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**SPEECH BY THE RT. HON. LORD LEONARD HOFFMANN
AT THE ANNUAL DINNER OF THE
LAW ASSOCIATION OF TRINIDAD AND TOBAGO
HILTON HOTEL AND CONVENTION CENTRE
FRIDAY 10TH OCTOBER 2003.**

1. Mr. President, it is a great privilege to have the opportunity to address you and your colleagues of the Law Association of Trinidad and Tobago tonight. These are momentous times for the legal systems of both our countries. Both are engaged in the process of establishing new courts of final appeals at the very apex of their judicial hierarchies. The Privy Council is to be replaced by a Caribbean Court of Appeal in Trinidad and the House of Lords by a Supreme Court in London. So this is a good moment to reflect upon the functions of a court of final appeal in a democratic society and to consider whether the new courts will be able to discharge these functions better than the old. I must emphasise that what I shall say represent only my own opinion. I do not know what my colleagues think and I know there are people here who will not agree. It is a contribution to the debate.
2. The main function of a court of final appeal is not to decide individual cases but to interpret the law. Of course it can only hear appeals in individual cases but most courts of final appeal regard their primary function as being to settle questions of law of general public importance. And by far the most important questions of law are those which concern the interpretation of the constitution. The interpretation of other laws is provisional because Parliament can change them. But section 2 of the Constitution says that it is the supreme law of Trinidad and Tobago. The court's interpretation of the constitution is binding upon Parliament and the Government. It can be changed only by constitutional amendment.

3. The interpretation which a final court of appeal gives to a constitution can therefore have far-reaching effects upon the people of the country which it serves. It can change their lives for better or for worse. This is particularly true of the parts of the Constitution which deal with human rights. Both our countries attach great importance to human rights. The very first paragraph of the preamble to the Trinidad and Tobago Constitution says that the nation is founded upon principles that acknowledge faith in fundamental human rights and freedoms, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator. In the United Kingdom, the Human Rights Act forms an important part of our partly written, partly unwritten constitution. We do not expressly say that it is supreme law, but for practical purposes it is. And in both our countries it is the function of the courts to give effect to the rights entrenched in the constitution. We, the courts, are the independent third branch of government and it is our function to declare the limits of the legal powers of the other two branches of government. It is our duty to protect the rights of the citizen against the powers of the legislature and the executive.

4. The interpretation of a constitution, and particularly its provisions on human rights, is not an easy matter. They are necessarily expressed in very broad and abstract terms. They have to be reconciled with the needs of safety, law and order. They have to be reconciled with each other. Liberty is a good thing but if you allow too much liberty, the strong will oppress the weak and there will be no equality. Equality is a good thing but you cannot have perfect equality without destroying liberty. And so on. ^{Compromise} ~~Comprises~~ have to be made and there are no perfect answers.

5. Decisions on how to reconcile statements of human rights with the rights of other people and the practical needs of government are the regular

business of a court of final appeal in a democracy. These decisions cannot be made on abstract philosophical grounds. They must reflect the practical needs and the values of the society which the court serves. It is often said that human rights are universal. We are all human beings and should therefore have the same rights. But this is a fallacy. In their abstract statement on the page, human rights in the constitutions of most democratic states are fairly similar. They all guarantee freedom of speech and religion, immunity from torture, the right to a fair trial and so on. But when it comes to their practical application to real human beings, they are not at all the same. Different societies have different compromises. In the United States, for example to prohibit press comment on a forthcoming criminal trial is an infringement of the freedom of the press in the First Amendment. In Trinidad and Tobago and the United Kingdom, to allow such comment is an infringement of the right to a fair trial in the Constitution and the Human Rights Act.

6. Human rights in their practical and important sense are therefore national, not universal. And that is what makes it so important that the final court of appeal which interprets human rights within a particular society should be part of that society. The court is the third branch of government and must have the same democratic legitimacy as the other two branches of government. The legislature and the executive gain their legitimacy from being elected by the people. The judiciary, on the other hand, are and should be independent, not elected. But they have a different kind of legitimacy, which comes from being accepted by the nation as interpreters of the law. And to be accepted by the nation they should be part of the nation, representative of the community, sharing its values and its history.

