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**SEMINAR FOR CARIBBEAN
JUDICIAL OFFICERS ON
INTERNATIONAL HUMAN RIGHTS
NORMS AND THE JUDICIAL FUNCTION
(Proceedings of the 1993 Barbados Seminar)**



Oliver Jackman and A. A. Cançado Trindade

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(PROCEEDINGS OF THE 1993 BARBADOS SEMINAR)

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HUMAN RIGHTS NORMS AND THE JUDICIAL FUNCTION

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FOREWORD

In the wake of the II World Conference on Human Rights, held in Vienna, Austria, in June 1993, the Inter-American Institute of Human Rights (IIHR) organised in Barbados, jointly with the University of the West Indies and the Barbados Bar Association, a Seminar on International Human Rights Norms and the Judicial Function. The Seminar, held in November of the same year, was aimed at both senior and junior levels of the judicial community in the Commonwealth Caribbean, and covered significant issues within the general theme of Human Rights and the Administration of Justice. These included highly topical items such as: fair trial procedures; judicial review of administrative decisions; the treatment of juveniles under the law (including care and rehabilitation); extradition and asylum; and the role of the Ombudsman. In addition, the Seminar dealt with a matter of particular interest and concern to the IIHR, namely, the interaction between international law and domestic law in the protection of human rights, with special attention to the role of the Judiciary in the promotion and protection of human rights.

The papers presented at the Barbados Seminar, assembled here, constitute, in the view of the IIHR, an important addition to hemispheric learning and literature on human rights, and should be of value to scholars and practitioners both within the Caribbean and in the Americas in general. With participants drawn from both the magistrature and the High Court Benches in the Eastern Caribbean (with the exception of Trinidad and Tobago), the Seminar had a

major impact on public opinion, the legal profession, and the academic community both in the host State, Barbados, and beyond.

Now that the work of international legislation on human rights protection is virtually completed, attention is increasingly turned to national measures of implementation of international instruments of protection. One of the messages of the Vienna Conference was precisely this; and it represents one of the current priorities on the IIHR agenda. Parallel to the call for "universal ratification" of human rights treaties by the end of the century, two relevant aspects can be identified for the forthcoming years: first, the harmonization of national legislations with the international instruments of human rights protection; and secondly, the development of national case-law that takes due account of international norms of human rights protection.

*The IIHR has already undertaken a series of initiatives in this area. The pioneering Barbados Seminar on International Human Rights Norms and the Judicial Function, now published in book form, represents a first step. In addition, in the same month of November 1993, the IIHR organised in Brasilia, in association with the United Nations High Commissioner for Refugees (UNHCR) and the International Committee of the Red Cross (ICRC), a Seminar on the Incorporation of the International Norms of Human Rights Protection into Brazilian Law, also forthcoming in book form. Subsequently, the IIHR has been engaged in developing, in a series of workshops, consultancies, and other activities, its Program on Human Rights and the Administration of Justice in Central and South American countries. And in October 1994, the IIHR launched its new periodical, *Judicium et Vitae*, containing a digest of national human rights case-law of Latin American countries.*

The present publication is testimony to the special attention which the IIHR continues to devote to the Caribbean region. This is further evidenced by the forthcoming publication, also in book form, of the proceedings of the Seminar on Youth and Political Rights held

in the Dominican Republic in September 1994. The Institute sees its activities in the promotion of human rights in the Caribbean region as an important aspect of its general mandate, and is proud to present this volume as a further step in the important process of bringing the Caribbean and Latin America closer together under the common rubric and conceptual universe of human rights.

Bridgetown/San José, August 1995.

*Oliver JACKMAN
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PREFACE

This is the first time that the Inter-American Institute of Human Rights, based in Costa Rica, the Barbados Bar Association and the Faculty of Law of the University of the West Indies have co-operated in a significant way in the field of international human rights, culminating in a very successful seminar for Judicial Officers held at the Heywoods Hotel, Barbados on November 26-27, 1993.

This publication contains the proceedings of the Seminar and the papers read. The papers provide a basketful of very valuable suggestions aimed at assisting the judiciary to reflect more fully the jurisprudence of international human rights norms in the local decision making process.

I welcome the institutional co-operation between the Barbados Bar Association, the University of the West Indies, Faculty of Law and the Institute and express the hope that this will be the beginning of a process which will develop into lasting and fruitful developments in the area of international human rights law throughout the Caribbean Region and Latin America.

*Albert K. Fiadjoe
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KEYNOTE ADDRESS

*The Honourable Maurice A. King**

Your Excellencies: Mr. Chief Justice, Madame Vice President of the Inter-American Court of Human Rights, My Lord Judges of various Courts of the region, distinguished colleagues, ladies and gentlemen, may I at the outset acknowledge the honour which the Inter-American Institute of Human Rights has done me by asking me to deliver this address. I take the opportunity to compliment the Institute for organising such a significant Seminar in Barbados, and the Bar Association and the University of the West Indies for co-sponsoring the Seminar.

In any discussion on international Human Rights Norms, the focal point must be the United Nations Declaration of Human Rights adopted by the General Assembly in 1948.

The nature of this Declaration is best summed up in the language of the Declaration itself:

"The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achieve-

* Q.C., M.P., Attorney General of Barbados.

ment for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."

In the period of time that has elapsed since its proclamation the Universal Declaration of Human Rights has come to be accepted as the basic international statement of the inalienable and inviolable rights of the individual, intended to serve as the common standard of achievement for all nations.

And so, in 1950, at Rome, the countries of Europe adopted most of the articles of the United Nations Declaration and proclaimed the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European nations followed this up with the European Social Charter at Turin, Italy in 1961.

In 1969, at San José, Costa Rica, the American States adopted the principles of the UN Declaration in the American Convention on Human Rights.

In 1981, at Nairobi, Kenya, the Member States of the Organisation of African Unity adopted the African Charter on Human and Peoples' Rights.

Then there are other equally significant declarations and conventions. For example in 1957, in India the International Congress of Jurists agreed on the Declaration of Delhi. In 1966 there are the International Covenant on Economic, Social and

Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocol thereto.

In 1967 the Declaration on the Elimination of all Forms of Discrimination Against Women, and most recently the Convention on the Rights of the Child.

The Articles of the UN Declaration and the other conventions, charters and declarations on Human Rights which followed contain a plethora of rights which serve as a benchmark for human dignity and freedom everywhere. They are models for states to adopt in their constitutional arrangements.

What then are "Human Rights?" They have been variously defined. Professor Louis Henkin of Columbia University, a celebrated human rights lawyer, in an article in the Columbia Law Review entitled "Rights: Here and There" (1981 Columbia Law Review at 1582) described human rights as:

"claims which every individual has, or should have, upon the society in which she or he lives. To call them human rights suggest that they are universal; they are the due of every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system or stage of development. They do not depend on gender or race, class or status. To call them "rights" implies that they are claims "as of right" not merely appeals to grace, or charity or brotherhood or love; they need not be earned or deserved.

They are more than aspirations or assertions of "the good" but claims of entitlement and corresponding obligation in some political order under some applicable law, if only in a moral order under a moral law. When used carefully,

"human rights" are not some abstract inchoate "good." The rights are particular, defined, and familiar, reflecting respect for individual dignity and substantial measure of individual autonomy, as well as a common sense of justice and injustice."

In the constitutions of our Commonwealth Caribbean Countries, we have chosen to recognise, entrench, and protect certain rights and freedoms of the individual which we guarantee as fundamental rights and freedoms.

These rights may be substantive or procedural. Substantive rights include the right to life, liberty and security of the person, protection from slavery and forced labour, from inhuman or degrading punishment or treatment, from deprivation of property, against arbitrary search and entry, freedom of conscience, of expression, and of assembly and association. Procedural rights refer to the basic principles of the laws of evidence and procedure such as the presumption of innocence, the privilege against self-incrimination, the right to a fair hearing within a reasonable time by an independent and impartial court or tribunal.

We know however, that these rights and freedoms are not absolute, but may be abridged or enlarged by legislation which our Parliaments may enact in accordance with certain prescribed formulae.

These are justiciable rights, which are enforceable by our Courts if the Executive infringes or attempts to infringe them. The judicial function in this regard is clear and unambiguous, and needs no elaboration.

The recent advice of the Judicial Committee of the Privy Council, which is still the final Court of Appeal for most of our

countries, in what is now the celebrated case of *Pratt and Morgan vs. the Attorney General of Jamaica and Others* has done nothing to alter the nature of the judicial function in relation to entrenched rights - in that case the right not to be subjected to inhuman or degrading punishment or treatment.

The judicial function remains as unambiguous as before, that is to say, to review allegations of the breach by the Executive of rights and freedoms guaranteed by the Constitution, and to protect individuals against the unlawful interference with or invasion of those rights and freedoms.

The nature of the judicial function is open to argument and discussion in those areas of human rights recognised as such in international conventions agreed and ratified by countries but not given the force of law in national legislation.

A number of very interesting and challenging questions arise: Are rights agreed by treaty absolute? Can the judiciary be called on to ensure that constitutional amendment will not be permitted to legislate contrary to international human rights norms?

You may argue with some force that these issues were addressed and settled by the judicial colloquium held at Bangalore in 1988 which enunciated the following principles.

Bangalore Principles:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.

2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to the judges and lawyers generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law -whether constitutional, statute or common law- is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country

undertakes -whether or not they have been incorporated into domestic law- for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.

8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchange of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

The Honourable Mr. Justice A. R. Gubbay of the Supreme Court of Zimbabwe in a paper which he presented at the

Third Commonwealth Africa Judicial Conference at Zambia,
April 5-9, 1990 commented on these principles as follows:

"The Principles adopted at the Judicial Colloquium in Bangalore, India, in February 1988 relating to the role of the judiciary in advancing human rights by reference to international human rights norms, should be ever foremost in the mind of Judges. The broad effect to these principles, ... is not that municipal Judges should override clear and unambiguous domestic law by recourse to international legal norms on human rights, but rather that they should acquaint themselves with these international norms and when the occasion arises, as it is bound to, seek assistance from them: for they are likely to guide the decision-maker along the right path."

"At the follow-up Colloquium held at Harare just a year ago, it was again emphasised by the participants that if Judges and lawyers have ready access to the basic texts of the most relevant international and regional human rights instruments: '... the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms and human rights in the performance of their duties. In this way the noble works of international instruments will be translated into legal reality for the benefit not only of the people we serve, but also of the people in every land.'"

For us in the region, the questions whether rights solemnly agreed by treaty are absolute, and the role of the judiciary in relation to those rights are interesting and challenging because of the current debate on capital punishment and corporal punishment which is taking place here in our

country and indeed in our neighbouring Commonwealth Caribbean Countries.

This debate is fuelled by genuine concerns over escalating violent crime, and the illegal drug menace.

If a poll were taken of Barbadian opinion today, I believe that in excess of 95% would readily agree that the way to deal with crime is to execute murderers and give long prison sentences and serve whippings to perpetrators of violent crime.

I will not dwell on capital punishment. It is clearly permitted by our Constitutions, and the only issue is, that it becomes cruel, inhuman and degrading punishment and treatment if you allow the condemned person to live too long after sentence before you execute him. The moral of *Pratt and Morgan vs. the Attorney General of Jamaica and Others* is that we must fine tune our judicial and penal systems so that executions of condemned persons should follow swiftly after convictions.

But what of corporal punishment? In the recent case of *Victor Hobbs and David Mitchell vs. the Queen*, the Barbados Court of Appeal declared whipping with the cat-o-nine tails to be inhuman and degrading treatment. Such punishment is proscribed by Section 15(1) of the Barbados Constitution which provides that

“No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

Section 40 of the Prison Act, Cap 168 of the Laws of Barbados sets out the circumstances in which corporal punishment can be inflicted in prison. Infliction of corporal punishment ordered by the Courts is not included.

