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THE BASIS OF JUDICIAL REVIEW OF LEGISLATION IN THE NEW COMMONWEALTH AND THE UNITED STATES OF AMERICA: A COMPARATIVE ANALYSIS*

FRANCIS R. ALEXIS**

INTRODUCTION

Reflecting on judicial review of legislation, Professor William W. Van Alstyne writes that

The controversies which have surrounded the exercise of this power by the Supreme Court require a periodic reexamination of the concept of judicial review at its source, the *MARBURY* decision.¹

This article would like to adopt those words and adapt them to its own context. But a qualification is advisable, and it is that the source of judicial review lies, not really in any one decision, however momentous it might be, but in the Constitutions themselves. With that caveat, one can say that the cruciality of judicial review requires a periodic reexamination of its basis. That basis, existing in the Constitutions, may also derive from other sources. This article confines itself to a textual analysis of the Constitutions, not because it fails to appreciate the value of the historical approach, but because, ultimately, it is what the framers put into the Constitutions that matter most.

*Nine of the New Commonwealth independent countries have been selected, five of which, the Bahamas, Jamaica, Barbados, Grenada and Trinidad and Tobago are monarchies; the other four, Guyana, Sierra Leone, Sri Lanka, and India are, like the U.S.A., republics. Moreover, India, like the U.S.A., is a Federal State, and the others unitary. This selection represents a broad cross-section of the New Commonwealth.

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For the production of this article, which is based on a chapter of my LL.M. thesis now being written, I relied greatly on the inspiration and encouragement of my supervisor, Prof. A. R. Carnegie, B.A. (Lond.-U.C.W.I.), M.A. (Oxon.), Dean of the Faculty of Law, U.W.I., formerly Fellow of Jesus College, Oxford. I am also heavily indebted to Mr. M. C. Okpaluba, LL.B., LL.M. (Lond.), LL.M. (Tor.), a fellow Lecturer in the Faculty of Law, U.W.I.

Judicial review of legislation assumes the existence of supreme or fundamental law constituting a yardstick by which other laws are measured for their validity. The Constitutions of the New Commonwealth² and the United States of America are of this nature. This article posits that the Supreme Courts³ of these countries do have the power, the duty, to pronounce laws enacted by these Legislatures to be inconsistent with or repugnant to the various Constitutions, and so, void, subject to provisions in the Constitution to the contrary.

THE SUPREME LAW CLAUSE

Most of these Constitutions themselves, by express command, render void such laws as are inconsistent with the Constitutions. Having declared themselves to be "the supreme law" of the land, they then lay down that

if any other law is inconsistent with the Constitutions, this Constitution shall prevail, and the other law shall, to the extent of the inconsistency, be void;

or that, as in the U.S.A.,

the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.⁴

Where no such express provision appears, as in Trinidad and Tobago, Sierra Leone, and Sri Lanka, it is well to bear in mind S.A. de Smith's view that the principle of the supremacy of the Constitution "does not strictly need to be expressly stated."⁵ For as the Supreme Court of the United States, through MARSHALL, C.J., put it in *MARBURY v. MADISON*,⁶ "essentially attached" to written constitutions being fundamental law, is the principle that laws inconsistent therewith are void, that is what the theory of every such government "must be,"⁷ subject to express provisions in the Constitution to the contrary.

It is true that the supreme law clause of the New Commonwealth Constitutions does not expressly speak to Judges in the way that the one in the American Constitution does, but these Constitutions explicitly set out the principle on which *MARBURY v. MADISON* was rested,⁸ which principle does not so appear in the American Constitution.

A not insignificant circumstance of these Constitutions being supreme law is that these legislatures cannot be said to be sovereign in the way that term is used in the classical Diceyan teaching on the doctrine of United Kingdom parliamentary sovereignty,⁹ in whatever other sense they might be sovereign,¹⁰ for an essential trait of such a legislature is that there is "no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional."¹¹ This means that the case against judicial review of legislation based on the existence of such a legislature¹² has no place in the jurisprudence of these countries.

CONSTITUTIONS CONTROL LEGISLATURES

ORDINARY LAWS

Where a Constitution is a body of supreme law whence state agencies derive their authority, the power of the legislature, being a state agency,¹³ must be "subject to the provisions of the Constitution." This principle, too, essentially inheres in a written Constitution. Some Constitutions may state it expressly, as most of those under review do, others may not;¹⁴ it is all the same.¹⁵ And, as WOODING, C.J., said in the Trinidadian case *COLLYMORE v. A.G. (TRINIDAD AND TOBAGO)*,¹⁶ the section saying so "means what it says. And what it says, and says very clearly, is that the power and authority of Parliament to make laws are subject to its [the Constitution's] provisions."¹⁷

In other words, even in making ordinary laws, as LORD PEARCE, speaking for the Privy Council in *BRIBERY COMR. v. RANASINGHE*¹⁸ put it, "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law."¹⁹

And many are these conditions of law-making, these restrictions on the power of these legislatures, which underline the subordination of these legislatures to the Constitutions²⁰ and at the same time strongly suggest the existence of judicial review.

ALTERATION OF THE CONSTITUTIONS

Laws altering the Constitutions are not ordinary laws. However, the requirements for constitutional alteration do represent serious restrictions

on the power of these legislatures. Undoubtedly all these legislatures may alter any and all of the provisions of the Constitutions,²¹ but apart from a few provisions in the Bahamas and the Trinidad and Tobago Constitutions, all the provisions of these Constitutions are entrenched, at varying levels, some alterations requiring in some countries majority votes of the electors in referenda, in others ratification by states' legislatures, and in one of them a dissolution of Parliament between successive sessions of Parliament.²²

This means that these legislatures are unable to meet yet another of the three traits of Dicey's sovereign legislature, which is that "fundamental or so-called constitutional laws are . . . changed by the same body and in the same manner as other laws, namely, by Parliament acting in its ordinary legislative character."²³

Now this is crucial, "the traditional answer denying judicial review was to a large extent dependent on the traditional view of the sovereignty of Parliament. If that view be not accepted, views on judicial review are affected."²⁴ Certainly, the third trait of Dicey's sovereign legislature, that there cannot be "any person or body of persons, executive, legislative or judicial, which can pronounce void any enactment passed by . . . Parliament on the ground of such enactment being opposed to the constitution, or on any ground whatever,"²⁵ seems to depend on the presence of the other two traits. For if there is no limit to the power of a legislature, and there is no yardstick against which the validity of its laws may be measured, judicial review must be out of context.

BILLS OF RIGHTS

No doubt the weightiest set of restrictions on the power of these legislatures in making ordinary laws is to be found in the Bills of Rights entrenched into these Constitutions, all guaranteeing persons the right to life, liberty, security of the person, enjoyment of property, protection of the law, freedom of conscience, expression, assembly and association, respect for private and family life, and freedom from unfair discrimination.²⁶

Legislature Expressly Spoken To

That some of the Bills of Rights provisions are express orders to the legislatures to do or not to do certain things in the interest of the individual is not open to doubt. Thus, the case of a person charged with a criminal offence, is to be heard by "an independent and impartial court established

by law.”²⁷ Similarly, any court or other adjudicating authority which determines the existence or extent of any civil right or obligation “shall be established by law and shall be independent and impartial.”²⁸ Of course, the right to have one’s case determined by an “independent and impartial” tribunal inheres in “equal protection of the laws”²⁹ as it does in “due process of law.”³⁰ Still controlling positively the contents of laws, the Constitutions lay down that if private property is to be compulsorily acquired, the legislatures must make laws providing for prompt and adequate, or just compensation, or prescribing the principles on which and the manner in which compensation is to be determined, and, in most countries, giving any person having an interest in or a right over the property a right of access to the Supreme Court for determining the amount of compensation to which he is entitled.³¹

Then the Constitutions control negatively the contents of legislation. They lay down that “no law shall make any provision which is discriminatory either of itself or in its effect,”³² for all are entitled to the “equal protection of the law.”³³ So too, the U.S. Congress is to make “no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.”³⁴ Likewise, having set out rights and freedoms in section one, the Trinidad and Tobago Constitution, then ordains in section two that

no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall

do many things, including the imposition of cruel and unusual treatment or punishment, and the depriving a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.³⁵

In fact, those provisions in section two constitute one of the two sets of provisions on which the Trinidad and Tobago Court of Appeal based judicial review in *COLLYMORE v. A.G.*, (*TRINIDAD AND TOBAGO*). There, the Industrial Stabilisation Act, 1965,³⁶ was alleged, unsuccessfully, to have contravened the Constitution.³⁷ To the extent that the validity of the Act was vindicated, what was said about judicial review was strictly obiter.³⁸ Nevertheless, the Court unanimously dealt with the matter, maybe because it felt that the opportunity for asserting the doctrine was too propitious to be lost.³⁹

Wooding, C.J., took the view that section two of the Trinidad and Tobago Constitution is, not a rule of construction, as he understood section two of the Canadian Bill of Rights to be,⁴⁰ but an act of limitation; and, on that foundation, said:

I am accordingly in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is ultra vires and therefore void and of no effect because it abrogates, abridges or infringes or authorises the abrogation, abridgement or infringement of one or more of the rights and freedoms recognised and declared by S.1. of the chapter. I so, hold.⁴¹

Whatever doubts PHILLIPS, J.A., had of the true interpretation of the Canadian provisions,⁴² it seemed to him that the imperative provisions of S.2. of the Trinidadian Constitution exclude their being understood otherwise than as invalidating any law which offends against the prohibitions. Continuing, the learned Justice of Appeal said:

When once this proposition is accepted, it appears to me to be obvious that even without express provision a power of judicial review of Parliamentary legislation must reside in the Supreme Court of this country.⁴³

FRASER, J.A., also looked to S.2. for a conferment of the power of judicial review on the Court.⁴⁴

Legislature Impliedly Spoken To

Then other provisions of the Bills of Rights simply define infringement without excluding infringement by the legislatures. Such is the stipulation that no one shall be deprived intentionally of his life save in pursuance of a court sentence in respect of a criminal offence of which he has been convicted.⁴⁵ This means that Parliament cannot violate the provision by legislating, for example, that persons may be deprived of their lives for criminal offences of which they have been accused even if they have not been convicted, or by legislating that persons may be deprived of their lives for civil offences.

That reasoning is applicable to many other Bills of Rights provisions. Take, for example, those laying down that no person shall be subjected to torture, or inhuman, or degrading, or cruel and unusual punishment or

other treatment;⁴⁶ that no person shall be subjected to the search of his person or his property or the entry by others on his premises;⁴⁷ and that no person shall be hindered in the enjoyment of his freedom of conscience, expression, or peaceful assembly and association.⁴⁸

Natural Justice Now Governs The Legislatures

Whether a decision has been reached in disregard of the rules of Natural Justice — the common law doctrine that where a judicial or quasi-judicial administrative, as distinct from legislative, decision prejudicially affects the liberty or property of a person, he has a right to be heard fairly before such decision is reached, and by an unbiased and impartial tribunal — is undoubtedly a matter over which the courts have jurisdiction.⁴⁹ If, then, those rules are extended to cover legislative action, surely, barring express provision to the contrary, the courts would have jurisdiction in this regard also. This is exactly the situation in these countries.

Short of amending the Constitutions, these legislatures cannot deny the individual the right to be afforded, in criminal trials, "a fair hearing within a reasonable time" by an "independent and impartial court",⁵⁰ the right to be given early notification of the nature of the alleged offence, adequate time and facilities for preparing his defence, and the right to be afforded facilities for calling one's own witnesses and examining those called by the prosecution.⁵¹ So, too, these legislatures are not to deny persons the right to have matters touching their civil rights or obligations decided by an "independent and impartial" court or other adjudicating tribunal and be given "a fair hearing within a reasonable time."⁵²

Enveloping these rules is the concept which has been described by FRANKFURTER, J., in the American case *ADAMSON v. CALIFORNIA*⁵³ as embracing "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offences."⁵⁴ He was speaking of the concept of "due process of law,"⁵⁵ however unfixed that concept may be.⁵⁶

In these countries, then, these rules do not constitute a mere constitutional convention, as they do in the United Kingdom and South Africa.⁵⁷ Rather they represent laws of the Constitution binding the legislatures fully. And just as the Courts guard the rules in relation to administrative action at common law so too they guard them in relation to legislative action under the Constitutions in the absence of express provision to the contrary.

