

TOWARDS THE EMERGENCE OF AN ANGLO-WEST INDIAN JURISPRUDENCE

BY HOWARD N. MALCOLM*

INTRODUCTION

The Faculty of Law of the University of the West Indies commenced classes in October 1970. The Faculty and the two affiliated professional law schools were established in the wake of the tide of political independence which had swept the shores of many of the former British colonies in the Caribbean. The major aims of West Indian¹ legal education are set forth in the Wooding-Marshall Report of 1967. These are as follows:

- (a) The organisation and pursuit of research through: (i) the publication of a law journal to meet the badly felt need for critical appraisal of current legal developments in both case and statute law; (ii) a thorough examination and scholarly exposition of current West Indian law and West Indian legal history; (iii) fundamental enquiries, in cooperation with the relevant disciplines in the field of social studies, into the suitability of existing laws (most of which have been borrowed from the colonial powers) to meet the needs of developing societies; and (iv) assistance with research into specific proposals for law reform, if so requested by governments.
- (b) The provision of an academic base for those who intend to practise law.
- (c) The provision of law degree programmes which are suitable for students who intend to practise law and those who do not.²

It is implicit from these objectives that it was the hope and anticipation of the architects of this decision to train all West Indian lawyers at home,³ that this process would eventually lead to the emergence of case and statute law which would be responsive to the needs, conditions and values of West Indian societies. As an indication of the degree of commitment to this implied

*LL.B. (Hons.), J.D., Attorney at Law. Member of the Jamaica Bar and Florida Bar.

goal, the following courses were included in the curriculum of the Bachelor of Law (LL.B.) degree: (i) History of the Caribbean, (ii) Introduction to Politics, (iii) Sociology, (iv) Economics, (v) Law In Society I⁴, and (vi) Law In Society II.⁵

Nineteen years have elapsed since the first group of University of the West Indies-trained attorneys entered the work force. An examination of reported West Indian cases decided during the last nineteen years reveals that the hopes for the emergence of a critical approach to the existing jurisprudence have not materialised. Indeed, with the exception of a few areas of statutory reforms to certain English common law principles, the aspirations for the evolution of an Anglo-West Indian jurisprudence⁶, have been dashed. For purposes of this article, the phrase "Anglo-West Indian jurisprudence" is defined to mean a judicial approach to the consideration and application of English case law which examines such law in a critical light, within the context of contemporary West Indian needs and conditions, and then alters, modifies or abandons such law whenever it is considered necessary and appropriate. Some commentators may, perhaps contend, that nineteen years is too short a period for this group of jurists to have an impact on the existing jurisprudence, and that eventually they will have the desired influence.

In this article it will be argued that there are three factors acting in concert which have thwarted the emergence of an Anglo-West Indian jurisprudence. These three factors are:

1. The West Indian judicial methodology.
 2. The method of legal education in the West Indies.
 3. The existence of the Judicial Committee of the Privy Council as the final appellate court.
-

1. Judicial Methodology

It may be useful to take as a starting point the following passages from Professor P. S. Atiyah's *The Rise and Fall of Freedom of Contract* (1979):

...Formalism really represents an attitude of mind rather than anything else; the attitude is that of the judge who believes that all law is based on legal doctrine and principles which can be deduced from precedents; that there is only one "correct" way of deciding a case; that it is not the function of the judge to invoke policy considerations, or even arguments about the relative justice of the parties' claims; that the reasons behind principles and rules are irrelevant; that the role of the judge is purely passive and interpretive; that law is a science of principles, and so on.⁷

...From 1850 or thereabouts, the phenomenon of formalism took an increasing hold upon English legal thought. I have sketched above the principal characteristics of formalism as it affected English law, in particular, it involved rejection of the law-making power of the judge, rejection of the relevance of policy issues to legal questions, belief that law was a deductive science of principles, and that the one "true" answer to legal questions could be found by a strictly logical process. It involved also a belief in the objective reality of legal concepts, so that, for example, lawyers came to see the answer to legal issues as depending on the "true" delineation of concepts such as offer, acceptance, consideration, estoppel, and a variety of others. The notion that legal concepts and categories were merely tools by which the lawyer could arrive at a range of justifiable decisions was not so much rejected, as simply not entertained by most English lawyers. And inextricably involved in this development was the gradual decline of the influence of external factors or bodies of thought on the law. It was, indeed, partly because lawyers could no longer find their answers in broad theories about society, or political economy, or moral principles, that they increasingly turned inward to the law itself.⁸

The most pervasive and enduring myth of formalism⁹ is the pretense that the common law is simply a neutral body of rules in a domain separate from social and public policy. For centuries English judges have clothed their decisions in the garb of legal doctrine, often unwittingly disguising the reality of what they were doing, namely, formulating and effecting policy, a function which is traditionally reserved to elected legislatures, who are subject to electoral review. The intellectual dilemma which the early English judges faced was to legitimise the exercise of essentially legislative powers by a body that did not enjoy the formal legitimisation of the electoral process, i.e., one-person one-vote election. It has been suggested that the development of formalism was the judiciary's response to this intellectual dilemma.

