Hi. HIRD E. JUDGES AND A BILL OF RIGHTS

Elizabeth Hird

JUDGES AND A BILL OF RIGHTS

Submitted for the LL.B. (Honours) Degree
at Victoria University of Wellington.

1 September 1981

INTRODUCTION

During the 1960's a debate took place, both in the United Kingdom and New Zealand, on the merits of introducing a Bill of Rights as a means of protecting fundamental civil and political rights. In New Zealand the Constitutional Society for the Promotion of Economic Freedom and Justice in New Zealand (Inc) presented a petition to Parliament in 1960 praying for a written constitution. This was followed by the inclusion in the National Party's 1960 Manifesto of a promise to introduce a Bill of Rights similar to that adopted by the Canadian Parliament. In 1961 the Society submitted to Parliament a draft Constitution, including a Bill of Rights enforced by the Supreme Court.

After consideration by the Public Petitions Committee, which made no recommendation, the matter lapsed until 1963.(1)

In 1963 the Minister of Justice of the National Government introduced to Parliament a Bill of Rights designed to give statutory protection for fundamental rights and freedoms already existing. This the National Government saw as fulfilling its 1960 Manifesto promise. The Bill was referred to a recess Parliamentary Committee which reported back to Parliament in 1964 with the recommendation that the New Zealand Bill of Rights be not allowed to proceed.(2) As an issue of public debate, the merits or demerits of introducting a Bill of Rights has since disappeared from political consciousness in New Zealand, although legal commentators still addressed the issue.(3)

The debate in the United Kingdom has however continued, if somewhat sporadically. Michael Zander in his booklet A Bill of Rights(4) traces the history of the written debate on Bills of Rights during the 1960's, while over the next few years the issue of a Bill of Rights was raised in Parliament on several different occasions.(5) In 1971 the then Attorney-

General, Mr Sam Silkin, moved the second reading of a Protection of Human Rights Bill. This Bill would establish a UK Commission of Human Rights with power to investigate, report and recommend but no power to enforce - a role corresponding to that of the New Zealand Human Rights Commission. Unfortunately the debate did not proceed as the House was counted out for lack of 40 members present. It remained for Sir Leslie Scarman, chairman of the English Law Commission, to re-open the debate with his Hamlyn Lectures in December of 1974.(6)

Sir Leslie saw English law at a crisis point, under pressure from the international human rights movement, evidenced by the General Assembly's Universal Declaration of Human Rights(7) and the European Convention on Human Rights.(8) This pressure needed to be accomodated into the prevailing legal system. However, the constitutional principle of legislative sovereignty often found the Courts helpless in the face of "...the will however frightened and prejudiced it may be of Parliament."(9) As the concept of fundamental and inviolable human rights could not withstand the determined onslaught of the legislature(10)

> Means, therefore have to be found whereby (1) there is incorporated into English law a declaration of such rights, (2) these rights are protected against all encroachments, including the power of the state, even when that power is exerted by a representative legislative institution such as Parliament.

Sir Leslie's solution called for entrenched or fundamental laws protected by a Bill of Rights. This call was echoed by Lord Hailsham in a series of articles in The Times(11) which prompted Professor O. Hood Phillips Q.C., in a letter to The Times to promote a Bill of Rights to which Parliament would be subject.(12) Notwithstanding the eminence of these advocates, the concept of a Bill of Rights has been subject to criticism, notably that of Lord Lloyd of Hampstead and Lord Diplock.(13)

The criticism engendered by the proposal of a Bill of Rights can be separated into two main spheres.

The first sphere concerns the problems of introducing a Bill of Rights into the existing constitutional framework, the second sphere is concerned with the substantive impact of a Bill of Rights once introduced. This paper will deal with an aspect of that second sphere - namely the role of the judiciary.

As pointed out earlier the ultimate goal of the proponents is a Bill of Rights which would be enforceable by the individual through the Courts. This goal raises issues concerning the suitability of judges, trained in the English legal system, as arbiters of the new legal regime. Many of the arguments raised against the efficacy of a Bill of Rights hinge upon a perception of judges as inadequate to the task of implementing the principles of a Bill of Rights, especially where such principles are often couched in broad language.(14) Concurrent with this perception is a fear that once the judiciary assume the power to strike down inconsistent legislation, then Executive interest in the appointment of judges will grow. Similarly involvement in controversial issues and a more open acknowledgement of the role of judges as law-makers which a Bill of Rights would induce, may lead to some erosion of the reputation for impartiality which the English judiciary holds.

Where opponents of a Bill of Rights argue on the basis of the unsuitability of the judges, the argument is based on the following :

1) That the judges are an unrepresentative conservative and possibly biased group.(15) As non-elected persons they are not answerable to the will of the electorate. Thus the argument runs that a Bill of Rights, placed in the hands of such a group, would become the means of restricting civil liberties. This then becomes a question of who decides important political issues, with whom should the ultimate responsibility lie, with the elected representatives and the broader political process or with the judges?

An example of the pressure to which the judiciary can be subjected comes from Papua New Guinea. In Premdas v. The Independent State of Papua New Guinea Re Rooney[16] a case concerning the legality of the revocation of an entry permit of a University teacher who also worked for a Government Minister; the Minister for Justice accused the Court of jeapodising its independence and neutrality by interferring in a matter which was considered to be the sole prerogative of the Government. The Minister then called upon the Judiciary "to make a greater effort to use their discretion effectively to develop the National legal system in the context of a proud and growing National consciousness. "[17]

The Chief Justice reacted by stating that he and his brother Justices were affronted by the remarks which could well constitute contempt of Court. The Chief Justice then stated that the Court would not "accept directions from or pressure by the Minister or anyone else," and requested the Minister to withdraw and apologise.

On 20 July 1979 the Chief Justice revealed the existence of the correspondence and the letters were published in the only daily newspaper. This action angered the Minister who stated that she had no confidence in the judges and later refused to retract her statement. A political wrangle then ensued with both the Deputy Prime Minister and the Prime Minister supporting Mrs Rooney, while the Opposition called for the Prime Minister's resignation and the Government was criticised by leading lawyers. After a private prosecution was dropped the Public Prosecutor charged Mrs Rooney with three counts of contempt of the Supreme Court. A majority found her guilty on all three counts and sentenced her to eight months imprisonment.[18] The Rooney case is an excellent example of the ease with which the judiciary can become embroiled in party politics and the alacrity of political parties in capitalising on the situation.

The pressures are all the more great where, as in Papua New Guinea, the judiciary are empowered by the Constitution to strike down inconsistent legislation.(19)

2) The question whether reliance should be placed upon the judiciary to stand fast against the will of a frightened or prejudiced legislature. The House of Lords' decision in Liversidge v. Anderson(20) stands as a stark warning of the acquiesence of the judiciary.

Similarly the United States Supreme Court has also retreated in the face of an emergency and popular feeling, holding in Korematsu v. United States(21) that an order issued by the Commanding General of the Western defence command excluding persons of Japanese descent from residing in the State of California and substantial portions of Oregon, Washington and Arizona, was valid.

3) Finally, commentators question whether judges' training in legal analysis really equips them to face the problems of interpreting a Bill of Rights. A Bill of Rights can sometimes involve statements of broad principle. Judges trained in the English system, it is said, adhere to rules of construction that require words to be given their literal meaning, even if unfortunate results accrue. Such techniques absolve the judge of the responsibility for the social impact of such decisions. The problem is compounded by a consistent refusal to allow any reference to Parliamentary debates, or other evidence of a social or economic nature as aids to interpretation and which may shed light upon the ramifications of a particular decision. The traditionalist literal approach to interpreting Bills of Right may circumvent the very purpose of such enactments.

The focus of the remainder of this paper will test the validity of these criticisms by an examination of some of the Privy Council decisions involving Bills of Rights emanating from Commonwealth countries that have gained independence since the 1960's. In the intervening 20 years the Privy Council has gained considerable experience having dealt

with nearly 30 cases which have raised constitutional issues from these countries. Lord Diplock, in particular, has delivered the Board's decision in eleven of the cases, six of which were appeals from Trinidad and Tobago. This represents a development of expertise and allows the debate to move beyond the generalities of the 1960's, although as yet, there has been no sustained discussion of the cases by United Kingdom commentators.(22)

INTERPRETING CONSTITUTIONS

1. Preliminary Obstacles and Judicial Avoidance

The most important power the judiciary wield under a written constitution is that of deciding the constitutionality of legislative acts.

However, there exist a variety of possible obstacles before this point may be reached. Some obstacles may occur at the commencement of the legal process where a claimant may face procedural barriers or be denied standing. Other obstacles may come in the form of judicial avoidance techniques such as the application of a "presumption of constitutionality" to legislative Acts and an unwillingness to decide constitutional questions unless directly in issue.