Enforcement of Bills of Rights

So, coupling the general supremacy of these Constitutions with the specifics of the Bills of Rights, it is not easy to resist the conviction of PHILLIPS, J.A., quoted above, that it is obvious that even without express provision a power of judicial review exists,⁵⁸ in the absence, one might add, of a clear directive from the Constitutions to the contrary.

The framers of the Republican Sri Lanka Constitution appreciated the force of this submission. They did not want it to apply to their Constitution for one reason or another⁵⁹ so they expressly stipulated that

No institution administering justice and likewise no other institution, person or authority shall have the power or jurisdiction to inquire into, pronounce upon or in any manner call in question the validity of any law of the National State Assembly.⁶⁰

They created a Constitutional Court and set out to give it exclusive power to pass on whether a Bill, not an Act, is inconsistent with the Constitution,⁶¹ and provided further that the decision of the Constitutional Court "shall be conclusive for all purposes" and that no institution administering justice shall inquire into, pronounce upon or in any manner call in question a decision of the Constitutional Court.⁶²

Far from a similar provision appearing in the other Constitutions to rebut the presumption of reviewability raised by the circumstances considered above, in all except the American Constitution, is an unambiguous directive to the Supreme Court to entertain, hear, and determine any application by any person that any of the Bill of Rights provisions has been contravened, actually or threatened, in relation to him, thus buttressing formidably the case for judicial review. With slight variations in wording, they all ordain that

(1) If any person alleges that any of [the provisions of the Bill of Rights] of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

Then comes the straightforward and unequivocal directive to the Supreme Court:

(2) The Supreme Court shall have original jurisdiction —

- (a) to hear and determine any application made by any person in pursuance of paragraph/subsection (1) of this Article/Section;

- (b) . . .

and may make such 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 [the Bill of Rights] to the protection of which the person concerned is entitled.⁶³

No wonder then that, in relation thereto, PHILLIPS, J. A., of Trinidad and Tobago having stated that the power of judicial review, given the various limitations imposed by these Constitutions on these legislatures, does not need to be expressly stated, added this:

Actually, however, the position is put beyond doubt by the express terms of [the enforcement provision just quoted]⁶⁴

Notably, from such determinations guaranteed appeals lie "as of right" sometimes to the highest court of the legal system,⁶⁵ other times not to the highest but certainly to a court higher than the Supreme Court.⁶⁶

The corresponding Indian provision is that

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition quo warranto, and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.⁶⁷

In the Indian case *STATE OF MADRAS v. V. G. ROW*,⁶⁸ SHASTRI, C. J., said that the Constitution of India "makes express provision for judicial review of legislation."⁶⁹ The learned Chief Justice did not identify the provisions on which he was resting. If he was thinking of those just quoted, one should say that the better view is that of PHILLIPS, J. A., of Trinidad and Tobago, that these provisions put the matter "beyond doubt," which is not the same thing as saying that they make "express provision for judicial review."

They put the matter "beyond doubt" because they do not exclude any particular kind of contravention of the Bill of Rights from occasioning an application by a person and a hearing and determination by the Supreme Court. And it is a commonplace of constitutional law that, as BOSE, J., of the Supreme Court of India put it in *DWARKADAS SHRINIVAS OF BOMBAY v. THE SHOLARPUR SPINNING AND WEAVING CO. LTD.*,⁷⁰

[T]he provisions in the Constitution touching fundamental rights must be construed broadly and liberally in favour of those on whom the rights have been conferred⁷¹

A generous and liberal construction being appropriate to these Bills of Rights, it is all the same whether they are infringed by legislative action or by any other kind of action.⁷²

Nothing in the Constitutions, in logic, or in reason, warrants reading into the sections a clause excepting infringement of the rights by Acts of the legislatures from the generality thereof. On the contrary, the imperatives of a written constitution demand that the provisions be interpreted in the full plenitude of their meaning, which entails that legislative violations fall within the mischiefs they seek to cure.⁷³

So one is not surprised to find that the Courts see in these provisions a commission to them to review parliamentary legislation and to declare it inconsistent with the Constitution in a proper case. This was the second set of provisions on which the Trinidad and Tobago Court of Appeal relied in the *COLLYMORE* case for asserting its power of judicial review.⁷⁴ WOODING, C.J., said that under the facility of these provisions the appellants "are in my opinion entitled to the right to proceed,"⁷⁵ while, as seen above, PHILLIPS, J. A., saw these provisions as putting the actuality of judicial review "beyond doubt."⁷⁶ Urged by the learned Attorney General to hold that the doctrine of ultra vires was not applicable to the instant case FRASER, J. A., replied:

Having regard to the provisions [being discussed] it is difficult to understand this submission. By that section any person may apply to the High Court for relief against the operation of any law which may offend against the provisions of S.2 of the Constitution. There is no doubt in my mind about this.

Continued the learned Justice of Appeal,

and the conjoint effect of ss.2 and 6⁷⁷ of the Constitution is to confer upon the High Court the function of judicial review over such

legislative measures as may be taken in contravention of the expressed provisions of [the Bill of Rights]⁷⁸

As in the COLLYMORE case, so too in the Guyanese case *JAUNDOO v. A. G. (GUYANA)*⁷⁹ what was said on judicial review of legislation was strictly obiter,⁸⁰ but once again, the question of the violation of the Bill of Rights having arisen, the opportunity was too golden to let slip.⁸¹ STOBY, C., assumed the existence of judicial review.⁸² LUCKHOOD, J.A., said that a failure to comply with the Bill of Rights "be it on the part of Government or otherwise" creates a legal right to apply for a legal remedy to protect, safeguard and enforce the wronged provisions, and that "[w]ithin the confines of art. 19⁸³ lies the responsibility for this most exacting task."⁸⁴ It was based on this article, 19, that he declared:

[T]he court is the custodian and guardian of the Constitution, seeking as it must at all times to prevent encroachment on or violation of the rights, to the depths of its power, be it against Government or legislature.⁸⁵

In short, "the Constitution recognises contraventions, however arising,"⁸⁶ said the learned Justice of Appeal.

It was based on art. 19 that CUMMINGS, J. A., having observed that prior to the commencement of the Constitution the avoidance of inroads into rights declared by the Constitution as fundamental rights against legislative invasion was an extra-judicial matter, went on to say that with the commissioning of the Constitutions:

[R]emedies in the nature of the prerogative writs for the curb of executive violation were now to appear with regard to legislative violation by virtue of the court's new jurisdiction to make 'such orders', give 'such directions' as it 'may consider appropriate for the purpose of the enforcement of any of the provisions' relating to fundamental rights.⁸⁷

The learned Justice of Appeal added that the provision contemplates the immediate alerting of the Court to a threatened or actual violation of a fundamental right and the Court's immediate reaction as being "Now, whoever or whatever you are, show cause why!"⁸⁸ He ended his judgment and the case on a very appropriate note, in this way:

No doubt art. 19 of the Constitution casts upon the court a heavy responsibility and a difficult task, but this does not justify judicial abdication. 'Fear must not lend wings to our feet.'⁸⁹

Just as the Trinidad and Tobago, Sierra Leone, and Sri Lanka Constitutions, the Associated States⁹⁰ Constitutions⁹¹ do not have a supreme law clause, but they state the power of the legislatures in the same way that most of the independent states do;⁹² they too have all their provisions entrenched;⁹³ they also contain Bills of Rights,⁹⁴ buttressed by enforcement provisions in virtually the identical phraseology of the independence Constitutions.⁹⁵ The consequence is that although, as Urias Forbes observed, the Associated States Constitutions "do not anywhere explicitly give the Supreme Court jurisdiction to review substantive legislation and to pronounce upon the vires of such legislation," yet, as he rejoined, "this jurisdiction is not explicitly withheld from the Court."⁹⁶ Rather, the relevant provisions are wide enough to recognise contraventions, as LUCKHOO, J. A., put it in the JAUNDOO case, "however rising."⁹⁷

Admittedly, the enforcement provisions do not specifically refer to Acts of Parliament. But for that matter they do not single out any given kind of contravention. Surely, however, it could not be asserted on that ground that no kind of contravention is included. The better view is that they frown upon all contraventions "however arising," the view which the Supreme Court of the Associated States⁹⁸ takes of the matter.⁹⁹

Why Shield Legislation?

The express shielding by the framers of the contents of some kinds of legislation from being held inconsistent with the Constitutions, surely, makes sense only if the above analysis is accurate. The provision that no person shall be subjected to torture or inhuman or degrading or cruel and unusual punishment or treatment has as its proviso that

Nothing *contained in* or done under the authority of *any law* shall be *held* to be inconsistent with or in contravention of this article/section to the extent that *the law* in question authorises the infliction of any description of punishment that was lawful . . . immediately before [Independence Day]¹⁰⁰ (emphasis added).

The language of that, and other provisos of its kind,¹⁰¹ is interesting in that its reference to nothing in a law being "held" inconsistent with the Constitution very much suggests the decision of some tribunal. If no other tribunal is named in the Constitutions, as is the case in all of them, Sri Lanka apart, it must be a court decision which has been contemplated. Another thing is that these provisos patently seek to immunise from being held inconsistent with the Constitutions the substance of legislation itself, speaking as they do of things "*contained in* . . .

any law" and the law in question," which is to be distinguished from references therein to things "done under" the law.

The more commonplace kind of exception clause lays down that "nothing *contained in* or done under the authority of *any law*" shall be "held" inconsistent with or in contravention of the Constitution to the extent that "the law in question" is reasonably required in the interest of defence, public safety, public morality public health; or for the purpose of protecting the rights and freedoms of other persons; or for preventing or detecting crime. This is the proviso which qualifies provisions protecting persons against forced searches of person or property or forced entry on premises;¹⁰² provisions protecting freedom of conscience, expression, assembly and association, and movement;¹⁰³ provisions ensuring freedom from discrimination on the grounds of race, colour, creed, political opinions, and place of origin;¹⁰⁴ and provisions ensuring freedom from deprivation of property.¹⁰⁵

These exceptions all lead inexorably to the conclusion, as a matter of law and logic, that anything contained in any "law," which term includes "any instrument having the force of law" as defined by the Constitutions themselves,¹⁰⁶ which exceeds the limits allowed by the provisos shall be "held" inconsistent with the Constitutions by the Supreme Court.

In Trinidad and Tobago, there are three general exception clauses, one relating to laws adapting or modifying existing laws; another to Acts passed during a period of public emergency except insofar as their provisions are shown not to be reasonably justifiable for dealing with the emergency; and thirdly, Special Acts passed by not less than three-fifths of all the members of each House of Parliament except insofar as their provisions are shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.¹⁰⁷ In relation to the latter two exceptions, the Constitution Commission of that Country¹⁰⁸ had this to say:

It would be for the Courts to decide whether the provisions of any such law passed in a period of public emergency are not reasonably justifiable for dealing with the existing situation. Likewise, it would be for the Courts to decide whether the provisions of any law passed at any time by the required majority are not reasonably justifiable in a society with a proper respect for the rights and freedoms of the individual.¹⁰⁹

NON-BILL OF RIGHTS PROVISIONS.

It will have been observed that in considering the case for judicial review of legislation covering the Bills of Rights, no one set of provisions was looked at as the touchstone to judicial review, not even the enforcement provisions, although these admittedly go a long way towards cementing the case for judicial review. But they are not indispensable to the case. After all, there are no such provisions in the U. S. Constitution. Focus was put on the totality of the provisions, some of which are not unique to the Bills of Rights.

Thus, the supremacy of these Constitutions,¹¹⁰ of considerable weight, is of general application. So too is the controlled nature of the power of these legislatures when acting ordinarily,¹¹¹ and when altering the Constitutions.¹¹²

And just as in the Bills of Rights, so too in the other articles/sections there are provisions which evidence the subordination of these legislatures to the constitutions and at the same time strongly support the case for judicial review.

Citizenship

Arguably, a person's right not to be deprived of his citizenship is no less fundamental than his right not to be deprived of his property without compensation.¹¹³ Accordingly, most of these Constitutions forbid the legislatures to deprive of citizenship those who are citizens by virtue of birth or parentage.¹¹⁴

Grenadian Laws To Be Published

A provision in the Grenada Constitution is that no law made by Parliament shall come into operation until it has been published in the Gazette.¹¹⁵ If it is true that at common law even subordinate legislation is operative antecedent to publication¹¹⁶ the Grenadian provision is remarkable.