Section 40 of Cap 168 was enacted prior to November 30, 1966, the date when the Barbados Independence Constitution came into force. So that immediately prior to Independence on November 30, 1966, the Laws of Barbados did not permit the carrying out of a sentence of corporal punishment in prison.

Such punishment found by the Court of Appeal to be inhuman and degrading treatment could not have been declared to be unconstitutional if the laws of Barbados had permitted it immediately prior to November 30, 1966. The provisions of Section 15 (2) and perhaps 26 (1) (b) and (c) of the Constitution would have saved it as an existing law.

Consequent on the decision of the Barbados Court of Appeal in *Hobbs*, the Barbados public has called vociferously and stridently for an amendment to the Constitution to permit whipping as part of the sentence of a Court to be inflicted in prison. I am sure that human rights activists may legitimately advance the argument that the public is demanding that its Parliament legislate contrary to international human rights norms, agreed and ratified by our country.

Indeed the issue as to whether judicial corporal punishment was inhuman and degrading treatment was the subject of a decision of the European Court of Human Rights in the case of *Tyrer v. U. K. (2.E.H.R.1)*. In that case the Court held that flogging with the birch was degrading punishment.

This extract from the judgement is very instructive:

"The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authori-

ties of the State, and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities- constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender (...).

Accordingly, viewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment" as explained at paragraph 30 above."

Let us look now at how a developing country on the African continent dealt with this issue. Section 15 (1) of the Zimbabwe Constitution, one of the entrenched provisions of the Declaration of Rights provides that.

"No person shall be subject to torture, or to inhuman or degrading punishment or other such treatment."

The effect of this provision was considered by the Supreme Court of Zimbabwe in the case of *S. V. Ncube and Others* (1988 2SA 702 (Z5)).

The issue was whether judicial corporal punishment ordered by the Court for a male offender over the age of 19 years infringed Section 15 (1) of the Zimbabwe Constitution. Judicially ordered whipping had been authorized by Zimbabwe law for over 80 years, and was firmly grounded in successive criminal codes.

The Supreme Court held that the punishment was unconstitutional, since in its very nature it is both inhuman and degrading.

They came to this conclusion by the application of an expansive interpretation of Section 15 (1). The Court held that

“The *raison d'être* underlying s. 15 (1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.”

The following year the Zimbabwe Supreme Court, in the case *A Juvenile vs. The State*, held that a provision of the Zimbabwe Criminal Code which authorized whipping with a light cane as a judicial punishment for male persons under the age of 19 years violated Section 15 (1) of the Constitution of Zimbabwe. The judgement was a 3-2 majority verdict. One of the judges expressed the opinion that

“This conclusion, I am confident, will prove acceptable to all who care for the reputation of the legal system in this country and are anxious for it to be thought humane and civilised. For we must never be content to keep upon our Criminal Code provisions for punishment having their origins in the Dark Ages.”

The Zimbabwe Parliament did not share the judge's view.

The sequel of these cases was that the Zimbabwe Parliament no doubt in response to public opinion, amended Section 15 of the Zimbabwe Constitution by inserting a new subsection to provide that

"No moderate corporal punishment inflicted

a) ...

b) in execution of the judgement or order of a court, upon a male person under the age of eighteen years as a penalty for breach of any law;

shall be held to be in contravention of subsection (1).

The Zimbabwe Parliament has taken the lead which the Barbados Parliament will most likely be asked to follow very shortly.

Time does not permit me to enlarge on other equally important issues relating to our civil liberties and human rights. But I throw them into the melting pot in the hope that you may find time to address them and to stimulate our publics to debate them keenly, intelligently, rationally and soberly.

In response to escalating levels of violent crime and the problems caused by the illegal traffic in narcotic drugs and psychotropic substances in all of our countries, there have been calls for our laws to be amended to permit the police to tap telephones subject to certain controls, to stop and search persons without first arresting them or having a warrant to stop and search them. There have been calls to amend our constitutions to permit civil forfeitures contrary to the existing protective provisions against deprivation of property. There have been questions about the continuing relevance of

the presumption of innocence and about the right to a public hearing in certain criminal cases.

One of the grave errors made by those who strongly advocate capital and severe corporal punishment, and the abridgement of civil liberties in reaction to escalating crime, is to assume that others who do not share their views have no concern for the victims of violence. Nothing could be further from the truth. Those who advocate the faithful observance of human rights are in the forefront of condemning violence done by offenders. The entire credo of their faith, so to speak, is an abhorrence and rejection of all forms of violence by man against his fellow man.

One of the most uncharitable, and unkind positions put by those who reject the idea that offenders have rights is to say to you that "You need to have a member of your family murdered or raped, then you will understand." But never will you hear those who advocate the faithful observance of human rights norms say, you need to have your son or daughter commit murder or rape, and be convicted, then you will understand. You don't hear that because all violence is anathema to those who advocate the strict observance of human rights.

In today's world, developing countries like ours like to assert our independence of thought and action -imagined or real- and to insist that we know what is best for our own circumstances.

In this age when access to development financing and assistance is being more and more conditioned by a nation's observance of international human rights standards and norms, can developing countries continue to insist that they determine what human rights norms they will accept and

what norms they will choose to disregard in their own perceived self interest?

In what will be the inevitable continuing dialogue and discussion after Bangalore, will the time come when international human rights norms, agreed by treaty and ratified by countries, be regarded as absolute and binding, and will the time come when judiciaries are called upon to ensure that constitutional amendments will not be permitted to be legislated contrary to agreed international human rights norms?

Whose business is it to ensure that international human rights norms become generally acceptable in our societies, to ensure that these lofty statements of principle in relation to human rights solemnly agreed in international conventions become part of national laws and of life in our countries.

There is clearly a need for:

- a) public education and acceptance of international human rights norms;
- b) a legal profession sensitive and competent in human rights issues; and
- c) a positive attitude by governments.

Where does our press stand in all this? Are they progressive or reactionary on the issue of human rights? Are they capable of being analytical and dispassionate in dealing with this issue of human rights? Or are they like so many of the rest of us, whose only response is to hang them and whip them.

I am sure the organisers of this Seminar will do their best to raise public consciousness in Barbados on these issues, to

bring some balance to opposing views, and put the case for observance of human rights by all in its true perspective.

But who will bell the cat after this Seminar is over?

HUMAN RIGHTS AND THE MACHINERY OF JUSTICE

Caribbean Judicial Approach to Constitutional and Conventional Human Rights Provisions

*Dr. Lloyd Barnett**

Historical antecedents:

1. The jurisprudence of the English-speaking Caribbean countries has been erected on the foundation of the English common law. As former British colonies their inheritance of common law notions of individual liberty, the control of arbitrary government and the rule of law provided a basis for their promotion and protection of human rights. For generations habeas corpus had protected personal freedom, the presumption of innocence had been accepted as the "golden thread" of the criminal process, the right against self-incrimination had been recognised, the right to a fair hearing enforced and freedoms of association, assembly and speech proclaimed by judges.

* President, Jamaican Bar Association; Member, Board of Directors IIHR

2. Despite these jurisprudential antecedents, the incidents of slavery, indentured labour and racism deprived the Negro and Indian majorities of these territories of the equal protection of the law until socio-economic forces made an impact on the political and constitutional systems. The abolition of slavery was followed by the gradual expansion of representative government, extension of the franchise and legalisation of trade union organisation. In the 1930's the labour movement in the Caribbean initiated demands for improved standards of living for the working classes and gave impetus to the quest for self-determination. It is therefore not surprising that the earliest examples of a significant incorporation of international human rights norms were legislative enactments which sought to give effect to I.L.O. Conventions and Recommendations in the field of labour law and industrial relations. In many of these territories laws were passed in the 1940's and 1950's to give recognition and protections to trade unions, to establish minimum wages, regulate the employment of children and the health and safety of workers. Such legislative progress was dependent on the strength of the trade union in the particular territories, the extent to which representative government had developed particularly through the extension of the franchise and the consequential influence which the unions exerted on government's legislative programmes. There is no evidence however, that judicial decisions in the field of labour law were significantly influenced by the body of conventional and customary international labour law being developed by the I.L.O.

3. Progress in the establishment of general standards for the promotion or protection of human rights in other areas was far less significant. The colonial status of these countries restricted their freedom to introduce any comprehensive human rights regime, and the legislative and executive organs were ultimately controlled not by constitutional guarantees but by the imperial government and legislature. In that

situation the initial prospects for the general incorporation of international human rights norms were not good.

4. Two further factors militated against the development of a comprehensive legal system for the protection of human rights in the British Commonwealth: Firstly, the traditionalist objection to written guarantees of fundamental rights which was hallowed by many of the great English jurists and, Secondly, obeisance to the constitutional principle of the supremacy of Parliament. Before the Second World War only spasmodic and isolated variations from this predilection occurred in the Commonwealth. These usually resulted from very special local conditions. As a result of federalism and cultural plurality, the British North American Act of 1867 included in the Canadian constitutional system the protection of certain religious denominational schools against encroachment by provincial legislation and for the equal treatment of the English and French languages in certain situations. In 1900 the Commonwealth of Australia Act provided that the legislative power of the Australian Commonwealth Parliament to acquire property was subject to the application of "just terms" and the indictable offences had to be tried by jury. The Commonwealth was prohibited from legislating for the establishment, imposition or restraint of religion or the impairment of freedom of religion. The 1922 Constitution of the Irish Free State Act contained express guarantees of the freedoms of conscience and religion, of expression and association, of the liberty of the person, of privacy of the home and a due process clause.

5. The real impetus toward the incorporation of human rights provisions in comprehensive Bills of Rights came in the aftermath of the Second World War. Post-War repugnance to racism, tyranny and inhumanity created a changed atmosphere against which tradition did not immunize the members of the Commonwealth. The ultimate elimination of

colonialism became a respectable ideal, if not the universal objective of the international community. In 1948, the Universal Declaration of Human Rights came into being. In 1950, India's Republican Constitution adopted a comprehensive Bill of Rights. In 1951, Britain herself ratified the European Convention. In 1959, the Independence Constitution of Nigeria incorporated a Fundamental Rights Chapter which was patterned on the European Convention on Human Rights. Thereafter, the Bill of Rights included in the Constitutions of the English-speaking Caribbean countries generally followed the Nigerian example. The concept of constitutional restraint on legislative power by detailed written expressions of individual rights and judicial review thus became a feature of the constitutions of the newer Commonwealth countries.

Constitutional options and judicial attitudes:

6. The most systematic and significant adoption by Caribbean legal systems of international human rights norms has been through the mechanism of the Bill of Rights guarantees of written constitutions. Apart from Trinidad and Tobago which utilised a more generic description of human rights more akin to the United States generalised expressions and due process formulation, these Constitutions expressed fundamental rights and freedoms and the permissible limitations thereon in the more detailed pattern of the European Convention on Human Rights. As Professor Richard B. Lillich remarked with respect to the parallel development in the African Commonwealth states:

"What is clear beyond doubt is that the provisions in many African constitutions replicate international human rights law standards found in one or more of the international instruments, allowing domestic courts to apply international law indirectly when construing and applying constitutional standards."

7. An immediate difficulty was probably created by the fact that these instruments failed to acknowledge their primary source. With an admixture of atavistic pride and neo-colonial traditionalism they declared that these rights which were being entrenched in the constitutional instruments were already the entitlement of or were being enjoyed by the citizenry. This attitude was reflected in the judicial approach to the interpretation of the constitutional guarantees.

8. In the *Nasralla Case*, which gave Caribbean Judges one of the earliest opportunities to construe one of these constitutional instruments, both the Supreme Court and Court of Appeal of Jamaica treated the fundamental rights provisions in question as merely declaratory of the common law. In the Court of Appeal, Mr. Justice Lewis stated: "The Bill of Rights Chapter of the Jamaican Constitution seeks in some measure to codify those 'golden' principles of freedom, generally referred to as the rule of law, which form part of the great heritage of Jamaica and are to be found both in statutes and in great judgments delivered over the centuries". In the same case, Lord Devlin on the appeal to the Privy Council in giving the opinion of the Board referred to the Preamble as demonstrating that this Chapter of the Constitution proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. His Lordship stated:

"All the Judges below have treated it as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to the implication for this intendment, since the Constitution itself expressly ensures it. This chapter as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not

they conform to the precise terms of the protective provisions."