The question of procedure arose in Jaundoo v. A.G. of Guyana[23] where the Privy Council considered the implications of the term "to apply to the High Court for redress," a wording common to many other new Commonwealth constitutions. This being the result of the common origin of the constitutions drawing heavily upon the European Convention for the Protection of Human Rights and Fundamental Freedoms and the structure of the Nigerian constitution. The term was not a term of art when the Constitution was made in 1961 and was not therefore descriptive of any existing procedure for enforcing legal rights.[24] The words were

> in their Lordships' view ... wide enough to cover the use by an applicant of any form of procedure by which the High Court can be approached to invoke the exercise of any of its powers ... The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament ... to make specific provisions as to how that access is to be gained.

Since neither Parliament nor the Supreme Court had exercised their power to make provisions governing applications to the Court for redress Mrs Jaundoo's originating motion, though not a method by which proceedings are initiated to obtain a remedy by way of judgment in a civil action,

was appropriate to invoke the jurisdiction of the High Court.

What Jaundoo illustrates is that the new constitutions have conferred upon the High Courts under those constitutions new jurisdiction in the area of fundamental rights. As stated earlier the judiciary have the power to strike down inconsistent legislation but it is up to the individual to apply for redress for any harm done under an unconstitutional law. Procedural forms should not be allowed to circumvent the exercise of the citizen's right to redress and this their Lordships have recognised.

In Collymore v. Attorney-General[25] a case concerning the constitutional validity of the Industrial Stabilisation Act 1965 which had imposed a system of compulsory arbitration; the issue of standing arose. Under the original Act, section 10(2) authorised a public officer to enter upon the business premises of any "employer, trade union or other organisation". This, the appellants claimed was an infringement of section 1(c) of the Constitution, which assured the right of the individual to respect for his private and family life. In the Court of Appeal this contention was rejected. The appellants had no standing because, the Chief Justice said, section 6 of the Constitution permitted complaints only "in relation to them" and neither appellant was "an employer, trade union or other organisation." Although obiter (because the Act had since been amended removing the power to enter the premises of any trade union) their Lordships thought "this may be too narrow a ground upon which to base a rejection of the appellant's argument."[26] A trade union was an unincorporated society and therefore each individual member may be affected by the power to enter union premises.

Attorney-General v. Antigua Times[27] presented the Privy Council with the issue whether "person"[28] in the redress section of the Constitution applied to artificial or legal persons as well as natural persons. Citing the history of the Antiguan Constitution which derived much of its wording from the European Convention for the Protection of Human Rights and Fundamental freedoms, their Lordships noted that the European Convention applied, in some of its articles, to artificial persons. Their Lordships then examined Australian and American decisions, in particular the Supreme Court of the United States' decisions on the fourteenth amendment to the American Constitution. In Grosjean v. American Press Co Inc.[29] the Court held a corporation to be a "person" within the fourteenth amendment and in Wheeling Steel Corporation v. Glander[30] Douglas and Black JJ. said that it had been implicit in court decisions since 1886 that a corporation was a person within the amendment.

As these decisions were not decisive their Lordships then examined the wording of the Antiqua constitution itself. Although some sections of the Constitution clearly could not apply to corporations others equally clearly could. Section 6 of the Constitution was clearly applicable being a protection against compulsory acquisition of property. Subsection (1) read :

> No property of any description shall be compulsorily taken possession of, and no interest in or rights over property of any description shall be compulsorily acquired...

If bodies corporate were to be excluded then the section would have to be read as if it contained the words "belonging to a natural person" as coming after "property." Similarly if bodies corporate were not entitled to apply for redress then other anomalies would arise, for example if an individual formed a company then the business would have no constitutional protection. The protection for freedom of expression would only apply to individuals and not to newspapers owned by companies. For these reasons their Lordships concluded that "person" included artificial legal

persons which thus gave Antigua Times entitlement to initiate proceedings.

Although the Privy Council has been liberal in its decisions on standing and procedure it is interesting to note however, that in a recent case Harrikisson v. A.G. [31] the Privy Council struck a note of caution. Harrikisson had claimed that his compulsory transfer within teaching posts was a contravention of his rights under section 1 of the Trinidad and Tobago Constitution. This contention their Lordships emphatically rejected. The idea that every failure of an organ of government or public authority to comply with the law, necessarily meant the contravention of a right or freedom guaranteed by the constitution was fallacious.[32] The mere allegation of a contravention of a human right or fundamental freedom[33]

> is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court ... if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court ...

Their Lordships also sternly warned against the dimunition that will attend the important safeguards of rights and freedoms in the Constitution if the right to apply for redress ",,, is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."[34]

The Privy Council has also been cautious when confronted by challenges to legislative Acts; the approach to questions of the constitutionality of legislative Acts is usually characterised by great circumspection. The Judicial Committee will usually avoid pronouncing upon the constitutionality of any question unless it is necessary so to do in order to decide the case.[35]

For example in Akar v. A.G. of Sierra Leone[36] the Privy Council declined to decide whether, in the event that an Act depriving Akar of citizenship was found valid, the Act could have retrospective effect. Their Lordships did however canvass the possible issues arising.[37]

Similarly in Attorney-General v. Antigua Times [38] the constitutionality of a provision requiring a grant of a licence signed by the Secretary to the Cabinet before publishing a newspaper was not decided because the respondent was deemed under the Act, to hold the licence required.

The Privy Council also acts under another restraint in deciding the constitutionality of legislative acts. The first is a principle of construction that involves applying a presumption of constitutionality to the measure of the legislature. The onus of disproving the presumption [39] lies upon the person challenging the legislation, but the presumption is rebuttable. "Parliament cannot evade a constitutional restriction by a colourable device." [40]

In Antigua Times the Constitution provided limits for the fundamental rights and freedoms granted. The particular right in the case was freedom of expression which included "the freedom to hold opinions and receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication". [41]

However, this right was limited by subsection 2 of section 10 which stated

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision (a) that is reasonably required - (i) in the interests of defence, public safety, public order, public morality or public health ...

The legislation which was being attacked had introduced three new requirements in regard to publishing newspapers in Antigua. The first, a requirement for a licence signed by the Secretary to the Cabinet before publishing, did not arise on the facts and their Lordships were concerned with the second and third requirement - an annual licence fee of $600 [42] and a surety of $10,000.

For their Lordships the issue was whether this requirement could

come within the limitation of section 10(2) of the Constitution as being reasonably required for one of the purposes specified. If the limitation applied then, although the licence may be regarded as a hindrance to the enjoyment of freedom of expression, the Act could not be treated as contravening the constitution.

The requirement for a licence fee was characterised by the Privy Council as a tax. Revenue was required to be raised in "the interests of defence and for securing public safety, public order, public morality and public health." Thus the issue became whether or not the tax was "reasonably required" to raise revenue for these purposes. It is at this juncture that the presumption of constitutionality assumes great importance.

In some cases, an examination of the Act itself will show whether or not it was reasonably required but in other situations this will not be so. In this situation "the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required".(43)

As Margaret De Merieux points out in an article in Public Law,(44) "reasonably required" relates to the state purpose and does not require a balancing of the state purpose against the right being infringed. The implications of this mean that the Privy Council is confined to determining whether the legislation is "reasonable to achieve the interest or purpose stated in section 10(2) without setting the attainment of these purposes against the background of the right given."(45) When this is combined with a presumption of constitutionality the burden then falls upon the challenger to show that the enactment is not "reasonably required." Given that "in the interest of" is a phrase of wide extent the presumption operates so as to make the challenger's task almost impossible. The combination of the wording of the limiting clause and

the presumption mean that the constitutional right may not have much real protection. In their Lordships' opinion the presumption was not rebutted, the licence fee was not shown to be so manifestly excessive as to lead to the conclusion that the statutory provision was so arbitrary as to not involve revenue gathering. Similarly the second Act which required a $10,000 surety for any libel action to be deposited with the Accountant General was held to be "reasonably required" for the purpose of protecting the rights and reputations of others and thus, by virtue of section 10(2) of the constitution, not in contravention of the constitution. The imposition of this requirement put Antigua Times out of business.

By way of contrast, the presumption of constitutionality does not have such deleterious effects where the constitution[46] adds to the limitation section the words

> and except so far as that provision or, as the case may be, thing done under the authority therefore is shown not to be reasonably justifiable in a democratic society.

This formulation requires the Courts to examine the legislation in question to see whether even if reasonably required, the limitation could be reasonably justifiable in a democratic society.

How the Courts will acquit themselves when confronted by this question will depend in part upon their attitude towards the nature of constitutions and the Bills of Rights they contain; and the statutory language contained within those constitutions. Both will operate to shape the scope of the protection given to the individual by Bills of Rights. The decisions made by the Privy Council will allow an appreciation to be made of the response of the judiciary.

