

THE WESTMINSTER TRANSPLANT IN THE COMMONWEALTH CARIBBEAN – SOME PERTINENT ISSUES

A presentation at the Washington Centre, Washington D.C.

Let me say how very pleased I am to be here this afternoon to participate in this Seminar dealing with the broad theme of "Law And Society".

I thought, at first, that I would perhaps discuss the Westminster model constitutions that failed to flourish in some parts of the Commonwealth, notably in West and East Africa. For example, Ghana at independence in 1957 inherited a Westminster constitution from the UK together with a legacy of Western structures at the centre and a politically informed, involved and active populace. But since independence, there have been eight changes of government! As a result, the search today in Ghana and elsewhere in Africa is how to create viable and stable democratic institutions for positive socio-economic and political development. Had I settled for that topic, I could then have examined concepts such as the "One Party States" or the supremacy of certain organs of the State and then proceeded to show how the absence of a written Constitution, in the end, makes Ghana and Britain unique 'bedfellows'. But that is not to be, for while tossing over various ideas, I got an inspiration from Prof. Yash Ghai's recent article entitled: The Westminster Model in the South Pacific: The Case of Western Samoa.¹

The constitution of Western Samoa was written when there was little in the form of organised political activity or parties. The Westminster system, the adoption of which raised little controversy, was adapted to that circumstance. Significantly, also, the Samoan constitution suggests a novel method for choice

of the prime minister in a situation where there are no political parties or no dominant party. Again, one respect in which the Westminster system was adapted to both the social structure and the political system was the office of the head of State. So that, today, it is possible to argue that the Westminster model constitution in Samoa has found a footing so strong and firm that the resultant transplant could receive the surgical attention of academics. So, I woke up one day feeling like Archimedes in his bath when he cried "Eureka". I had found a topic. It had to do with the successful and living transplant of the Westminster model constitution in the Commonwealth Caribbean.² But first, a word about the label, "the Westminster" model. Coined, I believe, by Prof. de Smith,³ the term was essentially used to suggest that what was intended for the erstwhile colonies of Britain was essentially the export version of the British Constitution. As Professor Carnegie has observed, "the terminological difficulties cannot be escaped here, since the English language cannot, without recourse to antiliterary neologism, provide discrete descriptive terms which uniquely convey the sense of the difference by lexicographical analysis of the meanings of the labels".⁴ Prof. Carnegie has recently gone further in arguing that "when we speak of our Westminster model Constitutions, we are not being lawyers or even political scientists. We are at best being poets!"⁵ For my part, dare I hope that I may pass for a poet in the tradition of the Muses after this presentation? But, perhaps the cardinal point that comes out strongly is that the term – with all the disputation as to its proper meaning – has acquired the 'sanction of educated usage'.⁶ And so I proceed to deal with the substance of the concept.

2. Antigua and Barbuda, The Bahamas, Belize, Barbados, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.
3. The New Commonwealth and its Constitutions: Stevens, 1964.
4. Prof. A.R. Carnegie: *On Comparing American and West Indian Constitutional Law*. October 1987 (Unpublished Paper)
5. Prof. A.R. Carnegie: *Floreat the Westminster Model? A Commonwealth Caribbean Perspective* December 1988 (Unpublished).

Mr. Chairman, let me proffer the broad thesis that while the Westminster model has generally failed in Africa, it has endured in the Caribbean, albeit in a significantly adapted form from what pertains in Britain. Indeed, while it is true that Caribbean Constitutions have, by and large, remained stable, yet a number of changes – dramatic and otherwise – have taken place and continue to do so. To adapt Dean Roscoe Pound's famous aphorism – Caribbean Constitutions based on Westminster have remained stable but not still! I would carry the metaphor further in the manner claimed by Harman J. in 1950 for equity that Caribbean Constitutions must be "presumed not to be past the age of childbearing".⁷ On the contrary, they are showing a remarkable fertility which would worry many family planners!

Of course, in proffering my broad thesis, I am not unmindful of the risk that, for every statement made, qualifying exceptions would be necessary. So, like the Judge before whom unsure evidence has been tendered, I warn myself of the necessity for corroboration by adverting once more – if I may – to what Prof. A. R. Carnegie has said:⁸

"The independent West Indian States now include a mixture of monarchies and republics. Not everyone follows the Westminster model, since Guyana has an executive Presidential system. The Federation has not ultimately fragmented into all unitary states, since St. Christopher and Nevis is, in name at least, a Federation. The states do not all have bicameral legislatures. They do not all reject proportional representation. And in areas where the greatest uniformity appears – all have constitutional bills of rights, for example – there is much divergence of substance within common formats."