9. In Trinidad and Tobago where the "due process clause" predominated and gave scope for less traditionalist sentiments, a similar approach was demonstrated. In *Collymore's Case*, Wooding, C.J. stated:

"I am of the opinion that before the Constitution came into force the enactment of legislation in the terms of the amending Act could not have been properly regarded as an encroachment on any of the then existing fundamental rights of the appellant. Those rights, though now guaranteed, have not been augmented, by the Constitution."

In *Rex Lassalle v. The Crown*, Phillips, J. A., stated:

"I now revert to the point from which I started. The fundamental rights and freedoms guaranteed by the Constitution do not owe their existence to it. They are previously existing rights, for the most part derived from the Common Law, the continuation of which is sought to be protected by the Constitution for the purpose of securing the Rule of Law in independent Trinidad and Tobago. The effect of the due process clause is to entrench, not the particular form of the legal procedure existing at the date of commencement of the Constitution for adjudication of the rights of the individual, but rather his fundamental right to such adjudication by a fair, independent and impartial tribunal in accordance with legal principles that have come to be well understood in our democratic society- in a word, his right to justice as we know it."

10. The frozen law doctrine which limits the contents of the constitutional guarantees to specific rules of the common law has pervaded judicial attitudes. In *Banton v. Alcoa Minerals of*

Jamaica Inc. (1971) Graham Perkins, J., in dealing with freedom of association and trade union rights stated that the freedom of association enshrined in the Jamaican Constitution grew out of "the two fundamental principles that the citizen could say or do what he pleased so long as he did not offend against the substantive law or infringe the legal rights of others, whereas public authorities could act only in pursuance of the authority of a rule of common law or statute. To the extent that public authorities were not authorised to interfere with the citizen it may be said that the citizen enjoyed those liberties. The four great Charters- Magna Carta, the Petition of Right, the Bill of Rights, and the Act of Settlement, dealt with particular problems between the Crown and the people.

The so-called freedoms, however, remained undefined and depended, for the most part, for their protection on the force of public opinion and certain refinements of the common law aided by particular statutory provisions. The particular freedom recognised as the freedom of association grew out of that process. It is one of those freedoms now entrenched in our Constitution, but which still remains undefined." Remarkably, this proposition was advanced although trade unionism was illegal at common law and the modern doctrine of freedom of association owed its development to changes in political philosophy as well as the influence of the International Labour Organisation and the conventional principles it fostered.

11. Even in such a case as *Trinidad Island-Wide Cane Farmer's Assn. & Att-Gen. v. Prokash Secreeram* (1975) where the Court of Appeal of Trinidad and Tobago took a liberal approach in holding that a statute imposing compulsory deduction of cess on canes supplied by cane farmers to sugar manufacturers for eventual payment to an Association was unconstitutional as infringing the constitutional right to property and freedom of

association this approach was evident. Although reference was made to the Universal Declaration of Human Rights and relevant I.L.O. Conventions, Phillips, J.A. nevertheless stated:

"The right of freedom of association, which is recognised by the Constitution as existing before its commencement, has its roots in the common law of England which is deemed to have been in force in Trinidad as from 1st March 1848. (See S 12 of the Supreme Court of Judicature Act 1962). In my judgment, counsel's submission that a restricted interpretation must be put upon the expression 'freedom of association and assembly' is untenable."

12. However, in *Mahraj v. Att-Gen.* (No. 2), Lord Diplock in delivering the majority Opinion in the Privy Council expressly recognised that common law rules could be in conflict with the constitutional guarantees as evidenced by the insertion of a saving clause in respect of pre-Independence law both written and unwritten.

Lord Diplock stated:

"In view of the breadth of language used in S.I to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far as it had not been superseded by written law) might have revealed provisions which (it could plausibly be argued) contravened one or other of the rights or freedoms recognised and declared by S.I."

13. The static approach which gave no recognition to international human rights norms and relegated the fundamental rights to established common law rules or principles failed to take into account even the settled principles of statutory interpretation, which presumed that statutes were to be

interpreted so as not to violate international conventional or customary law unless no other construction is possible, and that the Courts should seek to give effect to international conventions in construing statutory instruments which seek to implement their provisions.

14. In more recent years British consciousness of the importance of international human rights norms has been aroused by the application of the European Human Rights Convention and the work of the European Commission and Court. The literal approach to constitutional interpretation which the common law tradition prescribed is now being challenged by the more purposive approach which the international human rights norms suggest. In *Minister of Home Affairs v. Fisher* (1979), Lord Wilberforce in a Bahamian appeal gave the historical and philosophical justification for the liberal approach. His Lordship pointed out that the Bill of Rights Chapters of these post-colonial constitutions were influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and this was in turn influenced by the Universal Declaration of Human Rights. His Lordship then examined the issue of constitutional interpretation in a passage which demands extensive quotation:

"These antecedents, and the form of Chapter I itself, 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... Section 11 of the Constitution forms part of Chapter I. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the public interest.'"

When therefore it becomes necessary to interpret the subsequent provisions of Chapter I - in this case Section 11-

the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to acts of Parliament, is sound. In their Lordships' views there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession or citizen. On the particular question this would require the Court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second, would be more radical: it would be to treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origins 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.

15. The importance of judicial attitudes in the constitutional scheme has to be assessed against the background of the positive and normative role cast for the Judiciary in the new Commonwealth Constitutions. The affirmation of the application of the principles of the separation of the judicial power and the independence of Judges by the highest judicial authority in such cases as *Lyanage v. The Queen* and *Hinds v. The Queen*, has far reaching implications. An essential though implied term of the social contract embodied in these Constitutions is that the Judiciary has the duty and power to safeguard the fundamental values of the constitutional system. This necessarily involves enforcing the constitutional limitations on state power and protecting the citizen against arbitrary government. To the extent therefore the constitutional guarantees of fundamental rights seek to express and incorporate international human rights norms, the Courts will be failing in their most important function, if they do not give effect to those basic principles.

16. Constitution-makers have recognised the significance of the measures they were adopting. The Report of the Nigerian Minorities Commission stated with respect to the insertion of these provisions in their Independence Constitution:

"Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights."

Jamaica was the first English speaking Caribbean country to follow the Nigerian example. The Right Excellent, Norman Manley, who was Chairman of Jamaica's Joint Constitution

Committee enumerated the value of adopting the constitutional Bill of Rights as follows:

- “(i) the Island would stand before the world as a country which had incorporated the principles governing the society in the strongest possible form;
- (ii) by embodying the rights in a permanent and visible form, the Constitution would ensure that it would become more easy to detect any action which is taken for the purpose of invading these rights;
- (iii) the guarantees would preserve the rights against all forms of minor encroachments, because the courts would have the power to prevent infringements.”

The continuing clash of judicial attitudes:

17. The divergent attitudes of the liberal and traditionalist schools have a profound bearing on the significance and efficacy of the constitutional guarantees. Results of actual cases vary with the approach judges take in reasoning their judicial decisions both at the national and international levels. In the *Sunday Times Newspaper Case*, the highest Court in the United Kingdom reversed the decision of a liberally constituted Court of Appeal which had discharged an injunction restraining as in contempt of court the publication of certain articles dealing with the subject matter of pending court proceedings. In those proceedings, action had been commenced against a drug manufacturing company for the recovery of damages because drugs manufactured by the company had caused deformity of children “in utero.” The articles were critical of the company’s development and marketing of the drugs. The House of Lords held that the proposed publication was objectionable as it would prejudice

the issue of negligence, lead to disrespect of the processes of law and expose the defendants to public and prejudicial discussion of the merits of the case. The European Commission on Human Rights referred the *Sunday Times* application to the European Court of Human Rights, which held that the freedom of expression constitutes one of the essential foundations of a democratic society, and in weighing the interest of the parties, took into account that the families of numerous victims who were unaware of the legal difficulties had a vital interest in knowing all the underlying facts and the various possible solutions. The European Court held that the interference on which the House of Lords relied did not constitute a social need sufficiently pressing within the meaning of the European Convention and was unnecessary for the preservation of the judiciary with the result that the decision of the House of Lords conflicted with the Convention.

18. Similar divergence in judicial attitude both at the municipal and international level can be seen in the *Antigua Times Newspaper* case, where the Privy Council reversed the decision of the Eastern Caribbean Court of Appeal which had held that a statute requiring a deposit of a substantial sum of money as a pre-condition for operating a newspaper was invalid as it was not reasonably required for the protection of the reputation of others. In the *New Guyana Co.* case, the Court of Appeal of Guyana held that an import license and/or payment of a fee as a condition precedent to obtaining the newsprint or printing equipment needed to produce a newspaper did not hinder the fundamental right to freedom of expression. The basis of the decision was that the impugned orders in their true nature and character were intended to regulate trade and commerce and not the freedom of expression.

19. By contrast, the advisory opinion of the Inter-American Court in the *Stephen Schmidt* case took the more liberal approach. The question was whether compulsory membership

in an association prescribed by law for the practice of journalism offended articles 13 and 29 of the Inter-American Convention. The Court held the desire to regulate professional standards and ethics would not justify the restriction and that the Costa Rican provisions conflicted with the Convention. The Inter-American Court stated:

"The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions... (i)n fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."

20. The capital punishment cases provide the most dramatic demonstration of the divergence in judicial attitudes. Because the constitutional and conventional instruments permit the retention of the death penalty where it hitherto existed the real issue with which the Caribbean Courts have had to grapple is the delayed execution of such sentences. The first remarkable point of these cases is that the Caribbean Courts and the Privy Council prior to its historic Opinion in *Pratt vs Morgan* paid so little attention to the significance of conventional human rights provisions and the views of international human rights bodies. The second remarkable point is that the Courts tended to treat delay as constitutionally irrelevant, or worse, as a benefit to the condemned prisoner. Indeed, the Supreme Court in the *Riley Case* came dangerously close to expressing a philosophy that a third world country was not to be judged by civilised standards, Carey J. (as he then was) quoting with approval the *dictum* of Fox J. (as he then was) in *R v Chen See* (January 8, 1968) that:

"what is a reasonable time is determined not by an objective quest in search of the ideal, but subjectively by reference to circumstances prevailing."

My own contemporary response to that proposition was that it attached a remarkable strained construction on the phrase 'within a reasonable time' and provided a judicial charter for inefficiency in the administration of justice.

21. To a great extent constitutional guarantees of human rights in the Caribbean had been in danger of atrophy by reason of judicial predilection for "the frozen law doctrines" enunciated in the celebrated *Nasralla Case*, in which Lord Devlin stated that the Bill of Rights provisions of the Jamaican Constitution proceed upon the presumption that the fundamental rights which it covers are already (at Independence) "secured to the people of Jamaica by existing law." This was taken as establishing that the citizen had no greater protection under the constitutional provisions than he had prior to Independence. As recently as this year Bingham, J. in, *Albert Huntley vs The Attorney General and D.P.P.*, the capital murder classification case, stated:

"It has long been judicially recognized that the fundamental rights and freedoms... are and have always been available to the individual prior to the coming into operation of the Constitution."

22. In the Barbadian Case of *Bradshaw & Roberts vs. The Attorney General et al.*, where the challenge was to the common law doctrine of constructive murder which on the basis of the *Nasralla* decision, was protected by the specific constitutional preservation of preindependence law, Williams C.J. for the Court of Appeal stated that there is nothing in the fundamental rights guarantees of the Barbados Constitution corresponding to the Canadian Charter's concept of the principles

of fundamental justice. But this is exactly what our Constitutions have sought to provide. They have endeavoured to incorporate fundamental rights and freedoms as recognised by civilised nations and as expressed in international human rights conventions. These are the fundamental rights and freedoms of the individual to which we are entitled and to which our Constitutions have sought to give expression and protection, however ineffectively. As in the Jamaican Courts, the international human rights conventions were held to have no application and the relevance of the international human rights jurisprudence under the compelling precedent of *Riley* was denied. Indeed, the logical deduction from the Caribbean judgements is that the Court would have no power to prevent an execution from proceeding while the applications were still being considered by the international institutions pursuant to our treaty obligations.