2. Judicial Attitudes and Statutory Limitations

In countries that have found themselves with written constitutions the function of constructing the constitution is of vital importance. Under a written constitution the problems of interpreting statutes are magnified by the additional need to decide whether a particular statute conforms with the constitutional provisions. When it is alleged that some provision in the constitution has been violated, it is the role of the judiciary to pronounce upon such allegations. This role involves the judiciary in much more than the mere interpretation of the words in a particular provision. The judicial pronouncements on the meaning of a constitution become part of the fundamental and supreme law laid down in the constitution. This is because in most written constitutions, provisions considered most important will be entrenched and thus a judicial decision may not be overridden by an ordinary amending Act. These changes may be difficult to achieve and changes may have to await a reassessment of the provision by the Court. This is not likely to be a quick process if the American experience is any guide.

The judiciary then have thrust upon them a creative and formative role of wide legal and political significance. As Chief Justice John Marshall stated in the famous American case of Marbury v. Madison[47]

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.

Since most of the Constitutions under review provide, with certain

exceptions, that any law inconsistant with the Constitution, the constitution shall prevail and the other law be wholly or partially invalid, it logically follows that the power to construe the constitution and to determine the legality of those other laws adheres to the judiciary.

As a consequence the attitudes that the judiciary bring with them to this task, are of prime importance. If the fears of the opponents of Bills of Rights are real, then narrow and literal interpretations of the constitutions and Bills of Rights in particular may have a detrimental effect upon the protection of civil liberties. As seen in the first part of this paper the Privy Council has not allowed questions of locus standi, and procedure to inhibit individuals from claiming redress for infringement of their fundamental rights. It now remains to be seen whether the understanding of the nature of a constitution this shows by the Privy Council is reflected in their attitudes towards interpreting these constitutions and to upholding fundamental rights.

The constitutions of the new Commonwealth owe much of their origins to the European Convention of Human Rights. Provisions relating to humans rights were inserted in to the Nigerian Independence Constitution of 1957 and similar provisions have been incorporated into the constitutions of the newly independent Commonwealth States. Because of this origin Bills of Rights in the new constitutions are not written in absolute terms. Those Bills of Rights are also subject to two statutory devices for limiting the freedoms thus granted. The first device is the use of a savings clause, which acts to save the existing law from the scope of the new provision. Thus if a right was lawfully prescribed under pre-existing law anything done under the authority of such a law would not be held in contravention of the new provisions. Therefore existing law may in fact define the limits of the rights granted in the constitution. The second device is to

provide limits within the stated rights. Such limitations may, for example, provide that new laws may contravene the constitutionally guaranteed right where they are reasonably justified for a number of stated purposes. In none of the Commonwealth constitutions under consideration are Bills of Rights formulated in the absolute terms of the First Amendment to the American Constitution. All contain one or both of the above-mentioned devices.

The question of the operation of savings clauses received definitive treatment in the important decision of Maharaj v. A.G. of Trinidad and Tobago.(48) The appellant, a barrister engaged in a case in the High Court, had been committed to prison for seven days for contempt on the order of the judge. The appellant applied ex parte by notice of motion to the High Court under section 3 of the Constitution claiming redress for the contravention of his Constitutional right not to be deprived of his liberty save by due process of law.(49)

The High Court dismissed the motion and the appellant served his term of imprisonment. The appellant then appealed to the Court of Appeal against the decision of the High Court and also obtained leave to appeal to the Privy Council against the original committal order. The Privy Council quashed the order on the grounds of a failure to observe natural justice occasioned by the failure of the judge to explain the nature of the contemptuous behaviour thus preventing the appellant from tendering an explanation or excuse. Later the Court of Appeal dismissed the appellant's appeal from the High Court's decision on the ground that the failure to observe natural justice did not contravene a right protected by section 1 of the Constitution. The appellant appealed to the Privy Council. The question posed for the Privy Council was whether the failure to observe natural justice constituted a deprivation of liberty otherwise than by due process of law, within the meaning of section 1(a) of the Constitution, for which the appellant was entitled

to redress under section 6.

Lord Diplock (who delivered the majority decision) began by setting out the structure and presumptions which underlie the Fundamental Rights Chapter of the Constitution of Trinidad and Tobago and the corresponding chapters in other similar constitutions. Citing earlier cases[50] Lord Diplock reiterated that these chapters proceed upon the presumption that the fundamental rights which they cover were as at independence already secured to the people by existing law. Such laws were not to be scrutinised to see whether they conformed to the precise terms of the protective provisions; the object of the protective provisions was to ensure that future enactments in any area that the Chapters cover do not derogate from the rights which the individual possessed at the coming into force of the Constitution.[51]

The provisions of Chapter I of the Trinidad and Tobago Constitution confirmed this presumption. Section 1 declared the natural human rights and fundamental freedoms "to have existed and shall continue to exist" while Section 3(1) declared that sections 1 and 2 would not apply to any law in force at the commencement of the Constitution. What section 3 achieves is to debar the individual from claiming that anything "done to him that is authorised by a law in force immediately before ... [the commencement of the constitution] abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2."[52] However, section 3 does not legitimise any conduct unlawful under pre-existing law which contravenes any of the rights and freedoms set out in section 1 of the Chapter. This is because section 6, which deals with remedies, is not subject to section 3.

Section 6 of the Constitution is very wide in its terms. For any interference with a right or freedom declared by section 1 that would not have been lawful under pre-existing law "section 6 creates a new right on the part of the victim of the interference to claim a remedy for it described as 'redress' ".[53] In their Lordships' clear view the

protection granted by the Constitution was against contravention by the State or other public authority with coercive powers. For some of the rights and freedoms described there already was at the time of the Constitution an existing remedy. But where the rights or freedoms existed de facto, such as section 1(e) "The right to join political parties and express political views," and were "not protected against abrogation or infringement by any legal remedy before the Constitution came into effect [were] since that date given protection which is enforceable de jure under section 6(1)"[54] As section 6(1) is expressed to be "without prejudice to any other action with respect to the same matter which is lawfully available" the clear intention, their Lordships stated, "is to create a new remedy whether there was already some other existing remedy or not."[55]

Therefore it followed that whether or not the appellant's rights under section 1 of the Constitution had been contravened, depended upon whether the judge's order was lawful under any law in force before the commencement of the Constitution. At the commencement of the Constitution contempt of court was governed by the common law which required the specific offence charged to be distinctly stated and an opportunity be given to answer.[56] As the judge's order was unlawful, as a breach of this requirement, the appellant's rights under section 1(a) had been contravened although under pre-existing law the only remedy available would have been an appeal to the Privy Council, by special leave to have the order set aside, section 6 would provide a remedy for which monetary compensation would provide an appropriate redress.[57]

The case was then remitted to the High Court with a direction to assess the amount of monetary compensation.

Maharaj is an important development in the protection of fundamental rights and freedoms. The Privy Council by recognising the width of the section providing for redress against contravention of these rights has extended the citizen's remedies beyond those known at common law.

Although previously no action could be taken against a superior court judge or the State for alleged wrongful actions[58] a citizen can now claim against the State for what has been done in the exercise of the judicial power of the State. This new liability "is a liability of the State itself ... not of the judge himself"[59] and has been newly created by the redress provisions of the Constitution. In addition certain rights not previously recognised at common law have now been given protection which is enforceable under the Constitution. The Constitutional right to the due process of law under Section 1(a) may prove a fertile ground for developing new rights and freedoms.

Where the second device of providing limitations within the stated rights is used, the Courts are then often forced into the realms of policy and value judgments on the legislation under review may have to be made.

Whether or not the Judiciary can avoid a value judgment about the legislation attacked will in large measure depend upon the different types of constitutional language at issue. In some circumstances, such as in Collymore[60] the Court will only be required to make a narrower judgment. Collymore involved the Court in deciding whether "freedom of association" contained in the Constitution included the freedom to bargain collectively and the freedom to strike. Similarly in Government of Malaysia v. Selangor Pilots Association[61] the Privy Council had to decide whether a law providing for all licensed pilots to be employed by the Port Authority amounted to deprivation of property and thus was protected by the adequate compensation provision of Article B of the Constitution. But where the language used requires the Courts to decide issues of "reasonable justifiability" then the Courts will be forced into a judgment on the policy efficacy or fairness of a particular piece of legislation.

Two examples of how the Privy Council handle this responsibility are provided by the cases Akar v. A.G. of Sierra Leone[62] and A.G. of St.