Professor Atiyah has argued¹⁰ that there exists five separate reasons which explain the attitude of English judges in which they remain silent, and in many cases mask their legislative function. Firstly, the tradition of historical elitism. In feudal England, one of the principal functions of the judges was to provide an element of majesty and mystique which would help to keep the lower classes in their place. In order for the law to fulfill this role it had to have some super-human mystique to it. The second argument which has already been alluded to, is the undemocratic nature of the common law or judge-made law. Legislation, so the argument goes, is the function of legislatures who are elected by the electorate and therefore accountable to them. Un-elected judges have therefore no legitimate authority to legislate, and should not do so. The third reason which underpins the belief of the English judges that it is best to be discreet about their legislative or creative role, is that Parliament and the wider society are willing to tolerate the present exercise of legislative power by judges because they do not wield that power too openly.¹¹ If judges were to state more openly what they were doing, society through their legislature in Parliament, might respond by cutting down judicial power. Fourthly, judges ought to understand the nature of judicial techniques better than anyone else, but the fact is that they often seem to have simplistic and naive ideas about the nature of those techniques. Stated differently, when judges discuss the desirability of remaining silent about the legislative function of the judiciary, they appear to often assume that the nature of that role and function is a very simple one. The fifth argument which underlies the present English judicial attitude is that a judge's impartiality may be seriously prejudiced by an active judicial role where there is no community consensus.¹² Let us now turn our attention to West Indian judges.

It is generally accepted that there are at least two major jurisprudential theories on the common law: (1) The declaratory theory - the common law is out there and judges merely find it,

declare it and then apply it.¹³ This view of the common law acknowledges the orthodox doctrine of separation of powers, namely that the legislature formulates policy and enacts laws, the executive implements those laws, and the judiciary adjudicates disputes and applies law. (2) The legislative theory - judges create law in the same way that legislators legislate. This approach radically conflicts with contractarian political theory going back to Hobbes and Locke, under which consent is the only legitimate basis for the exercise of the coercive power of government. West Indian judges, whether they have thought about it or not, appear to subscribe to the declaratory theory. The analytical approach or methodology of a West Indian judge in applying common law rules and doctrines is usually as follows. If there are no statutory or constitutional provisions implicated, then the first step is to identify the "relevant legal issues." After this is done, the next step is to ascertain and declare the state of the English common law with respect to such issues. Once the English common law is identified, it is then invariably applied in a mechanical fashion to the issue or legal dispute to be resolved.¹⁴ Hence, we have what Roscoe Pound, the celebrated American jurist, dubbed "mechanical jurisprudence".¹⁵ It is this approach which A.D. Burgess¹⁶ describes as the traditional approach, which treats English decisions on the uncodified common law as containing unalterable rules which when once declared by English judges automatically apply in the Commonwealth Caribbean.¹⁷

The West Indian judicial mind-set is one steeped in formalism, and displays all of the characteristics of that intellectual school of thought. The tradition of the West Indian judge is not to examine and analyse the policy considerations which underlie the doctrine or rule of law upon which his decision is based. This uncritical and artificial view of the English common law

by West Indian judges has led to their failure to appreciate and understand the dynamics of the common law as a method of juristic thought for addressing and resolving disputes. This failure embodies two aspects. Firstly, a failure to recognise that every common law rule or doctrine represents a choice between possible options. Further, that each such choice reflects a decision on competing interests and social values, i.e., a value choice or value judgement, and that each such value judgement is influenced by various factors, such as theories of economics, politics and morality. Secondly, a failure to appreciate that the adoption of a common law doctrine or principle is not a final approach or solution, but is merely a provisional commitment or accommodation.¹⁸

In order for an Anglo-West Indian jurisprudence to evolve and emerge, it is necessary for West Indian judges and jurists to critically examine policy decisions made by English courts concerning socio-economic factors in that country. A comparison of the judicial approaches of an American court and a West Indian court to two old English common law rules, highlights the issue. In 1974 the case of *Green v. Superior Court of the City and County of San Francisco*, 10 Cal. 3d 616 (Cal. 1974), came before the Supreme Court of California. The facts of this landlord/tenant case are relatively straightforward. A landlord commenced an unlawful detainer action (recovery of possession) in the San Francisco Small Claims Court seeking possession of the leased premises and \$300.00 in back rent. The tenant admitted non-payment of the rent, but defended the action on the ground that the landlord had failed to maintain the leased premises in a habitable condition. Some of the more serious defects described by the tenant and his roommate included (1) the collapse and non-repair of the bathroom ceiling, (2) the continued presence of rats, mice and cockroaches on the premises, (3) the lack of any heat in four of the apartment's rooms, (4) plumbing blockages, (5) exposed and faulty wiring, and (6) an illegally installed and dangerous stove. The landlord did not attempt to contest the presence of serious defects in the leased premises, but instead claimed that such defects afforded the tenant no defence in an

unlawful detainer action. On appeal to the Supreme Court of California by the tenant, it was held, *inter alia*, that the transformation of the landlord/tenant relationship and developments in analogous areas of law, compelled the recognition of a common law implied warranty of habitability in residential leases in California. The analysis employed by the court in arriving at this conclusion is instructive as to the manner in which old common law principles ought to be viewed by a contemporary court. The court stated as follows:

At common law, the real estate lease developed in the field of real property law, not contract law. Under property law concepts, a lease was considered a conveyance or sale of the premises for a term of years, subject to the ancient doctrine of caveat emptor. Thus, under traditional common law rules, the landlord owed no duty to place leased premises in a habitable condition and no obligation to repair the premises. (Citations omitted.) These original common law precepts perhaps suited the agrarianism of the early Middle Ages which was their matrix; at such time, the primary value of a lease lay in the land itself and whatever simple living structures may have been included in the leasehold were of secondary importance and were readily repairable by the typical "jack-of-all-trades" lessee farmer. Furthermore, because the law of property crystallized before the development of mutually dependent covenants in contract law, a lessee's covenant to pay rent was considered at common law as independent of the lessor's covenants. Thus even when a lessor expressly covenanted to make repairs, the lessor's breach did not justify the lessee's withholding of the rent. (Citations omitted.)

In recent years, however, a growing number of courts have begun to re-examine these "settled" common law rules in light of contemporary conditions, and, after thorough analysis, all of these courts have discarded the traditional doctrine as incompatible with contemporary social conditions and modern legal values.....

