Introduction

No statement could surely be more trite and elementary in relation to the Constitutions of the twelve Caribbean and circum-Caribbean States which are full members of the Commonwealth than the statement that they are all, with the exception of Guyana, Westminster model Constitutions.

It is not to be supposed that this labelling is all that modern a development. A similar notion appears in Poyer’s History of Barbados, published in 1808, where the author remarks, “[T]he constitution of Barbadoes is an humble imitation of that great fabric of human wisdom, the constitution of England.”

Not only is the notion trite and ancient, it has also become legal doctrine in the Hinds case,’ to which further reference will be made. In that leading case, the first instance known to this writer in which a legislative provision of an independent Commonwealth Caribbean State was judicially declared void for infringing the Constitution’s limitations on the legislative power of Parliament, considerable doctrinal deduction...
was made as to the law which inheres in Westminster model Constitutions.

So there has been across dimensions of time, and at different levels of educated discourse, an impressive consensus that the member States of the Commonwealth in the Caribbean enjoy the Westminster system. There is no need, therefore, in that region, to address the clichified notion that the Westminster model has failed as a livable export, on account of the coups which have overturned it elsewhere in the new Commonwealth. We in the Commonwealth Caribbean think that we have the Westminster model, and we think that we like it!

Even in a state of such complacency, however, there is no harm in an occasional exercise in introspection and self-critique. For that reason, consideration is invited today of the implications of the assertion that the Commonwealth Caribbean Constitutions are Westminster model Constitutions.

The Crown and Parliament

It takes but a brief reflection on the Commonwealth Caribbean Constitutions to see that the differences from the characteristics of the system headquartered at Westminster stand out sharply.

The position of the Head of State seems a not inappropriate point of departure. Where the monarchy has been retained, as it has in all but three of the twelve instances, the fact that the same Queen is shared (there are no examples of the Malaysia/Tonga precedent in the Commonwealth Caribbean), and that the office of Head of State is not the Head of Government (N.B. the Guyana exception), does not mean that the Headship of the State, considered as an institution, has common characteristics with that of Westminster. The vicarious authority of the Governor-General perpetuates an extra level at the pinnacle of executive authority which has been familiar since colonial times. That this extra level of authority is a significant difference can be demonstrated by the occasional controversies arising from the duality of level, which cannot arise at Westminster: the commonest instances concern the dismissal of Governors-General, but there could be others engaging the question whether the Queen could be petitioned to overrule a Governor-General, comparable to the Australian instance where the Queen indicated her inability under convention to interfere with Sir John Kerr’s exercise of the Governor-General’s authority.

The next level of formal authority down from the sovereign is, of course, the Upper House of Parliament. In this connection there are Constitutions in the Commonwealth Caribbean, such as that of Dominica, which provide no Upper House at all, and where Upper Houses do exist, there is no resemblance to the composition or constitution of the House of Lords: in the House of Lords, members are either the holders of lifetime appointments or hereditary appointments, and neither category is possible in the system of any Commonwealth Caribbean State. All the similarity that remains relates to the powers of the Upper House, although even there variations of relative detail appear.

What of the House of Commons? After all, if the label refers to “Westminster”, it is the Palace of Westminster where one would expect to find help, and the House of Commons is all that remains after we have dismissed (figuratively) the House of Lords. And here, the Commonwealth Caribbean States do each have a Lower House of shared pre-eminence and shared method of election for the most part, leaving out particular instances such as proportional representation in Guyana and non-elected members in our unicameral Constitutions.

But it is surely difficult to see in these Lower Houses anything like a carbon copy of the House of Commons as a functioning institution. Two fundamental differences, at least, appear. In the first instance, the operation of the House of Commons over the centuries has come to depend, not only on the presence of Her Majesty’s loyal Opposition, which the Commonwealth Caribbean systems may claim to duplicate, but also on a substantial body of back-bench supporters of the Government who can in some critical situations be influenced by a somewhat different perspective from that which appears to the members of the Government. Secondly, the near-absolute decision-making power in relation to the content of legislation which

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the House of Commons enjoys is by no means typical of Commonwealth Caribbean Constitutions.