23. It is gratifying, however, to observe that against this tide of judicial conservatism, Davis, J., in the High Court of Justice of Trinidad and Tobago in *Thomas & Paul* (1987) boldly held that the prolonged incarceration of condemned men on death row coupled with the way they were advised of the decisions of the Mercy Committee and the conditions in which they were confined amounted to cruel and unusual treatment and granted relief against the imposition of the death penalty. In a remarkably prescient pronouncement of the *Pratt v Morgan* principle, His Lordship stated:

"It was in accordance with existing law that this Court performed its duty in 1975 when it passed sentence of death upon the two applicants herein. This does not mean however, that our Courts ever view lightly the extinguishment of human life, no matter how heinous the crime that attracted that penalty, and the execution of a duly condemned culprit by judicial hanging is an occasion which our criminal law, and indeed our civilization, can only

undertake with great solemnity and a meticulous respect for procedure, for form and indeed for the minutiae of entitlements commanded by ritual and due process. To kill, even a condemned man, in any other manner is repugnant to our sense of decency, morality and good order. This macabre process may never be personalised, and may never be adapted to administrative convenience or political expediency. The condemned man is not liable to have the measure of his suffering enhanced by the mischief of bureaucrats or the zeal of ideologists. Due process of law requires that the condemned man's life be extinguished, but only according to law."

24. The *Nasralla Case* had been concerned with a specific and narrow area of criminal justice relating to double jeopardy and had not explored the true genesis of the Bill of Rights. The *Fisher Case* (quoted above) had sought to clarify the position. It is to be hoped that the *Pratt and Morgan* decision has now decisively given the quietus to the "frozen law doctrine." The Barbadian Court of Appeal in the corporal punishment case of *Hobbs and Mitchell vs The Queen* which was decided a few months before *Bradshaw and Roberts* had itself adopted a more liberal approach to the Human Rights provisions and had referred to international notions of human rights as well as international judicial opinion. The Court of Appeal quoted with approval to the judgement of the Zimbabwe Supreme Court in *S. v Nowbe, S. v Tshuma, S. Ndhllore* where it was stated:

"The *raison d'être* underlying s. 15 (1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of

pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago maybe revolting to the new sensitivities which emerge as civilisation advances."

25. The Court held that whipping with the cat-o-nine tails is inhuman and degrading within the meaning of the constitutional provision, and that since under the relevant statutory provisions it could no longer be legally carried out in accordance with the law, it was not saved by the provision which preserved pre-existing types of punishment. This case therefore foreshadowed the reasoning of the Privy Council in *Pratt and Morgan*, where one issue was whether the sentence of death could after long delay be carried out in accordance with pre-existing law and practice.

26. The following momentous propositions bearing on the questions under examination appear to emerge from the Opinion of the Board in *Pratt and Morgan*:

- (1) The Bill of Rights provisions of our Constitutions are mainly (not exclusively) intended to entrench and enhance pre-existing (not necessarily common law) rights and freedoms not to restrict and contract them. Those principles of justice though not explicitly stated as specific or positive State obligations are incorporated in the constitutional guarantees.
- (2) The interpretation of the Bill of Rights must accord with civilised standards of behaviour which outlaw acts of inhumanity and such standards are those enshrined in constitutional and conventional human rights instruments, expressed in the decision of international human rights institutions and cherished by civilised persons of normal sensitivity.

- (3) At common law and by virtue of constitutional guarantees as well as conventional provisions inordinate delay amounts to a denial of justice deserving and capable of relief. On the issue of whether delay occasioned by the legitimate resort by the accused to all available appellate procedures should be taken into account or only delay attributable to the State, the approach of the European Court of Human Rights in the interpretation of the analogous provision of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms which takes into account all delays should be preferred.

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CAPITAL AND CORPORAL PUNISHMENT AND HUMAN RIGHTS LAW

*Derrick McKoy**

A Commonwealth Caribbean Lawyer addressing any problem of human rights must take into consideration several areas of law. Our member states are signatories to the International Covenant on Civil and Political Rights and we must necessarily take into consideration the international law. So too, we are subject to inter-American law under the American Convention on Human Rights. Finally (or some would have said, firstly) we must apply the law of our constitutions. A judge, on the other hand, addressing a similar problem, starts with the state law and, in our jurisprudence, often ends with it.¹

I have been asked to speak today on capital and corporal punishment and human rights law. Like most of you, I am not regarded as a "human rights" lawyer. On the other hand, I possess some passing familiarity with the constitutional laws relevant to the Commonwealth Caribbean and I trust, then,

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1 But cf. *Hobbs and Mitchell v. The Queen*, Crim. Appeal Nos. 9 & 10 of 1991. Barbados Court of Appeal (Unreported), which considered international, inter-American as well as state laws.

that you will allow me to examine the topic through the prism of the discipline.

I would like to challenge you with proposition that the law on corporal and capital punishment is dynamic. This is true whether or not you approach it from the broader perspective of the evolving human rights law (including international and inter-American law) or from the more narrow perspective of the constitutional laws of our particular states. I would like to further challenge you with the second proposition that human rights law is evolving far more rapidly than its representation in constitutional rules.

These propositions are not particularly controversial. But the real challenge is not what the propositions have said about our present positions, but rather what they promise our legal positions will become. There is a dialectic at work which confounds many of our sacrosanct propositions, not only those conservative ones embedded in state law, but perhaps even those progressive ones now prevailing in international and inter-regional human rights forums.

If the current thesis, as repeated in our constitutions, is that corporal and capital punishment is legal, then the antithesis, as represented in evolving doctrines and jurisprudence of human right law, must be that it is not. How then will this conflict be synthesized? All our constitutions possess bills of rights purportedly entrenching fundamental rights and freedoms. Too often these are interpreted by our Judges as creating no additional rights to those existing at independence.² If, however, we are to assume that our Bills of Rights are not meaningless, we must give them definition and such

2 *But see* the dissenting judgement of the Judicial Committee of the Privy Council in *Riley v. Attorney General of Jamaica* (1983) 1 A.C. 719. *See also* *Minister of Home Affairs v. Fisher*.

definition as we can draw from the broadest strokes of human rights law. It must be heartening to our colleagues in the Inter-American Commission on Human Rights to see human right principles taking stronger hold today in our constitutional law. The Supreme Court of Zimbabwe, while discussing section 15(1) of the Zimbabwe Constitution,³ articulated the principle in *S. v. Nowbe*, *S. v. Tshuma*, *S. v. Ndhlore*⁴ as follows:

It [the proscription against cruel and inhuman treatment] is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.⁵

The message of this paper is that while it might take an applicant, as it had taken Earl Pratt or Ivan Morgan of Jamaica,⁶ a decade or more to have the humanitarian recom-

3 Section 15(1) of the Zimbabwe Constitution provides "No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."

4 (1988) 2 S.A. 702.

5 *Id.* at page 717. (Cited with approval by the Court of Appeal in Barbados in *Hobbs and Mitchell v. The Queen*, Barbados Criminal Appeal Nos. 9 & 10 of 1991. Unreported).

6 See *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, St. Catherine's, Jamaica*. Privy Council Appeal No. 10 of 1993.

mendations of an organisation such as the Inter-American Commission on Human Rights acknowledged in a state jurisdiction, recommendations of this type will eventually be acknowledged, and eventually acknowledged as law!

The English Contribution

We are discussing human rights against the background of the law of the Commonwealth. It is useful to see where our history began. England, in addition to leaving us with an international language, trial by jury, and habeas corpus, also left us with a tradition for hanging. The story is told of persons shipwrecked on a uncharted and unknown Island who feared for their safety lest they came upon savages. As they moved inland, they were immediately reassured by the sight of a man hanging from a gibbet since that proved that they were in a civilised country.

The English predilection for hanging dated from Anglo-Saxon times. The Normans, however, were quick to adapt. While William the Conqueror used the death penalty sparingly, reserving it largely for the offence of treason, his successors conceived of and legislated penalties that far surpassed hanging for barbarity. High on the list of barbarous acts is a law passed during the reign of Henry VIII called, with some originality, An Act for Poisoning. This Act condemned one Richard Cook to be boiled in oil until he was dead. Cook had poisoned his master's guests.

If you are familiar with Henry Fieldings' *Joseph Andrews*, you will recall the conversation between the squire and the lawyer and the glib ease in which the latter would condemn two men to imprisonment for something as trivial as cutting a twig. The lawyer went on to explain that not only would he do it but he was being generous, because had he called the

twig a tree the men would have been hanged. Fielding, a Magistrate as well as an author, may have taken some poetic licence when he described the physical prowess of his heroes, but he took no licence with the law. In the 18th and 19th centuries in England there were between 200 to 300 offences which carried the death penalty, including destroying young trees in parks or travelling at night with a blackened face.

Hanging was regarded a particularly mild punishment and, for some offences such as treason, sometimes inadequate. It was often augmented with the "additional" punishment of decapitation or disembowelment. Forgery of a bank note or coin was petty treason and many, including women and children, suffered the superior punishment. As late as 1817 English judges were condemning prisoners to death by public disembowelment. In that year, a particularly generous sovereign granted a reprieve: Three men so condemned were not disemboweled, drawn and quartered as the judge had ordered. The men were merely hanged and then beheaded.

The law, however, reserved its special odium for women who murdered their husbands. The legal penalty was to be burned to death. Kind hearted executioners sometimes treated this sentence with some licence and while the public watched, they would kindly strangle the poor wretch before burning her. The most significant part of this is that it all took place in public. Indeed, some, such as Dr. Samuel Johnson, thought that private executions had no point.⁷

I entered on this morbid excursion to bring to your attention the particularly vile and violent legislative history we have inherited from England. We may now contemplate

7 It was Dr. Samuel Johnson, you might recall, who left us that poignant phrase, "When a man knows he is about to be hanged ...it concentrates his mind wonderfully."

cruel and inhuman punishment, but in the light of our particular English inheritance, it is difficult to conceive of a cruel penalty that, in the historical sense at least, would have been unusual.

This also serves in some small, and I trust very respectful way to take issue with Lord Griffith's interpretation⁸ of the death penalty for murder (as distinct from other capital offences). It is respectfully submitted that the historical evidence would suggest that persons convicted of other capital crimes did not have much more time than murderers to suffer the anguish of prolonged delay. It is also difficult to see the superior merit of a system which condemned persons to death with no provisions for appeal and, by virtue of almost instantaneous execution of the sentence, with very little prospect of reprieve.

Capital Punishment

The undesirability of the death penalty for peace-time offences has been recognized in international instruments since 1966 when the United Nations General Assembly adopted the International Covenant on Civil and Political Rights.⁹ A similar attitude formed part of inter-American law from 1969 with the American Human Rights Convention. It took until 1983, however, for an international instrument, Protocol N. 6 to the European Convention on Human Rights, to make the abolition of the death penalty into a legal obligation of the contracting parties.¹⁰ A similar instrument did not

8 In *Pratt and Morgan v. A.G. and Superintendent of Prisons*.

9 UN Doc. A/C.3/35/L.75.

10 See (1984) 10 CLB 910.

form part of inter-American law until the Protocol to the American Convention on Human Rights to Abolish the Death Penalty was approved on June 8, 1990.¹¹ The issue of the abolition of the death penalty has retained the attention of international human rights agencies, including the Human Rights Committee.