Lifetime of Parliament

In most of these countries, Parliament's normal life span is five years, in Sri Lanka six years, in the U.S.A. two years for members of the House of Representatives and six years for Senators, and in India five years for members of the House of the People and two years for Councillors.¹¹⁷ Admittedly, an Act of the United Kingdom's Parliament, 'the Parliament Act, 1911'¹¹⁸ says so for the United Kingdom too.¹¹⁹ But

unlike that ordinary Act, these provisions are entrenched in the Constitutions.¹²⁰ True, where any of these countries is at war, Parliament may extend its normal life-span, but not for more than twelve months at a time, and not for more than a total of two years in the Bahamas, Jamaica, and Barbados, and five years in the others, not including the U.S.A., Sri Lanka and India which do not have this provision.¹²¹

Electoral Law

In Jamaica and Barbados, any law providing for the election of members of Parliament is required to contain provisions designed to ensure that electors have a reasonable opportunity of voting, provisions on the conduct of the elections, and, in the case of Barbados, provisions for the division of Barbados into constituencies.¹²² In the U.S.A. the right to vote shall not be denied or abridged on account of race, colour or previous condition of servitude, or sex, nor, in India, on grounds only of religion, race, caste, or sex.¹²³ And in Guyana, election to Parliament shall be by secret ballot in accordance with proportional representation.¹²⁴ In the Bahamas, Parliament is enabled to provide for the institution of proceedings for determining questions as to membership of the House of Assembly; and to regulate the powers, practice and procedure of an Election Court established by the Constitution, but Parliament is expressly subject to the articles providing for tenure of office of members of the House of Assembly and determining questions as to membership thereof.¹²⁵

Habeas Corpus, Bills of Attainder, Ex Post Facto Laws

Habeas Corpus Suspension Acts may be passed at any time in the U.K. through the ordinary legislative procedure.¹²⁶ Not so in the U.S.A., for there, the privilege of Habeas Corpus shall not be suspended, unless rebellion, invasion or public safety requires it. So too no bill of Attainder or ex post facto law shall be passed.¹²⁷

Bills To Be Passed In Accordance With The Constitutions

A. R. Carnegie observes that the Constitutions of Guyana and Trinidad and Tobago [Sierra Leone too] provide that no Bill shall become law unless passed in accordance with the Constitution,¹²⁸ which is true.¹²⁹ But that provision represents, not really a separate manifestation of the supremacy of the Constitution over Parliament, but rather, merely the sum total of such prohibitions, limitations, and restrictions as considered above.

Those Limitations Suggest Judicial Review

Given these prohibitions, limitations, and restrictions on the power of the Legislatures, it is not possible to associate them with the classical doctrine of U.K. parliamentary sovereignty, so the case against judicial review of the acts of that kind of legislature, as seen already.¹³⁰

Such other ground appears in the Sri Lanka Constitution. This has already been noticed.¹³¹

But far from such other base appearing in the other Constitutions the Constitution of Grenada actually provides that:

(1) . . . any person who alleges that any provision of this Constitution (other than a provision of Chapter 1)¹³² has been or is being contravened may, if he has a relevant interest, apply to the High Court for a declaration and for relief under this section.

(2) The High Court shall have jurisdiction in an application made under this section to determine whether any provision of this Constitution (other than a provision of Chapter 1) has been or is being contravened and to make a declaration accordingly.

(3) Where the High Court makes a declaration under this section that a provision of this Constitution has been or is being contravened and the person on whose application the declaration is made has also applied for relief, the High Court may grant to that person such remedy as it considers appropriate, being a remedy available generally under the law of Grenada in proceedings in the High Court.¹³³

If the decision is a final one in any civil or criminal proceedings as to the interpretation of this Constitution, appeals from the High Court to the Court of Appeal and thence to the Privy Council lie "as of right."¹³⁴

All these provisions appear in the Associated States Constitutions.¹³⁵

Here again, as in the case of the enforcement provision in respect to the Bills of Rights, nothing in these provisions suggests that they do not encompass legislative contravention. Nor should such an exception be read thereinto, for the reason that, as MARSHALL, C.J., put it in *M'CULLOCH v. MARYLAND*¹³⁶ "[W]e must never forget that it is a Constitution we are expounding,"¹³⁷ the philosophy of which is that provisions in a Constitution are to be construed liberally and munificently in favour of those on whom the right has been bestowed.¹³⁸

The U.S. Constitution, quite apart from its supreme law clause which is expressly addressed to the Judges,¹³⁹ lays down that

The Judicial Power shall extend to *all Cases*, in Law and Equity, *arising under this Constitution*, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.¹⁴⁰

Yet Edward S. Corwin asks why did not the framers of the American Constitution, if they wanted judicial review, choose "explicit and unmistakable" language.¹⁴¹ But as Raoul Berger suggests, citing the provision just quoted, "the meaning of the language chosen was plain enough."¹⁴²

Some views seek to confine the unqualified words of those provisions to acts of State not including acts of Congress;¹⁴³ others would relate them to acts of the legislature but confining them within arbitrarily chosen circumscribed areas, for example, the matter of judicial "self-defence;"¹⁴⁴ yet others considering the clause ambiguous or inadequate.¹⁴⁵

This article is not prepared to read into those provisions such limitations in such an unwarrantable fashion. Only the very clearest directives of the framers would justify a construction which is not benevolent to the persons on whom rights¹⁴⁶ have been conferred. So the better view is that these provisions are "broad enough to comprehend power to set aside Congressional Acts which are inconsistent with the Constitution."¹⁴⁷

The other Constitutions do not have such provisions in relation to the non-Bill of Rights sections. But the way one should approach the issue is this. The functions of the regular courts of law include investigating whether a rule proposed for application really has the nature of law. For example, what may be presented as delegated legislation may not be law at all through its being *ultra vires* the parent Act. Where a Constitution is supreme law with the consequences that law inconsistent therewith is void, as is the case with these Constitutions,¹⁴⁸ the Constitution is like the parent Act, with other laws being valid only insofar as they are consistent with the Constitution. If the legal order does not contain any explicit rule to the contrary, there is a presumption that all the regular courts have the duty to investigate whether a rule, not being a rule of the Constitution, proposed for application, has the nature of law. Mauro Cappelletti and John Clarke Adams put it this way:

When there is a written constitution that cannot be amended by ordinary legislation, there is created a hierarchy of law, and just as a law prevails over an administrative regulation, so a constitutional provision prevails over an ordinary law: *lex superior derogat legi*

inferiori. According to this reasoning, when the courts declare a law incompatible with a provision in the constitution, they are merely performing their normal and fundamental judicial function of 'applying the law.'¹⁴⁹

Only a restriction of this power is needed.¹⁵⁰ The Sri Lanka Constitution has set out to provide such a restriction in relation to all the regular courts of law, having commissioned a Constitutional Court to deal exclusively with such questions and only as far as Bills are concerned.¹⁵¹ The other Commonwealth countries, Jamaica excepted, have also imposed restrictions in relation to the enforcement of the Bills of Rights, and, in Grenada, in addition thereto, in relation to the other provisions of the Constitution. The Constitutions provide that

If, in any proceedings in any court subordinate to/other than the Supreme Court any question arises as to the contravention of any of the [Bill of Rights provisions] the court in which the question has arisen shall refer the question to the Supreme Court.

And the Supreme Court is given original jurisdiction to determine such references.¹⁵²

This provision, which appears in the Associated States in relation to both Bill of Rights and non-Bill of Rights provisions,¹⁵³ could have been taken to the conclusion to which it was in Sri Lanka. It was not done because it was not desired by the framers. Nor must this or any other generation read into the Constitutions a provision which has the effect of putting there what the framers refused to write in, for better or for worse.

Clearly, there is nothing particularly sophisticated about the proposition that since no clause expressly confers the power of judicial review no such power exists. That kind of argument, understandably, was unable to impress the Appellate Division of the South Africa Supreme Court in *HARRIS v. DONGES*.¹⁵⁴ Understandably, it is suggested, because one has to have regard to the sum total effect of the provisions of a Constitution before one can say yea or nay to judicial review. If the total effect thereof is that the Constitution is supreme over the legislature with the consequent voidness of law inconsistent with the Constitution, then, barring express provision to the contrary, judicial review suggests itself. As the Federalist No. 78¹⁵⁵ put it, if a Constitution has superior obligation and validity, it must be preferred to a statute.¹⁵⁶

That is the philosophy behind *MARBURY v. MADISON*. There, an Act of Congress, the Judiciary Act, 1789, purported to authorise the

Supreme Court to issue mandamus in its original jurisdiction¹⁵⁷ when the Constitution confers only appellate jurisdiction in that matter.¹⁵⁸ Starting from the premise that an act of the legislature repugnant to the supreme law of a Constitution is void, MARSHALL, C.J., said that where the law and the Constitution conflict with each other,

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.¹⁵⁹

Felix Frankfurter considers this reasoning to be "not impeccable and its conclusion, however wise, not inevitable."¹⁶⁰ If the reasoning is not impeccable it is not unsound anyway. And if its conclusion, admittedly wise, is not inevitable in respect of a written constitution simpliciter, it certainly is so in the context of a written Constitution having about it all the marks of supremacy treated above without there being some such rebutting provision as appears in the Sri Lanka Constitution.

Certainly, the Privy Council takes it for granted that from the premise it stated in *BRIBERY COMMISSIONER v. RANASINGHE*, that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law,"¹⁶¹ must follow, no doubt subject to express provisions to the contrary, judicial review. For neither in that case itself where the Bribery Amendment Act, 1958, nor in *LIYANAGE v. THE QUEEN*¹⁶² where the Criminal Law (Special Provisions) Act, 1962 and the Criminal Law Act, 1962, all of Ceylon,¹⁶³ as it was then known, nor in *AKAR v. A.G. (SIERRA LEONE)*¹⁶⁴ where the Constitution (AMENDMENT) (NO. 2) Act, 1962, of Sierra Leone¹⁶⁵ were all struck down by the Privy Council for being inconsistent with the respective Constitutions,¹⁶⁶ did the Privy Council essay the kind of philosophy of its assumption of judicial review as is found in *MARBURY v. MADISON*.

Why Expressly Exclude Jurisdiction in Certain Cases?

If the framers did not intend to entrust general guardianship of these Constitutions to the Supreme Court, why was it necessary for them to have set out to expressly oust the jurisdiction of the Court from certain matters? More than one state agency has been expressly shielded from the protective arm of the courts. These include the titular Heads of States,¹⁶⁷ and their Deputies,¹⁶⁸ the various Services Commissions,¹⁶⁹ and the Speaker of the House of Representatives where he certifies certain Acts.¹⁷⁰

Admittedly, these examples all relate to the administrative, not legislative, branches. But their usefulness is this: the attempt to debar the courts from having jurisdiction over those agencies suggests that the framers appreciated that the Courts have jurisdiction over all state agencies subject only to an express provision to the contrary. They did not want the named agencies to be amenable to the jurisdiction of the courts, so they said so. Other agencies, not so protected, for example, the legislatures, therefore remain answerable to the Courts. Indeed, the legislatures have been also protected, but only in the usual way of affording their members absolute privilege.¹⁷¹ If the framers wanted to afford the legislatures further immunity from judicial inquiry, they would have said so *à-la-Sri Lanka*.

It is true that, on the other hand, the Constitutions do expressly confer jurisdiction in certain matters whence one might suggest that where jurisdiction is not so explicitly given, as in the case of judicial review, none exists. But such jurisdiction has been conferred only in cases where, were that not done, a plausible argument might have been made that the change introduced thereby could not have been intended to be wrought "*sub silentio*," there being no necessary connection between the supremacy of a Constitution and the existence of those jurisdictions in the Courts.

One such matter has to do with determining matters touching on membership of Parliament. Prior to the commencement of the Constitutions, this was always a matter, not for the courts, but for Parliament itself.¹⁷² There is no necessary connection between the supremacy of a Constitution and the location of this jurisdiction. That is why the handing over of jurisdiction in this matter to the Courts has been expressly provided for,¹⁷³ giving the Courts, as BOLLERS, C.J., of Guyana put it in *PETRIE v. A.G. (GUYANA)*,¹⁷⁴ "a new or peculiar jurisdiction . . . special."¹⁷⁵ Two features manifest the specialness of this jurisdiction: firstly appeals cannot go beyond the Court of Appeal, and secondly, either where the Attorney General is not a party to such proceedings he may intervene, appear and be represented therein, or such proceedings shall not be instituted except with the leave of a judge of the Supreme Court.¹⁷⁶

So too, a written Constitution does not *per se* raise a presumption that a Bill of Rights fortified by enforcement provisions will be operative automatically, thus breaking traumatically with the colonial past. Accordingly, it was necessary to expressly spell out the new provisions in the way the Constitutions have done.