With that caveat, I ask myself: Have Caribbean constitutions, based as they were on the 'Westminster model', endured in the sense that they have been stable? I would argue that generally the basic structure of those constitutions – excluding Guyana and to some extent Trinidad and Tobago and Dominica – has

endured, albeit at times under great stress and pressure. Sir Fred Phillips details out some of those stresses in his book:

West Indian Constitutions:
Post Independence Reforms.⁹

While views may differ as to what may constitute the bare bones of the 'Westminster model', I do think that the following form a part of that search:

- (a) a strong 'executive' Prime Minister;
- (b) a bicameral legislature;
- (c) an effective Opposition; and
- (d) an independent and fearless Judiciary

Time would not permit an exhaustive discussion of all the above but take, for example, the traditional role fashioned out by the founding fathers of the constitution for the Opposition.¹⁰ "Opposition" has altogether disappeared from the Parliament of Jamaica, and in Barbados and Dominica and, to a lesser extent, Grenada and Trinidad and Tobago, exceptionally large majorities in the Lower Houses have threatened the Opposition's role in the constitutional order of things.

In Grenada, the Supreme Court has been denied paper guarantees of its independence since 1979¹¹ and yet, as far as I know, no one has questioned the integrity of that Court,¹² except the appellants in the Maurice Bishop murder trial, some of whom were responsible for the establishment of that very Court. Does Grenada then prove the point that perhaps we do not need paper guarantees in order to secure the independence of the Judiciary? I wonder. The argument still rages about the proper role of the Senate – ought the Senate to be abolished or saved? Does the Senate really fulfil any useful role or is it just a Chamber for political patronage? Such is the division of opinion in these matters that when Trinidad and Tobago debated the matter in its Constitution Review Commission, it came up with a Majority Report calling for its abolition and a Minority Report calling for its reform.¹³ Then there are those who champion the view that Parliament itself has become an expensive irrelevance. The expense is greater and the irrelevance undiminished when there are two Parliamentary Chambers.

6. Prof. A.R. Carnegie: *Supra*, n. 4.

7. Quoted in Denning, *The Family Story*, London, Butterworths, 1981, 176–7.

8. Prof. A.R. Carnegie: *Supra*, n. 4.

9. New York: Oceana, 1985. See especially Chapters I, III, V and X.

10. See, for example, the Constitution of Jamaica, Ss 80–81.

11. Peoples Law No. 4 of Grenada.

12. *Andy Mitchell v. D.P.P. & A.-G.* [1986] A.C. 73 [PC].

13. Report of the Constitution Commission of Trinidad and Tobago Jan. 1974.

However, one high water-mark of endurance and stability in the constitutions has been the fortitude with which all the territories except Guyana and, thus far Grenada, have retained the hierarchy of courts with the Privy Council at its apex. But even this high water-mark of endurance and stability is now under severe assault. The need for change is no longer a matter for the academics in the classroom. Caribbean peoples, including the Judges themselves, are heading the crusade for the abolition of appeals to the Privy Council and for the creation of a Caribbean Court of Appeal.¹⁴

So that, within the seemingly stable outward structure of the Constitutions, there is understandably a strong movement for change.

But what of the actual changes that have occurred?

The Constitutions themselves foresaw the need and made provision for change. By deliberate choice, some change was to be more difficult to bring about than others — hence constitutional entrenchment.

Dr. Francis Alexis in his book — *Changing Caribbean Constitutions*¹⁵ — has detailed out the various mechanisms for bringing about such change. The details need not detain us here except to observe that “even the more restrictive provisions for amending the West Indian constitutions . . . are not necessarily sufficiently difficult to meet the full range of purposes which entrenchment might be expected to serve”.¹⁶

As regards implied change, happily for the Caribbean, the doctrine of implied repeal¹⁷ whereby subsequent or later Acts in conflict with previous ones

are deemed to have overridden the earlier acts has been provided against by the device of special enacting words, special certificates and similar such techniques.¹⁸

However, the argument has been proffered — and rightly in my view — that the door is still left open to constitutional amendment “by inadvertence”.¹⁹