In relation to the Opposition, reading the Constitutions reveals a conscious attempt to follow in the footsteps of the House of Commons and its party system. In some of the jurisdictions, however, the small size of the Parliament can mean that the Opposition might consist of a group as small as a single Member of Parliament. Again, instances of boycotted elections have occasionally produced the result that there are no Opposition Members at all in the lower House. In either of these situations, it must surely go without saying that the result is far from being the Westminster model in substance, notwithstanding the imitation in form.

In the case of Jamaica, this has led to some innovation in relation to constitutional convention which has no historical British application. In Jamaica, the last general elections were boycotted by the Opposition, leading to a sweep by the government party. Later in the life of the Parliament, two members of the governing party resigned, who, on the literal reading of the Constitution, might have seemed to be the legal Opposition. The Governor-General refused, however, to appoint either to the post of Leader of the Opposition, although the letter of the Constitution might have suggested that he was required to do so. He was clearly in so doing recognising the extra-Parliamentary Opposition as the real Opposition. There is little doubt that the Governor-General’s assessment was the more realistic, judging by the measure of subsequent and unboycotted local government elections.

This last instance illustrates a variant of another well-known aspect of the problem of using the "Westminster model" concept as an analytical matrix for the Commonwealth Caribbean Constitutions. Even where those Constitutions are clearly attempting to imitate the Westminster system as closely as possible, they may in many instances functionally cease to do so as Westminster does by the very process of codifying the Westminster rules, since those rules at Westminster are conventions of the Constitution, which might perhaps lose some of their intrinsic evolutionary character by the ossification which is inherent in codification in a Constitution.

This problem arises, it would seem, whether or not the codification is designed or is held by judicial decision to change the rule from a convention of the Constitution to a rule of constitutional law. Even if the rule should retain in its codified form the unjusticiable nature of a convention, the argument as to whether or not the convention might, in a particular case, have been observed or violated, has, by virtue of the codification, a fixed point of reference not capable of simple evolutionary modification by practice.

When, therefore, it is suggested that the Jamaica instance is one where the Governor-General refused to recognise the "legal" Opposition, that adjective is obviously being used to illustrate that the context of Jamaica is in that respect different from that of Westminster, since the usual learning is that the Opposition at Westminster is an institution of constitutional convention and not of law. But the matter goes even further. In Jamaica, the Governor-General’s action might well be evaluated with acclaim, as a defence of true constitutionalism. But it has become vulnerable to the charge of being the exact opposite because of the codification problem. The Governor-General knows full well what the Constitution was intended to achieve, but the codification may have failed in its object. And so if he overrides the Constitution in a manner incontestably in its defence rather than to the end of its subversion, the result would seem to be very much like that whereby constitutional convention at Westminster can override and nullify the law.

In relation to back-benchers, the problem of small size again produces the result that in most jurisdictions, the majority of the members of the lower House are members of the government, with the result that the backbench group of the governing party can have the same problems of miniscule size that have been identified above in relation to the Opposition. The result looks very different from anything seen at Westminster!

As to the near-absolute decision-making power of the House of Commons, this refers to the now commonplace learning that our doctrine of constitutional supremacy ousts the United Kingdom style doctrine of Parliamentary sovereignty. Legislation, which under the

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4 An issue of the compliance of the President of Trinidad and Tobago with the provisions of the Constitution requiring consultation with the Prime Minister was held to be unjusticiable in Re Bain’s Appointment (Trinidad and Tobago 1987). But clauses in the Constitutions expressly ousting the jurisdiction of the courts do not always provide the cover of unjusticiability: Thomas v. A.-G. (1’.&T.) [1982] A.C. 113.
Westminster model reflects the will of the House of Commons, is subject to judicial review under Commonwealth Caribbean Constitutions, whereas it is not so subject at Westminster. And although the instances where legislation is struck down as a result of the exercise of the power of judicial review may be few, the possibility reflects a difference which could hardly be described as trivial.

