fall only from "on high" by making the observation that in virtually all of the recent cases, at least one judgment from the locally-resident Courts ruled to similar effect as did the Judicial Committee. For example, Redhead J. (as he then was) in *De Freitas v. The Permanent Secretary of Agriculture & Others* (1998) 53 WIR 131, Saunders J. in *Benjamin v. Minister of Infor-*

mation & Broadcasting and Another (2001) 4 LRC 272, Matthew J. (as he then was) in *Hector v. Attorney General* (1990) 37 WIR 216, and this will also be the case when *Spence & Hughes et al v. Attorney General* is decided by the Privy Council shortly, but we cannot yet name names!

Separation of Powers

The judgment of the Privy Council in *Hinds v. R.* [1976] 1 All E.R. 353 contains one of the earliest and strongest judicial pronouncements of the applicability of the principle of Separation of Powers in the Commonwealth Caribbean. Since then, in several cases the Courts have had occasion to emphasize this vitally important aspect of the Supremacy of the Constitution. One of the most significant such rulings since *Hinds* is *J. Astaphan & Co. (1970) Ltd. v. The Comptroller of Customs & The Attorney General of the Commonwealth of Dominica* (1996) 54 WIR 153 in which then Chief Justice the Rt. Hon. Sir Vincent Floissac said:

“It is now well established that the basic principle of separation of powers is implicit in the Constitution of the Commonwealth of Dominica and that any law which is inconsistent with that basic principle is unconstitutional and invalid. The authority for that legal proposition is the case of *John v Director of Public Prosecutions* (1985) 32 W.I.R. 230 where the Privy Council applied to the Constitution of Dominica what they had previously said in *Hinds v. The Queen* [1976]. In *Hinds v. The Queen*, Lord Diplock (delivering the judgment of the Board in an appeal from a decision of the Court of Appeal of Jamaica) said:

‘It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these 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 power by either the executive or the legislature. As respects the judicature, 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 judicature. 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 judicature respectively.’”

To quote Saunders J. at first instance in *Benjamin's* cases

“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 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 functions and usurp the authority and role reserved for the other two pillars.”

Astaphan's case (which was recently applied in the Bahamas in *Financial Clearing Corporation v. Attorney General*, #232/2001 by Anita Allen J. on 27 November 2001) is seminal not so much for its restatement of the settled general principle, but rather because it also emphasized the importance of a **functional** separation between the **Legislative** and **Executive**, in contrast to the separation between the Judicial branch on the one hand, and the Executive and Legislative branches on the other hand, which was at issue in *Hinds* and *Patrick John* (1985) 32 WIR 230.

“The power to impose taxes and duties is inherently a legislative power constitutionally vested in the Legislature... [If] the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing the power or without prescribing 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.”

Our Court of Appeal held this to be so in the *Astaphan* case.

Then Chief Justice the Rt. Hon. Sir Vincent Floissac further said that the basic principle of Separation of Powers “recurs” in that same case where there was also contravention of the Separation of Powers between the Judicial branch on one hand and the Legislative and Executive branches on the other:

“... 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.” (per Floissac, CJ)

In purporting to confer a power or discretion on a member of the Executive (ie. a customs official) to decide what “further sum” should be extracted from the importer as a penalty in the particular circumstances of a particular case, the Dominican legislation was also held to be unconstitutional because **“the power or discretion to inflict the appropriate penalty is a judicial power or discretion which cannot be legislatively transferred to the Executive”** * (per Floissac, CJ).

In the context of the Eastern Caribbean, the Court’s insistence in *Astaphan* on the constitutional Separation of Powers between the Legislative and Executive branches is particularly important. Due to size, the Executive Cabinet in the Eastern Caribbean usually constitutes a voting majority in Parliament. For this reason, prior to *Astaphan*, Eastern Caribbean governments may have been tempted to disregard the functional Separation of Powers between the Legislative and Executive branches which was so clearly articulated and applied in that case. Governments might have been attracted by the simplistic, if base, reasoning that since the same individuals completely control both the Executive and the Legislature it does not matter as “it is six of one and half-a-dozen of the other.” Such thinking would be both unconstitutional and dangerous because it is likely to lead to such imprecision and laxity in the formulation of legislation that the Rule of Law itself would be threatened by “legal provisions which interfere with individual rights ... [not being] formulated with sufficient precision to enable the citizen to regulate his conduct” to use the language of the Privy Council in *deFreitas* (1998) quoting with approval the European Commission on Human Rights in *G. v. Federal Republic of Germany* (1989). Without clearly stated legislative guidelines and principles, neither the Executive public servant nor the citizen would be enabled to regulate their conduct with confidence that they are acting within the law. Such a state of affairs would be anathema to constitutional government, i.e. government by law.

Judicial Remedies in Constitutional Cases

The issue of Remedies in constitutional cases provides another important area which brings the Supremacy of the Constitution into sharp focus.

A plethora of recent decisions have dealt with significant aspects of this issue.