In terms of actual change, there has been a re-enactment of the constitutions of Guyana and Trinidad and Tobago, in the best tradition of autochthony. Barbados has had some constitutional amendments brought into place and so has Dominica. But I think that the change which is worthy of special mention is that of Grenada, precisely because that method of change was not one envisaged by the constitution. It was revolutionary. I am, of course, referring to the suspension of the Grenada Independence Constitution in 1979, by a usurping government and its restoration, or more accurately, partial restoration in 1983, by the elected civilian government. Grenada remains a constitutional maze. Mr. Chairman, let me simply highlight some of the legal issues arising out of the Grenada situation, as I see them. What does it mean, in constitutional law, to ‘suspend’ a constitution? How and when does a usurping power acquire legitimacy in law?²⁰ What is the legal status of the Grenada Supreme Court? If, as the Court of Appeal decided by majority, the Supreme Court of Grenada is founded on the doctrine of “Necessity”, does the necessity still exist today to support its continued existence four years after the installation of civilian rule? Do Grenadians have a right of appeal to the Privy Council? What is the role of the Queen acting through the Governor-General at a time of a national breakdown of law and order when the cabinet is in complete disarray? Has an incoming civilian regime the right to restore parts of the ‘suspended’ constitution and keep away other parts in a selective and eclectic manner? These are some of the issues bristling with legal complication in Grenada. I do not think that we have seen or heard the last from Grenada.

Mr. Chairman, apart from express and implied change in Caribbean constitutional law, there is that grey area of change which, to my mind, is rather fascinating and which — for want of a better phrase — I choose to call the area of imperceptible change.

14. Alexis: *The Case Against W.I. Appeals to the U.K. Privy Council*, Vol. 1 No. 4 of the *Bulletin On Eastern Caribbean Affairs*, P. 1.

Dorcas White: *Jettison the Judicial Committee? Cave Hill, Barbados*. (UWI Faculty of Law), 1976, (Unpublished).

Sir Isaac Hyatali: *Towards A West Indian Jurisprudence: Address by Sir Isaac Hyatali, former Chief Justice of Trinidad and Tobago, to the Caribbean Senior Policy Seminar sponsored by the Economic Development Institute of the World Bank at Sam Lord's Castle on April 22, 1987*.

15. Alexis, *Changing Caribbean Constitutions*, Barbados: Antilles Publication, 1984, Chapter 2.

16. Prof. A.R. Carnegie: *Supra*, n. 4. *Mitchell v. D. P. P.* [1986] AC 73.

17. *Vauxhall Estates Ltd. v. Liverpool Corporation* [1932] 1 K.B. 733.

Ellen Street Estates Ltd. v. Minister of Health [1934] 1 K.B. 590, 597.

18. See, for example, *Jamaica Constitution*, Ss. 49 (4) (b), 61 (3).

19. Prof. A.R. Carnegie: *Supra*, n. 4.

20. Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity*. Third World Foundation Monograph 6.

As to whether to apply Kelsen or the doctrine of necessity or both, see *State v. Dosso*, Pakistan Leading Decisions [1958] S.C. 533, *Attorney General of Cyprus v. Mustafa Ibrahim* [1964] Cyprus Law Reports 195, *Special Reference No 1 of 1955*, 1955 Pakistan Leading Decisions, W.P. 598 *Asma Jilani v. Govt. of Punjab* PLO 1972 S.C. 139; *Uganda v. Commissioner of Prisons Ex. P. Matouu* [1966] East African Law Reports 514.

I shall mention only two of those areas:-

- (1) The use of the prerogative power beyond the traditional, and
- (2) the use to which the Judges have put their interpretative function.

If Prof. Dicey is to be believed, the prerogative power of the state has represented the residual discretionary authority vested in the sovereign, which power is not in conflict with statute and which the sovereign does not share with the citizens.²¹

Constitutional lawyers have agonised over whether the prerogative power of the sovereign can ever be used in the general running of the state administration.²² In England, one such area of the use of the prerogative has been in the setting up of Criminal Injuries Compensation Boards.²³

I raise this issue because it has been said that in the case of Grenada when the Governor-General took over the administration of the State upon the breakdown of law and order, he was basing himself on the exercise of the prerogative power. If that argument is correct, it would indeed represent a revolution in Caribbean Constitutional law. I cannot bring myself to accept that a purely ceremonial head of state should ever be able to invoke such fundamental common law powers and justify that invocation on the basis of the prerogative alone. So I, for one, am quite content to rest that invocation on the dual basis of the doctrine of necessity and of the prerogative.