Under the American Convention on Human Rights as well as the Optional Protocol to the International Covenant on Civil and Political Rights, individuals who claim that the rights enumerated by the respective conventions have been violated and who have exhausted all available domestic remedies, may submit written communications to the Inter-American Commission (in the case of American Conventions) and the Human Rights Committee (in the case of International Covenant) for consideration.¹² It was under these procedures that Pratt and Morgan applied.¹³

What about municipal law? Few would argue, in this the last half of the twentieth century, that a sentence of death is anything but cruel and unusual punishment.¹⁴ Indeed, this was one early component of the applicant's argument in *de Freitas v. Benny*.¹⁵ But an unchallengeable argument that a particular punishment is cruel, inhuman or degrading is not

11 OAS Treaty Series No. 73. Only Costa Rica, Ecuador, Nicaragua, Panama, Uruguay and Venezuela were signatories as of July 1992.

12 See (1984) 10 CLB 1829.

13 See *Pratt and Morgan v. A.G. and Superintendent of Prisons*.

14 In this regard the judgement in *Deena alias Deen Dayal v. Union of India*, AIR 1983 Supreme Court, 1155, which will be discussed later, must stand out as one of the remarkable exceptions.

15 (1976) A.C. 239 at 241.

an unchallengeable argument that the punishment is unlawful under the laws of the state.¹⁶

In some jurisdictions of the United States judges have been more bold,¹⁷ and the Supreme Court of India has addressed this issue in a marginally more candid manner than other jurisdictions of the Commonwealth. The Supreme Court of India has held that whenever there is deprivation of life, the burden must rest on the State to establish that the procedure prescribed for such deprivation is not arbitrary, but is reasonable, fair and just, otherwise it will be struck down as violating the protective provisions of Article 21 of the Indian Constitution.¹⁸

Not all approaches are as clinical as the decision of the Indian Supreme Court in *Deena alias Deen Dayal v. Union of India*.¹⁹ There the Court had to consider two issues: was the death sentence barbarous, torturous or degrading within the meaning of the Indian Constitution; and was death by hanging, as distinct from some other method of execution such as electrocution, lethal gas, shooting or lethal injection, barbarous, torturous or degrading. The Court considered both issues separately, and concluded that the death sentence did not offend the constitution and, with regard to the second question, that other methods of execution have no distinct or

16 This was conceded before the Judicial Committee of the Privy Council by counsel for the applicant in *de Freitas v. Benny* who proceeded instead with the more elegant complaint of unconstitutionally carrying out a death sentence which had been lawfully imposed. In substance, this is the argument which later succeeded in *Pratt v. Morgan*.

17 See, e.g. *Furman v. Georgia* (1972) 408 U.S. 238, where Brennan J. concluded that capital punishment was unconstitutional in the U.S.

18 *Bachan Singh v. State of Punjab* AIR 1982 Supreme Court 1325.

19 AIR 1983 Supreme Court, 1155.

demonstrable advantage over the system. More importantly, for our purposes, death by hanging was not barbarous, torturous or degrading.

The Court's analysis in arriving at its view of death by hanging is instructive. The Court itemized the factors that led it to its conclusions. These are: the mechanism for hanging was easy to assemble, the preliminaries to the act are quick and simple and free from anything which unnecessarily sharpen the poignancy of the prisoner's apprehension, chances of accidents during executions can be safely excluded, the method is a quick and certain means of executing the extreme penalty of the law, it eliminates the possibility of lingering death, unconsciousness supervenes almost instantaneously after the process is set in motion and death follows as a result of the dislocation of the cervical vertebrae, and avoids "to the full extent" the chances of strangulation or decapitation.

Although the Court agreed that some physical pain would be implicit in the very process of the ebbing of life, it concluded that based on reason and the findings of modern medicine, the act of hanging caused the least pain imaginable on account of the fact that death supervenes instantaneously. Therefore, the Court concluded, the system of hanging was as painless as possible in the circumstances, it caused no greater pain than any other known method of execution, and it involved no barbarity, torture or degradation. The system was therefore consistent with the obligation of the State to ensure that "the process of execution is conducted with decency and decorum" without involving degradation or brutality of any kind.

It was the opinion of the Court in *Dayal v. Union of India*, that the law is concerned to ensure that the various steps which are attendant upon or incidental to the execution of any sentence do not constitute punishments by themselves. If a

prisoner is sentenced to death, it is lawful to execute that punishment and that punishment only. He cannot be subjected to humiliation, torture or degradation before the execution of that sentence. That would amount to inflicting a punishment on the prisoner which does not have the authority of law. Therefore torture, brutality, humiliation and degradation of any kind is not permissible in the execution of any sentence. The process of hanging does not involve any of these, directly, indirectly or incidentally. Of course, one might wish to disagree.

In the Commonwealth Caribbean, our courts are not put to this test. The early direct challenge to the death penalty in *de Freitas v. Benny*²⁰ was given the short shrift by the Judicial Committee of the Privy Council. Later, in *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's, Jamaica*,²¹ the Judicial Committee of the Privy Council formulated the position as follows: "Thus, as hanging was the description of punishment for murder provided by Jamaican Law immediately before independence, the death sentence for murder cannot be held to be an inhuman description of punishment for murder."²² We may therefore conclude that in the Commonwealth Caribbean, the sentence of death for murder is either cruel and inhuman but constitutional and thus lawful or, alternately, to use the language of the Privy Council in *Pratt and Morgan v. AG and Superintendent of Prisons*, that it is not inhuman. On any interpretation, it is sure to withstand any direct challenge.

20 (1973) A.C. 239.

21 Privy Council Appeal No. 10 of 1993.

22 *Id.*

Corporal Punishment

There is no reason to think that corporal punishment, of the type traditionally administered in the Commonwealth, should be regarded as anything other than cruel, inhuman and degrading treatment. In *Tyrer v. United Kingdom*²³ the European Court of Human Rights, in examining a case of corporal punishment from the Isle of Man under the European Convention, said:

The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. ... Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on... a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

... [V]iewing these circumstances as a whole, the Court finds that the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of "degrading punishment" ...²⁴

Similarly, the Barbados Court of Appeal in *Hobbs and Mitchell v. The Queen* had no difficulty concluding that whipping with a cat-o-nine tails is a punishment which is both inhuman and degrading within the meaning of the Barbados Constitution. The question which then remained to be answered by the court was whether this type of punishment was in fact prohibited by the state law.²⁵

23 (1978) 2 European Human Rights Report 1; March 15, 1978, Publication of the European Court of Human Rights, Series A, No. 26 (the Isle of Man case).

24 (1978) 2 European Human Rights Report 1, at 11-12.

25 See, e.g., re Corporal Punishment by Organs of the State, *Ex parte Attorney General, Namibia* (1991) 3 S.A. 76, where the Supreme Court of Namibia

It would appear that the penal systems of the Commonwealth Caribbean are abandoning corporal punishment as inappropriate sentences. The authority to implement it, however, still remains on the various statute books. Thus, in February of 1991, two men were sentenced by a Judge of the High Court in Barbados to imprisonment and strokes with the cat-o-nine tails for the offence of aggravated robbery. On appeal, in *Hobbs and Mitchell v. The Queen*,²⁶ the appellants maintained that their sentence was excessive, cruel and unusual and an infringement of their constitutional rights and thus presented the Court with a clear opportunity to make a definitive ruling on the question of corporal punishment.

The Barbados Court of Appeal cited with approval the Supreme Court of Zimbabwe in *S. v. Nowbe, S. v. Tshuma, S. v. Ndhlore*²⁷ and accepted that "a penalty that was permissible at one time of our nations's history is not necessarily permissible today."²⁸ The Court also concluded without any difficulty that the punishment was both inhuman and degrading and proceeded to address the question of whether the penalty was unconstitutional or saved under section 15(2) of the Barbados Constitution. The European Court of Human Rights had faced a similar problem in the *Tyrrer Case*. In that case, however, the applicant had obtained relief because the delay of several weeks in carrying out the sentence of juvenile court to inflict corporal punishment constituted additional and cruel and unusual punishment. As the European Court of

declared that the constitutional prohibition of cruel and inhuman treatment provides five distinct areas of protection: protection from (a) torture, (b) inhuman punishment, (c) degrading punishment, (d) inhuman treatment, and (e) degrading treatment.

26 Barbados Crim. App. Nos. 9 & 10 of 1991.

27 (1988) 2 S.A. 702.

28 *Id.* at page 717.

Human Rights said: "Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him."²⁹

The Barbados Court of Appeal found for its appellants with equal dexterity but for completely different reasons. The Court first found that Parliament, by section 40 of the Prisons Act 1961, had unintentionally legislated away the legal means of giving effect to judicial orders for corporal punishment. That Act prohibits the infliction of corporal punishment in any prison except as is provided by the section 40, and section 40(2) provides only for corporal punishment for specified offences committed within the prisons. The Court then concluded that whipping (pursuant to a sentence) would not have been an act done under the authority of law and, finally, since this change had already taken place prior to independence, whipping would not have been part of the pre-independence law of Barbados and thereby saved by the Constitution. The result of this, is that we can now say definitively that corporal punishment is not part of the law of Barbados but we cannot extrapolate from this to make the same assertion for the rest of the Caribbean.

Pratt & Morgan

The Court of Appeal in Jamaica in *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's, Jamaica*,³⁰ held that it was bound by the earlier decision of the Privy Council in *Riley v. Attorney-General of Jamaica*³¹ as to the effect of delay on the

29 (1978) 2 European Human Rights Report 1.

30 Privy Council Appeal No. 10 of 1993.

31 (1983) 1 A.C. 719.

constitutionality of carrying out a sentence of death after prolonged delay. In the earlier case, the Judicial Committee of the Privy Council had held that section 17(1) of the Constitution which proscribed cruel and inhuman punishment was not breached by delay in carrying out the death sentence. The Judicial Committee of the Privy Council, in *Earl Pratt and Ivan Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons, Saint Catherine's, Jamaica*,³² however, overruled its earlier decision in *Riley v. Attorney-General of Jamaica*³³ on the constitutional effect of excessive delay, choosing instead to prefer the minority opinion in that case.

In *Riley* the five appellants had been sentenced to death between March 1975 and March 1976. Each appealed and their appeals were dismissed between February 1976 and January 1977. Three of the applicants sought leave to appeal to the Judicial Committee of the Privy Council (or in the language of the Jamaica Constitution, the Queen in Council). Two of those petitions were dismissed between December 1976 and July 1978, and the third was abandoned in October 1978. Between April 1976 and January 1979 there was a suspension of executions pending the resolution of the political controversy on its retention. The controversy was resolved by a free vote in the House of Representatives in January 1979 and in May and June of that year the Governor-General issued warrants for the execution of the sentences. The applicants then applied to the Supreme Court for a declaration that their execution after such prolonged delay was cruel and inhuman and would infringe their rights guaranteed by section 17(1) of the Constitution. Their applications and subsequent appeals to the Court of Appeal and the Judicial Committee were dismissed.

32 Privy Council Appeal No. 10 of 1993.

33 (1983) 1 A.C. 719.

The applicants were held in custody for between six and seven years before their final appeals on the constitutional motions were heard by the Privy Council. In the majority judgement, their Lordships declined to express an opinion of whether execution of a sentence of death by hanging is "inhuman or degrading punishment or other treatment." In any event, this was not urged on behalf of the applicants. Nonetheless, in their Lordships opinion the delay in carrying out the execution in this particular case was saved by section 17(2). The delay of the execution was both done under the authority of law and was of a type of punishment which was lawful in Jamaica prior to independence.

The only arguable ambiguity, in the opinion of the majority of the Board, concerned whether the delayed execution "exceeded in extent" the description of the authorized punishment. Their Lordships considered that executing a death sentence by burning at the stake would have exceeded in extent the authorized punishment. It takes a mind forcibly conditioned by the Anglo-Saxon experience of executions to regard execution by hanging as "less" than any other form of execution. Because the legality of delayed execution could never have been questioned before independence, their Lordships had no doubt that delay in carrying out the death sentence which had been lawfully imposed, did not exceed in extent the authorized punishment. The *ratio decidendi* of the case, as contained in the majority opinion, is neatly summarized by their Lordships: "Accordingly, whatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1)."