7. A final court needs such legitimacy because its decisions are often electorally unpopular. Most people are in favour of human rights for

themselves but are willing to make exceptions for unpopular minorities. It is the duty of the courts to uphold the rights of such minorities, whose votes are not worth the attention of politicians and who are viewed with distaste or suspicion by the general public. Furthermore, human rights cost money. If one says, as many countries do, that one cannot have a fair trial without legal representation and that an accused who cannot afford to pay himself should be provided with a competent lawyer by the state, that costs money. If one says, as many countries do, that the right not to be subjected to cruel treatment or punishment means that prisoners should not be kept in degrading conditions, that costs money. And most people think that the state should do other things with its money. Those in prison or on trial for criminal offences are mostly criminals and are not popular. The public would rather that the state provided better housing, hospitals and protection against crime. So a court which considers that everyone should have a right to a fair trial and that even convicted prisoners should be treated like human beings needs legitimacy if it is going to do anything about it. It must be able to draw upon reserves of goodwill from the community, so that those who disagree nevertheless, as law-abiding citizens, accept the court's decision as the law.

8. I was born and brought up in South Africa, in the colonial and apartheid years. Last week I attended a conference there to celebrate, among other things, the tenth anniversary of its democratic constitution and the establishment of its Constitutional Court. I found it moving to witness the evident pride which the people of South Africa have in their constitution, their democratic institutions and their court. The court is representative of the people of South Africa. Its members, as well as being respected lawyers, are diverse in race, sex and experience. They have set themselves to interpret the constitution to reflect the

values and aspirations of the nation. They are part of the transformation of South Africa into a truly democratic society after the years of apartheid.

9. In reading the debate in Trinidad and Tobago on the creation of the Caribbean Court of Appeal, I have seen a number of arguments advanced in support. It is said that such a court would be cheaper than going to London. It is said that having your own court is more in accordance with the dignity of an independent nation, like having your own flag or national anthem. It is said that such a court would be less protective than the Privy Council of the rights of condemned prisoners, although as no judges have yet been appointed, there seems little evidence to support such a belief. But all these arguments trivialise the importance of a final court, which is not a matter of saving airfares, or symbolism, or rulings on a single issue which generates far more passion than rational debate. The court does not merely provide technical legal services which can be contracted out at a greater or lesser expense. It is an integral part of the way the nation is governed.

10. It is an extraordinary fact that for nearly nine years I have been a member of the final court of appeal for the independent Republic of Trinidad and Tobago, a confident democracy with its own culture and national values, and this is the first time that I have set foot upon the islands. No one unaware of the historic links between the islands and the United Kingdom would believe it possible. Although the Privy Council has done its best to serve the Caribbean and, I venture to think, has done much to improve the administration of justice in parallel with improvements in the United Kingdom, our remoteness from the community has been a handicap. We have been necessarily cautious in doing anything which might be seen as inappropriate in local conditions and although this caution may have occasionally saved us from

doing the wrong thing, I am sure it has also sometimes inhibited us from doing the right thing.

11. The ability of a final court to function as a third branch of government depends not only upon its legitimacy but upon the sensitivity of its members to what is both necessary and possible. The famous decision of the United States Supreme Court outlawing school segregation had immense political importance. The court was able to take that step because of its awareness that changes in social attitudes after the Second World War made it essential and that political deadlock made it impossible for the other two branches of government to act. So, for example, if the question arose whether the resources devoted by a Caribbean State to legal aid were sufficient to satisfy the minimum requirements of a fair trial, all the resources devoted to prisons were sufficient to maintain civilised standards, it would be very difficult for the Privy Council in London to express a view. They would have no knowledge of the consequences of their decision one way or the other. It is only a local court which would have the necessary knowledge and legitimacy to say, if it thought so, that the Constitution required more to be done.

12. I do not underestimate the difficulty of creating a final court for the various Caribbean communities. But I think that States which have so much in common in their history and values, which can even play cricket together, should be able to do so. We in London will do what we can to help as we would if in the end you decided to continue the present system. But my own view is that a court of your own is necessary if you are going to have the full benefit of what a final court can do to transform society in partnership with the other two branches of government.

13. Mr. President, I congratulate the people of Trinidad and Tobago on their new court. It is an historic decision which completes your independence. But it places a great responsibility upon those who choose the judges and upon the judges themselves in the discharge of their constitutional duties. But besides being a responsibility, it is an opportunity. An opportunity to play a vital part in making Trinidad and Tobago and the other islands which share their culture and values into the kind of democracies in which you wish to live.