As regards change brought about through the judicial function of interpretation, I mention only a few significant ones.

It seems to me that, having been castigated by the Privy Council for the "austerity of tabulated legalism" in interpreting the Bill of Rights clauses,²⁴ Caribbean Courts have shown a kind of boldness which I welcome, a kind of imaginative enthusiasm to the constitutional text.

For example, it is to the case of *Collymore v. A. G.*²⁵ that Caribbean Constitutional Law must give the credit for firmly establishing the doctrine of constitutional supremacy over Parliamentary supremacy, and despite the fact that the constitution of Trinidad and Tobago then never expressly said so.

21. A.D. Dicey, *Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1959.

H.R. Wade, *Constitutional Fundamentals*, London: Stevens 1980, Chapter 4.

22. R. F. V. Heuston, *Essays in Constitutional Law*, London: Stevens, 1964, Chapter 3.

23. See *R. v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 QB 864.

24. *Minister of Home Affairs v. Fisher* [1980] A.C. 319.

25. (1967) 12 WIR 5 (C.A.T.T.), affirmed [1970] A.C. 538 (P.C.).

According to Prof. Carnegie, "that case may well have filled the place which is occupied in United States constitutional law by *Marbury v. Madison* successfully claiming the power of judicial review of legislation, while leaving scholars to argue whether or not the claim was a usurpation".²⁶ Once again, it is to the majority opinion of the Privy Council in the Jamaican case of *Hinds v. R.*²⁷ that we must give the credit for the theory that the jurisdiction of the Supreme Court is entrenched at the highest level on the basis of the doctrine of the separation of powers, though the main ground for so holding was that the doctrine was only "implied" in the Constitution.

Here we observe one of the sharpest contrasts between the constitutional Law of the Caribbean, United Kingdom and America. For it is well known that the Westminster models carry no 'separation' in the traditional sense but rather a 'symbiotic' relationship between the various organs.²⁸ Indeed, the development of the cabinet system in England ipso facto implied a rejection of the theory of separation of powers.

Also, the doctrine of legislative supremacy in the UK distinguishes that system from the Westminster export models in which the written constitution imposes limits upon the legislature and provides for the judicial review of legislation, such as was claimed for the US in *Marbury v. Madison*.²⁹ By contrast, the legislative supremacy of the UK Parliament appears to be a fundamental rule of their constitutional law despite assaults on that doctrine by Britain's entry in the European Economic Community which posits the primacy of European Community law.

In the US, on the other hand, the system of a Presidential executive is quite different from that of cabinet government in Britain. Indeed, in the US constitution of 1787 the separation of powers was clearly expressed so as to achieve a balance of powers by vesting each primary constitutional function in a distinct organ.

For the Commonwealth Caribbean, what the term means in functional terms today is little more than an independent judiciary. And so, *Hinds* is justifiable on grounds of public policy but not in terms of the Privy Council's reasoning. Indeed, G. E. Henderson puts it clearly thus:

26. Prof. A.R. Carnegie, *Supra*, n. 4.

27. [1977] A.C. 195.

28. Hood Phillips, 93 L. Q. R. (1977) 13; Lewis [1978 October] W.I.L.J. 4.

29. (1803) 1 Cranch 137.

"The threefold division of labour, between a legislator, an administrative official, and an independent judge, is a necessary condition for the rule of law in modern society and therefore for democratic government itself."³⁰

Another policy consideration for accepting the conclusion in *Hinds* is that

"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."³¹

Again, it is to the Trinidadian case of *Thomas v. A. G.*³² that one should give the credit for exploding the Common Law doctrine of dismissal of public servants at pleasure. Here, too, this result was achieved principally through an ingenious piece of 'judicial legislation'. From Jamaica, the 1985 Privy Council case of *Bell v. D.P.P.*³³ amplified the ambit of the fundamental right to a fair hearing within a reasonable time by holding that one can enjoy rights far beyond those that existed at common law.

In at least two Barbadian cases, namely, *Biggs v. C.O.P. and A.G. v. Barker and Pilgrim*,³⁵ the efficacy of the constitutional prescription that Parliament shall have some control over delegated legislation was upheld when the courts declared null and void regulations which tried to short circuit proper procedure.

30. *Fundamentals of English Administrative Law*, London, p. 5.

31. See Allan Lewis, [1978 October] W.I.L.J. 4.

32. [1982] A.C. 43.