The third area in which jurisdiction has been expressly conferred is the election of the Head of State in Guyana. Never before independence in any of these countries was that office an elective one; its holder was always appointed by Her Majesty, though no doubt in consultation with the Head of Government, holding office during Her Majesty's pleasure. In Republican Guyana,¹⁷⁷ the Head of State, the President, is elected by the National Assembly.¹⁷⁸ If the Court of Appeal of Guyana were not expressly given jurisdiction to hear and determine questions as to the validity of election of a President,¹⁷⁹ it is difficult to see how it could be argued that the jurisdiction exists.

It is only in those areas, in respect of which a presumption of jurisdiction in the Courts does not arise on account of a written constitution without more, that jurisdiction has been expressly conferred. But a presumption of general review of legislation is always raised by the supremacy of a Constitution, to be rebutted by some provision akin to that which is contained in the Sri Lanka Constitution. Where a Constitution is supreme, manifesting its supremacy through various restrictions, prohibitions, limitations, and qualifications imposed on the legislature, it no more suffices for Courts to merely ascertain the plain meaning of words used in an Act, rather, as Urias Forbes put it,

a new requirement is to canvass the intentions of an Act to determine whether its underlying principles are in conflict with those enshrined in the constitution.¹⁸⁰

RESTRICTIONS ON PARLIAMENT NEED NOT MEAN JUDICIAL REVIEW

Not that this article is suggesting that judicial review is an inevitable consequence of the existence of limitations on legislative competence. What is being posited is that limitations do raise a strong presumption of the existence of Judicial review, not a presumption of "legislative supremacy," contrary to what William W. Crosskey thinks.¹⁸¹

Nor is it being suggested that the presumption is irrebuttable. The framers of the Sri Lanka Constitution have set out so to do, with what degree of success is yet to be determined.¹⁸² Or, the Sri Lanka Constitutional Court device may have been used, but instead of its decisions being "conclusive for all purposes" it could have been given only an advisory role. Again, a Council of Revision may have been utilised. One was suggested in America. As proposed, it would have included the

judiciary and would have operated on a basis analogous to the Sri Lanka Constitutional Court so that there would have been revision of Bills, but not judicial review of legislation 'strictu sensu'. But that was rejected.¹⁸³

So, no institution, other than the ordinary courts of law, was set up in these countries, Sri Lanka apart, to pass on the validity of Bills or of Acts. In theory, no institution need be set up, it being the province of each individual to pass his own judgment on the validity of Acts of Parliament, giving and withholding obedience accordingly. But in modern systems this approach is "almost a status of anarchy"¹⁸⁴ so it will require the clearest showing that the framers opted for it, evidence of which is certainly lacking.

And if the U.K. system tries to render unconstitutional legislation impossible rather than inoperative, by relying on public opinion and a balancing of political powers,¹⁸⁵ a system which according to Dicey, opposes unconstitutional legislation by moral sanctions,¹⁸⁶ it is well to remember that Dicey suggests that it is the peculiarity of English history which has produced this, in that England has always, at least since the Norman Conquest, been governed by an absolute legislator.¹⁸⁷ On the other hand, as K.C. Wheare points out:

in many countries a Constitution is thought of as an instrument by which government can be controlled. Constitutions spring from a belief in limited government.¹⁸⁸

WERE THE FRAMERS BEING REVOLUTIONARY?

In the legal systems in which these countries operated before the commencement of these Constitutions, acts of the highest Legislature, the U.K. Parliament, were not, in classical teaching, amenable to judicial review, as is still the position in orthodox understanding.¹⁸⁹ Now that the local Legislatures are the highest Legislatures of their respective systems, that they are subject to judicial review does not necessarily mean that the framers were men given over to innovations.

Coke's idea that "where an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void," which he implemented in *DR. BONHAM'S CASE*¹⁹⁰ is not unusually considered as the 'fons et origo' of the modern concept of judicial review. Edward S. Corwin, for example, sees that proposition as providing "the most im-

portant single source of the notion of judicial review.”¹⁹¹ As Raoul Berger puts it, “the Framers did not pluck the concept of judicial review from the void. It harked back to Coke’s 1610 statement in *BONHAM’S* case.”¹⁹² Indeed, Edward Coke has been styled “legal father of judicial review.”¹⁹³

So it is difficult to understand how Charles Beard could suggest that judicial review is the product of “American political genius.”¹⁹⁴ Rather, in the Commonwealth, as in the U.S.A., judicial review is, to quote J. A. C. Grant, “the normal consequence of its political experience prior to independence,”¹⁹⁵ for colonial constitutions and charters were treated judicially as binding the colonial legislatures, prevailing over colonial statutes in the event of conflict. When the colonial constitutions and charters were replaced by independence Constitutions, the practice continued, with the word “unconstitutional” replacing the phrase “*ultra vires*.”

That is why Dicey could suggest that the originality of the U. S. draftsmen is perhaps exaggerated in that to one who had inhabited a colony governed under a Charter whose effect on the validity of a colonial law was certainly liable to be considered by the Privy Council, there was “nothing startling” in empowering the judiciary to pronounce upon the constitutionality of Acts passed by assemblies whose powers were limited by the constitution, just as the authority of the colonial legislature was limited by the charter or by an Act of Parliament. In establishing the Supreme Court, says Dicey, the framers probably had in mind the functions of the Privy Council.¹⁹⁶

Accordingly, in asserting the power of judicial review, PHILLIPS, J. A., in the *COLLYMORE* case, did not at all believe that he was being revolutionary. Taking the view that even without express provision a power of judicial review must reside in the Supreme Court of Trinidad and Tobago, the learned Justice of Appeal continued thus:

“This conclusion is only in consonance with the view expressed more than half a century ago by GRIFFITH, C. J., BARTON and O’CONNOR, JJ., of the High Court of Australia in *BAXTER v. COMRS. OF TAXATION* (N.S.W.). ((1907), 4 C.L.R. 1087, at p. 1125) that:

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*.¹⁹⁷

CONCLUSION

It will have been noticed that this article confined itself to the views of the framers as they manifested themselves in the text of the Constitutions. No attempt was made to consider the views of the framers as they came out in Convention Halls in debates or in any channel other than the provisions of the Constitutions themselves. While wanting to remain outside of the historical approach,¹⁹⁸ one would like to observe that the first judge to assert the power of judicial review in the independent Commonwealth Caribbean, WOODING, C. J., of Trinidad and Tobago, had been representative of the Bar Association of that country to the Queen's Hall Conference, Trinidad and Tobago, on the draft independence constitution and had played a very active part in the discussions, especially in relation to the Bill of Rights.¹⁹⁹

Apt then to describe WOODING, C.J., are the words of Charles Beard used in relation to MARSHALL, C.J. of the U.S.A.: he had better opportunities than any student of history or law today to discover the intention of the framers. So, WOODING, C.J., first Chief Justice of Independent Trinidad and Tobago,²⁰⁰ was no closet philosopher, ignorant of the conditions under which the Constitution was established and unlearned in the reason and spirit of that instrument.²⁰¹

In any case, in the face of the supremacy of these Constitutions manifested in supreme law clauses; in rigorous requirements for constitutional alterations; in the multiplicity of prohibitions, limitations, restrictions, and qualifications on the powers of these legislatures; in Bills of Rights buttressed with enforcement provisions of wide enough amplitude to embrace contraventions, however arising; in provisions controlling the content of legislation, negatively and positively, expressly and impliedly; given all these demonstrations of the supremacy of these Constitutions over the legislatures, a very strong presumption, surely not of legislative supremacy, but of judicial review, is raised.

And nothing in the text of the Constitutions attempts to rebut that presumption in any of these countries. Sri Lanka apart. That is why this article proposes that the Supreme Courts of these countries have, as WOODING, C.J., put it in the COLLYMORE CASE.

[the] right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is ultra vires and therefore void and of no effect [because it contravenes the Constitution].²⁰²

NOTES

¹Professor William W. Van Alstyne, "A Critical Guide to *MARBURY v. MADISON*," (1969), Duke L.J. I, at I.

²In Schedules to United Kingdom Independence/Constitution Orders are to be found some of these Constitutions: Bahamas, Sched., Bahamas Indep. Order, 1973 (S.I. 1973/1080) [UK]; Jamaica, Sched. 2, Jamaica (Const.) Order in Council, 1962, (S.I. 1962/1550) [UK], as amended by Act. 15 of 1971 (Jamaica); Barbados, Sched., Barbados Indep. Order, 1966, (S.I. 1966/1455 [UK], as amended by Act. 34 of 1974 (Barbados); Grenada, Sched. 2, Grenada Const. Order, 1974, (S.I. 1974/—) [UK]; Trinidad and Tobago, Sched. 2, Trinidad and Tobago (Const.) Order in Council, 1962, (S.I. 1962/875) [UK], as amended by Acts 13 of 1964, 22 of 1965, 28 of 1968, and 15 of 1970 (Trinidad and Tobago); Guyana, Sched. 2, Guyana Indep. Order, 1966, (S.I. 1966/575) [UK], as amended by National Assembly Resolution XXVI of 1969, and Acts 16 of 1968, 1 of 1969, 14 of 1970, 2 of 1971, 7 of 1973 and 19 of 1973 (Guyana).

Such was the nature of the Sierra Leone and Sri Lanka Constitutions until 1971 and 1972, respectively, when they promulgated their own autochthonous Republican Constitutions thus bringing them to where the U.S. and the India Constitutions always were. Trinidad and Tobago is on the verge of following suit. See note 18, *infra*.

³Apart from the Privy Council where it has jurisdiction, the judicature of these countries comprises the Supreme Court and a Court of Appeal in the Bahamas, Const., Ch. vii, Parts 1 & 2; Jamaica, Const., Ch. vii, Parts 1 & 2; Barbados, Const., Ch. vii; and Sri Lanka, Const., s.122. But it comprises a High Court and a Court of Appeal in Grenada, Const., Ch. viii, Trinidad and Tobago, Ch. vi, Part 1; Guyana, Const., Ch. vii, Part 1; and a High Court, a Court of Appeal, and a Supreme Court in Sierra Leone, Const., Ch. v, so the term "Supreme Court" in relation to these latter countries means the High Court. The federal judicature of the U.S.A. comprises one Supreme Court and such inferior courts as Congress may from time to time establish, U.S. Const., art. iii, s.1, while the Union judiciary of India comprises a Supreme Court, India Const., art. 124(i).

⁴Bahamas Const., art. 2; Jamaica Const., s.2; Barbados Const., s.1; Grenada Const., s.106; Guyana Const., art. 2; U.S. Const., art. vi, cl.2; India Const., art. 13(2), where the principle is stated only in relation to the Bill of Rights, and where, as in Jamaica, the words "the supreme law" do not appear.

⁵THE NEW COMMONWEALTH AND ITS CONSTITUTIONS 109 (1964).

⁶1 Cranch 137, 2 L.ed. 60 (1803).

⁷1 Cranch 137, at 177, 2 L.ed. 60, at 73 (1803).

⁸See text accompanying notes 3 and 6, *supra*.

⁹The classical orthodox doctrine of U.K. parliamentary sovereignty teaches that the United Kingdom Parliament cannot set itself limits, neither as to the manner and form nor as to the substance of legislation. See Dicey, *LAW OF THE CONSTITUTION* Ch. 1 (10th ed. E.C.S. Wade 1964); 4 Coke, *INSTITUTES*, at 36; 4 Blackstone, *COMMENTARIES*, at 90; H.W.R. Wade "The Basis of Legal Sovereignty, [1955] *Camb. L.J.* 172; O. Hood Phillips, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* Ch. 4 (8th ed. Wade and Bradley 1970).