Christopher Nevis and Anguilla v. Reynolds.[63] Akar required the Privy Council to pronounce upon the constitutionality of an Act which would limit citizenship to those of negro African descent. The Constitution of Sierra Leone provided by section 1(1) that "every person who, having been born in ... Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961." The alleged amendment purported to insert the words "of negro African descent" after the words "every person".[64] This added qualification their Lordships categorized as essentially a racial one and as such it offended against the letter and flouted the spirit of the Constitution.[65]

Section 23 of the Constitution[66] gave protection from discrimination on the grounds of race. As subsection 1 of section 23 was direct and prohibitive stating that "no law shall make any provision which is discriminatory," any provision which offended was therefore invalid. However, section 23 was subject to certain exceptions contained in subsection 4 and in particular subsection 4(f). If the exception was applicable then the general prohibition against discrimination in subsection 1 did not apply. Subsection 4 (as far as relevant) states :

> (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision ...
> (f) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

Did the provisions of subsection 4(f) save Act 12 from the operation of subsection 1? Immediately before the passing of Act 12 the appellent had Sierra Leone citizenship. If the Act was valid then because neither his father nor grandfather could be described as "negroes" of African descent his citizenship would be removed. It was therefore necessary to consider "whether the disability or restriction of deprivation of

citizenship is something which 'having regard to its nature and special circumstances pertaining to' the appellant and those similarly placed is 'reasonably justifiable' in a democratic society."(67)

Their Lordships emphatically rejected the notion that a disability imposed by reason of race could by its nature be "reasonably justifiable in a democratic society." The Board then observed that for the Act to be saved by subsection 4(f) not only must "the disability be of itself of a nature that makes it reasonably justifiable but there must also be 'special circumstances' pertaining to the persons subjected to the disability which make the legislation reasonably justifiable in a democratic society."(68) The only "special circumstances" pertaining to the appellant was the fact that his father and grandfather were not of African descent. As their Lordships rightly pointed out if section 23 itself prohibited laws treating persons differently because of differences of race, then it was impossible that differences of race alone could constitute "special circumstances". These "special circumstances" would have to be in addition to differences of race. The Act was declared ultra vires the Constitution and therefore null and void.

This decision is indeed a praiseworthy example of the judiciary refusing to bow to the legislature. The approach of the majority is to be contrasted with the dissent of Lord Guest, who accused the majority of looking behind the face of the statute to its purpose. His Lordship maintained that the courts can only as a matter of construction decide whether an Act is or is not within the powers of the Constitution. Courts in interpreting Constitutions should, he warned, tread "warily and with great circumspection."(69) A democratic society, his Lordship stated must have control over the qualifications for membership in that society. Therefore the Act which affected a disability as regards citizenship was "reasonably justifiable". His Lordship was not prepared to look at the purpose of the legislation even when the racial disqualification was plain upon the face of the Act.

Reynolds involved the Privy Council in deciding the question whether regulations made under a State of Emergency legitimised the detention of a retired police inspector in conditions that were humiliating and unsanitary. The detention order was made under the Emergency Powers Regulations 1967 which were in turn promulgated under section 3(1) of the Order-in-Council of 1959. The Constitution of St. Christopher, Nevis and Anguilla had come into effect on February 27, 1967. It provided that no person should be deprived of personal liberty save as authorised by law (section 3(1)) and gave a right of compensation for unlawful detention (section 3(6)). But section 14 provided :

> Nothing contained in or done under the authority of a law enacted by the legislature shall be held to be inconsistent with or in contravention of section 3 or section 13 of this Constitution to the extent that the law authorises the taking during any period of public emergency of measures that are reasonably justifiable for dealing with the situation that exists in [the state] during that period.

Section 103(1) required:

> The existing laws shall as from the commencement of this Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with ... this Constitution ...

The Privy Council were firmly of the opinion that Leeward Islands (Emergency Powers) Order in Council 1959 was an existing law immediately before the commencement of the Constitution. Therefore the Order in Council had to be construed in accordance with Section 103(1) and in light of section 14 of the Constitution. Whereas previously section 3(1) of the Order had given "an authority absolute discretion, and indeed the power of a dictator, to arrest and detain anyone", section 14 allowed "a law to be enacted conferring power to arrest and detain only if it was reasonably justifiable to exercise such power."(70) Their Lordships did not perceive any difficulty in construing the Order in Council by modification, adaption, qualification, and exceptions so as to bring it into conformity with Section 14 of the Constitution.

The Order in Council so reconstructed read :

> The Governor of a state may, during a period of public emergency in that state, make such laws for securing the public safety or defence of the state or the maintenance of public order or for maintaining supplies and services essential to the life of the community to the extent that those laws authorise the taking of measures that are reasonably justifiable for dealing with the situation that exists in the state during any such period of public emergency.

This reconstruction also necessitated that the Emergency Powers Regulations made under the Order in Council be adapted. The regulation now meant :

> if the Governor is satisfied upon reasonable grounds that any person has recently been concerned in acts prejudicial to the public safety or to public order ... and that by reason thereof it is reasonably justifiable and necessary to exercise control over him, he may make an order against that person directing that he be detained.

Their Lordships next considered whether, under the reconstructed regulation there existed reasonable grounds for supposing that the plaintiff had been concerned in acts prejudicial to public safety and order and that by reason thereof it was reasonably justifiable and necessary to detain him.

During the plaintiff's imprisonment he had been handed a written statement which purported to specify in detail the grounds on which he was detained, as required by section 15 of the Constitution. The notice was vague and ambiguous and did not inform him of the grounds of detention.(71) It seemed plain to their Lordships "that the irresistible inference to be drawn from the notice is that there were no grounds, far less any justifiable grounds for detaining the plaintiff."(72) Accordingly their Lordships found the detention order invalid and that the plaintiff was unlawfully detained and ordered that damages of $18,000 be paid.

Although it can be seen from these decisions that the Privy Council has responded well to the demands placed upon it by allegations of infringement of fundamental rights, such has not always been the case.

In the past a combination of traditional attitudes towards interpreting legal instruments and statutory limitations within the instruments, led to very narrow and restrictive decisions.

One of the earliest Privy Council decisions in the period under consideration came in Runyowa v. R.[73] The accused was charged with attempting to set fire to a residential dwelling in contravention of section 37(1) of the Southern Rhodesia Law and Order (Maintenance) Act 1960. A conviction under this section carried a mandatory death sentence for persons (other than pregnant women) over the age of sixteen. On the appeal a new point was raised that section 37(1) contravened section 60 of the 1961 Southern Rhodesian Constitution. This section provides that :

> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
> (2) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the doing of anything by way of punishment or other treatment which might lawfully have been in Southern Rhodesia immediately before the appointed day.

The argument advanced by the appellant required an examination of the meaning, in its context, of "punishment". "Punishment" in section 60(1), it was submitted, meant the infliction of some penalty proportional to the offence committed. A punishment that was out of proportion to that deserved by the commission of the offence was "inhuman" and contravened section 60(1) of the Constitution.[74] In relation to this it was submitted that subsection (3) of Section 60 should operate to save only punishments which could have been imposed prior to the commencement of the Constitution in relation to a similar offence. The death penalty for arson was amended by the Law and Order (Maintenance) Act after the coming into effect of the Constitution.[75] Thus the issue raised required their Lordships to decide whether the Constitution prohibited not only inhuman or degrading modes of punishment but those that were inappropriate or excessive.

Their Lordships rejected these contentions holding that "the ban that is imposed is upon any such type or mode or description of punishment as is inhuman or degrading"[76] Subsection (3) of section 60 was construed as saving any mode of punishment authorised by any written law in effect prior to the commencement of the Constitution. The effect of this construction was to limit the application of section 60(1) to newly devised inhuman treatments. Punishments of an existing type would survive, either for new or existing crimes. As the death penalty was not considered inhuman or degrading per se, the appellant's argument failed.

To arrive at this conclusion the Board considered the matter to be purely a question of the construction of the words in their context.[77] Accepting the appellant's argument would, they believed, involve reading into the section words that were not there. The Board appealed to section 70(1)(6) of the Constitution which prevented pre-existing law from being held inconsistent with sections 57 to 68 of the Constitution. However, I submit that all this section achieves is to prevent pre-existing law from being scrutinised for consistency with the constitutionally protected rights. The death penalty for arson was added after the commencement of the Constitution and thus fell to be considered under the Constitution. The fact that the death penalty was a punishment alloted under the pre-existing law is irrelevant to the consideration of whether section 60(3) saves punishments only to the extent to which they were previously stipulated for particular offences.

Even adopting a literal approach to the sections it is not at all clear that the appellant's construction required a reading in of words. "Punish" in a statutory sense means to suffer for an offence. This necessarily imports the idea of a relationship between the offence and the penalty. However, their Lordships rejected American authorities which construed the Eighth Amendment to the United States Constitution as

requiring a proportionate relationship between the offence and its sanction. There was, their Lordships stated, a manifest difference in wording. This American approach would lead the Court beyond a consideration of the words in their context; to questions of policy in regard to punishment for crime.(78) "Unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation". This they would not do.(79) It was for the legislature to decide what was "necessary and desirable for the pruposes of maintaining peace order and good government".(80)

It is clear from the judgment that their Lordships approach was concerned more with the sovereignty of the legislature. They expressly approved a statement by Quenet A.C.L. in Gundu and Sambo's Case(81) that " 'once laws are validly enacted it is not for the Courts to adjudicate upon their wisdom, their appropriatness or the necessity for their existence.' " But this statement misses the point at issue. It was the very validity of the legislation under the Constitution that was questioned. If the enactment was ultra vires the Constitution then it had no validity. By stressing the power of the legislature to make laws for "maintaining peace, order and good government" the Committee appeared to ignore the important effect that a written constitution has upon the ambit of legislative power.