33. [1985] A.C. 937.

34. (1982) 6 W.I.L.J. 121.

35. H. Ct. No. 61 of 1984 (Barbados) (Unreported).

From the Bahamas, we have it on the authority of Chief Justice Telford Georges that the police may set up road blocks for the purpose of detecting crime but that they are not entitled to search "everybody who approaches the road block without reasonable belief in the guilt of that party".³⁶ It is a decision which will inevitably call for a revision of police procedures in the Caribbean.

As was held in the Trinidadian case of *Katwaroo v. Burroughs*³⁷ and the Barbadian case of *Ford v. Durant*,³⁸ withdrawal of an applicant's firearm licence without reasons is an infringement of a constitutional right, thus reversing an old common law position that a functionary need not give reasons for his decisions. This is in recognition of the new thinking that giving of reasons aids good administration. Talking about "Reasons" reminds me of what Lord Mansfield once said to his fellow judges:

"Give your decision, but never give your reasons; for your decision may well be right, but your reasons are almost certain to be wrong."

OR

As Professor A. L. Goodhart states it in a piece of advice to Lord Denning by way of comment on Lord Denning's first article submitted to the *Law Quarterly Review* in March 1944:

"When you state a proposition always give some authority for it. Your readers will not check it up. That is what Coke did. He gave authorities for everything but, if you looked them up, they were authority for nothing. He got away with it time after time."³⁹

By reciting these developments, I do not mean to say that I necessarily agree with all of them. For example, in the Trinidadian case of *Maharaj*,⁴⁰ the Privy Council established a new head of damages founded not on the principle of vicarious liability in the law of tort but in public law for the wrongful acts of the judiciary as the third arm of the state. No less an authority than Dr. Francis Alexis has hailed that remedy as a welcome development.⁴¹ For my

36. *Smith v. C.O.P. and A.G.*, H. Ct. No. 638 of 1984 (The Bahamas) (Unreported).

37. H. Ct. No. 1502 of 1980 (T & T) (Unreported).

38. H. Ct. No. 906 of 1985 (Barbados) (Unreported).

39. Quoted in Denning, *Landmarks in the Law* London, Butterworths, 1984, 173.

40. *Maharaj v. A.G.* (No. 2) [1978] 2 WLR 902 (P. C.) [1979] A.C. 385 (Lord Hailsham dissenting).

41. (1979) May W.I.L.J. 8.

part, while I welcome the opportunity for redress for any wrongdoing on the principle laid down by Holt C. J. — *Ubi Ius Ibi Remedium* — yet I am unable to share the enthusiasm of Dr. Alexis and it is with some diffidence that I suggest that that development is, in my view, suspect because, no matter how one looks at it, that development provides an avenue for a collateral attack on the independence of the judiciary.

Indeed, an important attribute of the independence of the judiciary is the common law rule that judges are not liable in tort for judicial errors committed in the course of their duties. This rule has developed ever since the year 1613, if not before. So, the words which the judge speaks, the orders which he makes, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. And the reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and freedom from fear.⁴²

Lord Diplock was at pains to distinguish this immunity from the new liability of the state based in public law in respect of the wrongful acts by the judicial arm of the state, which liability was *primary* and not *vicarious*.

Maharaj has been re-echoed in two Barbadian cases⁴³ and its tentacles seem to be spreading. The collateral threat on the judiciary is growing. Perhaps, it is timely to re-examine the full implications of *Maharaj*.

In the area of constitutional redress, Caribbean Courts seem to be in uncharted seas. I submit that it is important, however, for the development of Caribbean constitutional jurisprudence that the courts do not merely duplicate the redress provisions in the law of tort, nor should they stray beyond the limits of constitutional propriety. To do this, the courts must develop some appropriate methodology. Otherwise, we are in danger of encountering the kind of problem faced by the judge in the case of *Thomas v. A. G. of Trinidad and Tobago*⁴⁴ where a motion for a stay of execution of a death sentence was turned eventually by the learned judge into one for the review of the conviction itself! Or, in the case of *Owens and Herbert v. A.G. of Barbados*⁴⁵ where Chief Justice Denys Williams of Barbados commented:

42. *Marshalsea Case*, (1613) 10 Co. Rep. 769, *Anderson v. Gorrie* [1895] 1 Q.B. 668, *Garnett v. Ferrand* (1827) 6 B & C 611, *Sirros v. Moore* [1975] A.C. 133.