The Institutions of the Law

The instances so far considered have been chosen because they relate to the salient institutions of the body politic, the Crown and the Parliament. But that is by no means the end of the story. The strangeness of the popularity of the Westminster model label appears also when attention is turned to the institutions of the law and to legal doctrine.

The point of departure in respect of this part of the study must be the opinions of the courts. And here the doctrinal assertion of the Judicial Committee of the Privy Council in the Hinds case presents itself that our Constitutions are examples of Westminster model Constitutions, as does the deduction by the Privy Council of important legal consequences from this premise. My case is therefore unarguable from the outset, since it is contrary to the authority of the highest court of our system!

The particular deduction of the Hinds case related to the doctrine of separation of powers, which, according to the majority opinion of the Board, is a characteristic of all Westminster model Constitutions: legislative power must be exercised by the legislature, executive power must be exercised by the executive, and judicial power must be exercised by the judicature.

Immediately, of course, there is the difficulty, which was identified by Hood Phillips, of reconciling this with the usual learning that the Westminster model is, as far as the relationship between the executive and the legislature is concerned, the exemplar of the opposite of the separation of powers. In Britain and in all the Commonwealth Caribbean jurisdictions, the executive cannot survive without the support of the legislature, and the legislature is always subject to the executive by virtue of the Prime Minister's privilege of dissolving Parliament without notice.

Indeed, mere disagreement may well be an understatement. In seeking the substantial reason why, despite all the differences such as those which are here being discussed, the Commonwealth Caribbean Constitutions qualify as Westminster model Constitutions, it may well be that that reason is the contrast with those systems which operate a separation of powers between the executive and the legislature: the Westminster model as distinguished from the Washington model, where the system can accommodate a Republican President-elect Bush simultaneously with a Congress controlled both in the Senate and in the House of Representatives by the Democratic Party. The Judicial Committee might thus have laid themselves open to the accusation of having attempted to deprive the term "Westminster model" of an aspect of its very definition.

So striking a contradiction of universal perception is the assertion in the Hinds case, that it is probably beyond the power even of the doctrine of precedent to give any life to that dictum. There has not appeared any indication that Prime Ministers have been emancipated from the shackles of their Parliamentary majorities, or that Parliaments have become elected for fixed terms, as a result of the Hinds case!

In relation, however, to the separation of the legislative and executive powers from the judicial power, the Hinds case has indeed settled constitutional legal doctrine, and changed the lives at least of lawyers. Following that case, we know that only a court can exercise judicial power, and that statutes can fail for infringement of this principle. We also know that there is a special protection under this doctrine for the judges entitled to exercise Supreme Court jurisdiction, and that their jurisdiction is protected from erosion by the transfer of such jurisdiction to lower courts with judges who do not enjoy the Constitutions' protection of the Supreme Court judges' independence.

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10 Hinds v. Reg., supra, n.3, at 213.
There is no difficulty, of course, in querying the rigour of the reasoning whereby the Privy Council held the law to be in some instances the opposite of what was clearly intended by the constitutional draftsman: Luckhoo, J.A., has drawn attention in the Bata Shoe case to the fact that the Constitution of Guyana expressly referred to the determination of rights and obligations by authorities other than courts, and the point would have had equivalent force in relation to the opinion of the Judicial Committee in Hinds, since the Constitution of Jamaica makes similar provision. But since the Privy Council, it is submitted, produced a far superior result to that of the draftsman, it is far from being my purpose to challenge the law as laid down in these respects. But to accept the legal result need not necessarily imply acceptance of the labelling.