By adhering to a literal interpretation of the Constitution, ignoring possible ambiguities in the wording, and displaying marked reluctance to venture into the area of policy the Committee reacted in favour of legislative encroachment on the fundamental rights granted in the Constitution. The fears expressed earlier seem manifest.

Discouraging as this appears recent cases indicate a swing away from the treatment of constitutions as merely another statute. In 1977 in the case of Hinds v. The Queen(82) the Privy Council made important statements concerning the nature of constitutions and their interpretation.

The Parliament of Jamaica by the Gun Court Act of 1974 established a new Court, the Gun Court, to try "firearms offences". The Act provided for three divisions of the Court - (1) the Circuit Court Division, (2) the Resident Magistrate's Division, and (3) the Full Court Division. The Circuit Court and the Resident Magistrate's Divisions were presided over by a Supreme Court judge and a Magistrate respectively. The Full Court Division was constituted by three resident magistrates.

The jurisdictions of the first two Divisions were that of a circuit court and of a Resident Magistrate respectively in relation to firearm offences and certain other offences but their geographical area of operation was extended to cover the whole island instead of being restricted to certain parishes. The Full Court Division's jurisdiction was, with the exception of capital offences, expressed to cover only firearm offences or other offences committed by a person detained for firearm offences and covered the whole island. Such a jurisdiction at the time the Constitution came into force had only been exercisable by a Supreme Court Judge in the Circuit Court. The Gun Court Act had not been passed by the special procedure prescribed in Section 49 of the Constitution for an Act of Parliament to alter provisions of the Constitution, nor did the Act contain any express amendment of the Constitution.

Before deciding upon the constitutional validity of the Gun Court their Lordships first considered the problem at a more general level. Where the legislation under consideration does not come into direct conflict with the Constitution, it is necessary for the Court to seek the true character of the Act in order to ascertain whether it contravenes the express provisions or the implications of the Constitution. This was the approach adopted by the Privy Council who stated that "when the constitutional validity of an Act passed by the Parliament of Jamaica is in issue, the problem cannot be solved by the Court's confining its

attention to the specific provisions of the Act that are directly applicable to the particular case."[83] In order to decide whether the Act contravened the Constitution, the express and implied meaning of the Constitution must be established.

Their Lordships had been referred in argument to a number of previous authorities dealing with constitutions granted to former colonial or protected territories of the Crown. While caution was necessary, particularly where the reasoning depended upon express words in particular constitutions, all these constitutions were similar in that they differed[84]

> fundamentally in their nature from ordinary legislation passed by the Parliament of a sovereign state. They embody what is in substance an agreement reached between representatives of the various shades of political opinion in the State as to the structure of the organs of government through which the plentitude of the sovereign power of the State is to be exercised in future.

The constitutions of the newly independent Commonwealth countries were negotiated and drafted by persons familiar with the basic concept of the separation of legislative, executive and judicial power. The successor institutions would therefore exercise powers of a similar character to those of the institutions they replaced. This statement, which forms the basis of their Lordships' judgment is interesting to say the least when you consider that the United Kingdom, and for that matter New Zealand systems of government do not adhere to the strict principles of separation of powers as is evidenced in the American Constitution and flies directly in the face of the historical facts that in Colonial administration the Governor of the Colony was granted wide powers to administer, legislate and act judicially.[85]

Their Lordships then went on to hold that a necessary implication of the adoption of a structure which contains these three branches of the State, is that the basic principle of separation of powers will apply to the exercise of those powers. Thus a constitution would not normally contain any express mention of the principle. However, the absence of

express words in constitutions of this nature does not prevent the powers of each branch being exercised exclusively by the legislature, executive and the judicature respectively:(86)

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading - particularly those applicable to taxing statutes as to which it is a well established principle that express words are needed to impose a charge upon the subject.

As a result a common pattern of drafting can be discerned in the Constitutions of the newly independent Commonwealth countries which their Lordships described as "the Westminster model".

Before examining the express provisions of the Jamaican Constitution their Lordships made some general observations about the interpretation of constitutions which follow that model. The Constitutions deal with the legislature executive and judiciary in separate Chapters. The provisions concerning the judiciary usually deal with appointment and security tenure the latter designed to give independence from the other two branches of government. What was implicit in the "Westminster model" is that :(87)

> judicial power, however it is to be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though not expressly stated in the Constitution: Liyanage v. The Queen [1967] 1 A.C.269,287-288.

Where the constitutions include a Chapter dealing with fundamental rights and freedoms these provisions form part of the "substantive law of the State and until amended by whatever special procedure is laid down in the Constitution ... impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plentitude of their respective powers."(88)

The remaining Chapters of the Constitution are concerned with the

technical details of who and how these powers should be exercised. Thus when the Constitution refers to a "court" in existence at the commencement of the Constitution the word is used collectively. Any express provisions in the Constitution for appointment or security of judges will apply to individual judges "subsequently appointed to exercise an analogous jurisdiction, whatever other name may be given to the 'court' in which they sit."(89) Thus when considering whether a law conflicts with the constitution it is the substance of the law that must be noticed not its label. Their Lordships adopting the words of Viscount Simonds in Attorney-General for Australia v. The Queen(90) considered (91)

> it would make a mockery of the Constitution if Parliament could transfer the jurisdiction previously exercisable by holders of the judicial offices named in Chapter II of the Constitution to holders of new judicial offices to which some different name was attached and to provide that persons holding the new judicial offices should not be appointed in the manner and upon the tems prescribed in Chapter VII for the appointment of members of the judicature. If this were the case there would be nothing to prevent Parliament from transferring the whole of the judicial power of Jamaica ... to bodies composed of persons, who not being members of the judicature, would not be entitled to the protection of Chapter VII at all.

This would have the important effect that (92)

> the individual citizen could be deprived of the safeguard which the makers of the Constitution regarded as necessary of having important questions affecting his civil or criminal responsibilities determined by a court, however named, composed of judges whose independence from all local pressure by Parliament or by the executive was guaranteed by a security of tenure more absolute than that provided by the Constitution for judges of inferior courts.

The Gun Court Act 1974 in attempting to establish the Full Court Division of the Gun Court purported to confer upon a court consisting of persons qualified and appointed as resident magistrates a jurisdiction which under the provisions of Chapter VII of the Constitution was only exercisable by a person qualified and appointed as a judge of the Supreme Court. The Constitution required that Supreme Court judges be appointed by the Governor-General on the recommendations of the

Judicial Service Commission. Judges of the Supreme Court are protected by entrenched provisions against Parliament passing ordinary laws (a) abolishing their office (b) reducing their salaries or (c) providing for an earlier end to their tenure. They may only be removed for disciplinary reason upon advice from the Judicial Committee acting upon the recommendations of a tribunal of inquiry.

In contrast the resident magistrate is not protected by such entrenched provisions and thus their conditions of service can be altered by an ordinary law. Consequently their independence is not completely assured. Dismissing an argument that Section 97(1)[93] of the Constitution allowed Parliament by ordinary law to downgrade any part of the jurisdiction previously exercisable by the Supreme Court their Lordships rejected that part of the Gun Court Law which attempted to vest in a new court composed of members of the lower judiciary a jurisdiction that was a significant part of that exercised by the Jamaican Supreme Court when the Constitution came into force.

The direction of Hinds is reinforced by two further Privy Counci; decisions. In Minister of Home Affairs v. Fisher[94] an appeal from the Bermudan Court of Appeala Jamaican mother of four illegitimate children all born in Jamaica married a Bermudan in 1972. The family took up residence with the husband in Bermuda in 1975. In 1976 the Minister of Labour and Immigration ordered the children to leave Bermuda. The mother and her husband applied to the Supreme Court to quash the order and for a declaration that the children were to be deemed to belong to Bermuda. The Supreme Court refused the declaration on the grounds that the children were illegitimate. The Court of Appeal reversed this decision and the Minister appealed to the Privy Council. The issue before their Lordships was whether the four children "belong to Bermuda "within the meaning of section 11 of the Constitution. Section 11(5) of the Constitution of Bermuda provides :

(5) for the purposes of this section, a person shall be

> deemed to belong to Bermuda if that person -
> (a) possesses Bermudian status, ...
> (c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such a person under a decree of a court or a deed of separation; or (d) is under the age of 18 years and is the child stepchild or child adopted in a manner recognised by law of a person to whom any of the foregoing paragraphs of this subsection applies.

The question for decision then became whether the word "child" in section 11(5) (d) of the Constitution includes an illegitimate child.

First their Lordships placed section 11(5) into its context. The Bermudan Constitution opens with Chapter I headed "Protection of Fundamental Rights and Freedoms of the individual".

These fundamental rights and freedoms are stated as the right of every person and are subject to respect for the rights and freedoms of others. Section 11 was a provision dealing with freedom of movement which includes a right to enter and reside in Bermuda, but allows a restriction of this right in the case of any person who does not "belong to Bermuda". The function of Section 11(5) is to define those persons who "belong to Bermuda". In this context what is meant by the word "child"?