43. *DeMerieux v. A.G. of Barbados*, H. Ct. No. 734 of 1981 (Unreported), *Owen and Herbert v. A.G. of Barbados*, Civil Appeals Nos. 6 and 8 of 1988 (Unreported).

44. H. Ct. No. 6346 of 1985 1988 (Barbados) (Unreported). rted).

45. Civil Appeals Nos. 6 and 8 of Trinidad and Tobago, *Supra*, no. 40.

"I do not think that arriving at the level of compensation appropriate to a particular case can simply be a matter of division and multiplication based on an amount awarded in a previous case."

By S. 24 of the Constitution of Barbados, a victim of an infringement under the Bill of Rights is guaranteed the right to apply to a court for a remedy and the court is empowered to provide a remedy which it considers appropriate and just in the circumstances. To decide on the appropriateness or justness of the remedy, the court must inevitably draw upon its remedial experience in other areas of law but should consider such experience only as a starting point in an assessment of their appropriateness to redress constitutional wrongs and to refashion them, where necessary, to meet constitutional purposes. The Trinidadian case of *Maharaj v. A.G. of Trinidad and Tobago* illustrates that the ordinary law of tort will not necessarily protect a victim's constitutional rights.

I submit, therefore, that it is about time that courts begin to develop guidelines for the quantum of such awards, such as that laid down here in America to the effect that the amount awarded should neither be so small as to trivialise the right nor so large as to provide a windfall.⁴⁷

Again, the recent case of *Re Bain*⁴⁸ from Trinidad and Tobago holds that because an ouster clause is said to protect a public functionary in the performance of his functions, the court is disabled from reviewing the manner of its exercise. This, on the face of it, disturbs me because today, public law has developed a new forensic approach to ouster clauses, whereby the infringement of any of the known heads of legal propriety would effectively disable an ouster clause from protecting the authority in question.

For the longest while, the attitude of Caribbean courts to the problem of standing has been a jaundiced one.⁴⁹ Caribbean courts have enforced strictly the law which says that an individual has no right to bring an action in court to litigate a matter of general public interest. He has to establish his locus standi by proving that he has sufficient relevant interest in the matter. I submit that perhaps today the law is changing in favour of the individual. In his book *The Discipline of Law*⁵⁰ Lord Denning says:

47. *Piphus v. Carey*, 545, f. 2nd 30 at 32 (7th Cir. 1976) revd., 435 U.S. 247 (1978).

48. H. Ct. No. 3260 of 1987 (Trinidad and Tobago) (Unreported).

49. See, e.g., *Re Herbert Blaize*, H. Ct. No. 19 of 1972 (Grenada) *Gordon v. Ministry of Finance*, (1968) 12 WIR 416, *Home Industries Ass. v. Govt. of Grenada*, (1969) 14 W.I.R. 412.

50. Denning. *The Discipline of Law*, London, Butterworths 1979, p. 144.

"I must confess that whenever an ordinary citizen comes to the Court of Appeal and complains that this or that government department — or this or that local authority — or this or that Trade Union — is abusing or misusing its power — I always like to hear what he has to say."

He concludes:

"When [the ordinary] citizen has a point which affects the rights and benefits of all citizens, then I would hope that he would be heard: for there is no other person or body to whom he can appeal."

But this is, of course, not the law at present.

On this issue, I take some comfort from Canadian jurisprudence where the argument has been made that

"... the dividing line between public and private has been repeatedly challenged as an unsure border. And with standing, there are also no clear lines: again, public and private are not separate words but a challenging blend ..."

The argument goes on: The lesson for the law at the close of the twentieth century must surely be that it cannot only concern itself with means and exclude ends if it seeks to lay claim to justice. Ends now are more than just economic quests and the struggle for individual liberty, as important as these are. Significant areas of the law, such as occupational health and safety, workers' compensation, products liability, consumer protection and landlord and tenant legislation show how self-determination and altruism are competing ideologies which yield differing substantive legal results, depending upon the context. Even more tentative and abstract values such as quiet, health, access to nature and the environment, a sense of individuality and a sense of position in social organisations impress themselves upon our individual and collective consciousness and, in turn, upon the law ... liberalised standing, no longer tied to traditional legal interests, will allow developing interests a voice of their own in the discussion about the appropriate solution to the problem at hand. Deciding which of these interests should be recognised in any particular circumstance will not be easy. What is essential is that they not be turned aside only because they appear very different in form and in substance from those long cherished by the law.⁵¹

51. W. Bogart, *Standing and the Charter: Rights and Identity*, Ch. 1 in *Charter Litigation*, (Robert J. Sharpe (ed.)). Toronto and Vancouver: Butterworths, 1986.