¹⁰The "New View" of U.K. parliamentary sovereignty holds that the U.K. Parliament can limit itself as to the manner and form but not as to the substance of legislation. See R.F.V. Heuston, *ESSAYS IN CONSTITUTIONAL LAW* Ch. 1 (2nd ed. 1964); Jennings, *THE LAW AND THE CONSTITUTIONAL* Ch. iv, s.1 (5th ed. 1972); S.A. de Smith, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* Ch. 3 (2nd ed. 1973); J.D.B. Mitchell, *CONSTITUTIONAL LAW* Ch. 4 (2nd ed. 1968):

D.V. Cowen, *PARLIAMENTARY SOVEREIGNTY AND THE ENTRENCHED SECTIONS OF THE SOUTH AFRICA ACT* (1951); W. Friedman, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" 24 *Aust. L.J.* 103 (1950); Keir and Lawson, *CASES IN CONSTITUTIONAL LAW* 8 (4th ed. 1954).

The New Commonwealth Constitutions are limited only as to the manner and form of legislation, not as to substance, see text accompanying note 19 *infra*. So it follows that they are sovereign in the eyes of the "New View." See also *BRIBERY COMR. v. RANASINGHE* [1965] AC 172, P.C. (Sri Lanka, Ceylon).

¹¹Dicey, *supra* note 7 at 89. See also, *ibid*, at 91, 92.

¹²On the view that there cannot be judicial review of the acts of a legislature which is sovereign in the Diceyan sense, see *BRITISH RAILWAYS BOARD v PCKIN* [1974] 2 W.L.R. 208, H.L., at 213 C-D per LORD REID, 219 A-C per LORD MORRIS, 228 A-B, per LORD SIMON; *BLACKBURN v A.G.* [1971] 1 W.L.R. 1037, C.A., at 1041 D, per SALMON, L.J.; *Ex p. SELWYN* [1872] J.P. 54, at 55, per WILLES, J.; *EDINBURGH and DALKEITH Ry. CO. v WAUCHOPE* (1842) viii Cl. F. 710, H.L., at 725, [1841-427] 8 Eng. Rep. 279, at 285, per LORD CAMPBELL; *R v JORDAN* [1967] Crim. L.Rev. 483, Q.B.D.; H.W.R. Wade, *supra* note 7, at 187-188. Dicey, *supra* note 7, at 91, 102; O. Hood Phillips, *supra* note 7, at 25.

¹³Admittedly, only the India Constitution expressly defines "the State," and only for purposes of the Bill of Rights, to include "The Government and Parliament of India and the Government and the Legislature of each of the States." India Const., art. 12. But, as the Sri Lanka Constitution puts it, the legislature is "the supreme instrument of State power," s.5, so, any reference to "the State" must include the legislature unless the contrary is expressly provided or the context otherwise requires.

¹⁴Bahamas Const., art. 52(1); Jamaica Const., s.48(1); Barbados Const., s.48(1); Grenada Const., s.38; Trinidad and Tobago Const., s.36; Guyana Const., art. 72; Sierra Leone Const., s.33; India Const. art. 245(1); The U.S. Const., art. 1, s.1 provides that "All legislative powers herein granted shall be vested in a Congress of the United States, whence it follows that such legislative powers as are not therein granted expressly or by necessary intendment, shall not vest in Congress. But see Sri Lanka Const., s.44.

¹⁵See Wade and Phillips, *supra* note 7, at 61; "Where the legislature is governed by a written constitution, it is the constitution which must be regarded as fundamental."

¹⁶(1968) 12 W.I.R. 5 C.A. (TRINIDAD AND TOBAGO); (1970) 15 W.I.R. 229, P.C.

¹⁷(1968) 12 W.I.R. 5 at 81.

¹⁸[1965] AC 172, P.C.

¹⁹[1965] AC 172, at 197G.

²⁰The Constitution Commission of Trinidad and Tobago, (this Commission, comprising, among others, Sir Hugh Wooding, former Chief Justice of that country, as Chairman, and T. Georges, formerly a judge of the High Court there and formerly Chief Justice of Tanzania now Professor of Law, U.W.I., set up by the Governor-General in 1971 to make recommendations for the revision of the Trinidad and Tobago Constitution, submitted a Proposed Constitution in January 1974 recommending a Republican form of Government in lieu of the Monarchical one which now obtains there, in its paper *THINKING THINGS THROUGH* 38 (Government Printery, Trinidad and Tobago, 1972), speaking of the Trinidad and Tobago Parliament said this: [B]ecause the Constitution binds everybody, including the Parliament set up under its provisions, Parliament's right to pass laws is subject to such restrictions as the Constitution imposes."

²¹Bahamas Const., art. 54(1); Jamaica Const., s.49(1); Barbados Const., s.49(1); Grenada Const., s.39(1); Trinidad and Tobago Const., s.38 (1); Guyana Const., art. 73(1); U.S. Const., art. v.; Sierra Leone Const., s.34(1); Sri Lanka Const., s.44; India Const., art. 368(1).

²²Bahamas Const., art. 54(2)-(3); Jamaica Const., s.49(2)-(6); Barbados Const., s.49(2)-(4); Grenada Const., s.39(2)-(5); Trinidad and Tobago Const., s.38(2)-(3); Guyana Const., art. 73(2), (3), (5); U.S. Const., art. v; Sierra Leone Const., s.34(J) proviso, (3); Sri Lanka Const., s.51(5); India Const., art. (368(2).

Only in the Bahamas and Trinidad and Tobago can alterations be made by simple majority vote of Parliament. In Barbados, Trinidad and Tobago, and Sri Lanka all the provisions may be altered by Parliament alone. In the Bahamas, Jamaica, Grenada, and Guyana some alterations cannot be made without the approval of the electors voting in referenda, with required majorities varying from a simple majority in the Bahamas and Guyana through a three-fifths majority in Jamaica for certain purposes to a two-thirds majority in Jamaica for other purposes and in Grenada. Some alterations in India, and all in the U.S.A., require ratification by not less than one-half of the states' Legislatures in India and by the Legislatures of three-fourths of the American states or by Conventions in three-fourths thereof. Sierra Leone is the country which has to have a dissolution for certain purposes.

²³Dicey, *supra* Note 7, 88. See also, *ibid*, at 91, 92. For the inability of these Legislatures to meet another of Dicey's requirements, see text accompanying notes 7-10, *supra*.

²⁴J.D.B. Mitchell, *supra* note 8, at 87, and "Sovereignty of Parliament — Yet Again", 79 L.Q. Rev. 196, at 219 (1963)

²⁵Dicey *supra* note 7, at 90-91. See also, *ibid*, at 92. and see, further, note 10, *supra*.

²⁶Bahamas Const., arts. 16-27; Jamaica Const., ss.14-24, Barbados Const., ss.12-23; Grenada Const., ss.2-15; Trinidad and Tobago Const., ss.1-5; Guyana Const., arts. 4-17; U.S. Const., Amends. I-X; Sierra Leone Const., ss.2-13, Sri Lanka Const., s.18(1); India Const., arts. 14-31C.

²⁷Bahamas Const., art. 20(1); Jamaica Const., s.20(1); Barbados Const., s.18(1); Grenada Const., s.8(8); Trinidad and Tobago Const., s.2(e)(h); Guyana Const., art. art. 10(1); Sierra Leone Const., s.9(1)

²⁸Bahamas Const., art. 20(8); Jamaica Const., s.20(2); Barbados Const., s.18(8); Grenada Const., s.8(8); Trinidad and Tobago Const., s.2(e)(h); Guyana Const., art. 10(8); Sierra Leone Const., s.9(2)

²⁹Sri Lanka Const., s.18(1(a)); India Const., art. 14, (and see U.S. Const., Amend. xiv, s.1, which applies to the member states of the United States).

³⁰U.S. Const., Amend v, (see also, *ibid*., Amend. xiv, s.1), Trinidad and Tobago Const., s.1(a).

³¹Bahamas Const., art. 27(1)(c); Jamaica Const., s.18(1); Barbados Const., s.16(1); Grenada Const., s.6(1),(2); Guyana Const., art. 8(1); Sierra Leone Const., s.7(1)(c); U.S. Const., Amend. v. But see India Const., art. 31(2); there is no such provision in Sri Lanka Constitution.

On decisions on provisions in "pari materia" with these see D'AGUIAR v. A.G. (BRITISH GUIANA) (1961-62) 4 WIR 481, S.C. [BRITISH GUIANA now GUYANA] (1964-65) 7 WIR 496, British Car. Court of Appeal.

³²Bahamas Const., art. 26(1); Jamaica Const., s.24(1); Barbados Const., s.23(1); Grenada Const., s.13(1); Guyana Const., art. 15(1); Sierra Leone Const., s.13(1); cf. Sri Lanka Const., s.18(1)(h)

See AKAR v A.G. (SIERRA LEONE) [1970] AC 853, P.C. (SIERRA LEONE) and R. v. DRYBONES (1970) 9 D.L.R. (3d) 473. The Jamaican case BYFIELD v

ALLEN (1972) 16 WIR 1, C.A. [JAMAICA], and the Antiguan case CAMACHO and SONS, LTD v. COLLECTOR OF CUSTOMS (1971 18 WIR 159, C.A. [WEST INDIES ASSOCIATED STATES]), also deal with these provisions but as far as administrative action is concerned.

³³Sir Lanka Const., s.18(1)(a); India Const., art. 14; (and see U.S. Const., Amend xiv, s.1).

³⁴U.S. Const., Amend. 1. See William Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 Harv. R.Rev.1 (1965-66). Contra BATES v. CITY OF LITTLE ROCK 361 U.S. 516 (1960) BLACK AND DOUGLAS, J.J., Concurring).

³⁵Trinidad and Tobago Const., s.2(b), (e)(h), respectively.

³⁶Acts and Subsidiary Legislation of Trinidad and Tobago, 1965, Act. No. 8, after having been amended by the Industrial Stabilisation (Amendment) Act 1965, Act. No. 5 of 1967, and the Industrial Stabilisation (Amendment) (No. 2) Act, 1967 Act No. 11 of 1967, the Act has now been repealed and replaced by the Industrial Relations Act, 1972, Act No. 23 of 1972.

³⁷The provisions of the Act abridging strike action were said to violate freedom of association and assembly guaranteed by s.1(j) of the Constitution. It was also urged that the provisions of the Act enabling the Attorney General to authorize a public officer to enter the business premises of a trade union to require the production of literature contravened the right to privacy and the right to property guaranteed by s.1(c) of the Constitution. Again, the Industrial Court, established by the Act, was given discretion to disclose information demanded from any source or to prohibit its publication, which was said to violate the right to a fair hearing and procedural fairness guaranteed by s.2(e),(h) of the Constitution. Finally, the Act provided for the cancellation of a trade union's registration for the commission of certain offences, thus disabling it from operating, which the appellants claimed to be a cruel and unusual treatment or punishment, contrary to s.2(b) of the Constitution. All these grounds of challenge failed to impress the Trinidad and Tobago Court of Appeal and the Privy Council.

³⁸But see Charles Beard, "The Supreme Court — Usurper or Grantee" in ESSAYS IN CONSTITUTIONAL LAW 55 (Robert G. McCloskey ed. 1957) in which place, with reference to a situation similar to this one, in the American case HYLTON v. U.S. 3 Dallas 171 (1796), he asks rhetorically, "If the court believed that it did not have the power to declare the act void as well as the power to sustain it, why did it assume jurisdiction at all or take the trouble to consider and render an opinion on the constitutionality of the tax?"

³⁹Cf. Charles Beard, *ibid.*, at 55 n.72 dealing with the assertion of judicial review in MARYBURY v. MADISON.

⁴⁰The Canadian Bill of Rights is Part 1 of the Act for the Recognition and Protection of Human Rights and Freedoms, 1960, Statutes of Canada, 1960 (8-9 Elizabeth II, Vol. 1, C.44) S.2 thereof states that "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared." For the Trinidadian S.2 see text accompanying note 33, *supra*. The Chief Justice took the view that the Canadian S.2 is only a rule of construction; (1968) 12 WIR 5, at 8H-1. Maybe the decision and reasoning of the Canadian Supreme Court in R. v. DRYBONES (1970) 9 DLR (3d) 473 requires qualification of WOODING, C.J.'s understanding of the Canadian Bill of Rights. But see S.A. deSmith, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS, at 209. See also note 40 *infra*.

⁴¹(1968) 12 WIR 5, at 9A-8.