The appellants urged upon the Council the view that the Constitution was an Act of Parliament and that in all Acts of Parliament the word "child" prima facie means "legitimate child". To depart from this meaning the object of the statute must warrant such a departure[95] or the departure must arise by express words or necessary implication from the context. Neither of these tests, argued the appellants,[96] was satisfied.[97] Their Lordships rejected this line of reasoning and did so in two stages.

First the Board maintained that all Acts of Parliament cannot be

classified on the same level. Acts of Parliament involving the use of "child" or "children" vary greatly in scope and purpose. The distinction between legitimate and illegitimate, especially in matrimonial law, has become less sharp and "requires the courts to consider, in each context in which the distinction between legitimate and illegitimate is sought to be made whether in that context, policy requires its recognition."(98)

But most importantly what was under consideration was a constitution, albeit brought into effect by an Act of Parliament. This document has special characteristics.

1. It is drafted in a broad and general style. 2. The Chapter on fundamental Rights and Freedoms owes its origin to the European Convention for the Protection of Human Rights and fundamental freedoms and the United Nations' Universal Declaration of Human Rights. Such origins call for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."(99) Thus, their Lordships asked whether the appellent's contention that the Constitution should be construed according to the rules applying to Acts of Parliament, was sound.(100)

This involved deciding between two possible answers. The first involved recognising the Constitution as an Act of Parliament, but treating it with more generosity than other Acts. The second required treating the Constitution "as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."(101) Their Lordships preferred the second answer. In doing so they cautioned that this did not mean that no rules of law applied to the interpretation. "Respect must be paid to the language used and to the traditions and usages which have given meaning to that language."(102) But consistent with this was to take as a basic premise for the interpretation of the "character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights

and freedoms with a statement of which the Constitution commences."[103]

As the rights and freedoms stated are those of "every person in Bermuda" the Council then considered whether matters of birth were regarded as relevant when considering the permissible limitations upon these rights. Their Lordships came to the conclusion that the use of "child" in its context was a clear recognition of the family unit and the need to maintain the unit as a whole.

This recognition was fully in line with decisions on Article 8 of the European Convention recognising the family unit and the right to protection of an illegitimate child. Although the Court of Appeal based its decision upon a comparison of the wording of the Bermuda Immigration and Protection Act 1956, which referred in places specifically to legitimated or illegitimate children, and the general use of "child" in Section 11(5) of the Constitution, their Lordships preferred to base their decisions on the wider grounds outlined above. Their Lordships concluded by upholding the decisions of the Court of Appeal.

The views expressed by their Lordships have greater ramifications than just their impact upon the particular issue in Fisher[104] Their Lordships expressly referred to all "constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitution of most Caribbean territories..."[105]

Finally, in Ong Ah Chuan v. Public Prosecutor[106] the Privy Council had to consider a claim whether a statutory rebuttable presumption of drug trafficking on being found in possession of more than 2 grammes of heroin conflicted with the "presumption of innocence". This was the defendant's claimed, a fundamental right protected by the Constitution of the Republic of Singapore and found expression in Article 9(1) which provides :

> No person shall be deprived of his life or personal liberty save in accordance with law.

and by article 12(1) which provides:

> all persons are equal before the law and entitled to the equal protection of the law.

Their Lordships began by applying their earlier decision in Fisher and would give to Part IV of the Constitution of Singapore " 'a generous interpretation avoiding what has been called the austerity of tabulated legalism, suitable to give to individuals the full measure of the]fundamental liberties] referred to."(107) Following this principle their Lordships rejected the contention of the Public Prosecutor that the requirements of Articles 9 and 12 are met if the deprivations of life or liberty complained of has been carried out under an Act passed by the Parliament of Singapore "however arbitrary or contrary to fundamental rules of natural justice the provisions of such an Act may be."(108) This argument was based on the fact that "written law" as defined in Article 2(1) meant "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore," and "law" is defined as including "written law."

Their Lordships rejected this literalist approach, Article 4 of the Constitution provided that any law enacted after the commencement of the Constitution which was inconsistent with the Constitition, would be void. Turning to the Constitution, and categorising it as one founded on the Westminster model, their Lordships examined those articles which purport to assure individual citizens of protection of their fundamental rights and liberties.

References to "law" in such articles refer to a system of law which "incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."(109) Thus it would have been taken for granted by the makers of the Constitution that "law" would embody these fundamental rules:(110)

> If it were otherwise it would be a misuse of the language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment of articles 9(1) and 12(1) would be little better than a mockery.

However, their Lordships then went on to examine whether the statutory presumption of trafficking violated any of these fundamental rules. Although one of the fundamental rules of natural justice in the criminal field necessitated that a person could not be punished unless it was established by an independent and unbiased tribunal that an offence had been committed, observance of the rule in Singapore did not mean adherence to technical rules of evidence and permitted methods of proof of facts exactly as they stood at the commencement of the Constitution. These were a legacy from the English criminal law which may be inappropriate in Singapore.

In their Lordship's view it was fanciful to suggest that a law containing a statutory presumption which operated once certain acts were proved, which were in themselves unlawful and consistent with the presumption, offended against some fundamental rule of natural justice. As such section 15 of the Drugs Act (which contained the presumption) could not be held inconsistent with the Constitution (as far as it related to proved possession).

The defendants also claimed that the mandatory death sentence upon conviction for trafficking in more than 15 grammes of heroin was contrary to the constitution. This claim was based upon the belief that the mandatory nature of the sentence rendered it arbitrary because the Court could not discriminate in punishing offenders according to their individual blameworthiness. This then was not "in accordance with law." Alternatively the principle of equality before the law was breached because the penalty was related to the amount of heroin in possession and not to individual culpability.

Deferring to the judgment of the legislature their Lordships' stated that "in their judicial capacity they are in no way concerned with arguments for or against capital punishment ... whether there should be capital punishment in Singapore ... are questions for the legislature in Singapore..."[111] What their Lordships were concerned with was whether the imposition of the mandatory death penalty breached the constitutional requirements of "equality before the law". This required that like be compared with like. It prohibits laws which treat individuals within a single class more harshly than others but does not forbid discrimination in punitive treatment between one class of indivuals and another where there is some difference in the circumstances of the offence that has been committed.

Questions of what is to comprise the dissimilarity in circumstances and whether this justifies any difference in punishment are questions of social policy:[112]

> under the constitution which is based on separation of powers, there are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law. There is no inconsistency with article 12(1) of the Constitution.

Article 12(1) being concerned with equal punitive treatment for similar legal guilt has no application to a claim of equal punitive treatment for equal moral blameworthiness. Consequently the mandatory death sentence was not unconstitutional.

CONCLUSION

The decisions reviewed in this paper reveal that the early fears of a judiciary unable to cope with its new found role as arbiters of a written constitution have not been realised.

This is not to say that the Privy Council has not at different times reacted conservatively as the early decision in Runowya amply demonstrates. However, the passage of time has found the Privy Council more confident in its pronuncements upon the nature of constitutions as Hinds and Fisher indicate, yet still able to strike a sensible note of caution against the "trivialisation" of the important protection offered to citizens by Bills of Rights.

It has often been the language of the particular constitutional article in question which has dictated the judiciary's response. The use of the "savings clause"and the limitations contained within fundamental rights provisions have meant that the judiciary do not have the freedom to create new rights as does the Supreme Court under the American Constitution. But the extension of protection to pre-constitution de facto rights and an expansive definition of "redress" in Maharaj have gone some way to ameliorate this.

Although the Privy Council will defer where necessary to the will of the legislature as Ong Ah Chuan indicates; when faced with a blatant discriminatory Act such as in Akar or an overweening executive as in Reynolds, the reaction has been to protect the fundamental rights under threat even though this has meant a conflict with the Government of the day. These decisions and the decisions in Hinds and Fisher are more to be appreciated when it is remembered that the Commonwealth Governments could remove the right of appeal to the Privy Council at any time. It is also important to remember that in New Zealand there is no mechanism by which Acts of a sovereign legislature can be challenged as being in contravention of fundamental rights.

This survey suggests that the Privy Council appear fully cognisant of the written constitution as the fundamental law, defining and legitimising

the organs of government and the exercise of power by these organs. Their Lordships have also demonstrated that they appreciate the role of the Constitution as "higher law" superior to the ordinary enacted laws of the legislature and the duty of the judiciary to protect the constitution and the fundamental rights contained therein. At the same time the Privy Council is aware of its own peculiar position and the need for restraint. It takes time to develop a public and political consciousness around a Constitution and these factors combined with the limitations imposed by the draftsmen have meant the decisions made may be characterised as cautious, but do represent a reasonable balance between civil liberties and conflicting State interests.

FOOTNOTES

(1) G.W. Palmer, "A Bill of Rights for New Zealand" in K.J. Keith (ed.) Essays on Human Rights (Wellington, 1968) 107.