In Caribbean constitutional law, then, the frontiers established by landmark cases like *Collymore*, *Thornhill*, *Reynolds* and *Maharaj* —⁵² to mention only a few — are being pushed aside by new and intriguing decisions — some for better, others for worse. For, how else can one describe the judgement in *Sokhoo v A.G. of Trinidad and Tobago*⁵³ to the effect that the Chief Justice of Trinidad was not, after all, a Chief Justice when he attained the age of retirement, despite the extension of his office by the Governor-General? *Rambachan* sought to introduce the state action theory into Caribbean constitutional law jurisprudence but thus far there has been no known or marked enthusiasm to embrace it. And now the judges say that they are the moral conscience of the society, not mere robots, but crusaders.⁵⁴ Is this crusading spirit not in danger of conflicting with the very doctrine of the separation of powers, so fundamentally entrenched in the Westminster constitutions; that is, if the Jamaican case of *Hinds* is to be accepted? Mr. Chairman, Ladies and Gentlemen,

In this short presentation I have tried to paint a very broad picture of stability and change in Caribbean Constitutional Law.

In part, I have tried to raise some provocative issues. Though there is a lot that it is impossible for me to deal with in the time frame allotted, I wish to make some general concluding remarks:

- (a) The experience of the wider Commonwealth shows that the adoption of the Westminster model at independence has proved to be more than a transitional stage in the constitutional development and the experience of the Caribbean seems to represent history repeating itself;
- (b) Experience has also shown that constitutional flexibility is generally desirable: the strongest constitutions are usually those which impose the lightest controls upon the processes for their own amendment;
- (c) As regard the monarchies, the constitutions vest executive authority in Her Majesty the Queen and provide for its exercise by the Governors-General who represent her but, with little further eluci-

52. *Collymore v. A.G.*, Supra, n. 25.

Thornhill v. A.G. [1980] 2 WLR 511.

A.G. of Trinidad and Tobago v. Reynolds [1980] A.C. 637 A.G.

Maharaj v. A.G. of Trinidad and Tobago, Supra, n. 40.

53. H. Ct. No. 1292 of 1985 (Trinidad and Tobago) (Unreported), revd. C.A. No. 144 of 1985, affirmed Privy Council Appeal No. 37 of 1985.

54. H. Ct. No. 4789 of 1982 (Trinidad and Tobago) (Unreported).

dation of their respective functions in the constitutions. The respective roles of Her Majesty and the Governors-General rest upon implied undertakings or conventions which may not always work effectively [vide Grenada, Fiji];

- (d) Armed with a justiciable Declaration of Rights, an alert and independent judiciary is the most effective bastion against executive encroachment on individual rights and freedoms, buttressed by fearless public opinion.

After 25 years in Jamaica, and 21 years in Barbados, Caribbean courts have come of age and must begin to gather together the practices, customs, precepts and habits which have been learnt – in short, to build their own convention, because, it is to these conventions that I would ascribe the therapy for harnessing stability and change in Caribbean constitutions in the next several decades to come.

The conclusion that Caribbean Constitutions are essentially the same is one that comparative lawyers often like to draw, but while it is true that certain common features will be found whenever and wherever judges try to resolve disputes in a rational manner, it is nevertheless undeniable that important differences of style and atmosphere emerge when one compares the constitutional law of, say, Barbados with that of Jamaica or Trinidad and Tobago. So the fact that all Caribbean Constitutions are written and have Bills of Rights and provide for the judicial review of legislation hides a lot of subtle differences among them.

In this very brief excursus, I have tried to give you a blend of the historical, the analytical and the applied.

It has been said by one writer in Constitutional Law that "Constitutional Jurisprudence in Australia illustrates the influence of legalism without imagination; that of the US illustrates imagination untrammelled by legalism. Canada by contrast offers an ideal, a body of law displaying neither imagination nor legalism".

My ideal for Caribbean Constitutional Law is to develop constitutional jurisprudence that is fuelled and buttressed by bold imagination and humanistic legalism in a proper and harmonious balance.

55. See a classic example in *Rambachan v. T.T.T.*, *Supra*, n. 54.

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