justice, undermine and disregard basic principles for the sake of expediency.

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THE ROLE OF THE LAW AND THE LAWYER IN DEVELOPING SOCIETIES *

In a sense every society, which is not developing, is disintegrating; but I am using the term 'developing' in the more specific context of societies, which have recently emerged from a period of colonialism and have just attained their independence, or are about to do so, and which are variously described as 'underdeveloped,' 'developing' or as part of the Third World. The Commonwealth Caribbean is a microcosm of this type of society and I shall use it to illustrate the submissions that I wish to make.

In 1956 Lord Denning expressed the view that the common law was not suitable for export without considerable adaptation. He said:

> "[The common law] has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications."[1]

However that may be, the fact is that there has been a considerable export trade in the common law and the Caribbean was an early port of call. The Honourable S. S. Ramphal, S.C., Attorney General and Minister of State for External Affairs of Guyana, put it very lucidly when he addressed the Inaugural Session of the Fourth Commonwealth Law Conference in New Delhi on January 6, 1971. He said: "It was in the Caribbean that the seed of the common law was first planted outside its English habitat. Before the plantations of North America, before the trading posts of India, before the pursuit of dominion in Africa – it was the islands of the Caribbean that provided that first nursery beyond the seas over three hundred years ago."

The Honourable Minister went on to depict the common law as having developed into a law of the Commonwealth by which he meant, "not merely that body of the common law which is now a part of each

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1. Nyali Ld v A.G. [1956] 1 Q.B. 1, at pp. 16-17.

of our legal systems, but all those other aspects of the law, both structural and substantive, which have moulded a unity out of the diversity of our communities." In his view the law of the Commonwealth belonged no longer to any one country but had become a joint possession– a legal heritage which the entire Commonwealth was required to nourish in such a way that the development of that law would meet the several national needs as well as the collective Commonwealth need.

At this point let me interject to say that you in Canada and we in the Caribbean must interpret the common law in a wider sense than Lord Denning or the Hon. S. S. Ramphal seem to conceive. For both of us have well established systems of civil law in active operation in our respective countries – you in Quebec and we in the island of St. Lucia whose Civil Code is almost an exact copy of that of Quebec. Moreover you in Newfoundland may well question the historical accuracy of the Hon. S. S. Ramphal's assumption that the Caribbean was the first port of call for the common law. It may well be that Newfoundland can add this to the number of its other 'firsts.'

Before we attribute to the common law even in the wide sense that I have indicated so advanced a stage of development and so great a degree of universality as is claimed for it by the Hon. S. S. Ramphal, let us examine some of the qualifications to which it has become subject in the course of its journeys abroad. For this purpose we must omit the technical details of any particular branch of the common law and concentrate instead on the broad conceptual areas.

The field of constitutional law affords scope for useful comparison between the member countries of the Commonwealth. From the point of view of my theme – the role of the law and the lawyer in developing societies – the question that comes immediately to mind is why the doctrine of the absolute Sovereignty of Parliament, which is a fundamental principle of the Constitution of the United Kingdom, has been regarded as unsuitable for export to the new Commonwealth.

A necessary consequence of that doctrine is the inability of the judiciary to declare an Act of the Legislature unconstitutional. The judiciary in the United Kingdom has made the position abundantly clear with the statement that they do not sit as a court of appeal from Parliament. Yet in every developing Commonwealth country, dependent as well as independent, we find limitations imposed upon the supremacy of the legislature in the form of entrenched constitutional provisions guaranteeing certain specified fundamental rights.

What form do these take? Special procedures are required for amending the entrenched provisions and the courts have power to

declare invalid such legislation as contravenes the entrenched provisions otherwise than by the prescribed method.

It can be argued that the difference between the United Kingdom and the new Commonwealth countries is justified on the ground that the supremacy of Parliament does not need to be circumscribed in the United Kingdom. This is untenable, as a single recent example shows. In 1968 in the course of a mere couple of days the United Kingdom Parliament passed through all its legislative stages an Act depriving certain categories of United Kingdom citizens resident in certain Commonwealth countries of a fundamental attribute of their citizenship, namely the right to enter the country of their citizenship. The Act is the more remarkable in that it was the United Kingdom government, acting in right of its government of the United Kingdom, which had conferred the citizenship; and not the United Kingdom government, acting in right of the government of the Commonwealth country from which the excluded person came.