A similar argument to that made by the appellants in *Riley* had been advanced before the Privy Council in an appeal from Trinidad and Tobago, *de Freitas v. Benny*.³⁴ The appellant

34 (1976) A.C. 239.

in this case had argued that as the time between sentence and execution before independence was five months, an execution that involved a longer delay was subject to challenge as cruel and inhuman punishment. Executions were now taking place after a longer delay and were therefore unlawful. The Privy Council would not at that time have been receptive to this argument, which was in principle and up to this point quite sound. The extension, however, was not. That is, all post-independence executions of the death penalty, including de Freitas' execution, were therefore illegal. Their Lordships gave this argument the short shrift.

In *Riley*, however, this argument received better, though still inadequate support from the Board. The minority of the Board would have restricted the savings of section 17(2) of the Jamaica Constitution to more limited application: In the minority opinion, section 17(2) of the Jamaica Constitution is restricted in scope to authorizing the passing of a judicial sentence of a description of punishment lawful before independence and is not concerned with the carrying out of the punishment.

The Judicial Committee of the Privy Council when it reconsidered the matter in *Pratt and Morgan v. The Attorney General for Jamaica and The Superintendent of Prisons*, preferred the minority opinion in *Riley* and departed from the majority judgement. The Privy Council now held that section 17(2) does not deal with the problem of delay in carrying out the sentence and therefore does not exempt it. More importantly, their Lordships now agree with the argument that applicants had advanced in *Riley* that prior to independence the law protected the citizen from being executed after unconscionable delay:

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman

treatment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.

The circumstances of *Pratt and Morgan* differed sufficiently from *Riley* for their Lordships to have granted the applicants relief without necessarily re-examining the correctness of the decision of the majority in *Riley* on the construction of section 17(1). *Pratt and Morgan* were served with three different warrants for executing the death sentence. *Riley* and his fellow applicants were served with one and they sought their constitutional relief immediately. The multiplicity of warrants in the *Pratt and Morgan* case should have been enough to secure for the applicants the protection of section 17(1) without the need for a ruling on prolonged delay. The significant fact to note, from the perspective of the proposition I had proffered when we began this discussion, is that the applicants' arguments which succeeded so wonderfully in *Pratt and Morgan* were not significantly different from those which had failed in *Riley*.

Prolonged delay

The constitutional right to a speedy trial has been long recognized under the constitutional laws of Commonwealth States.³⁵ The existence of that obligation was never in doubt. The question often to be determined was whether or not the obligation was breached. On the other hand, the question of

35 *Kadra Pahadiya v. State of Bihar* AIR 1982 Supreme Court 1167; *Bell v. D.P.P.* (1985) A.C. 937.

the right to speedy process after trial and, in particular, to the speedy execution of sentence of death, stood on an entirely different foundation and not one conceded early to have existed. Nonetheless, it was clearly articulated in *Abbott v. Attorney General of Trinidad and Tobago*³⁶ that "due process of law" does not end with the delivery of a judgement in a civil matter or the pronouncement of a sentence in a criminal matter.

It is true, of course, that from one perspective it seems incongruous that one should complain that one is kept alive, rather than executed. Indeed, Lord Bridge of Harwich, in delivering the judgement of the majority in *Riley*, ventured the opinion: "Clearly the applicants cannot base their complaint on the prolongation of their lives by the delay in executing their sentences."³⁷

With respect, the issue was never one of prolongation of life but of the treatment (such as the mental anguish) consequent on the prolongation. As Lord Scarman and Lord Brightman argued in their dissent:

...(W)e believe that this view to arise from a wrong approach to the interpretation of a constitutional instrument and a failure to recognize that the act of state which is challenged in these proceedings is not the sentence of court but its execution after prolonged delay. The applicants' case is that this delay, which arose from the exercise of a power conferred not by pre-existing law put by the Constitution, rendered subsequent execution a contravention of the constitution."³⁸

36 (1979) 1 W.L.R. 1342.

37 (1983) A.C. 719, 725B.

38 (1983) A.C. 719, 727-728.

A similar point of view was articulated by Davis J. in the Trinidad and Tobago High Court in the case of *Andy Thomas and Kirkland Paul v. The State of Trinidad and Tobago*.³⁹ This distinction was also neatly argued on behalf of the applicants in *Riley* but not to the significant appreciation of their Lordships who were associated with the majority opinion. They felt that prolonged delay was an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. Lord Scarman and Lord Brightman, on the other hand, in their dissenting judgement in *Riley* had maintained that: "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment."⁴⁰

This principle was recognized by the Privy Council in *Abbott's* case, although their Lordships then characterized the problem as one of due process. In other words, the inordinate delay in executing the sentence might mean that the taking of a condemned man's life would not be "by due process of law." Thus, the Supreme Court of India commuted the death sentence of the petitioner to life imprisonment after he had been kept on death row for two years and nine months. The Court had acknowledged that prolonged delay was a result of the inability of the Supreme Court itself to deal expeditiously with the case. It was held that the inability of the Supreme Court to devise a procedure to deal expeditiously with such life and death matters could not excuse it from enforcing Article 21 of the Indian Constitution which proscribes degrading punishment.⁴¹

39 Civil Case Nos. 6346 and 6347 of 1985. High Court, Trinidad and Tobago.

40 (1983) A.C. 719, 736.

41 *Pawala v. State of Maharashtra*, AIR 1985 Supreme Court 231.

Nor would the dissenting judgment in *Riley* have discounted delay brought on by the actions of the prisoner himself. In one sense, the desire to stay alive is human and natural. As their Lordships put it: "It is this ineradicable human desire which makes prolongation inhuman and degrading." Similarly, in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*,⁴² Gubbay C.J., thought it artificial to discount the mental anguish and torment experienced on death row on the basis that by not using the legal process available the prisoner would have shortened his suffering.

In *Soering v. United Kingdom*,⁴³ the European Court of Human Rights recognized the death row phenomenon in Virginia where prisoners were held for several years before execution as a consequence of their repeated application for stay of execution, but nonetheless acknowledged that such delay could amount to inhuman or degrading treatment or punishment within the meaning of Article 3, European Convention for the Protection of Human Rights and Fundamental Freedoms.⁴⁴

The Indian Decisions

The Indian Supreme Court has been the most bold in the Commonwealth in challenging prolonged delay but few judges have been as bold as those in *Vatheeswaran v. State of Tamil Nadu*,⁴⁵ who held that a period of two years should be

42 (Judgement No. S.C. 73/93, unreported, delivered on 24th June 1993. Cited by Lord Griffiths in *Pratt and Morgan*.)

43 (1989) 11 E.H.R.R. 239.

44 (Cmd. 8969).

45 (1983) 2 S.C.R. 348.

sufficient for a person under sentence of death to demand the quashing of his sentence. More importantly, the court did not wish to fetter this right of challenge by prejudicial considerations of the cause of delay. In the *Vatheeswaran* case Chinnappa Reddy J. said:

"We think the cause of the delay is immaterial when the sentence is death. Be the cause for the delay, the time necessary for appeal and consideration of reprieve or some other cause for which the accused himself may be responsible, it would not alter the dehumanizing character of the delay."⁴⁶

Although the Court on subsequent considerations of the issue has been less expansive or exuberant than it had been in *Vatheeswaran*, declining on a number of occasions to accept a strict time limit of two years delay to guarantee a successful application, the principle remained that prolonged delay is offensive. In *Sher Singh and Others v. The State of Punjab*⁴⁷ the court held: Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed."⁴⁸

46 *Id.* at page 353.

47 (1983) 2 S.C.R. 582. See also *Smt. Treveniben v. State of Gujarat* (1989) 1 S.C.J. 383 at 410 where the Court again asserted that inordinate delay in executing a sentence of death will ground an application to the Court to determine if "it is just and fair to allow the sentence to be executed."

48 There are many other cases from India as well as the United States of America which support this principle. See e.g. *Ediga Anamma v. State of Andhra Pradesh* (1974) 2 S.C.R. 329, 355 and *Rajendra Prasad v. State of Uttar Pradesh* (1979) 3 S.C.R. 78, 130 from India. See also *People v. Chessman* (1959) 241 P. 2d 679, 699 and *People v. Anderson* (1972) 493 P. 2d 880, 894.

The Death Row Phenomenon

We have already mentioned the phenomenon and it might be useful here to explain its implications. The death row phenomenon describes the situation where men are held under sentence of death for many years while their lawyers pursue a multiplicity of appellate procedures. While there is much to disparage this procedure, it cannot be inhuman or degrading to allow an accused every opportunity to prolong his life by resort to appellate procedures however extended may be the eventual time between sentence and execution. This argument is well supported by authorities both in the U.S. and the Commonwealth.⁴⁹ A most forcible articulation of this principle is that of Davis, J. in the case of *Andy Thomas and Kirkland Paul v. The State of Trinidad and Tobago*. The applicants in this case challenged the issue and service of the warrants for their execution as unconstitutional. Davis, J.'s discussion of the death row phenomenon is worthy to be set out in some detail:

It did not take long for astute lawyers, seeking to serve the interest of desperate men, to appreciate that the new legal dispensation (of the Constitution) could, with industry and ingenuity, be made to yield unending opportunities for testing and retesting, but in any event, for objecting and frustrating the traditional course of criminal justice, in particular in capital cases.

49 See, e.g., In the USA, Circuit Judge O'Scanlain in *Richmond v. Lewis* (1990) 948 F. 2d. 1473 (U.S. Court of Appeals, Ninth Circuit); in Canada, La Forest, J. in *Kindler v. Canada (Minister of Justice)* (1991) 67 C.C.C. (3d) 1 (Supreme Court of Canada); in Zambia, *Catholic Commission for Justice and Peace in Zambia v. Attorney General and Others* (Judgement No. S.C. 73/93, unreported, delivered on 24th June 1993 (Supreme Court of Zimbabwe); in Trinidad and Tobago, *de Freitas v. Benny* (1976) A.C. 239; and *Abbott v. A.G. of Trinidad and Tobago* (1979) 1 W.L.R. 1342.

The result was that executions become less and less frequent until today; a hanging will only be accomplished if for some reason there is a lapse in the vigilance of the condemned man or his lawyers in activating the parallel constitutional jurisdiction (which is permitted according to law) or the due process of law is abrogated by the stealth or cunning of State officials (which is not permissible) and which I regret to say has occurred in this case.⁵⁰

In the same way that the courts under the constitutions cannot legislate judicially for the abolition of the death penalty, so too state officials cannot violate due process in order to evade constitutional provisions being used to delay execution.

On the other hand, other views are not so accommodating. In *Abbott v. A.G. of Trinidad and Tobago*⁵¹ the appellant challenged his death sentence on the ground that the period of eight months taken to reject the petition for reprieve had infringed his constitutional rights. Lord Diplock, in applying *de Freitas v. Benny*,⁵² said:

(I)t has to be conceded that the applicant cannot complain about the delay totaling three years preceding his petition for pardon caused by his own action in appealing against his conviction or about the delay totalling two years subsequent to the rejection of his petition caused by his own action in appealing against his conviction on constitutional grounds.⁵³

50 *Andy Thomas and Kirkland Paul v. The State of Trinidad and Tobago*. Page 16 of the Judgement.

51 (1979) 1 W.L.R. 1342.

52 (1976) A.C. 239.

53 (1979) 1 W.L.R. 1342 at 1345.

Even Lord Scarman and Lord Brightman, who had both dissented in *Riley*, conceded that it was for the applicant for constitutional protection to show that the inordinate delay did not arise from his act.⁵⁴ And Gubbay, C.J., who had so succinctly articulated the death row prisoner's dilemma in *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General*, and who found no prejudice in the legitimate legal proceedings of a prisoner to prolong his life and thus his suffering on death row, would not have advanced the arguments if the prisoner had resorted to vexatious and frivolous proceedings with the effect of delaying the ends of justice. In *Pratt and Morgan*, however, the Privy Council went further. In that case it declared:

If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.⁵⁵

The Common Law Phenomenon in Constitutional Law

To give meaning to our constitutional provisions for human rights the Privy Council has had to look at the common law. Lord Devlin in delivering the judgement of the Board in *Director of Public Prosecutions v. Nasralla*⁵⁶ said:

54 (1983) A.C. 719, 736.