The recent decisions recognize initially that the geographic and economic conditions that characterized the agrarian lessor-lessee transaction have been entirely transformed in the modern urban landlord-tenant relationship..... The typical city dweller, who frequently leases an apartment several stories above the actual plot of land on which an apartment building rests, cannot realistically be viewed as acquiring an interest in land; rather he has contracted for a place to live... As noted above, at the inception of the common law rule, any structure on the leased premises was likely to be of the most simple nature, easily inspected by the lessee to determine if it fit his needs, and easily repairable by the typically versatile tenant farmer. Contemporary urban housing and the contemporary urban tenant stand in marked contrast to his agrarian model.

First, the increasing complexity of modern apartment buildings not only renders them much more difficult and expensive to repair than the living quarters of earlier days, but also makes adequate inspection of the premises by a prospective tenant a virtual impossibility; complex heating, electrical and plumbing systems are hidden from view, and the landlord who has had experience with the building, is certainly in a much better position to discover and to cure dilapidations in the premises. Moreover, in a multiple-unit dwelling repair will frequently require access to equipment and areas solely in the control of the landlord.

Second, unlike the multi-skilled lessee of old, today's city dweller generally has a single, specialized skill unrelated to maintenance work. Furthermore, whereas an agrarian lessee frequently remained on a single plot of land for his entire life, today's urban tenant is more mobile than ever; a tenant's limited tenure in a specific apartment will frequently not justify efforts at

extensive repairs. Finally, the expense of needed repairs will often be outside the reach of many tenants for "[l]ow and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property". (Citation omitted.)

In addition to these significant changes, urbanization and population growth have wrought an enormous transformation in the contemporary housing market, creating a scarcity of adequate low cost housing in virtually every urban setting. (Footnote omitted.) This current state of the housing market is by no means unrelated to the common law duty to maintain habitable premises. For one thing, the severe shortage of low and moderate cost housing has left tenants with little bargaining power through which they might gain express warranties of habitability from landlords, and thus the mechanism of the "free market" no longer serves as a viable means for fairly allocating the duty to repair leased premises between landlord and tenant. (Footnote omitted.) For another, the scarcity of adequate housing has limited further the adequacy of the tenant's right to inspect the premises; even when defects are apparent the low income tenant frequently has no realistic alternative but to accept such housing with the expectation that the landlord will make the necessary repairs. Finally, the shortage of available low cost housing has rendered inadequate the few remedies that common law courts previously have developed to ameliorate the harsh consequences of the traditional "no duty to repair" rule. (Footnote omitted.)...

In most significant respects, the modern urban tenant is in the same position as any other normal consumer of goods. (Citation omitted.) Through a residential lease, a tenant seeks to purchase "housing" from his landlord for a specified period of time. The landlord "sells" housing, enjoying a much greater opportunity, incentive and capacity than a tenant to inspect and maintain the condition of his apartment building. A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit. Moreover, since a lease contract specifies a designated period of time during which the tenant has a right to inhabit the premises, the tenant may legitimately expect that the premises will be fit for such habitation for the duration of the lease....

Unquestionably these numerous factual and legal developments have completely eroded the foundations of the traditional common law rule....

For the reasons discussed at length above, we believe that the traditional common law rule has outlived its usefulness; we agree with the *Hinson* court's determination that modern conditions compel the recognition of a common law implied warranty of habitability in residential leases.¹⁹

The West Indian jurist, schooled in formalism and accustomed to the English and West Indian judicial writing style of mystification, may perhaps be surprised by the California Supreme Court's open analysis of policy considerations, and its candid approach to judicial law-making. This American judicial method is best understood by a brief reference to the American intellectual movement known as legal realism. In the 1920's and 1930's Karl Llewellyn of Harvard and Thurman Arnold of Yale led a vigorous attack on legal formalism, the then prevailing intellectual school of thought. The American realists argued that legal rules, removed

from the particular contexts in which they were applied, meant nothing in themselves, and that issues of substantive public policy underpinned the law and were concealed by the language of legal doctrine. Legal realism eventually supplanted legal formalism in American jurisprudence, and the former has had a profound effect on American judicial methodology.²⁰ The *Green* decision must therefore be viewed in the context of the impact of legal realism. For completeness, it should be noted that English law and English legal education never experienced a movement similar to legal realism.

The above approach of the California Supreme Court will now be compared and contrasted to the approach of a West Indian court. In *O'Brien Loans Limited v. Edward Misick* (1977) 1 B.L.R. 49, the Bahamas Court of Appeal was asked to determine whether a wooden house which had been built on a plot of land was a chattel or a fixture, i.e., part of the realty. The facts of this case are as follows: in 1960 Samuel Woodside "leased" a plot of land from Orland Brodie, and in or about 1962 Woodside built a house on the said plot. The house was a wooden house resting on wooden beams which were bolted at the four corners to four columns. These columns were made of concrete blocks resting on the ground with cement poured into the hollow spaces to hold them together. The bolts were fixed into the cement. In addition, the house was fitted with a flush toilet. After the house was built there was a dispute over the ownership of an area of land of which the lot formed a part. Proceedings were commenced under the Quieting Titles Act, and in 1968 the court granted title in fee simple to O'Brien Loans Limited. Brodie therefore had no title to the land, and Woodside had been a trespasser on the land from the start. Woodside was ordered by the court to give up possession of the land, whereupon he sold the house to Misick. Some four months later Misick used jacks and rollers and removed the house, including the blocks and bolts, to a new location.