Whether or not a Bill of Rights should now be entrenched in the United Kingdom and power given to the judiciary to disallow legislation which contravenes it, the fact remains that the United Kingdom has reached its present stage of devolpment without such safeguards. Why then have other Commonwealth countries followed a different path?

The answer is not difficult to find in the case of member states such as Canada with federal forms of government. They must have some machinery for determining the constitutionality of federal legislation, since departure from the terms of the constitution will inevitably alter the nature of the distribution of the powers according to which the Federation was set up. That machinery is best provided through some form of judicial tribunal – either the ordinary courts of the land or special constitutional courts.

It is less obvious why those member states with a unitary form of government should vest in the judiciary wide powers to disallow legislation. This is even more surprising when one considers that the underdeveloped member states of the Commonwealth have several objectives in view, which entrenched constitutional provisions might be thought to some extent to obstruct. The objectives include the quick achievement of social and economic change, the preservation of fundamental rights and the development of the independence of the judiciary.

Some people question whether a jurisdiction to disallow legislation in an underdeveloped country with a unitary form of government is

compatible with the development of an independent judiciary, particularly where the jurisdiction extends to fundamental rights. For the power of disallowance imposes a fetter upon the political arm of governments and makes the judiciary, rather than the legislature, the final arbiter in matters of acute political controversy. The exercise of its powers by the judiciary thus tends to invite counter attack from the executive.

In this respect let us look at the history of the matter in the United Kingdom. The independence of the judiciary was achieved after a prolonged conflict between the Executive and the Courts. Courageous judges who refused to do the bidding of an oppressive monarch paid the penalty by being dismissed from the bench, or even worse, from this life. It was not until after a Civil war, a period of Republicanism and the Restoration of the Monarchy that statutory recognition was given to the independence of the judiciary in the Act of Settlement of 1701. Even then, however, two factors had to occur to sustain the statutory independence of the judiciary: the first, a strong legal profession operating through powerful professional associations – the Inns of Court – and the second, the recognition by the judiciary of the Sovereignty of Parliament.

It would be cynical, however, to assume that the entrenchment of constitutional provisions, including a provision dealing with the independence of the judiciary, itself places that independence in jeopardy. It is true that constitutional documents cannot entirely short-circuit the lessons of history; but they help. Men learn not only from document but also from experience, and it is in these factors that we find the clue to the emphasis on entrenched fundamental freedoms in the constitution of underdeveloped Commonwealth countries.

At this point let me say that I remain an unrepentant believer in the value of entrenched constitutional provisions guaranteeing fundamental freedoms. Constitutional provisions have an educative as well as a controlling function. They engender respect for law and make patent to the persons breaking the law, as well as those suffering from the breach, that the law is being broken. In this connection it is significant that for the most part in the new nations of the Commonwealth independence did not bring about a curtailment of judicial functions or any large diminution of judicial privileges, though post-independence revolution has in some cases done both.

This is in part due to the experience of the men who led the new Commonwealth to independence. Many of them suffered periods of preventive detention imposed under legislation enacted by an Imperialist

Britain. It is not surprising therefore that they should wish to have inserted into the independence constitutions of their countries provisions lessening the possibility of recurrence. The fact that after some years of independence some of them resorted to legislation similar to that imposed by the colonial rulers should not be interpreted to mean that their motives at the time of independence were insincere.

At least as important a reason, however, is the role that the judiciary and the legal profession have played in interpreting the entrenched provisions of 'independence' constitutions. They have been astute to avoid confrontations with the executive and, wherever possible, they have decided and argued constitutional issues on technical and procedural grounds – at times to the dismay of those critics who would like to hasten the development of a new jurisprudence of the new Commonwealth. Yet when the chips were down and confrontation was inevitable they have for the most part shown the courage that one has come to expect from the practitioners and administrators of justice according to the best tradition of the common law.

In no sphere do the judges have a more important role to play than in the interpretation of labour legislation, for upon their decisions often depend the peace or chaos of the industrial life of their country. Let me give you an example. In 1965 the Legislature of Trinidad and Tobago enacted the Industrial Stabilisation Act which curtailed the right to strike, unless the Minister of Labour failed to refer an industrial dispute to the Industrial Court for settlement. It was argued that this infringed the entrenched provisions of the constitution of Trinidad and Tobago relating to freedom of association of which the right to strike was alleged to form a constitutional and essential part.