⁴²Phillips, J.A. (1968) 12 WIR 5 at 21 G-I, citing Bora Laskin, "Canada's Bill of Rights: A Dilemma for the Courts?" 11 Int'l. & Comp. L.Q. 530 (1962) and S.A. deSmith, "Fundamental Rights in the New Commonwealth", 10 Int'l. & Comp. L.Q. 215 at 228-32 (1961) was quite aware of the conflict of legal opinion as to the true interpretation of the Canadian provision, but he saw no need to try to resolve that conflict. See also D.B. Fowler, "The Canadian Bill of Rights — A Compromise Between Parliamentary & Judicial Supremacy, 21 Am. J. Comp. L. 721 (1973).

⁴³(1968) 12 WIR 5, at 21 I 22B.

⁴⁴(1968) 12 WIR 5, at 35C.

⁴⁵Bahamas Const., art. 16(1); Jamaica Const., s.14(1); Barbados Const., s.12(1); Grenada Const., S.2(1); Guyana Const., art. 4(1); Sierra Leone Const., s.2(1). But see Sri Lanka, s.18(1)(b); India Const., art. 21.

⁴⁶Bahamas Const., art. 17(1); Jamaica Const., s.17(1); Barbados Const., s.15(1); Grenada Const., s.5(1); Trinidad and Tobago Const., s.2(b); Guyana Const., art. 7(1); U.S. Const., Amend. VIII; Sierra Leone Const., s.6(1). The Sri Lanka and India Constitutions do not have such a provision.

⁴⁷Bahamas Const., art. 21(1); Jamaica Const., s.19(1); Barbados Const., s.17(1); Grenada Const., s.7(1); Trinidad and Tobago Const., s.1(c); Guyana Const., art. 9(1); U.S. Const., Amend. IV; Sierra Leone Const., s.8(1). The Sri Lanka and India Constitutions do not have such a provision.

⁴⁸Bahamas Const., arts. 22(1), 23(1), 24(1) respectively; Jamaica Const., ss.21(1), 22(1), 23(1) respectively; Barbados Const., ss.19(1), 20(1), 21(1) respectively; Grenada Const., ss.9(1), 10(1), 11(1) respectively; U.S. Const., Amend. 1; Sierra Leone Const., ss.10(1), 11(1), 12(1) respectively; Sri Lanka Const., ss.18(1),(d),(g),(f) respectively; India Const., arts. 19(1)(a), (b)-(c), 25(1) respectively. Cf. JAUNDOO v. A.G. (GUYANA) (1968) 12 WIR 221, at 226F-I, per STOBY, C.

⁴⁹See H.W.R. Wade, ADMINISTRATIVE LAW Ch.5 (3rd ed. 1971); S.A. deSmith, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (Chs. 4-5) (3rd ed. 1973); Chucks Okpaluba, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN GUYANA 18-36 (1972); K.C. Davis, ADMINISTRATIVE LAW TEXT Chs. 7, 12 (3rd ed. 1972).

⁵⁰See notes 25, 27, *supra*; and note 53, *infra*.

⁵¹Bahamas Const., art. 20(2); Jamaica Const., s.20(6); Barbados Const., s.18(2); Grenada Const., s.8(2); Trinidad and Tobago Const., s.2(f),(c), (i)(ii), (h); Guyana Const., art. 10(2); Sierra Leone Const., s.9(5). Cf. India Const., art. 22(1), (2) Sri Lanka Constitution has no such provision. On the U.S., see note 53, *infra*.

⁵²See notes 26-28 *supra*, note 53, *infra*.

⁵³332 U.S. 46, 91 L. ed. 1903 (1946).

⁵⁴332 U.S. 46 at 67-68, 91 L. ed. 1903, at 1917 (1946).

⁵⁵See note 28, *supra*.

⁵⁶On some of the different understandings of the requirements of "due process of law", see the following American cases: PALKO v. CONNECTICUT, 302 U.S. 319, 82 L. ed. 288 (1937), ADAMSON v. CALIFORNIA, 322 U.S. 46, 91 L. ed. (1946); WOLF v. COLORADO, 338 U.S. 25, 93 L. ed. 1782 (1948); ROCHIN v. CALIFORNIA, 342 U.S. 165, 96 L. ed. (1951); IRVINE v. CALIFORNIA, 347 U.S. 128, 98 L. ed. 561 (1953); MAPP v. OHIO, 367 U.S. 643, 6 L. ed. 2d 1081 (1960); BETTS v. BRADY, 316 U.S. 455, 86 L. ed. (1953); GIDEON v. WAINWRIGHT, 372 U.S. 335, 9 L. ed. 2d 799 (1963). So too, the rules of Natural Justice are not fixed; see readings note 47, *supra*.

⁵⁷Albert van de Sand Centlines, "Constitution and Law in South Africa", in *GOVERNMENT UNDER LAW* 444 (A.E. Sutherland ed. 1956) dealing with the U.K. and South Africa, notes that "the right to be heard before you are deprived of your life, liberty, or property is a fundamental constitutional convention but... there is nothing to prevent Parliament from infringing that convention."

⁵⁸See text accompanying note 41, *supra*.

⁵⁹Maybe they could not understand how the Privy Council could refer to the then Ceylon Parliament as sovereign and yet strike down its legislation in *BRIBERY COMR. v. BRANASINGHE*, and *LIYANAGE v. THE QUEEN* [1965] AC 259 for being inconsistent with the then Ceylon Constitution when orthodox U.K. constitutionalists hold that the Acts of a sovereign legislature cannot be questioned in a court of law on any ground whatever, see note 10, *supra*.

⁶⁰Sri Lanka Const., s.48(2).

⁶¹Sri Lanka Const., s.54(1)-(3).

⁶²Sri Lanka Const., s.54(4). Query: can *ANISMINIC v. FOREIGN COMPENSATION COMMISSION* [1969] 2AC 147, H.L. apply here?

⁶³Bahamas Const., art. 28(1), (2)(a); Jamaica Const., s.25(1), (2); Barbados Const., s.24(1), (2)(a); Grenada Const., s.16(1), (2)(a); Trinidad and Tobago Const., s.6(1), (2)(a); Guyana Const., art. 19(1), (2)(a); Sierra Leone Const., s.14(1), (2)(a). And see the Sri Lanka Const., s.54(2)(e) which allows citizens to move the Constitutional court to have it declare a Bill unconstitutional. On the Indian provisions see text accompanying note 65, *infra*. The American Constitution does not have such a provision.

⁶⁴(1968) 12 WIR 5, at 22C.

⁶⁵Bahamas Const., art. 104; Barbados Const., s.87; Guyana Const., art. 92(1)(b); on Guyana, see the Judicial Committee of the Privy Council (Termination of Appeals) Acts, 1970, Act. No. 14 [Guyana], and the Constitution (Amendment) Act, 1973, Act No. 19 [Guyana].

⁶⁶In Grenada, appeal is "as of right" in respect of all human rights but only to the Court of Appeal, but in the case of property rights it goes all the way up the Privy Council "as of right": Grenada Const., s.103(b), 104(1)(a). So too appeal from determination of the Supreme Court on property rights is "as of right" from the Court of Appeal to the Privy Council in the Bahamas, Const., art. 104; Jamaica, Const., s.110(1)(a); Barbados Const., s.87; Trinidad and Tobago Const., s.82(1)(a); with the remarkable result that appeals are "as of right" in Jamaica and Trinidad and Tobago in respect of property rights from the Court of Appeal to the Privy Council without those words appearing in the section providing for appeal to the Court of Appeal from the Supreme Court: Jamaica Const., ss.3.110(1)(a), 25(3) respectively, Trinidad and Tobago Const., ss.82(1)(a), 6(4) respectively. Those words never appear in these provisions in Sierra Leone: Const., s.14(4).

⁶⁷India Const., art. 32(1)(2). See also, *ibid.*, art. 226.

⁶⁸(1952) 39 All India Rptr. 196, S.C.

⁶⁹(1952) 39 All India Rptr. 196, at 199. There the Criminal Law Amendment (Madras) Art. 1950 was held to violate art. 19 of the Indian Constitution and so void.

⁷⁰(1954) 41 All India Rptr. 119, S.C. There the Indian Supreme Court struck down the Sholapur Spinning and Weaving Co. (Emergency Provisions) Ordinance, 1950, Ordinance No. 2 of 1950, and Act, No. 28 of 1950, for offending art. 31(2) of the Constitution, guaranteeing freedom of property.

⁷¹(1954) 41 All India Rptr. 119 at 138. See also *BOYD v. U.S.* 116 U.S. 616, at 635, 29 L. ed. 29 L. ed. 746, at 752, per BRADLEY, J. (1885) *STATE OF WEST*

BENGAL v. SUBODH GOPAL (1954) 41 All India Rptr. 92, S.C. at 118, per JAGANNADHADAS, J.; JAMES v. COMMONWEALTH OF AUSTRALIA [1936] AC 578, P.C., at 613-614, per LORD WRIGHT, M.R. The rule extends even to ordinary legislation: COLONIAL SUGAR REFINING CO. LTD. v. MELBOURNE HARBOUR TRUST COMRS. [1927] AC 343, P.C., at 359, per LORD WARRINGTON. But see text accompanying notes 141, 144; *infra*.

⁷²The Courts tend to say that they will not give constitutional redress where the Bills of Rights are infringed by the action of a private individual: BURDEAU v. McDOWELL, 256 U.S. 465, 65 L. ed. 1048 (1920); McGUIRE v. U.S. 273 U.S. 95 at 99, 71 L. ed. 556, at 557 (1927); IRVINE v. CALIFORNIA, 347 U.S. 128, 98 L. ed. 561 (1953) BANTON v. ALCOA MINERALS OF JAMAICA (1973) 17 WIR 275 S.C. [JAMAICA], at 290A, per GRAHAM PERKINS, J. But see FELDMAN v. U.S., 322 487, 88 L. ed. 1408 (1944); LUSTWIG v. U.S., 338 U.S. 74, 93 L. ed. 1819 (1949).

⁷³See text accompanying note 83, *infra*.

⁷⁴For the other set of provisions see text accompanying note 33, *supra*.

⁷⁵(1968) 12 WIR 5, at 8E.

⁷⁶See text accompanying note 62, *supra*.

⁷⁷For s.2 see text accompanying note 33, *supra*. s. 6 is the section now being dealt with, see text accompanying note 61, *supra*.

⁷⁸(1968) 12 WIR 5, at 35 B-D.

⁷⁹(1968) 12 WIR 221, C.A. [GUYANA]; (1972) AC 972, P.C.

⁸⁰There private land was acquired by the state without the Government's paying compensation therefor, thus contravening, it was alleged, the constitutional right to property. But the question before the Court of Appeal and the Privy Council was whether originating motion for an injunction against the Crown restraining the building of the road till adequate compensation was paid was a procedure sanctioned by the constitution. The trial judge thought that it was not, the appeal to the Court of Appeal failed although two of three members of the Court thought it was, as did the Privy Council. So, no question of judicial review of legislation arose.

⁸¹See text accompanying note 37, *supra*.

⁸²(1968) 12 WIR 221, at 226 H, 235 G.

⁸³Art. 19 is the one being now dealt with, see text accompanying note 61, *supra*.

⁸⁴(1968) 12 WIR 221, at 239 E-F.

⁸⁵(1968) 12 WIR 221, at 243 I.

⁸⁶(1968) 12 WIR 221, at 245 A.

⁸⁷(1968) 12 WIR 221, at 254 F-G.

⁸⁸(1968) 12 WIR 221 at 254 H.

⁸⁹(1968) 12 WIR 221 at 261 D.

⁹⁰"Associated State" is a status created by the West Indies Act, 1967, (15 and 16 Elizabeth 2, C.4) [U.K.], s.1(3) in respect of the territories named in s.1(2), which are Antigua, Dominica, Grenada (now independent), St. Christopher, Nevis and Anguilla, St. Lucia, and St. Vincent. By s.3 of the Act, these states are fully competent in internal affairs, while the United Kingdom Parliament retains equally full sovereignty in external affairs and defence, nationality or citizenship, succession to the Throne or the Royal Style and Titles.