O'Brien Loans Ltd. commenced an action seeking, *inter alia*, a declaration that the house was the property of O'Brien Loans Ltd. The Bahamas Court of Appeal unanimously held that

the house was a chattel and not a fixture, and it was therefore the property of Missick. The court's approach to the "applicable" legal principles is succinctly set forth in the judgment of Georges, J.A.:

The case was argued on the undisputed assumption that English law applied and there is no doubt that the authoritative statement on this matter is that of Blackburn J. in Holland v. Hodgson (1872) L.R. 7 C.P. 328. He stated that -

"----- the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances viz. the degree of the annexation and the object of the annexation".²¹

Georges, J.A then proceeded to recite the test formulated by Blackburn, J:

"Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel".²²

At least two members of the Bahamas Court of Appeal recognised that there was an inherent difficulty in applying the English common law of fixtures to the West Indian phenomenon of a chattel house, which is often moved from site to site. Hogan, P. observed that:

The concept of the chattel house has, however, been a feature of countries in this part of the world and in the far East to a much greater extent than in England and I believe it would be wrong to ignore that aspect in determining this appeal.²³

Georges, J.A. addressed the difficulty in greater detail:

In many parts of the West Indies persons become the yearly tenants of plots of land on which they build houses. In a sense the purpose for which the house is built is always the proper enjoyment of the plot of land but even though there may be some minimal attachment which will make the house less liable to damage from stormy weather, there is no intention to benefit the landlord by adding value to the land. In a sense the conclusion that the tenant did not intend to benefit the landlord can be said to be subjective but in a sense it can objectively be determined from the nature of the tenancy and the method of construction which aims to make the connection minimal.

While it is true that such minimally annexed structures might still be saved from becoming the property of the landlord by holding them to be tenant's fixtures which can be moved at the end of the tenancy, the intention of the parties would more accurately be reflected in the law if they were held to be chattels.....²⁴

With respect in many situations in the West Indies it will be impossible to distinguish between the use of the house as a chattel and the better enjoyment of the land..... Where the house is built as a residence for the tenant the use of it as a house and the enjoyment of the land are one and the same thing. The object and purpose test propounded in the English authorities should yield to a determination on the circumstances of the case as to whether there was an intention to retain the moveability of the house as a chattel - the important factors being the method of construction, the mode of annexation and the nature of the tenancy.²⁵

Duffus, J.A. made no reference to the tension which arose in applying the English law of fixtures to an alien cultural practice which sprung from a completely different socio-economic environment. He did, however, acknowledge the West Indian chattel house phenomenon:

The removal of houses from one site to another used to be a fairly common occurrence in some of the islands of the West Indies. The houses were small, constructed of wood, and built so as to be removed when the tenant of the land moved to another plot of land.²⁶

The judicial approach of the Bahamas Court of Appeal in the *O'Brien* case is typical and representative of West Indian courts, and provokes a number of observations.²⁷ Firstly, the court implicitly treated the *Holland* decision as if it was binding, when in fact that decision was only persuasive. Secondly, no attempt was made by the court to explore and analyse the policy considerations behind the principles enunciated in the *Holland* case, in order to determine whether those considerations were consistent with the needs of Bahamian society. This is in keeping with a court which worships at the shrine of legal formalism. Thirdly, although the court recognised that the dispute before it involved a West Indian social practice which was dissimilar, and perhaps unknown in England, the court did not consider it appropriate to depart from English law and to fashion a rule or principle to meet the West Indian social reality. One would have expected the court to have taken the opportunity to formulate and announce a new rule or principle, perhaps along the lines of section 162 of the Barbados Property Act, namely: a chattel house is deemed a tenant's fixture and any building erected at the tenant's expense for any purpose of residence may be removed by the tenant at any time during the term of the lease, or within a reasonable time of its determination, provided that its removal would not cause irreparable damage to the landlord's premises. Where damage is caused the landlord is entitled to compensation.

The fourth observation is that the judicial self-image which emerges is that of a court which sees itself as powerless or incapable of departing from English case law. It appears that the court views judge-made real property law as a static agrarian concept which is not susceptible to change or departure by a West Indian court. This is in marked contrast to the

perspective of the California Supreme Court in the *Green* case.²⁸

The observations of Dr. Winston Anderson on the attitude of West Indian courts towards English decisions, merit quoting at length:

The commonplace adherence of courts in the countries of the Commonwealth Caribbean to the decisions of the English courts is rooted in profound psychological and jurisprudential considerations of colonial domination. Not only was there the historical pre-eminence of English jurisprudence to accompany military conquest or peaceful settlement of Caribbean territories, but there was also, prior to the reception date, the actual incorporation of English law to constitute the substratum of the colonies' legal systems. (Footnote omitted.) Much of the work of Commonwealth Caribbean courts in the intervening centuries since the early 1600's (footnote omitted) has been the refinement of those founding principles in the light of the exigencies of the times. Judges have therefore followed, without inhibition, parallel developments in the "mother country." (Footnote omitted.)²⁹

2. Legal Education

The format of legal education at the Faculty of Law of the University of the West Indies is primarily a combination of formal lectures, tutorials and seminars. The main purpose of the lectures is to transmit to the students rules and doctrines of law. During these lectures, the lecturer presents the subject matter (invariably reading from pre-prepared materials), and the students take copious notes. There is little or no interaction between the lecturer and the students. Tutorials, on the other hand, are conducted with much smaller groups of students meeting with their tutorial instructor. In this setting, doctrines and rules of law are analysed within the context of hypothetical fact-situations. Students are expected to display an ability to identify all the relevant legal issues and then properly apply the doctrines and rules to the hypothetical facts. The lecture/tutorial method is also the format used at the two professional law schools situated in Trinidad and Jamaica.