(2) New Zealand Constitutional Reform Committee Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights (R.F. Owen, Government Printer, Wellington, 1965).

(3) G.W. Palmer, Unbridled Power? (Oxford University Press, Wellington, 1979).

(4) (2nd edition Barry Rose [Publishers] Ltd London, 1979)

(5) Lord Lambton introduced a ten-minute rule bill "to preserve the rights of the individual"; House of Commons, Hansard col. 782, 23 April 1969, vol. 474. Lord Wade began a four hour debate on Mr J MacDonald's pamphlet A Bill of Rights; House of Lords, Hansard vol 302, 18 June 1969 col. 1026. The same matter was raised by Mr Emlyn Hooson Q.C., in the Commons. House of Commons, Hansard Vol. 787 22 July 1969, col. 1519.

(6) Sir Leslie Scarman English Law - New Dimensions (London, 1974).

(7) 1948.

(8) 1950.

(9) Scarman, op.cit.15

(10) Idem.

(11) The Times, London, England, 2, 16, 19,20 May 1975

(12) The Times, London, England, 2 June 1975.

(13) Lord Diplock, "On the Unwritten Constitution" (1974) 9 Israeli Law Journal 463. Lord Lloyd of Hampstead, "Do We Need a Bill of Rights?" (1976) Modern Law Review 121.

(14) P. Wallington and J. McBride Civil Liberties and a Bill of Rights (Cobden Trust, London, 1976) 45.

(15) Professor J.A.G. Griffith The Politics of the Judiciary (Glasgow, 1978).

(16) Unreported, Supreme Court Case n.163, 11 September 1979.

(17) Reproduction in the judgment of Raine Deputy C.J. in the Rooney case, 4-6.

(18) These facts are taken from an article by Peter J. Bayne "Judicial Methods and the Interpretation of Papua New Guinea's Constitution". (1980) Vol 11 No.1. Federal Law Review 150-153.

(19) Papua New Guinea Constitution 1975 S.11(1). This Constitution

(19) cont. and the Organic Laws are the Supreme Law of Papua New Guinea and,... all acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency invalid and ineffective. This type of provision is standard to most Commonwealth constitutions.

(20) [1945] A.C. 206.

(21) 323 U.S. 214 (1944).

(22) See Appendix for list of cases considered and judges involved.

(23) [1971] A.C. 972.

(24) Ibid. 982.

(25) [1970] A.C. 538.

(26) [1970] A.C. 538, 549.

(27) [1976] A.C. 16.

(28) Section 15(1) provides: "If any person alleges that any of the provisions of sections 2 to 14 (inclusive) of this Constitution has been, or is being, 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 High Court for redress.

(29) (1936) 297 U.S. 233, 244.

(30) (1949) 337 U.S. 562.

(31) [1980] A.C. 265.

(32) Ibid, 268.

(33) Idem.

(34) Idem.

(35) S.A. de Smith The New Commonwealth and its Constitutions (Stevens and Sons, London, 1964) 189-191.

(36) [1970] A.C. 853.

(37) Ibid, 869.

(38) [1976] A.C. 16.

(39) It is also interesting to note that in Akar v. Attorney-General of Sierra Leone [1970] A.C. 853, 868, in the absence of a statutory requirement that an endorsement regarding the manner in which a Bill was passed in the legislature be attached to Bills purporting to amend the Constitution, their Lordships were not prepared to accept any suggestion that a Bill amending the Constitution was not properly passed or for supposing that any procedural requirement was not followed.

(40) Ladore v. Bennett [1939] A.C. 468, 482, quoted in Hinds v. The Queen [1977] A.C. 195, 224.

(41) S.10(1) Constitution of Antigua.

(42) S.1B Newspaper Registration (Amendment) Act 1971, No. 8 of 1971.

(43) [1976] A.C. 16, 32.

(44) "Delineation of the Right to Freedom of Expression" (1980) Winter, Public Law, 359,362.

(45) Idem.

(46) S.14(2) Malta Constitution 1961, SS. 7,8,9,10,11 Constitution of Bermuda 1968, SS.6,7,9,10,11,12, Constitution of Saint Christopher, Nevis and Anguilla 1967, for example.

(47) 1. Cranch. 137, 175 (1803).

(48) No. 2 [1979] A.C. 385.

(49) Section 6(1) read: for the removal of doubts it is hereby declared that if any person alleges that any of the foregoing sections or section 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 High Court for redress.

(50) D.P.P. v. Nasralla [1967] 2 A.C. 328 (Jamaica), Baker v. The Queen [1975] A.C. 774 (Jamaica) and de Freitas v. Benny [1976] A.C. 239 (Trinidad and Tobago).

(51) [1967] 2 A.C. 238, 247

(52) de Freitas v. Benny [1976] A.C. 239, 244 as quoted by Lord Diplock in Maharaj [1979] A.C. 385, 396.

(53) Maharaj 385, 396.

(54) Ibid, 397.

(55) Ibid, 396.

(56) In re Pollard (1868) L.R.2. P.C. 106.

(57) Supra, n.48, 398.

(58) Sirros v. Moore [1975] 1 Q.B. 118.

(59) Supra, n.48, 399.

(60) Supra, n.25.

(61) [1978] A.C. 337.

(62) Supra, n. 36.

(63) [1980] A.C. 637.

(64) Act 12, of 1962.

(65) Supra n.25, 864.

(66) S.23(1) Subject to the provisions of subsections (4)(5) and (7) of this section, no law shall make any provision which is discriminatory either of itself of in its effect.

(67) Supra, n.25, 865.

(68) Idem.

(69) Ibid, 872.

(70) Supra, n.63, 655.

(71) Ibid, 661.

(72) Idem.

(73) [1967] 1. A.C. 26

(74) Ibid, 46.

(75) Act No. 12 of 1963.

(76) Supra, n. 85, 48.

(77) Ibid, 47.

(78) Idem.

(79) Ibid, 49.

(80) Idem.

(81) C.A. No. A.D. 256 of 1965.

(82) [1977] A.C. 195.

(83) Ibid, 210.

(84) Ibid. 211-212.

(85) Sir Fred Phillips Freedom in the Caribbean: A Study in Constitutional Change (Oceana Publications, Inc. Dobbs-Ferry, New York, 1977) 118.

(86) Supra, n. 82,212.

(87) Ibid.213.

(88) Idem.

(89) Idem.

(90) [1957] A.C. 288.

(91) Supra n. 82 , 219.

(92) Ibid. 221.

(93) S.97(1) There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon by the Constitution or any other law.

(94) [1980] A.C. 319.

(95) Woolwich Union v. Fulham Union [1906] 2 K.B. 240.

(96) Galloway v. Galloway [1956] A.C. 299, 323 per Lord Tucker

(97) Supra n. 94 , 327.

(98) Ibid. 328.

(99) Idem.

(100) Ibid. 329.

(101) Idem.

(102) Idem.

(103) Idem.

(104) Supra n. 94.

(105) Ibid, 328.

(106) [1980] 3 W.L.R. 855.

(107) Ibid, 864.

(108) Ibid, 865.

(109) Idem.

(110) Idem.

(111) Supra n. 106, 867.

(112) Ibid. 868.

APPENDIX

Opinions of the Judicial Committee of the Privy Council concerning Commonwealth Bills of Rights

Runyowa v. R. [1967] 1 A.C. 26 - freedom from inhuman or degrading punishment.
Committee - Lord Morris of Borth-y-Gest, Lord Pearce and Lord Pearson (Southern Rhodesia). Delivered by Lord Morris.

Oliver v. Buttigieg [1967] 1 A.C. 115 - freedom of expression.
Committee - Lord Morris of Borth-y-Gest, Lord Pearce and Lord Pearson (Malta). Delivered by Lord Morris.

D.P.P. v. Nasralla [1967] 2 A.C. 238 - freedom from double jeopardy.
Committee - Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Upjohn and Lord Pearson (Jamaica). Delivered by Lord Devlin.

King v. R. [1969] 1 A.C. 304 - admissibility of evidence obtained in violation of a fundamental right.
Committee - Lord Hodson, Lord Upjohn and Lord Pearson (Jamaica). Delivered by Lord Hodson.

Collymore v. A.G. [1970] A.C.538 - freedom of association and a right to a fair hearing.
Committee - Lord Pearce, Lord Donovan, Lord Pearson and Sir Richard Wild (Trinidad and Tobago). Delivered by Lord Donovan.

Akar v. A.G. of Sierra Leone [1970] A.C. 853 - freedom from discrimination on grounds of race.
Committee - Lord Morris of Borth-y-Gest, Lord Hodson, Lord Guest, Lord Wilberforce and Sir Gordon Willmer (Sierra Leone). Delivered by Lord Morris.

Jaundoo v. A.G. of Guyana [1971] A.C. 972 - right to property and procedural requirements.
Committee - Lord Guest, Lord Donovan, Lord Wilberforce, Lord Pearson and Lord Diplock (Guyana). Delivered by Lord Diplock.