55 Notwithstanding this bold statement, it would seem that the Privy Council in *Pratt and Morgan* would discount prolonged delay that resulted from frivolous proceedings on the part of the condemned prisoner.

56 (1967) 2 A.C. 238.

This chapter (on Fundamental Rights and Freedoms) proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions.⁵⁷

The "generous interpretation" of Commonwealth Caribbean Constitutions that Lord Wilberforce had advocated in *Minister of Home Affairs v. Fisher*⁵⁸ has not materialized. In *Fisher*, Lord Wilberforce suggested that we should: "... treat a constitutional instrument such as this 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."

Some superior support for this proposition is to be found in the dissenting judgement of Lord Scarman and Lord Brightman in *Riley*, but that approach in the Judicial Committee of the Privy Council is still unique. Our constitutional rights, from the right to access to an attorney to the protection from cruel and unusual treatment, is too often not founded on the international standards of human rights articulated in the post-World War European Convention on Human Rights, but on some revisionist interpretation of post-medieval English common law.

So that Lord Griffiths, in evaluating the remedy available for prolonged delay, did so against the Common Law: "Prior

57 (1967) A.C. 247-248; See also *de Freitas v. Benny* (1976) A.C. 239, 244, where Lord Diplock advanced a similar opinion on the Constitution of Trinidad & Tobago.

58 (1980) A.C. 319.

to independence, applying the English common law, judges in Jamaica would have had the like power to stay a long delayed execution." And Lord Templeman in *Bell v. D.P.P.* (1985) A.C. 937 at 950: "Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay."

Conclusion

The third proposition which I now offer you, and which I suggest is the synthesis of the dialectic we have been pursuing, is that human rights concepts are further defining our constitutional law and it is only a matter of time when all kinds of corporal punishment will be regarded as inhuman, in breach of fundamental human rights and, to be sure, unconstitutional. The Privy Council in *Pratt and Morgan* did not have to overrule *Riley* to have given the applicants their remedy. The cases are easily distinguishable and the State's position in *Pratt and Morgan* seems almost too weak to be defensible on the particular treatment of the applicants.⁵⁹ The Board, however, dealt with that case on the broader issues common to both cases, overruling themselves in the former. This is a clear example of evolving international and inter-American human rights norms finding expression in state law.

59 Lord Griffith quoted with some approbation the sentiments of Mr. Winston Churchill in the U.K. House of Commons when he said "people ought not to be brought up to execution, or believe that they are to be executed, time after time, whether innocent or guilty, however it may be, whatever their crime. That is a wrong thing."

PENAL INSTITUTIONS, CUSTODIAL SENTENCES AND HUMAN RIGHTS

*Delroy Chuck**

Prisons, prisoners and, regrettably, justice have not been priorities in the Caribbean. Post independence governments have concentrated on programs and activities which generate popularity, which are vote-catching, and for which they can be remembered. Schools, hospitals, roads, houses, government buildings and other monuments to their term in office get priority. Understandably, no government wants to be remembered by the building of a prison. Hence no prison with modern facilities and basic decent amenities has been constructed in any Caribbean territories during the past thirty years.

Penal institutions accommodate the dregs of society. The social outcast, the vile and evil, the dangerous and wicked, the dishonest and greedy, the thoughtless and reckless, the mentally aberrant and psychologically warped, are adjectives which describe the occupants of these institutions. Yet, they remain human beings with needs, hopes and basic human rights which ought to find expression even in the

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society of captives. To what extent, have we addressed these concerns to recover these prisoners and to ease the burden to which they are subjected from their social incapacitation.

Penal institutions, generally, are filthy, dilapidated and physically unsafe buildings. Security is still the main emphasis.

Absolutely no activity which can contribute to rehabilitation exists. The overcrowding, poor staff-prisoner ratio, lack of facilities, tools and equipment make it difficult, nay impossible, to engage in any meaningful exercise program, skills training or valuable activity. The prisoners are basically locked away for nineteen hours per day, at least in two prisons, the General Penitentiary and the St. Catherine's District Prison in Jamaica. These prisons have more than twice the capacity for which they were built.

Two other prisons in Jamaica, Richmond Farm and Tamarind Farm, which provide meaningful agricultural activity, are actually under populated. The main reason is the poor management and slow processing of prisoners from the overcrowded ones. In any event, even if the prisons were fully utilized, there would still be massive over-crowding.

One suspects that prison over-crowding is a major concern of all Caribbean Governments. It is a drain on government resources, impacts negatively on the prisoners, and demands an immediate solution. To be sure, the State has a duty to provide the minimum standard of care for men who have been locked away after transgressing the laws. However, any careful examination of Caribbean prisons will demonstrate that no minimum standard of care can exist. The appalling food served to prisoners, the disgusting and offensive bathroom facilities, the lack of clothing and basic requirements such as soap, toilet paper, toothpaste, etc., are

dehumanising. In many penal institutions, the prisoners are kept in the most inhumane conditions imaginable for supposedly civilized societies. The conditions undoubtedly amount to cruel, humiliating and degrading punishment.

No one can deny the need for prisons. Some men will simply not be friends of society, and they constitute a danger and threat to the social order. From them, society needs to be protected. Yet a caring, humane and civilised society must recognise that for the vast majority of prisoners, imprisonment is not permanent, but a temporary relief. In time, these men will re-enter the society. They will do so after serving their sentence or after society has exacted an appropriate punishment for their criminal conduct. Society must therefore have an interest in the inevitable consequence of a term of imprisonment since eventually it will reap the benefit or suffer the detriment. We must be concerned if imprisonment, as happens, causes a man's deterioration rather than his rehabilitation. Yet, it is a truism that our prisons are schools for crime, institutions for inhumane and dehumanizing conduct, and laboratories for institutionalising anti-social behaviour and violating the dignity of the human person.

Indeed, from the foregoing, it becomes clear that most penal institutions are violating the Right to Humane Treatment which is provided for in every constitution. Article 5(2), Chapter 1 of the American Convention on Human Rights states:

"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

A revamping and overhauling of the management and organisation of our penal institutions should be undertaken.

The enormous resources expended on our prisons could be more efficiently utilized if convicted men were productively engaged, allowed to spend their time in humane conditions and, where possible, encouraged to acquire skills to prepare for their re-entry to the wider society. By so doing, penal institutions could conform with the American Convention of Human Rights, Chapter 1, Article 5(6) which states "Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaption of the prisoners." One suspects that, in the present atmosphere of increasing rates of crimes and violence, and more brutal and vicious criminality, our leaders are unlikely to improve prison conditions and to make life more bearable in prisons. The overwhelming opinion and vindictive urge dictate that prison life should become less comfortable. In fact, it is often opined that the very cause for the escalation in criminal violence is the comfort of prison life and the failure to exact harsh punishment on criminal offenders. Capital punishment is supported with the understandable passion and the strong desire to inflict on killers their just desert. Corporal punishment is seen, like capital punishment, as a strong and effective deterrent, even though the evidence and the figures show otherwise. The insistence on harsher punishment must be challenged.

It must not be ignored that capital punishment, including public execution, was once the mandatory sentence for over one hundred forty-four crimes, many of them simple misdemeanours. It proved to be an utter failure in the control of criminality. Moreover, mandatory sentence, including the death penalty, now exists for a wide assortment of offences such as illegal drugs and have failed dismally as an effective deterrent. Thus, the call for more brutal, harsh and barbaric punishment must be resisted lest we make the mistake of repeating the failures and inhumanity of history.

To be sure, punishment has not proven to be an effective deterrent to crimes, but no one can argue that it must be abandoned. Punishment is necessary because it is the only appropriate means by which society expresses its emphatic disapproval of social misconduct and also to satisfy the emotional feelings of the victim and other right thinking members of society that justice is done. Where the appropriate punishment is a term of imprisonment, our penal administrators must be reminded of the English penologist Alexander Patterson's maxim "that men go to prison as punishment not for punishment."

Are custodial sentences the only appropriate sentence for a given offence? It cannot be denied that a judge, or sentencer, has a duty to reflect the demands and expectations of the victim or the society. To ignore these legitimate concerns would bring into disrepute and disfavour the whole judicial process. A judge's task in sentencing therefore is an onerous and unenviable one which he has to perform, and, more often than not, immediately after the completion of the case. The immediacy of the sentencing process, it is suggested, is unnecessary and often distorts the range of sentencing imposed on convicted offenders. When sentencing is imposed immediately after conviction, and undoubtedly as an immediate response to a guilty verdict, the underlying feature of the sentence reflects an obvious retributive bias. The sentence tends to reflect the nature and gravity of the offence which cannot be ignored; but, too often, very little credit is given to relevant factors and material considerations possessed by the offender which may assist the sentencer in mitigation of sentence. In Jamaica, it is now required by the Criminal Justice Act (1978) for sentencers to give reasons for imposing a term of imprisonment on convicted offenders below twenty-four years of age, i.e. convicted offenders between the ages of seventeen and twenty-three. If inappropriate or extraneous reasons are given then the Court of Appeal may allow an appeal against the sentence.

The imposition of a custodial sentence deprives an individual of one of the fundamental rights enshrined in every constitution "the right to liberty." Judges are very careful and meticulous in imposing a custodial sentence. Yet, it is suggested that where a sentencer intends to impose a custodial sentence then the offender and/or his attorney should be warned and given at least a week to submit to the sentencing judge why a custodial sentence should not be imposed or why he should take into account relevant factors and mitigating features in determining the length of sentence. By so doing, terms of imprisonment can be imposed by reasoned arguments and after due consideration.

On a wider issue, sentencers are very likely to be influenced by the prevalence of crimes. If the offender has been convicted for a crime which is on the increase the sentence is harsher. To what extent is an exemplary sentence, imposed on an individual, to act as general deterrence to potential offenders, a breach of the convicted offender's human rights? His sentence is definitely aggravated by the prevalence of crimes committed by others or the sentencer's wish to use the sentence as a tool for social control. It seems to me that each individual must be given his just desert, and it is unfair to use him, by inflicting a heavier punishment, as an example to others.

Human rights organisations have started to investigate the conditions in prisons and the sentencing process, and have found breaches of human rights conventions and laws. Thus, in Jamaica, the disgusting and untenable prison conditions have been criticised and deemed to be a violation of basic human rights. Whipping, as a part of a sentence, has been held to be inhuman and degrading by the European Court of Human Rights: See *Tyrer v. United Kingdom*, referred

to in the Court of Appeal of Barbados' judgment in *Hobbs and Mitchell v. The Queen* (1991).

Preposterously, and inconceivably, as it may seem, unless we address prison conditions and impose consistent and reasonable prison sentences, then before long human rights laws and conventions may overtake the whole process. Prison sentences may be adjusted as being in breach of human rights laws; but more likely, prison sentences may be forbidden since the prisons may be condemned and deemed unfit for human habitation.

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THE EXTRADITION AND RETURN OF FUGITIVE OFFENDERS - APPLICABILITY OF HUMAN RIGHTS CONSIDERATIONS

*A. R. Carnegie**

The pre-human rights history of the international law governing fugitive offenders

The task of discussing the law governing the human rights of the fugitive offender is rendered to a certain extent more complex by the fact that the law relating to fugitive offenders is older than international human rights law.