In *Gairy v Attorney General of Grenada* [2001] 4 LRC 671 the Privy Council, reflecting what they themselves described as “an enlightened approach,” emphatically declared that:

“Historic common law doctrines restricting the liability of the Crown or its amenability to suit cannot stand in the way of effective protection of fundamental rights guaranteed by the Constitution.”

“And if it is necessary to fashion a new remedy to give effective relief, the Court may do so within the broad limits of s. 16.”

Section 16 being the familiar Constitutional clause dealing with “Enforcement of Protective Provisions” common to the Eastern Caribbean Constitutions:

“The High Court ... may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3–17 [i.e. the fundamental rights].”

The wording of this enforcement provision unquestionably justified the Privy Council’s pronouncement that:-

“The Court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right”

and this was clearly echoing learned Chief Justice Sir Dennis Byron’s dicta in the very same *Gairy* case that:

“The provisions of ss. 16 and 101 of the Constitution of Grenada confer **unlimited** jurisdiction on the court to **fashion remedies** to secure the enforcement of the fundamental rights and freedoms provisions of the Constitution and grant protection against the contravention of the other provisions in accordance with the law.” [2001] 1 LRC 119 at 132.

The Privy Council’s decision makes it clear that:

“No legal or political system today can place the State above the law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. The modern social thinking of progressive societies and the judicial approach is to do away with archaic State protection and place the State or the Government at par with

any other juristic legal entity.” (Privy Council quoting an Indian judgment) and:

“Where the people by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available. It is as much the duty of the State to render justice against itself in favour of citizens as it is to administer the same between private individuals. There is nothing in the Constitution envisaging the writing into it of a theory of immunity from suit of the State (a state set up by the People to be governed in accordance with the provisions of the Constitution) stemming from or based upon the immunity of a personal sovereign who was the keystone of a feudal edifice. English common law practices, doctrines, or immunities cannot qualify or dilute the provisions of the Constitution.”

“... it would seem correct to say that the Constitution is not imbued with feudal conceptions of privilege and exemptions but rather with modern conceptions of the duty of the State and the recognition by it of the human rights and needs of those who are the citizens of the State so that, **instead of hedging the State with privileges and immunities the general trend is to place obligations on the State.**” (Privy Council quoting an Irish Supreme Court judgment).

“By Chapter 1 and s. 106 of their Constitution the people of Grenada established a new constitutional order. The Constitution has primacy (subject to its provisions) over all other laws which, so far as inconsistent with its provisions, must yield to it. To read down its provisions so that they accord with pre-existing rules or principles is to subvert its purpose.”

Sweeping away as it does any possible restrictions flowing from dicta in *Jaundoo v. Attorney General of Guyana* [1971] A.C. 972, *Gairy's* case is certainly a landmark decision. But to my mind an even more dramatic demonstration of the Judiciary's powers in ensuring effective enforcement of fundamental constitutional rights is to be found in the Indian case of *Nilabati Behera (through the Supreme Court Legal Aid Committee) v. State of Orissa & Others* [1994] 2 LRC 99.

At 8 a.m. on 1 December 1987 Suman Behera, aged 22, had been taken into police custody in Sundergarh District, Orissa State in connection with the investigation of a theft. At about 8 p.m. the petitioner, his mother, had visited the police station with food which he ate. On the following day he was found dead on a nearby railway track with multiple injuries and still wearing a handcuff. The petitioner wrote to the Supreme Court a **letter which was treated as a writ petition** in the original jurisdiction of

the Court under the Constitution. The Court accordingly treated this letter as initiating a claim for contravention of the fundamental right to life guaranteed by the Constitution!

The Supreme Court **directed the District Judge to hold an inquiry** into the facts. In his report the District Judge found that the deceased had died from multiple injuries inflicted on him while in police custody. Before the Supreme Court the State of Orissa and the police disputed the District Judge's findings, alleging that the deceased had escaped from police custody and that his injuries indicated that he had been run over by a train.

Compensation was awarded to the mother and Rs.10,000 costs were ordered to be paid to the Supreme Court Legal Aid Committee Board. The applicable Indian Constitutional redress provisions there under consideration were similarly worded to those in the Caribbean and the Supreme Court expressly relied on *Maharaj v. Attorney General of Trinidad & Tobago* (No. 2) [1978] 2 All E.R. 670 and on the ‘enlightened’ procedural aspects of *Jaundoo v. Attorney General* [1971] AC 972.

A most striking and notable feature of constitutional law jurisprudence, worldwide, is the Court's willingness to consider foreign Courts' reasoning, and to adopt it wherever it fits the justice of the particular case being decided. It is important and right that our Courts see themselves as part of a Commonwealth, indeed global, context in these matters, even while adjudicating four square on the particular Constitution whose supremacy is being protected. Even in countries with strong strains of what some might describe as national arrogance one finds repeated references in constitutional judgments to decided cases from other jurisdictions. While not binding, such decisions often provide fertile food for thought and good guidance towards workable principles and also serve to deflect domestic political preoccupations.