Francis v. Chief of Police [1973] A.C. 761 - freedom of expression.
Committee - Lord Wilberforce, Viscount Dilhorne, Lord Pearson, Lord Kilbrandon and Lord Salmon. (St. Christopher, Nevis and Anguilla). Delivered by Lord Pearson.

Baker v. R. [1975] A.C. 774 - freedom from retrospective increase in penalties.
Committee - Lord Diplock, Lord Simon of Glaisdale, Lord Cross of Chelsea, Lord Salmon and Sir Thaddeus McCarthy. (Jamaica). Delivered by Lord Diplock.

A.C. v. Antigua Times Ltd. [1976] A.C. 16 - freedom of expression and the imposition of licensing fees on newspaper companies. Questions of locus standi for non-natural persons.
Committee - Lord Wilberforce, Viscount Dilhorne, Lord Edmund-Davies, Lord Fraser of Tullybelton, and Sir Thaddeus McCarthy. (Antigua). Delivered by Lord Fraser of Tullybelton.

de Freitas v. Benny [1976] A.C. 239 - Legality of a mandatory death sentence. Non-retroactivity of fundamental rights and freedoms in the Constitution.
Committee - Lord Diplock, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Kilbrandon and Lord Salmon. (Trinidad and Tobago). Delivered by Lord Diplock.

Hinds v. R. [1977] A.C. 195 - Observations on the structure and implications of a written constitution. Constitutionality of a new court exercising jurisdiction of the Supreme Court but composed of members of the lower judiciary.
Committee - Lord Diplock, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Edmund-Davies and Lord Fraser of Tullybelton (Jamaica).
Delivered by Lord Diplock.

McBean v. R [1977] A.C.537 - Whether proceedings in chambers before plea. Violated constitutional provisions requiring "all proceedings of every court" to be held in public.
Committee - Lord Diplock, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Cross of Chelsea. (Jamaica).
Delivered by Viscount Dilhorne.

Government of Malaysia v. Selangor Pilot Assoc. [1979] A.C. 337 - Deprivation of property and compensation for compulsory acquisition.
Committee - Viscount Dilhorne, Lord Wheatley, Lord Salmon, Lord Fraser of Tullybelton and Lord Russell of Killowen. (Malaysia).
Delivered by Viscount Dilhorne.

Maharaj v. A.G. of Trinidad and Tobago No. 2 [1979] A.C. 385 - Creation of a new remedy under the "redress" section of the constitution. Sowing of pre-existing law. Monetary compensation for infringement of human rights and fundamental freedoms.
Committee - Lord Diplock, Lord Hailsham of St. Marylebone, Lord Salmon, Lord Russell of Killowen and Lord Keith of Kinkel. (Trinidad and Tobago).
Delivered by Lord Diplock.

Abbot v. A.G. of Trinidad and Tobago [1979] 1 W.L.R. 1342 - Right to life and delay in execution of a death sentence.
Committee - Lord Diplock, Lord Morris of Borth-y-Gest, Lord Edmund-Davies and Lord Fraser of Tullybelton (Trinidad and Tobago).
Delivered by Lord Diplock.

Mootoo v. A.G. of Trinidad and Tobago [1979] 1 W.L.R.1334 - Unemployment levey - whether unauthorised exaction by legislature and void as being a charge imposed without due process of law.
Committee - Lord Wilberforce, Lord Salmon, Lord Fraser of Tullybelton, Lord Russell of Killowen and Sir William Douglas (Trinidad and Tobago).
Delivered by Sir William Douglas.

A.G. v. Ryan [1980] A.C. 718 - Constitutional right to registration as a citizen and legislation limiting that right. Construction of ordinary legislation that limited entrenched rights.
Committee - Lord Diplock, Viscount Dilhorne, Lord Russell of Killowen, Lord Keith of Kindel and Sir Clifford Richmond (Bahamas). Delivered by Lord Diplock.

Harrikisson v. A.G. of Trinidad and Tobago [1980] A.C. 265 - applications alleging contravention of human rights and freedoms, whether misconceived when other procedures for review available.
Committee - Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen and Lord Scarman. (Trinidad and Tobago). Delivered by Lord Diplock.

Minister of Home Affairs v. Fisher [1980] A.C.319. - Extension of Bermudan status to illegitimate children. Comments on construction of constitutions and differentiation from Acts of Parliament.
Committee - Lord Wilberforce, Lord Hailsham of St. Marylebone, Lord Salmon, Lord Fraser of Tullybelton and Sir William Douglas (Bermuda). Delivered by Lord Wilberforce.

Ong Ah Chuan v. Public Prosecutor [1980] 3 W.L.R. 855 - Drug trafficking, statutory rebuttable presumption of possession of more than 2 grammes of heroin presumed trafficking.
Committee - Lord Diplock, Lord Keith of Kinkel, Lord Scarman and Lord Roskill (Singapore). Delivered by Lord Diplock.

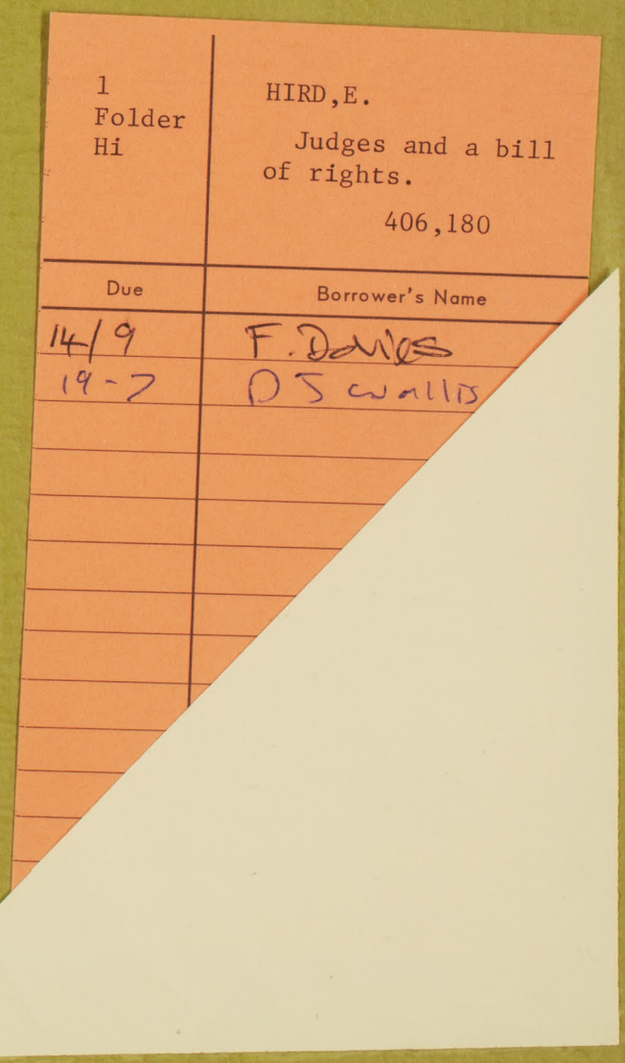
Thornhill v. A.G. of Trinidad and Tobago [1980] 2 W.L.R. 510 - Police refusal to allow detainee to communicate with lawyer. Contraventions of human rights by police within the ambit of protection afforded by the Constitution.
Committee - Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Scarman and Lord Lane. (Trinidad and Tobago).
Delivered by Lord Diplock.

Stone v. R. [1980] 1 W.L.R. 880 - Whether right to trial by jury entrenched in constitution.
Committee - Lord Diplock, Lord Salmon, Lord Elwyn-Jones, Lord Russell of Killowes and Lord Keith of Kinkel. (Jamaica). Delivered by Lord Diplock.

Zainal bin Hashin v. Govt. of Malaysia [1980] A.C. 734 - Dismissal of police constable contrary to the Constitution, amendment to Constitution while appeal pending, validating the dismissal.
Committee - Lord Wilberforce, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen and Lord Keith of Kinkel. (Malaysia). Delivered by Viscount Dilhorne.

A.G. v. Reynolds [1980] A.C. 637 - Detention under emergency powers, whether the emergency powers regulations in conformity with the constitution. Validity of an Act purporting to take away a fundamental right passed without going through procedure prescribed in the Constitution.
Committee - Lord Salmon, Lord Simon of Glaisdale, Lord Fraser of Tullybelton, Lord Russell of Killowen and Lord Scarman. (St. Christopher, Nevis and Anguilla). Delivered by Lord Salmon.

Chokolingo v. A.G. of Trinidad and Tobago [1981] 1 W.L.R. 106 - Whether imprisonment for contempt a deprivation of right to life, liberty security of person and property, without due process of law.
Committee - Lord Diplock, Lord Edmund-Davies, Lord Keith of Kinkel, Lord Scarman and Lord Roskill. (Trinidad and Tobago). Delivered by Lord Diplock.



1
Folder
Hi

HIRD,E.

Judges and a bill of rights.

406,180

Due	Borrower's Name
14/9	F. Davies
19-7	D S Wallis