⁹¹Just as in the case of most of the independent states, so too with the Associated States, in Schedules to United Kingdom Constitution Orders, see n.1, *supra*, are to be found these Constitutions: Antigua, Schedule 2 to the Antigua Const., Order, 1967, S.I. 1967/225 [U.K.]; St. Christopher, Nevis and Anguilla, Schedule 2 to the St. Christopher, Nevis and Anguilla Const. Order, 1967, S.I. 1967/228 [U.K.]; Dominica, Schedule 2 to the Dominica Const. Order, 1967, S.I. 1967/226 [U.K.]; St. Lucia, Schedule 2 to the St. Lucia Const. Order, 1967, S.I. 1967/229 [U.K.]; St. Vincent, Schedule 2 to the St. Vincent Const. Order 1969, S.I. 1969/1500 [U.K.].

⁹²Antigua Const., s.37; St. Christopher, Nevis and Anguilla Const., s.34; Dominica Const., s.33; St. Lucia Const., s.35; St. Vincent Const., s.36. Cf. note 12, *supra*.

⁹³Antigua Const., s.38(2); (4); St. Christopher, Nevis and Anguilla Const., s.35(2)-(4); Dominica Const., s.34(2), (3); St. Lucia Const., s.36(2), (3); St. Vincent Const., s.37(2), (3). Cf. note 20, *supra*.

⁹⁴Antigua Const., ss.2-14; St. Christopher, Nevis and Anguilla Const., ss.2-15; Dominica Const., ss.2-15; St. Lucia Const., ss.2-15; St. Vincent Const., ss.2-15. Cf. note 24, *supra*.

⁹⁵Antigua Const., s.15(1), (2); St. Christopher, Nevis and Anguilla Const., s.16(1), (2)(a); Dominica Const., s.16(1), (2)(a); St. Lucia Const., s.16(1), (2)(a); St. Vincent Const., s.16(1), (2)(a); Cf. note 61, *supra*.

⁹⁶"The West Indies Associated States: Some Aspects of the Constitutional Arrangements", Social and Economic Studies, Vol. 19, No. 1, 57 at 82 (Institute of Social and Econ. Research, U.W.I., Jamaica, March, 1970).

⁹⁷See note 83, *supra* and accompanying text.

⁹⁸Grenada and the Associated States share judicial services. There is a Supreme Court and a Court of Appeal of Grenada and the Associated States; see Grenada Const., s.105.

⁹⁹The existence of the power of judicial review of legislation had been taken for granted and exercised to strike down the Public Meetings and Processions (Amendment) Ordinance, 1967, as being inconsistent with the rights guaranteed by ss.10 and II of the Constitution of that state to freedom of expression, and of association and assembly respectively, in CHIEF OF POLICE v. POWELL AND THOMAS (1968) 12 WIR 403, High Court. See also CHARLES v. PHILLIPS AND SEALEY (1966-67) 10 WIR 423, C.A. [WIAS]; and HERBERT v. PHILLIPS AND SEALEY (1966-67) 10 WIR 435, C.A. [WIAS] where the Court of Appeal of the Associated States struck down an Imperial Order in Council, the Leeward Islands (Emergency Provisions) Order in Council 1959, as being unconstitutional. A challenge failed on the facts in FRANCIS v. CHIEF OF POLICE (1970), 15 WIR I, C.A.

¹⁰⁰Bahamas Const., art. 17(2); Jamaica Const., s.17(2); Barbados Const., s.15(2); Grenada Const., s.5(2); Guyana Const., art. 7(2); Sierra Leone Const., s.6(2); Cf. India Const., art. 13(1). The Trinidad and Tobago, U.S., and Sri Lanka Constitutions do not have such a provision.

¹⁰¹Bahamas Const., arts. 19(1), 20(1), 30; Jamaica Const., ss.15(1), 20(5), 26(8); Barbados Const., ss.13(1), 18(1), 26; Grenada Const., ss.3(1), 8(11), Sched. 3 to the Grenada Constitution Order, s.1; Guyana Const., art. 5(1), 10(11), 18; Sierra Leone Const., ss.3(1), 9(4) proviso, 9(5) proviso, 9(8) proviso; India Const., arts. 15(3)-(4), 16(3)-(5). Only one of these provisos appears in Trinidad and Tobago, s.3, and Sri Lanka, s.18(3). The U.S. Constitution has none such.

¹⁰²Bahamas Const., art. 21(2); Jamaica Const., s.19(2); Barbados Const., s.17(2); Grenada Const., s.7(2); Guyana Const., art. 9(2); Sierra Leone Const.,

s.8(2). In the U.S. the search must not be "unreasonable" U.S. Const. Amend. IV. The Trinidad and Tobago and Sri Lanka Constitutions do not have such a provision.

¹⁰³Bahamas Const., arts. 22(5), 23(2), 24(2), 25(2) respectively; Jamaica Const., ss.21(6), 22(2), 23(2), 17(3) respectively; Barbados Const., ss.19(6), 20(a), 21(2), 22(3) respectively; Grenada Const., ss.9(5), 10(2), 11(2), 12(3) respectively; Guyana Const., arts. 11(6), 12(2), 13(2), 14(3) respectively; Sierra Leone Const., ss.10(5), 11(2), 12(2), 4(3) respectively. Cf. India Const., arts. 25(1), 19(2), 19(3)-(4), 19(5) respectively; Sri Lanka Const., s.18(2). The Trinidad and Tobago, and U.S. Constitutions do not so provide.

¹⁰⁴Bahamas Const., art. 26(5), (9); Jamaica Const., s.24(5)-(7); Barbados Const., s.23(4)(6); Grenada Const., s.13(5), (7); Guyana Const., art. 15(4), (6); Sierra Leone Const., s.13(7); Sri Lanka Const., s.18(2); Cf. India Const., art. 15(3)-(4). The Trinidad and Tobago and U.S. Constitutions do not have such a proviso.

¹⁰⁵Bahamas Const., art. 27(1)(a)-(b), (2)-(4); Jamaica Const., s.18(2)-(4); Barbados Const., s.16(2)-(4); Grenada Const., s.6(5)-(7); Guyana Const., art. 8(2)-(4); Sierra Leone Const., s.7(1)(a)-(b), (2)-(3). Cf. India Const., art. 31(5)(b) (ii). Not so in the Trinidad and Tobago, and U.S. Constitutions.

¹⁰⁶Bahamas Const., art. 137(1); Jamaica Const., s.1(1); Barbados Const., s.117(1); Grenada Const., s.111(1); Trinidad and Tobago Const., s.105(1); Guyana Const., art. 125(1); Sierra Leone Const., s.93(1).

¹⁰⁷Trinidad and Tobago Const., ss.3, 4, 5 respectively. Compare Special Acts in Jamaica, Const., s.50.

¹⁰⁸See note 18, *supra*.

¹⁰⁹THINKING THINGS THROUGH, at 6.

¹¹⁰See notes 3-10 and accompanying text, *supra*.

¹¹¹See notes 11-18 and accompanying text, *supra*.

¹¹²See notes 19-23 and accompanying text, *supra*.

¹¹³See the Universal Declaration of Human Rights, art. 15.

¹¹⁴Bahamas Const., art. 13(b); Jamaica Const., s.11(b); Barbados Const., s.9(b); Grenada Const., s.99(2); Trinidad and Tobago Const., s.17(b); Guyana Const., art. 28(b). Cf. Sri Lanka Const., s.67 proviso. But see India Const. art. 11. Depriving one of one's citizenship is not a power given by the U.S. Constitution to Congress. Sierra Leone has no Citizenship Laws in its Constitution although those laws are entrenched in the Constitution, s.34(3), and see *AKAR v. A.G. (SIERRA LEONE)* [1970] AC 853, P.C.

¹¹⁵Grenada Const., s.45(4). Cf. Sierra Leone Const., s.42(3); Sri Lanka Const., ss.46(1), 55(1).

¹¹⁶Only in *JOHNSON v. SARGANT AND SONS* [1918] 1 KB 79 has it been said, and obiter that delegated legislation must be published before it can be effective. To the contrary are *RE BENN* (1963-64) 6 WIR 500, S.C. [GUYANA]; *JAGAN v. McFARLANE* [1945] LRBG 129, S.C. [GUYANA]; *R. v. LEE* (1936-40) 3 JLR 237, C.A. [JAMAICA]; *JONES v. ROBSON* [1901] 1KB673; *SIMMONDS v. NEWELL* [1953] 1 W.L.R. 826, Q.B.D.; *R. v. SHEER METALCRAFT LTD.* [1954] 1 Q.B. 586.

¹¹⁷Bahamas Const., art. 66(3); Jamaica Const., s.64(2); Barbados Const., s.61(3); Grenada Const. s.52(2); Trinidad and Tobago Const., s.50(2); Guyana Const., art. 82(3); U.S. Const., art. 1, s.2 cl.1 art. 1, s.3, cls. 1-2, respectively; Sierra Leone Const.,

s. 46(2); Sri Lanka Const., s.40(1); India Const., art. 83(2), art. 83(1) respectively. The Vice President of the U.S.A. is President of the Senate and holds office for four years.

¹¹⁸(I and II Geo. 5., Ch. 13).

¹¹⁹Parliament Act, 1911, (1 & 2 Geo. 5, c.13) [U.K.], s.7.

¹²⁰India apart, in all the countries where there are two levels of entrenchment this provision is entrenched at the higher level; and where there are three levels, at highest. Of course in the U.S. and Sri Lanka there is only one level of entrenchment: Bahamas Const., higher level, art. 54(3)(b); Jamaica Const., highest level, s.49(3)(b); Barbados Const., higher level, s.49(2)(d); Grenada Const., higher level, 39(5) and sched. 1(iii); Trinidad and Tobago Const., higher level, s.38(3)(b); Guyana Const., highest level, art. 73(3)(a); U.S. Const., art. v; Sierra Leone Const., higher level, s.34(1)(b); Sri Lanka, s.51(5); India Const., lower level, art. 368(2).

¹²¹Bahamas Const., art. 66(4); Jamaica Const., s.64(3); Barbados Const., s.61(4); Grenada Const., s.52(3); Trinidad and Tobago Const., s.50(3); Guyana Const., art. 82(4); Sierra Leone Const., s.46(3). Cf. Sri Lanka Const., s.40(2); India Const., art. 83 proviso.

¹²²Jamaica Const., s.38(1); Barbados Const., s.42(1). Contrast the permissive provisions in Guyana, Const., art. 66(4); Sri Lanka, Const., s.73; and India Const., art. 327. In THOMPSON v. FORREST (1967-68) 11 WIR 296, the Supreme Court of Jamaica assumed the existence of judicial review in relation to these provisions but held the impugned Representation of the People (Amendment) Act, 1963, Law 54 of 1963, valid and constitutional.

¹²³U.S. Const., Amends. XV, XIX; India Const., art. 325. Cf the generality of the provisions against non-discrimination in the other constitutions, see notes 30-31, *supra*.

¹²⁴Guyana Const., art. 66(1). Cf. Sri Lanka Const., s.72.

¹²⁵Bahamas Const., art. 51(2).

¹²⁶See Dicey, *supra* note 7, at 228-232.

¹²⁷U.S. Const., art. 1, s.9 cls. 2-3.

¹²⁸"Judicial Review of Legislation in the West Indian Constitutions" [1971] PUBLIC LAW 276, at 276.

¹²⁹Guyana Const., art. 79(3); Trinidad and Tobago Const., s.44(2) Sierra Leone Const., s.42(2).

¹³⁰See notes 8-10 and accompanying text, and notes 21-23 and accompanying text, *supra*.

¹³¹See notes 58-60 and accompanying text, *supra*.

¹³²Chapter 1 contains the Bill of Rights which has its own enforcement provision, see text accompanying note 61, *supra*.

¹³³Grenada Const., s.101(1)-(3).

¹³⁴Grenada Const., s.103(a), 104(c) respectively.

¹³⁵Antigua Const., ss.102(1)-(3), 104(b), 105(1)(c) respectively; St. Christopher, Nevis and Anguilla Const., ss.98(1)-(3), 100(a), 101(1)(c) respectively; Dominica Const., ss.96(1)-(3), 98(a), 99(1)(c) respectively; St. Lucia Const., ss.96(1)-(3), 98(a), 99(1)(c) respectively; St. Vincent Const., ss.99(1)-(3), 101(a), 102(1)(e) respectively.

¹³⁶⁴Wheat 316, 4 L.ed 579 (1819).

¹³⁷⁴Wheat 316, at 407, 4 L.ed. 579, at 601 (1819).

¹³⁸See text accompanying note 69, *supra*.

¹³⁹See text accompanying note 3, *supra*.