It is fair to state that notwithstanding the declared aims of West Indian legal education, as set forth in this essay's introduction, in practice, the primary goal of legal education in the

Commonwealth Caribbean is to impart rules and doctrines. The present format does not include any critical examination of the policies behind the rules and doctrines, and the values which inform those policies. Despite the inclusion in the Bachelor of Law curriculum of Caribbean history, politics, sociology, economics, theories of jurisprudence, and law and justice in the social dimension,³⁰ these disciplines and theoretical frameworks are not incorporated into the analysis of case law. In addition, West Indian legal education is characterised by rote memory, nonfunctional analysis and exposition of legal principles, and a rigid view of *stare decisis*. The observations of the noted comparative jurist, Professor von Mehren, made almost thirty years ago on Indian legal education, accurately describe contemporary legal education in the West Indies:

The Indian law teacher's conception of law is typically a static one, and he approaches legal education through a lecture method, emphasizing systematic presentation and verbal analysis of the existing structure of rule and doctrine. Little attention is paid either to the policies that underlay the rules or to the processes of growth and development through which the legal system adapts old rules or announces new ones.³¹

The following observations made in 1980 on legal education in Australia, are likewise applicable to West Indian legal education today:

Certainly till the sixties, and even now in most schools, legal education was one of the primary institutions for expressing and developing a particularly narrow philosophy of formalism. This was generally manifested in a teaching method of straight lectures which expounded rules and authoritative precedent, distinguishing ratio from obiter dicta with meticulous and wonderful precision. The discipline demanded limited intellectual horizons. Memory exercise was literally the only skill demanded of the average Australian student: straight exposition of texts with references to the Australian cases (since the text were usually English) was the primary skill of the teacher. [T]he comparative youth of the Australian law student can no longer support the still very visible predilection of law schools for memory exercises.³²

The above identified characteristics of West Indian legal education are inevitable given its dependence on,³³ and influence from, English legal education. Moreover, like its imperial model, West Indian legal education operates within the context of formalism. As has already been observed, English law and English legal education never experienced a movement similar to legal realism in the United States.³⁴ Although legal realism is covered as part of the Law in Society I course at the Faculty of Law, no attempt is made to apply the tenets of this movement to the various cases studied.

What changes are required to the manner in which cases are discussed and analysed, so as to lead to a better understanding of judicial law-making techniques and the dynamics of the common law? It is suggested that analysis of cases would be more enlightening and meaningful if the Socratic method³⁵ of teaching is introduced, perhaps in the tutorial and seminar setting. In the Socratic method of teaching, which obtains in American law schools, students are required not only to show knowledge of the rules and doctrines expounded in the various cases examined, but also to display a keen familiarity with the facts and social context of these cases. In addition, students are usually asked to identify, articulate and analyse the policies behind the rules and doctrines of law.

The following is a useful analytical framework within which cases can be examined using the Socratic method. It is generally accepted that there are at least three levels at which most reported cases can be analysed. Firstly, the doctrinal level. This answers the question: what doctrine(s) or rule(s) of law is the court applying? Secondly, the socio-economic level. The question to be asked here is: what assumption is the court making with respect to social, economic and political factors relevant to the parties and the wider society? Thirdly, the institutional level, i.e., what institutional role is the court adopting for itself? Is it a deferential

one, such as is embodied in the doctrine which holds that a court will not enquire into the adequacy of consideration in a contract dispute case, or is it an assertive one, as is to be seen in certain administrative and constitutional law cases involving disputes between a citizen and the state. A critical analysis of cases using the Socratic method will probably lead to recognition that there are at least three reasons which explain a court's decision in a particular case. These are: (1) the principle or rule of law applicable to the facts of the case is clear; (2) the equities of the case; and (3) the court's view of sound social-judicial policy. The challenge in any given case is to identify which of these reasons is at work.

As part of a more probing and critical examination of cases, students should be required to focus on the process by which: (a) a court adopts or announces a new rule or principle of law, and (b) the form in which the court expresses that rule or principle. That process will now be described in very general terms. The first stage involves the embracement of a policy, since policies underlay all rules and principles of law. This is a somewhat simplistic view of the policy process, as before the policy emerges there will usually be one or more countervailing policies or competing interests. As a consequence, there will be the judicial dilemma of deciding the extent to which one policy should be advanced at the expense of another. In determining which policy should prevail the court makes a value choice or value judgement. Policies are difficult to apply in their theoretical state, since their proper range of application may be uncertain. This leads us to the second stage.

The court next has to translate the adopted policy and the scope of its application into a rule or a standard.³⁶ A rule is a legal directive to an official that requires him to respond to a list of easily distinguishable factual aspects of a situation by intervening in a determinate way, e.g., determination of legal capacity solely by reference to age. At the opposite pole from a rule is a standard, examples of which are: best interest of the child, due care, reasonableness and balance of convenience. The application of a standard requires the judge to determine the facts of a

particular situation and then to assess them in terms of the purposes or values embodied in the standard.³⁷

Rules are employed in most areas of the law. This is so because it is generally accepted that rules have three major benefits or virtues, as compared to standards. These are: (1) certainty and predictability, (2) restraint on official arbitrariness, and (3) administrative convenience. Certainty and predictability are seen as important factors because of their effect on persons who are planning future transactions. If parties know in advance which circumstances will trigger official intervention, then they will adjust their activities in advance to take account of them. Moreover, certainty and predictability are of immense assistance to those facing either lawsuits or claims, in that they are in a better position to determine whether to embark on settlement negotiations or not. From the perspective of the state, certainty and predictability tend to increase the likelihood that private activity will follow a desired pattern.

Official arbitrariness means the covert use of inappropriate criteria in the decision-making process. These range from corruption to political bias. It is felt that the use of rules reduces the incidence of official arbitrariness, since there is less scope for individual discretion where a rule is involved, as compared to a standard.

Rules, because of their more specific nature, greatly facilitate the judicial task in that administratively they are easier and more convenient to apply than standards. Where a rule is involved the primary task for a judge or a bureaucrat when adjudicating a case is to ascertain the appropriate rule, identify its components or elements and then apply them to his findings of fact relevant to those components or elements. Rules, however, are not without flaws. They are, by nature, rigid and courts are often forced to stretch and bend them from case to case in order to do "justice".