Among the rich Eastern Caribbean caselaw, mention must be made of *Observer Publications Ltd. v. Matthew* [2001] 4 LRC 288. There the Privy Council did not content itself with a declaration of violation of the right to freedom of expression guaranteed by the Constitution, but further:

“ordered that forthwith a radio broadcasting licence shall be issued to the claimant as applied for or on such other frequency as the High Court on prompt application by the Attorney General, may approve. A business licence must also be issued. The seized equipment should be returned forthwith. Leave is reserved to the appellant to apply to the High Court for the assessment and award of damages in the event that the equipment has suffered any

damage, counsel for the appellant having indicated that that no further relief by way of damages is sought. Leave is also reserved to the appellant to apply in the High Court for any orders incidental to the foregoing. The respondents must pay the appellant's costs in the courts of Antigua and Barbuda and before the Board."

That is as comprehensive a relief as any Court could be expected to grant. The only thing the judgment did not say was "Batteries not included!" This was indeed tangible demonstration that "...human rights guaranteed in the Constitution are intended to be a major influence upon the practical administration of the law."

The decision of the Eastern Caribbean Court of Appeal in *Lucas v. Jack & Attorney General* [2000] St. Vincent Civil Appeal #6 of 1999, and their Lordship's statements in the *Observer* case that "the enforcement of constitutionally guaranteed rights, cannot be reserved for cases in which it is not even arguable that an alternative remedy is available" and that "bona fide resort to rights under the Constitution ought not to be discouraged [although] ... frivolous, vexatious or contrived invocations of the feasibility of constitutional redress are certainly to be repelled" stand in contrast to Privy Council *dicta* in the very recent decision of *Jaroo v. Attorney General of Trinidad & Tobago* (2002) Privy Council Appeal #16 of 2001 delivered on 4th February 2002. Comments in that judgment restricting access on alternative remedy grounds are out of step with a considerable current of authority to the contrary and would diminish the supremacy of the Constitution if not confined to the particular circumstances of that case and recognized as being mere *obiter dicta* since no constitutional right violation was found established on the facts.

Years ahead of the Privy Council's decisions in *Observer Radio* (2001), *Gairy* (2001) and *Benjamin et al v. Minister of Information & Another* (2001), we have the decision of Adams J. in *Peters v. Marksman* (2001) 1 LRC 1 (April 1999) where the learned Judge ruled in St. Vincent that:

"under the [enforcement provision of the Constitution] a court may, inter alia, order the initiation of legal proceedings against a delinquent public official, impose an award of damages against him, subject him to disciplinary proceedings and commute a sentence of death to one of life imprisonment when the discretion to do these things is warranted – because of constitutional breaches."
[2001] LRC 1 at 11e.

Although the Eastern Caribbean Court of Appeal varied somewhat the redress Order made by Adams J. in light of the particular circumstances of

the case, it expressly approved his aforesaid statement: per Singh, J. A. at paragraph [19] of *Supt. of Prisons & The Attorney General v. Peters*, Civil Appeal No. 9 of 1999 (25 September 2000).

Like the Privy Council's pronouncements in several later cases, including *Gairy*, and their Lordships' earlier pronouncements in *Maharaj v. Attorney General* (1978) 2 All E.R. 670, this is a clear recognition that our Constitutions indeed ushered in a new era, with an expanded role and responsibility for the judiciary.

However, any notion that these cases suggest that the system in the Commonwealth Eastern Caribbean is characterized by 'Judicial Government' is readily refuted by reading the Eastern Caribbean Court of Appeal's judgment in the "Asian Village" case from Antigua (*Spencer v. Attorney General & Others* [1999] 3 LRC 1) and the Privy Council's judgment in the "McDonald's" case from Bermuda (*Grace Bay Ltd v. Attorney General of Bermuda* [2000] 1 LRC 167), both of which make it clear that the Judicial branch of Government has a constitutionally-restricted role and accords full respect and scope to the considerable lawful authority of the Executive and Legislative branches of Government.

The *Grape Bay* case concerned a constitutional challenge to legislation which effectively blocked the establishment of McDonald's in Bermuda by prohibiting any "restaurant which is operated in any manner, whether through distinctive name, design, uniforms, packaging, decoration or otherwise, which reasonably suggests a relationship with any restaurant or group of restaurants operating outside Bermuda."

As the Privy Council said:

"... some people [in Bermuda] feel that [McDonald's well-defined image] does not fit into their own image of what their neighbourhood should be like. ... In the Supreme Court, Meerabux J. said that he was unable to accept that the form of regulation contained in the Act was in the public interest. He said that he had heard no evidence about what the Act was designed to achieve and could not for himself see any benefits which would accrue to the community..."

"Their Lordships would accept that Bermudians are in the best position to know what the public interest of Bermuda requires. But the Constitution lays down a separation of powers between the executive, legislature and judiciary. On a matter such as the desirability or otherwise of franchise restaurants, which is a pure question of policy, raising no issue of human rights or fundamen-