It is conceded that the Privy Council's judgment in the Hinds case was motivated by the intention to protect a functional feature of the Westminster model, that is, the effective independence of the judges. As the opinion argues, judges without jurisdiction cannot protect anyone, and if the Constitutions set out to protect the higher judiciary against political interference by devices such as Judicial Service Commissions, fixed tenure until retiring age, and dismissibility only on the say so of the Judicial Committee itself, the complete effectiveness of that protection depends on ensuring that those judges' jurisdiction is not whittled away by the legislature. But, of course, the Westminster system, which has provided the label, does not achieve the effect of judicial independence by constitutional protection. No reminder is needed of the Terrell rule that English common law treats a judge as a lackey holding office at the pleasure of the Crown. The Act of Settlement provides, admittedly, for the address procedure for removing the judges, but the nature of Parliamentary party discipline would not normally lead to any confidence whatever that this was a significant protection for the judges. And nothing could be clearer or more obvious than that the powers of the United Kingdom Parliament in law are not limited by any fetter which respects the independence of the judges. The separation of powers doctrine au Hinds is a legal doctrine restricting the legislative power of Parliament, and its deduction from Westminster model structure has to be reconciled with the impossibility of any such restriction at Westminster.

But it is not merely a question of recanvassing ad nauseam the implications of the flexible, unwritten Constitution of the United Kingdom and its contrast with the Commonwealth Caribbean's rigid, written Constitutions. Quite apart from this, the law and custom of the British Constitution is riddled with forms quite inconsistent with the notion of the independence of the judiciary. There is the Lord Chancellor's membership of the Cabinet and politically insecure tenure of office. There is the function of a legislative chamber in form, the House of Lords, as the highest Court of Appeal. As to this point, it is interesting that in the Hinds case the Privy Council hardly seemed to notice that its own system of operation, where it advises the Queen, who is the executive authority, to allow the appeal, is a formal affront to the notion of the mutual separation of judicial and executive power. There is the curial character of the House of Commons in its character as part of the High Court of Parliament, which is the foundation of the rule in The Case of the Sheriff of Middlesex. And yet it remains orthodoxy, dignified by precedent, that the separation of the judicial power from other powers of the State is a deduction from the possession of a Westminster model Constitution!

In all these matters, of course, the comment has to be taken in the light of the difference between form and function. The House of Lords as a legislative tribunal is not the House of Lords as a Court, as it is submitted O'Connell's case made clear as a matter of law. I have never fully understood how, after the decision in a criminal case was arrived at by refusing to count the votes of the non-judicial members, it could still be claimed thereafter that it stands as a matter of mere

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2 Bata Shoe Guyana Ltd. v. Commr. of Inland Revenue (1976) 24 W.I.R. 72 at 204 (the provision of the Guyana Constitution then in force, art. 10(8), has been replaced by art. 144(8) of the 1980 Constitution); Jamaica Constitution, s.20(2).
3 Hinds v. Reg., supra, n.3, at 219-220.
4 Terrell v. Secretary of State for the Colonies [1953] 2 Q.B. 482.
5 The relevant provisions of 12 & 13 Will. 3, s.3, under the reincarnation of Supreme Court Act 1981 (U.K.), s.12 (3).
6 (1840) 11 Ad. & E. 273.
7 (1844) 11 Cl. & F. 155 at 421-426.
Constitutional convention.’ But we ask a great deal of the Convention as a model when it presupposes an understanding of the Lord Chancellors' universal ability over the years to maintain a sharp division between their judicial and their political roles, and to maintain also public confidence in their ability to maintain this division. And when the modelling is applied, the copying applies uniquely to the judicial half of the Lord Chancellor's persona, with a quasi-surgical excision of his political role.

Interestingly, there remain some instances where the Commonwealth Caribbean States may indeed be said to have retained the marrying of judicial and political executive roles. When Barbados was reviewing its Constitution, there was criticism of the ability of the Chief Justice to act as Governor-General: suppose a Chief Justice should be called on to review the constitutionality of legislation to which he assented as acting Governor-General?’ The point was put in this technical manner, and did not rely on the implications of the Prime Minister's power of choosing, even if merely by default, whether or not the Chief Justice should be chosen to act on any particular occasion. The criticisms did not succeed in producing a change in the system, demonstrating that the Lord Chancellors' institutional schizophrenic feats in inspiring confidence in their dual roles have been matched by those of Commonwealth Caribbean Chief Justices who have been called on to act in the office of Governor-General.