¹⁴⁰U.S. Const., art. 111, s.2, cl. 1; emphasis supplied.

¹⁴¹THE DOCTRINE OF JUDICIAL REVIEW: ITS LEGAL AND HISTORICAL BASIS, AND OTHER ESSAYS 16-17 (1963).

¹⁴²CONGRESS v. THE SUPREME COURT 206 n. 33 (1969).

¹⁴³Alexander Bickel, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 6,13 (1962); William W. Crosskey, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1107 (1953).

¹⁴⁴William W. Crosskey, *supra* note 140, at 1002-1003, 1007.

¹⁴⁵Alexander Bickel, *supra* note 140, at 5-6; William W. Crosskey, *supra* note 140, at 983; Edward S. Corwin, *supra* note 138, at 14-16.

¹⁴⁶It is true that the American Bill of Rights was not adopted till 15 December, 1791, the original Constitution having itself become effective on 4 March, 1789, but the original Constitution does confer rights on Americans, See art. 1, s.9 cls. 2-3, text accompanying note 124, *supra*.

¹⁴⁷Raoul Berger, *supra* note 139, at 222.

¹⁴⁸See text accompanying notes 3-5, *supra*.

¹⁴⁹"Judicial Review of Legislation: European Antecedents and Adaptations," 79 Harv.L.Rev. 1207, at 1214 (1965-66).

¹⁵⁰See Kelsen, GENERAL THEORY OF LAW AND STATE 267-268 (Anders Wedberg transl. 1949).

¹⁵¹See text accompanying notes 57-60, *supra*. It is in this context that we must read de Smith's statement in THE NEW COMMONWEALTH AND ITS CONSTITUTIONS, at 108 that "many countries with constitutions alterable only by special procedures do not countenance judicial review."

¹⁵²In Grenada a Court Martial does not have to make such a reference. See Bahamas Const., art. 28(3), (2)(b); Barbados Const., s.24(3), (2)(b), (4); Grenada Const., ss.16(3), (2)(b), (4) 102; Trinidad and Tobago Const., s.6(3), (2)(b); Guyana Const., art. 19(3), 2(b), (4); Sierra Leone Const., s.14(3), (2)(b).

¹⁵³Antigua does not have such a provision in relation to the Bill of Rights specifically. Also, as in Grenada, all the Associated States exempt courts-martial from having to make the reference, see Antigua Const., s.103; St. Christopher, Nevis and Anguilla Const., ss.16(3), (2)(b), (4), 99; Dominica Const., ss.16(3), (2)(b), (4), 97; St. Lucia Const., ss.16(3), (2)(b), (4), 97; St. Vincent Const., ss.16(3), (2)(b), (4), 100.

¹⁵⁴[1952] 1 TLR 1245. See D. V. Cowen, "Legislature and Judiciary: Reflections on the Constitutional Issues in South Africa, Part II," 16 Mod. L. Rev. 273, at 284 (1953); and T. B. Smith, "The Union of 1707 As Fundamental Law," [1957] PUBLIC LAW 99, at 113-114.

¹⁵⁵The Federalist Papers written by Alexander Hamilton, James Madison, and John Gray, are collected in the book THE FEDERALIST (Benjamin F. Wright ed. 1911).

¹⁵⁶*Ibid.*, at 492. See also de Smith, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS, at 109.

¹⁵⁷Judiciary Act, 1789, s.25.

¹⁵⁸U.S. Const., art. 111, s.2, cl. 2.

¹⁵⁹1 Cranch 137, at 177-178, 2 L. ed. 60 at 73-74 (1803).

¹⁶⁰"John Marshall and the Judicial Function," in GOVERNMENT UNDER LAW, at 8.

¹⁶¹[1964] PC 172, at 197 G., per LORD PEARCE.

¹⁶²[1965] AC 259, P.C.

¹⁶³Acts. Nos. 40 of 1958, 1 of 1962, and 31 of 1962 respectively.

¹⁶⁴[1970] AC 853, P.C.

¹⁶⁵Act. No. 12 of 1962.

¹⁶⁶At this time the Ceylon Constitution was contained in the Constitution and Independence Orders in Council 1946 and 1947 (consolidated), (S.I. 1948, Vol. 111 Rev. Edn. at 560) [U.K.]; and the Sierra Leone Constitution in Schedule 2 to the Sierra Leone (Constitution) Order in Council, 1961, (S.I. 1961/741) [U.K.].

¹⁶⁷Bahamas Const., art. 79(4); Jamaica Const., s.32(4); Barbados Const., s.32(5); Grenada Const., s.108; Trinidad and Tobago Const., s.63(2); Guyana Const., art. 124; Sri Lanka Const., s.27(2). Cf. Sierra Leone Const., s.56(2); India Const., art. 361(1). On the U.S.A., see *MARBURY v. MADISON* 1 Cranch 137, at 165-166, 2 L.ed. 50, at 69-70, PER MARSHALL, C. J. (1803).

¹⁶⁸Bahamas Const., art. 34(2) proviso; Jamaica Const., s.30(2) proviso; Barbados Const., s.30(2) proviso; Grenada Const., s.22(2) proviso; Sri Lanka Const., s.28(3). Cf. India Const., art. 65(3). On the U.S.A., see n.164, *supra*.

¹⁶⁹Bahamas Const., art. 125(4); Jamaica Const., s.136; Barbados Const., s.106; Trinidad and Tobago Const., s.102(4); Guyana Const., art. 119(6); Sierra Leone Const., s.90.

¹⁷⁰Bahamas Const., art. 62(4); Jamaica Const., s.58(4); Barbados Const., s.57(4); Grenada Const., s.39(8), 49(4); Trinidad and Tobago Const., s.48(4); Sri Lanka Const., s.49(3). See also Jamaica Const., s.38(2); Barbados Const., s.42(2).

¹⁷¹Bahamas Const., art. 53(2); Jamaica Const., s.48(3)(5); Barbados Const., s.48(3); Trinidad and Tobago Const., s.37; Guyana Const., art. 72(3), (5); U.S. Const., art 1, s.6, cl. 1. Sri Lanka Const., s.38(1); India Const., art. 105.

¹⁷²See *THEBERGE v. LAUDRY* [1876-777] AC 102, P.C. But see Edward A. Laing, "Procedure in Commonwealth Caribbean Election Petitions: Its Effect on the Free Franchise," Vol. 2, No. 3. *Anglo-American L. Rev.* 363 (July-September 1973).

¹⁷³Jamaica Const., s.44(1); Grenada Const., s.37(1); Trinidad and Tobago Const., s.35(1); Guyana Const., art. 71(1); Cf. Bahamas Const., arts. 51(1), (3)-(5), 45(1) (3)-(4); Barbados Const., s.46 (1)(2). See also, Sierra Leone Const., s.30. Cf. Sri Lanka Const., s.39; Jamaica Const., s.46; Grenada Const., s.44; Guyana Const., art. 64.

¹⁷⁴(1969-70) 14 WIR 292, H. C. [GUYANA].

¹⁷⁵(1969-70) 14 WIR 292, at 301C. See also, *ibid.*, at 302E, 305F.

¹⁷⁶Jamaica Const., s.44(1), (2); Grenada Const., s.37(7), (2)-(4); Trinidad and Tobago Const., s.35(3)-(4), (2); Guyana Const., art. 71(4), (2), (3)(a). Not so, however, in Sierra Leone, Const., s.30.

¹⁷⁷Guyana became a Republic as from 23rd February, 1970, by virtue of Resolution No. XXVI passed in the National Assembly on 29th August, 1969, by virtue of art. 73(5) of the Guyana Constitution (see Laws of Guyana, 1973 Rev. Edn., Cap. 1:01, vol. 1, at 120).

¹⁷⁸Guyana Const., art. 30(2). This paragraph came into effect by virtue of the changeover to Republicanism as told in note 174, *supra*.

¹⁷⁹Guyana Const., art. 30(13). See note 175, *supra*.

¹⁸⁰*Supra* note 93, at 83.

¹⁸¹*Supra* note 140, *passim*.

¹⁸²See text accompanying notes 57-60, *supra*.

¹⁸³See Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787. 4 vols. Vol. 1, at 21, 97-104, 108-110, 138-140, vol. 2, at 73-80, 298. (1911).

¹⁸⁴Kelsen, *supra* note 147, at 160.

¹⁸⁵See O. Hood Phillips, *supra* note 7, at 36.

¹⁸⁶Dicey, *supra* note 7, at 131.

¹⁸⁷*Ibid* at 69n. Cf. one of the main reasons given by André Tunc for the absence of judicial review of legislation in France, it is an historical one: "Government Under Law: A Civilian View," in GOVERNMENT UNDER LAW, at 37-38, 72-73.

¹⁸⁸MODERN CONSTITUTIONS 7 (2nd ed. 1966).

¹⁸⁹See text accompanying note 23, *supra*.

¹⁹⁰(1610) 8 Co. Rep. 107a, at 118(c)-(d); 77 Eng. Rep. 638, at 652.

¹⁹¹"The 'Higher Law' Background of American Constitutional Law," 42 Harv.L. Rev. 149, and 365, at 379 (1928-29). See also Theodore F.T. Plucknett, "Bonham's Case and Judicial Review" 40 Harv.L.Rev. 30, especially at 68 (1926-27); Mauro Cappelletti and John Adams, *supra* note 146, at 1211; Erwin Griswald, "The 'Coloured Vote Case' in South Africa," 65 Harv.L.Rev. 1361, at 1374 (1951-52); G. L. Mosse, THE STRUGGLE FOR SOVEREIGNTY IN ENGLAND 179 (1968). And Cf., J.D.B. Mitchell, "What Do You Want To Be Inscrutable For, Maria?" 5C.M.L.R. Rev. 112, at 120 n.24 (1967-68); Boudin, "Lord Coke and the American Doctrine of Judicial Power," 6 N.Y.U.L. Rev. 223 (1929); McGovney, "British Origin of Judicial Review of Legislation," 93 U.Pa. L. Rev. 1 at 1-7 (1944); McKay, "Coke—Parliamentary Sovereignty or the Supremacy of the Law?", 22 Mich. L. Rev. 215 (1923); George P. Smith, "Dr. Bonham's Case and the Modern Significance of Lord Coke's Influence," 41 Wash. L. Rev. 297 (1966).

¹⁹²*Supra* note 139, at 23. Contra, William W. Crosskey, *Supra* note 140, at 941.

¹⁹³George P. Smith, *supra* note 188, at 297.

¹⁹⁴AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 162 (1935).

¹⁹⁵"Judicial Control of Legislation," 3 Am.J.Comp.L. 186, at 189 (1954).

¹⁹⁶*Supra* note 7, at 164.

¹⁹⁷(1968) 12 WIR 5, at 22A-B. Cf. DIXON, J., as he then was, in A.G. (N.S.W.) v. TRETHOWAN (1931) 44 COMMW.L.R. 394, at 426: "because the law over which the Imperial Parliament is supreme determines the powers of a legislature in a Dominion, the courts must decide upon the validity as well as the application of the statutes of that legislature."

¹⁹⁸Using the historical approach, Charles Beard, *supra* note 36, at 41-42 and Raoul Berger, *supra* note 139, at 336 in relation to the U.S.A., and James B. Kelly, "The Jamaican Independence Constitution of 1962," *Caribbean Studies*, Vol. 3, No. 1, 18, at 46-56 (Institute of Caribbean Studies, U. of Puerto Rico, April 1963) and Trevor Munroe, "Origins of the Jamaica Independence Constitution," [1972] *Jamaica L.J.* 58, at 63-65 in relation to Jamaica, point out that the framers made it clear in various speeches that they were aware of their conferring the power of judicial review. *Contra*: Max Farrand, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 22 (1913); William W. Crosskey, *supra* note 140, at 938; Louis B. Boudin, *GOVERNMENT BY JUDICIARY* 115-116 (1932).

¹⁹⁹Verbatim Notes of the Queen's Hall Conference, at 59-61.

²⁰⁰And when in 1971 the Governor-General of that country set up the Constitution Commission, see note 18, *supra*, it was to WOODING, then retired from the Chief Justiceship, the Governor-General turned for Chairmanship of the ten-member Commission. WOODING died, 1974, in active service, but not before his Commission had prepared a Proposed Constitution, see note 18, *supra*.

²⁰¹Charles Beard, *supra* note 36, at 54-55.

²⁰²See text accompanying note 39, *supra*.