The Court of Appeal of Trinidad and Tobago denied that this was so.[2] In the words of Wooding, C.J.:

> "the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel."[3]

The learned Chief Justice then went on to say:

> "When under the protective cover of statutory immunities the strike weapon was so extensively used that to many it began to appear that the imbalance had tilted the other way, it is likewise easy to see that Parliament may have

2. Collymore—Attorney General of Trinidad & Tobago (1967) 12 W.I.R. 5.
3. Ibid. at p. 15.

> considered that the best means of holding the scales in equal poise was to refer to a tribunal for its impartial adjudication all disputes which the parties themselves should fail to resolve. That was within the prerogative of Parliament."[4]

Let me now leave the sphere of constitutional and industrial law and examine some aspects of the machinery of justice in developing societies. One problem that every new member state of the Commonwealth has to face on becoming independent is whether to continue to recognize an external court – the Judicial Committee of the Privy Council – as its final Court of Appeal.

Some critics contend that the continuance of the appeal is a negation of independence and that an essential attribute of every independent state is the existence within its boundaries of its own final appellate court. You in Canada are not strangers to this line of argument.

However persuasive the argument may be in political terms, it has no logical or legal validity. The fact is that before independence a dependent country has no choice in the matter. The colonial power alone could determine where final appeals went. After independence the new independent state acquired a choice – to continue or discontinue the previous practice as it saw fit. The exercise of that choice is an exercise of sovereingty not a renunciation of it.

The practical question remains, however, and that is whether in the exercise of their post-independence sovereignty newly independent states should allow appeals to the Judicial Committee of the Privy Council to continue. It is my considered opinion that they should not. In the modern context of active, sometimes aggressive, nationalism in the new Commonwealth, a system of external appeals is unlikely to survive a decision adverse to the government of the day in an important constitutional appeal.[5] If that is so, it is better to place the ultimate responsibility on the local judiciary immediately independence is obtained, rather than delay it until the occurrence of acute constitutional controversy makes their assumption of that ultimate responsibility less secure. Moreover, the fact that the Judicial Committee is itself aware of its own untenable position is likely to lead it to resort to an excessively literal interpretation of the written terms of the constitution and to ignore the role of a constitutional court in accommodating the conflicting interests within a state at any given time and in thus achieving a desirable and balanced creativity.

The Commonwealth Caribbean, in this as in many other matters, displays a not untypical schizophrenia, for at the same time that it is

4. Ibid. at p. 16.
5. See **Akintola & Adegbinro** [1963] 3 W.L.R. 63.

questioning the continuance of appeals to the Judicial Committee it is considering the establishment of a Commonwealth Caribbean Court of Appeal to take its place.

The Commonwealth Caribbean area has not yet got over the trauma of the break-up of the Federation of the West Indies and is still unsure whether it wishes to make its mark as a single political entity in the form of a midi-state or whether each of the units that comprise the area will go its own way as a mini, or in some cases, a miniscule sovereign state. Support for a Commonwealth Caribbean Court of Appeal comes mainly from those who believe that its establishment will lead to closer association in other areas of human endeavour in the Caribbean – not least the political.

I am not convinced that the case for a Caribbean Court of Appeal has been made out, and indeed the contrary may well be the case. For I doubt whether a single Caribbean country would be prepared to entrust the decision of constitutional cases to any courts other than its own. I doubt also whether many Caribbean countries would be prepared to allow appeals from their own High Courts direct to a Caribbean Court of Appeal without first going to their own Court of Appeal. If my doubts are well founded the Caribbean Court of Appeal would be an expensive judicial instrument with little important jurisdiction. In those circumstances its premature establishment could well result in a failure, which would damage the hopes of its most ardent protagonists.

Another important aspect of the machinery of justice in developing societies concerns the suitability to local conditions of some of the legal institutions that are said to constitute our legal heritage. Let me mention two examples. The divided legal profession, however many advocates it may have in current English conditions, has not been a successful item in the legal export trade from England.