The task of adjudication is often more difficult when a judge is dealing with a standard. Here the judge is applying an abstract concept which embodies one or more factors. In applying

these factors judges are usually given little if any guidance as to the weight that they should give to these factors.³⁸ As a result, judges, as well as attorneys, will often be unable to obtain significant guidance from earlier decisions. On the other hand, a standard is good if the maker of the standard has confidence in judges, particularly trial judges. A standard gives judges more flexibility in that it allows them to "call the shots" as they see them.

Lastly, it should be noted that there exists a tension in the law between certainty and predictability on the one hand, and flexibility on the other. This tension arises because it is generally felt that the law should achieve two things - (a) certainty and predictability in its application (rule), and (b) flexibility so as to permit a tribunal to do "justice" in the case before it (standard). As we have already observed, these objectives are at odds in so far as the choices available to the law-maker in formulating the legal directive or principle, i.e., a rule or a standard.

It is perhaps useful at this stage to provide a concrete illustration of the judicial law-making process canvassed above, by reference to an old common law decision. In 1722 the case of *Armory v. Delamirie* (1722) 1 Strange 505, was tried before the King's Bench. The facts were as follows: a chimney sweeper's boy (plaintiff) found a jewel and carried it to a goldsmith (defendant) to find out what it was. The boy delivered it to the goldsmith's apprentice, who under pretense of weighing it, took out the stones. The apprentice informed the goldsmith that the jewel was worth three halfpence, and the goldsmith then offered the boy the money. The boy refused to take the money and insisted on the return of the jewel, whereupon the apprentice delivered the socket to the boy without the stones. The boy commenced an action in trover against the goldsmith to recover the jewel. The legal issue which the court had to resolve was: can the finder of a jewel maintain an action in trover? Three approaches to the policy issue of whether the finder of lost property should receive any protection, presented themselves: (i) a finder of lost property shall be afforded no protection; (ii) a finder of lost property shall be

afforded some protection; or (iii) a finder of lost property shall be given absolute protection. The court choose a middle ground and adopted option number (ii). In answer to the legal issue the court held that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property interest as will enable him to keep it against all but the rightful owner.

The apparent policy justification may be stated as follows: by protecting a finder of lost property the law protects the interest of the real owner by keeping the property "above ground" and in the stream of commerce. Once the property is kept in the stream of commerce then there is a greater possibility for it to be found by the real owner.

Having adopted this policy, the court elected to enforce it with a rule rather than a standard. The rule, in its most concise terms, may be stated thus: the finder of a lost article is entitled to it as against all persons except the real owner. There are a number of advantages to the "prior possessor" rule - it is easier to establish, less costly to claimants of lost property because of its certainty and predictability, and it is relatively easy for the courts to administer.

In concluding this section, it should be noted that the Socratic method of teaching has had a significant impact in the United States in training lawyers both as legal technicians and as policymakers through the courts, rather than merely legal mechanics who are only skilled as appliers of law.³⁹

3. *The Judicial Committee of the Privy Council*

The Judicial Committee of the Privy Council⁴⁰ remains the final appellate court for all West Indian countries, with the exception of Guyana. In the context of an appeal emanating from Jamaica, the binding nature of decisions of the Privy Council was expressed by Lord Diplock in the following terms, "Although the Judicial Committee is not itself strictly bound by

the *ratio decidendi* of its own previous decisions, courts in Jamaica are bound as a general rule to follow every part of the *ratio decidendi* of a decision of this Board in an appeal from Jamaica that bears the authority of the Board itself. To this general rule is an obvious exception, *viz.* where the *rationes decidendi* of two decisions of the Board conflict with one another and the later decision does not purport to overrule the earlier. Here the Jamaican courts may choose which *ratio decidendi* they will follow and in doing so they may act on their own opinion as to which is the more convincing."⁴¹

As a general principle, the Privy Council follows the English common law, except, on occasion, where such law has been developed in an independent Commonwealth country in a manner different from its development in England. This exception, however, is extremely rare insofar as the Commonwealth Caribbean is concerned.⁴² The continuation of this body as the final appellate court for the vast majority of Commonwealth Caribbean countries acts as a constraint on the evolution of an Anglo-West Indian jurisprudence.⁴³ The Privy Council's mandate is to determine whether the local appellate tribunal from which the appeal arose applied the "relevant law" in a correct manner. The development of an Anglo-West Indian jurisprudence is not the responsibility or concern of the Judicial Committee of the Privy Council. Moreover, this body has consistently followed decisions of English courts, an observation which is not surprising, given the fact that the composition of the Board is primarily drawn from the English judiciary.

It is appropriate to once again quote Dr. Winston Anderson:

And there are other considerations which further reinforce the apparent subjugation of Commonwealth Caribbean decisions to those of the English courts. For one, there is the continued retention of the Privy Council as the final appellate court for all but one of the Commonwealth Caribbean countries. (Footnote omitted.) Nice distinctions have been made about the binding force of the Privy Council's decisions on the courts located in the jurisdictions from which the appeals emanate in addition to, and as distinct from, courts located outside those jurisdictions. (Footnote omitted.) But these technicalities aside, the hard fact remains that the Privy Council is geographically foreign, staffed overwhelmingly by English judges, and adheres to decisions of English courts with a marked degree of consistency. Again, the still extensive practice in local legislatures of statutorily incorporating by reference English common law and even statute law can hardly be expected to have assisted in the cause of judicial emancipation. (Footnotes omitted.) Thus, notwithstanding isolated judicial dicta stating that after independence the judges would no longer consider themselves bound by English decisions but would, with mature judgment in appropriate cases, strike out on their own and mould the common law to suit the needs of their ever-changing society (footnote omitted), the empirical evidence details a different story.⁴⁴

CONCLUSION

At the beginning of this article it was asserted that there are three factors acting together which have stultified the emergence of an Anglo-West Indian jurisprudence. Some observers might argue that there is really only one factor, namely, a post-colonial dependency syndrome, and that the three factors examined in this article are merely different aspects or strands of this one factor. That may very well be so, as despite political independence and the establishment of local legal education, the West Indian legal experience continues to be characterised by the uncritical and mechanical importation of English common law rules, practices and approaches to adjudication.