But it is not always a matter of form, even in Britain. The lex et consuetudo Parliamenti in relation to Parliamentary privilege is surely inconsistent with the doctrine of the separation of powers, and probably with all notions of common justice, in relation to the ability of a political tribunal, the House of Commons, to impose a penalty of imprisonment.21

Nor has the theory, which supports the historical House of Commons jurisdiction, been without its dangers in a Commonwealth constitutional setting. The celebrated High Court of Parliament case from South Africa's Commonwealth days vindicated the separation of powers by refusing to recognise that Parliament could constitute a real court, notwithstanding the history of the United Kingdom House of Commons, but the attempt which failed showed that the Westminster theories themselves could threaten to provide real obstacles to functioning separation of powers.

Any conspectus of the legal institutions of the Commonwealth Caribbean States thus leads to unbearable strain on the lawyer's habit of deference to the Judicial Committee. It may be good doctrine, on account of the opinion in the Hinds case, that the separation of powers, especially as it concerns the relationship of the judiciary with the other branches of government, is the legacy of the Westminster model, but it is respectfully submitted that it can hardly be good sense.

The Mystery of the Consensus

At this point, a pause is dictated in this tirade by a sobering reflection. The points being canvassed are by no means arcane either to lawyers or to politicians with experience of the working of government. It is hardly a brilliant research insight to notice that the House of Lords is both a court and a House of Parliament! How, then, is the remarkable consensus to be explained, which we routinely evidence in our political and legal discussion, that the Westminster model is indeed an apt analogy by reference to which our Constitutional systems may be described?

It is submitted that the answer may in part lie in the continuing influence of the historical attitudes even in the era of political independence. Poyer's view of the patterning of early nineteenth century Barbados government on the English system perhaps reflected a desire for self-assurance by colonial settlers which produced the fiction that the colonial system was Westminster adapted only in relative detail. That psychological comfort still has a part to play in constitutional design is no doubt too obvious for any warning to be needed against denying its value, and so citation would be superfluous of, for example, the express warning, in the Cox Commission's

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20 Report of the Commission Appointed to Review the Constitution, etc. (Senator M.E. Cox (later Sir Mencea Cox), Chairman), Barbados, 1979 (mimeographed), 19-20.
21 Case of the Sheriff of Middlesex, supra, n.17.
discussion of the comparative advantages of a monarchical and a republican form of government, against ignoring fears which may be real though groundless.

The only analytical defence of the "Westminster model" terminology might relate to the distinguishing features whereby the Headship of State is separated from the Headship of the Government, and the executive is controlled by the legislature. Those characteristics are virtually universal features of our Constitutions. But the grand generalisations sb common in conversation and, as has been shown, even in the judgment of the Privy Council in Hinds, go much further than relying on these admittedly fundamental structural considerations. The conclusion is compelled, therefore, that we are perpetuating a custom whereby the connotation of language cannot be ascertained by grammatical analysis.

Such a development is, of course, by no means strange in the context of poetry. Nor, when it is reflected that dimensions such as those of psychological comfort are included among those relevant to discussions of constitutional matters, need it be matter of apology to introduce poetry into this discussion. This is not the first occasion on which this writer has made this association,' and attention is drawn to the work of a distinguished Caribbean scholar who has, in the context of United States constitutional law, devoted some attention to the link between poetry and the constitutional ambience.' But might not some eyebrows for all that yet be raised in relation to the conclusion to which the arguments above seem to lead: when we speak of our Westminster model Constitutions, we are not being lawyers or even political scientists. We are at best being poets.

23 Report of the Commission, etc., supra, n.20, 16.
24 "The Importance of Constitutional Law in Jamaica's Development" West Indian Law Journal, Special Issue Commemorating the 150th Anniversary of the Abolition of Slavery (October 1985) 43 at 50.