Yet we find it in operation in the Commonwealth Caribbean with the most unsatisfactory refinements and qualifications. In some territories a lawyer can practise both as a solicitor and a barrister, though qualified only as the latter. In one capacity he can instruct himself in the other, and charge two sets of fees. In one capacity he can sue for his fees: in the other he enjoys some degree of immunity from himself being sued for negligence. In some territories the barrister has an exclusive right of audience in the superior courts, but also shares with the solicitor the privilege of being instructed directly by the lay client, and is also entitled to break in upon the solicitor's traditional monopoly of conveyancing. In one territory the profession takes on a chameleon-like quality, a person qualified in one branch being permitted to change to

the other without the need to obtain any further qualification, and to return to his former position if he is not satisfied with the change.

This unsatisfactory state of affairs is likely to be changed in the near future in most territories by legislation which will give everyone the best of all possible worlds. It is likely to permit lawyers to practise as barristers or as solicitors or as both.

Take another example. The jury system is deeply embedded in English jurisprudence. Yet some people question its extension to countries where there are wide differences of wealth, education, class, colour and race, such as exist in many countries of the new Commonwealth. The arguments in favour of the jury system are nowhere better expressed than by Justice Learned Hand:

> "The institution of trial by jury – especially in criminal cases – has its hold upon public favour chiefly for two reasons. The individual can forfeit his liberty – to say nothing of his life – only at the hands of those who, unlike any official, are in no wise accountable, directly and indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree."[6]

The opponents of the jury system emphasize the risk of perverse verdicts of acquittal and argue that where they become too frequent they tend to encourage law enforcement agencies to take the law into their own hands. They cite in their support the apocryphal tale of the Irish judge who said to the accused whom he was about to discharge: "You have been acquitted by an Irish jury, and you leave this Court with no stain upon your character other than that."

In my submission the jury system affords one of the most valuable safeguards to the liberty of individuals, particularly in societies that are in the process of rapid social and economic change. It should not therefore be tampered with except on positive proof that it persistently returns perverse verdicts.

A cause for concern in developing societies is the high cost of the machinery of justice. The Honourable S. S. Ramphal sounded a warning about this in his speech to the Fourth Commonwealth Law Conference at Delhi, to which I have already alluded. He said: "All too often all too many lawyers of the Commonwealth regard themselves, consciously or unconsciously, as skilled operators of a push-button legal machine

6. United States ex rel. McCann & Adams (1942) 126 F(2d) 774, at p. 775.

computerized by precedent and legislation and programmed to do justice. If this Conference can serve to dispel this image and to promote a concept of the Commonwealth lawyer as an active participant in the creative processes of social action we will have done much to secure the future of the law, and the lawyer, in the Commonwealth. For, let us have no illusions, the rest of our communities, now conditioned to this image of the lawyer as a mere operative, is beginning to question the high cost of his manipulative talent."

It is here that the fledgling Faculty of Law of the University of the West Indies faces its biggest challenge and has its greatest opportunity. It must demonstrate to the student that the law in action is no less important than the law in abstraction. It must provide the lawyer with an elementary knowledge of the non-legal disciplines that he needs to enable him to play a creative part in the social and economic changes that he can no longer merely stand aside and observe. It must make him aware that he is nothing more than a parasite if all that he does is to latch on to and thrive upon the disputes of the general public. It must show him that the way to earn the respect of that same public is to ensure that the law is not merely a responsible body of fixed rules, but is also responsive to the changing needs of society and is itself an instrument of change.

It must produce teachers who are prepared to discharge the function of writing critically about legal institutions, issues and developments in the Caribbean. A Law teacher will not be said to do that if he relies on the standard English texts as the sole medium of instruction for his students. For there is a growing body of Caribbean case and statute law which does not at present have the critical appraisal rendered by academic lawyers and teachers of law in the more developed jurisdictions through legal journals and periodicals.

Above all, the Faculty must impress upon the young lawyer the perceptive words of Edmund Burke: "You can never plan the future by the past." For the lawyer of tomorrow must be able to do more than quote the precedents of the past: he must have the imagination, the inventiveness and the insight to play his part in the quest for solutions to problems of a kind not yet encountered by the human race. I am confident that the Faculty of Law of the University of the West Indies will acquit itself with distinction in the pursuit of these objectives.

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