We have seen that legal formalism permeates West Indian judicial methodology and legal education. Perhaps the greatest evil of formalism is its perpetuation of the myth that the common law is a neutral body of rules devoid of any policy content. The dominance of formalism has led to the almost exclusive focus on preserving the symmetry of the rules and principles of the common law, which in turn has caused legal arguments to be frequently disingenuous and

presented in the form of a categorisation game - "this is fundamental breach rather than breach of a fundamental term". A relaxation of formalism in West Indian judicial methodology in favour of a more functional approach to common law rules and principles, would eventually lead to the presentation of legal arguments which are directed more towards the function and policy of the particular rule or principle of law being applied. This approach, hopefully, will bring about a general recognition amongst West Indian jurists that law is the child of politics, and that legal arguments are, in essence, arguments about values.

In the Commonwealth Caribbean the primary mechanism for legal change and innovation is legislation, not judicial decision. In other words, there is no emphasis on law-making by adjudication, rather than by legislation. This is of tremendous significance to law reform since most West Indian legislatures generally lack interest in legislating on matters which have little or no political impact. The non-emergence of an Anglo-West Indian jurisprudence is therefore not merely of academic interest, but it also has practical and political implications. West Indian judges have not played the role in law reform and innovation which they are capable of, and ought to be playing, particularly in those areas that do not excite the attention of West Indian legislators. It may also be argued that the other important reason for developing an Anglo-West Indian jurisprudence is that inherent in that exercise is the process of judicial emancipation. Judicial emancipation, in turn, is likely to have a positive impact on our collective self-image, because of our judiciary's ability to develop and fashion West Indian approaches to resolving disputes and addressing social problems.

October 24, 1994

Footnotes

1. The phrase "West Indian" refers to all those former British possessions in the Caribbean archipelago, namely: Anguilla, Antigua, the Bahamas, Barbados, Bermuda, the British Virgin Islands, the Cayman Islands, Dominica, Grenada, Jamaica, Montserrat, St. Kitts/Nevis, St. Lucia, St. Vincent, Trinidad & Tobago, the Turks & Caicos Islands, and the mainland countries of Belize and Guyana. In this article the term " West Indian" will be used interchangeably with the phrase "Commonwealth Caribbean". In this article the term "West Indian" will be used interchangeably with the phrase "Commonwealth Caribbean".

2. Report of Joint Consultations between Sir Hugh Wooding and Professor Marshall on the Question of Legal Education in the West Indies (1967) at 6.

3. Prior to the establishment of the Faculty of Law of the University of the West Indies (U.W.I.), only those persons wanting to be solicitors could be trained locally. Those wishing to become barristers had to travel to England where they would study law either at a university or through one of the four English Inns of Court.

4. The course content is usually divided under three broad headings as follows:
 - A. Law, Justice and Morality:

Relationship between law and morals; justice and equality; natural law vs. positivism; power and authority; obedience to law; aims and ethics of punishment; the rule of law and the principles of democratic government vs. totalitarianism; conflict and consensus in plural societies.

 - B. Theories of Jurisprudence:

Analytical theory and legal positivism; natural law; American and Scandinavian realists - sociological jurisprudence and the sociology of law - historical school; Marxist theory of law; legal theory and the Third World.

 - C. Law and Justice in the Social Dimension:

Law and its relation to other forms of social control - law as an instrument of economic and social change - legal agencies in their social context - the role of the lawyer in contemporary society.

5. A student registering for this course is required to undertake a dissertation designed to examine a legal subject in its wider social context, in order to understand more fully the actual functional problems of law in society as they relate to the subject chosen. Particular emphasis may be given to economic, sociological, political or historical considerations. Local West Indian orientated enquiries are encouraged, whereby a student will gain insights into his own society. A student may choose as his research project a legal subject in which inter-disciplinary considerations are not involved, but he will be required to show that the approach proposed will explore the development of the legal topic in its broader social context so as to meet the overall requirements of the functioning of law in society.

6. It is generally recognised that we cannot speak of West Indian law in the sense of such law being indigenous to the region. *See Anthony, Aspects Of The Evolution Of Caribbean Legal Systems* in *Comparative Law Studies: Law and Legal Systems of the Commonwealth Caribbean States and other Member States of the Organization of American States* 29 (1986).

7. At 388.

8. At 660.

9. For a detailed discussion and analysis of formalism, see Wallace and Fiocco, *Recent Criticisms of Formalism in Legal Theory and Legal Education*, 7 *Adel. L. Rev.* 309 (1980).

10. *See Atiyah, Judges and Policy*, 15 *Israel L. Rev.* 346, 362-369 (1980).

11. For a penetrating account of the political role of the English judge, see John Bell, *Policy Arguments in Judicial Decisions* 1-21 (1983).

12. *See, e.g., Duport Steels Ltd. v. Sirs* (1980) 1 *W.L.R.* 142, 168 - 169, where the judges in the House of Lords stated that judges ought to avoid becoming involved in controversial social issues, since this might compromise their reputation for impartiality.

13. *See Atiyah, supra* note 10, at 347.

14. On a few occasions West Indian courts have refused to follow English decisions, e.g., *R. v. Oliver Whyllie* (1977) 25 *W.I.R.* 430. There have also been judicial pronouncements which have clearly indicated an intention of departing from English decisions when circumstances warrant, e.g., the following:

...[A]s this country (Guyana) has now achieved the status of complete independence, we judges will no longer consider ourselves hidebound by English decisions, but with mature judgment in appropriate cases will strike out on our own and mould the common law to suit the needs of our ever-changing society.

Per Bollers, C.(Ag.) in *Persaud et.al v. Pln. Versailles & Schoon Ord. , Ltd.* (1973) 17 *W.I.R.* 107, 118.

...[I]t ought to be said that this court is not bound to accept as authoritatively settling the common law of Jamaica a decision of the House of Lords on a question relating to the common law of England at some point of time after Jamaica became a settled colony.

Per Luckhoo, P.(Ag.) in *Douglas v. Bowen* (1974) 22 W.I.R. 333, 339.

These, however, are isolated judicial statements.

15. *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

16. *Judicial Precedent In The West Indies*, West Indian L.J. 27, 32 (May 1978). Although Burgess identified two other approaches to English decisions on the uncodified common law, those approaches are yet to find support in the decided cases.

17. As a general statement it is still correct to say that West Indian jurists still treat English case law as binding, when in fact those decisions are merely persuasive. *See, e.g., A.G. of The Bahamas v. Royal Trust Co.* (1983) 36 W.I.R. 1, 7, 39. Anthony's observation that: "...Caribbean jurisprudence continues to rely for some of its nourishment and guidance from English common law jurisprudence and practice", is therefore quite inaccurate. *Supra* note 6, at 45. The truth is that West Indian common law jurisprudence continues to rely on English common law jurisprudence and practice for almost all of its nourishment and guidance.

18. "We tend sometimes in determining the growth of a principle or a precedent to treat it as if it represented the outcome of a quest for certainty. That is to mistake its origin. Only in the rarest instances, if ever, was certainty either possible or expected. The principle or the precedent was the outcome of a quest for probabilities. Principles and precedents, thus generated, carry throughout their lives the birth marks of their origin. They are in truth provisional hypotheses, born in doubt and travail, expressing the adjustment which commend itself at the moment between competing possibilities." Per Cardozo, C.J. cited in *Iola v. Philadelphia Board of Public Education*, 453 Pa. 584,305 A. 2d 877 (Supp. Ct. Penn. 1973).

19. *Ibid* at 622-629.

20. The American reformation of English judicial methodology is discussed in Hardisty, *The Effect of Future Orientation on American Reformation of English Judicial Method*, 30 Hast. L.J. 523 (1979).

21. *Ibid* at 56.

22. *Ibid* at 56.

23. *Ibid* at 54-55.

24. *Ibid* at 58.

25. *Ibid* at 58-59.

26. *Ibid* at 60.
27. For a critique of this case, see N.J.O. Liverpool, *Towards Reform In Commonwealth Caribbean Real Property Law* in *Commonwealth Caribbean Legal Essays* 187 (1982).
28. *Supra* at 8-11.
29. W. Anderson, *Double Renvoi and The Circulus Inextricabilis* in *Commonwealth Caribbean Legal Studies* 313 (1992).
30. *Supra* at 2.
31. von Mehren, *Law and Legal Education in India: Some Observations*, 78 *Harv. L. Rev.* 1180, 1186-1187 (1965).
32. Wallace and Fiocco, *supra* note 9, at 311-312.
33. The dependence is also practical as the examination papers for most courses offered in the Bachelor of Law curriculum are sent to British external examiners, after they have been graded by U.W.I. lecturers. Most, if not all, of these external examiners are law teachers at English universities. These external examiners assess the grading system and determine whether the standard of the papers is in keeping with international standards. A student's grade can be adjusted after review by the external examiner.
34. *Supra* at 11.
35. This method, as the name implies, owes its origin to the Greek philosopher Socrates. Socrates did not write down his teachings or invent any system of philosophy. Instead, he talked with people and started them thinking for themselves about what is good in life. Socrates would ask them questions. By questioning, they all tried to find the true answer. This method of learning the truth by asking questions has been named "Socratic" or "dialectic".
36. For a sophisticated and incisive treatment of the nuances of rules vs. standards, see Kennedy, *Form and Substance In Private Law Adjudication*, 89 *Harv. L. Rev.* 1685 (1976).
37. These definitions of a "rule" and a "standard" are those of Kennedy, *supra* note 36, at 1687-1688.
38. *See, e.g., American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All E.R. 504, 511, where in the course of enunciating the principles governing an application for an interlocutory injunction, Lord Diplock opined, "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case".

39. For an early discussion of the impact of legal education on American and English judicial methodology, see Goodhart, *Case Law In England and America*, 15 Cornell L.Q. 173, 189-191 (1930).
40. See N.J.O. Liverpool, *Judicial Systems in the Commonwealth Caribbean* in Comparative Law Studies, *supra* note 6, at 78.
41. *Baker v. R* (1975) 23 W.I.R. 463, 471.
42. In *R v Palmer* (1971) 16 W.I.R. 499, the Privy Council preferred the development of the law relating to self defense in Jamaica and Trinidad and Tobago, over the way it had developed in Australia. See also *Berry v. R* (1992) 41 W.I.R. 244, 253.
43. I will not examine the merits and demerits of the proposed Caribbean Court of Appeal. That topic has been the subject of numerous commentaries and articles over the last couple of years. See, e.g., Pollard, *A Caribbean Court of Appeal - A Reality?*, *The Young Attorney* (1987) 16; Chuck, *Should We Continue to Have Appeals to The Privy Council*, *JAMBAR*, Vol. 11 No. 4 (December 1988) 5; Chuck, *A Final Appellate Court*, *The Gleaner*, Sept. 28, 1994, at 6 and 8.
44. Anderson, *supra* note 29, at 313-314.