Long before international law broke out of its constraint of exclusive concern with states as international persons sufficiently to generate, in the mid twentieth century, the present corpus of human rights law, the fugitive offender's position had been discussed in the context of the basic principle of territorial asylum. Within that principle, the law of extradition developed, based on a network of treaties, which could be seen as purely consensual limitations on the privi-

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lege of the state granting territorial asylum.¹ Questions were occasionally canvassed as to the existence of the possibility of extradition in the absence of treaty obligation.²

The fugitive offender under the human rights instruments of modern international law

The advent of human rights law in the twentieth century gave rise to a number of multilateral human rights treaties, of which some are more relevant than others, both by reason of subject matter and level of country participation. The leading instruments on human rights of the civil liberties variety which have the greatest relevance to the Caribbean region in the context of the fugitive offender are the American Convention on Human Rights³ and the United Nations Covenant on Civil and Political Rights,⁴ judged by the level of participation in those instruments by the independent Commonwealth Caribbean States. Barbados, Grenada, Jamaica and Trinidad and Tobago are parties to the ACHR, while Barbados, Guyana, Jamaica, St. Vincent and the Grenadines and Trinidad and Tobago are parties to the CPR Covenant. None of the independent states is a party to the European Convention on Human Rights⁵ or its Protocols, but the influence of the ECHR on the drafting of the Commonwealth Caribbean constitutions, together with the indirect impact it has on the English

1 Whiteman, *Digest of International Law*, Vol. 6, 1968, pp. 727-728, 732-733.

2 *Id.*, p. 727.

3 Hereafter ACHR.

4 Hereafter CPR Covenant.

5 Hereafter ECHR.

common law which still nurtures that of the Commonwealth Caribbean states and its potential relevance for the British dependent territories which remain in the Caribbean, seems to justify including it in the comparison.

Of these instruments mentioned, only the ECHR makes any express reference to the extradition situation. Under article 5(1) (f) of the ECHR, the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition is an exception to the rule protecting against deprivation of liberty. Clearly, this is a provision excluding the fugitive offender from a right, and not one conferring a right on the fugitive offender, although the European Court of Human Rights has, by focusing on the qualification of the lawfulness of the arrest, shown the provision not to be empty of human rights significance.⁶

In other respects, the position of the extraditee needs to be deduced from the applicability of provisions of rather more generality. Thus under the CPR Covenant the statement that everyone has the right to liberty and security of person is qualified by the prescription that no one shall be deprived of liberty except on such grounds and in accordance with such procedures as are established by law.⁷ The ACHR adopts a similar approach.⁸

The freedom of movement provisions of the CPR Covenant and the ACHR may presumably also be considered relevant. Under the CPR Covenant, the liberty of movement

6 Contrast *Bozano v France* (1966) 9 E.H.R.R. 297 and (1987) 13 E.H.R.R. 428 with *Stocké v. Germany* (1991) 13 E.H.R.R. 839.

7 CPR Covenant, art. 9.1.

8 ACHR, art. 7.1-2.

provision is qualified by the prescription that the right shall not be subject to any restrictions "except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."⁹ The ACHR provisions also follow this pattern.¹⁰ The general provisions of the CPR Covenant and the ACHR cited are not mirrored in the ECHR in its original form, but appear in the Fourth Protocol to the ECHR.¹¹

The ACHR also goes out of its way to provide explicit protection to the fugitive from a charge of political offence: article 22.7 confers a right, not only to seek, but also to be granted asylum "in accordance with the legislation of the state and international conventions"¹² in the event that the

9 CPR Covenant, art. 12.1-3.

10 ACHR, art. 22.1.3.

11 ECHR Protocol 4, art. 2.1,3. The Protocol's list of purposes permitting derogation from freedom of movement differs from the CPR and ACHR lists in omitting specific reference to public health and public morals.

12 On the question whether the right exists in the absence of legislation, *cf. Enforceability of the Right of Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights. Advisory Opinion OC-7/85 of August 29, 1986. Ann. Rep. Inter-Am. Court of Human Rights 1986 49 at 54-55*, where the Inter-American Court has rejected the argument that the language describing a right, the "right of reply," as "exercisable subject to the conditions to be established by the law" (art. 14.1 of ACHR), merely empowered the States Parties to adopt a law creating the right of rectification or reply without requiring them to guarantee the right where the national legal system did not provide such a right. See Carnegie, "The Caribbean Bills of Rights and the Convention - Compatibility and Conflicts" in 3 *Emory Journal of International Dispute Resolution* (1988) 41 at 41-45.

fugitive is being pursued for "political offenses or related common crimes."

A specific difficulty arises from the ECHR Protocol and the ACHR instruments in relation to the rule against expulsion of nationals.¹³ That rule is not qualified by any exceptions, and would therefore grammatically seem to apply to prohibit forced extradition of a national of the country of refuge.

It would not necessarily follow, of course, from the absence of mention in the human rights instruments discussed that there were no other relevant aspects of human rights of fugitive offenders, even in the absence of those provisions of those instruments which expressly safeguard against the drawing of such negative inferences.¹⁴

Rights of fugitive offenders distinguished from the rights of the state of refuge

The effect of this history, with regulation by international law preceding the recognition of the law of human rights as part of international law, is that much of the law of extradition must originally have developed as ascription of rights and duties of states *inter se*. It is obviously in the new environment now a question to what extent such rights and duties of states among themselves may have become now part of human rights law, as rights of which the fugitive is entitled to take advantage.

13 ACHR, art. 22.5; ECHR, Protocol 4, art. 3.

14 CPR Covenant, art. 5.2; ECHR art. 32; ACHR, art. 29.b.

In the "global village" which the world has now become, it is perhaps not surprising that instances should easily now be found of recent cases engaging these issues. It is accordingly proposed to develop the consideration of the topic by an examination of the extent to which selected recent developments—and the cases addressed are a minute proportion even of those reported—including some reference to Commonwealth Caribbean problems, may have thrown light on the problem.

The recent instances which will be considered are addressed under the following heads:

the extradition of nationals of the state of refuge;

the right of fugitives to the protection of treaty provisions:
extradition of fugitives in the absence of treaty provisions;

the right of fugitives to the protection of treaty provisions:
extradition of fugitives in contravention of treaty provisions;

the recovery of fugitives from the state of refuge in contravention of law other than treaty provisions.

The extradition of nationals of the state of refuge

It is, of course, highly controversial whether there is any interest worthy of protection in exempting nationals of the state of refuge from liability to extradition to a requesting state. The Anglo-American tradition offers no such protection to its nationals. And, of course, although the references in the human rights instruments do not refer thereto, the exemption of nationals from liability of extradition is considered by some to be claimed only under the principle *aut dedere aut*

punire, the obligation of the state of the fugitives's nationality to put the offender on trial as the correlative to the right to refuse surrender.¹⁵

But there seems insufficient reason to permit the Anglo-American tradition to overrule a principle strong enough to be reflected, not only in the major regional human rights instruments in the Western world, as has been indicated above,¹⁶ but in some extradition treaties to which either the United States or Britain is a party.¹⁷ We are justified in continuing to seek in the non-rendering of nationals principle an international law interest meriting defence.

To the extent, moreover, that the Anglo-American position deprives citizens of the immunity from expulsion from the state of their nationality, as is reflected generally in West Indian law, the point might even merit being considered whether there is not thereby a falling short of the international human rights standard, and, in those states who are parties to the ACHR or the ECHR Protocol, a standing contravention of their treaty obligations. But it is conceded that any such conclusion would be contrary to the weight of other authority.

15 For denial that the correlative obligation to put the national on trial is a rule of international law, see the joint declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley in *Case Concerning Questions of Interpretation on and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Order of 14 April 1992, ICJ Reports 1992, p. 114 at 136 (reprinted in 13 I. L. M. (1992) 662).

16 *Supra*, n. 13.

17 See, e.g., U.S. - Greece, 1931, art. VIII (*Bevans, Treaties and Other International Agreements of the United States of America, 1776-1949*. Vol. 8, p. 353 at 357); European Convention on Extradition 1957, art. 6.

The principle is currently in issue in an unprecedented fashion in the aftermath of the Lockerbie air disaster. The authorities in the United States and Britain claim that two Libyan nationals deserve to be put on trial on account of their being suspected of having caused the disaster by sabotage. Libya has so far refused to surrender those persons in the light of requests to that end from the United States and Britain, relying essentially on the non-rendering of nationals principle.

The Libyan case before the Security Council was that the matter ought to be treated as a dispute under the provisions of the Montreal Convention,¹⁸ and referred to arbitration or to the International Court of Justice under art. 14 of that Convention.¹⁹ Libya has, consistently with that position, commenced proceedings in the International Court of Justice against the United States requesting that Court to enjoin the United States from coercing Libya into surrendering its nationals.²⁰ The United Nations Security Council, however, has considered it within its responsibilities in relation to threats to the peace, breaches of the peace and acts of aggression under the Charter to call on Libya in effect to surrender the two persons being pursued by the United States and Britain.²¹

18 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971.

19 U.N. Doc. S/PV 3033 (Provisional), 21 Jan 1992, p. 13.

20 *Case Concerning Questions of Interpretation on and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*. Order of 14 April 1992, ICJ Reports 1992, p. 114 (reprinted in 13 I. L. M. (1992) 662). For the outcome, see *infra*, n. 30 and accompanying text.

21 See S.C. Resolutions 731(21 January 1992) and 748 (31 March 1992).

The question clearly needs to be asked, to what extent does the Security Council's stance require reevaluation of the principle which is arguably enshrined in the human rights instruments?

One possible answer may be that the Security Council has exceeded its authority in requiring Libya to surrender the fugitives. Arguably, the past facts on the Lockerbie disaster are no longer capable of being considered a threat to the peace, breach of the peace or act of aggression, so as to give the Security Council jurisdiction to mandate action rather than merely to recommend settlement under Chapter VI of the U.N. Charter.

On the other hand, a decision of the Security Council is a strong *prima facie indicium*²² that the action is permitted by customary international law, given the level of representation of concurring states and the responsibility of the Security Council for the most central function of international law, that of peacekeeping.²³ And it is hardly unreasonable to acknowledge that a state which prevents saboteurs acting from political motives from being brought to justice in some sense thereby interferes with the removal of threats to the peace. If the *metwand* of a threat to the peace is cross-border violence, after all, that test would be satisfied.

Presumably, there is no need to see an abrogation of the rights of states to refuse to surrender their nationals. Perhaps

22 See *infra*, n. 30 and accompanying text, on the decision of the ICJ in the *Lockerbie* case (*supra*, n. 20).

23 Resolution 731, which did not expressly invoke Chapter VII of the Charter, was adopted unanimously. Resolution 748, which required compliance with Resolution 731 and expressly invoked Chapter VII, was passed by a vote of 10 in favour with China, Cape Verde, India, Morocco and Zimbabwe abstaining.

the law is that this right is, like the principle of domestic jurisdiction,²⁴ a right normally enjoyed by states but which may be overridden by the Security Council's functions under Chapter VII of the U.N. Charter.

The views expressed in January 1992 by those members of the Security Council supporting the call on Libya to surrender its nationals may be considered to support this view. The British delegate, for example, unsurprisingly defended the Anglo-American approach by denying that international law prohibited the surrender of nationals, but acknowledged the right of states to operate the rule of non-surrender of nationals in the normal course of events. What he considered to make the difference in the Lockerbie affair was the evidence of complicity of the Libyan Government itself in the sabotage, and the perhaps consequential inference that the *aut punire* part of the option, which Libya wished to exercise, was in practice a dead letter.²⁵ In so far as other contributions to the debate in the Security Council addressed the legal point of reconciliation with the non-surrender of nationals principle, it seemed that the genuineness on the facts of Libya's willingness to punish was questioned,²⁶ or, in the lone view of the Venezuelan member, that the circumstance justifying the departure from the rule was the circumstance that the crime was a crime against international law.²⁷

24 U.N. Charter, art. 2.7.

25 U.N. Doc. S/PV 3033 (Provisional), 21 Jan. 1992 at p. 105 (Sir David Hannay).

26 See U.N. Doc. S/PV 3033 (Provisional), 21 Jan. 1992 at p. 71 (Mr. Mumbengegwi of Zimbabwe) and at p. 80 (Mr. Pickering of the United States).

27 See U.N. Doc. S/PV 3033 (Provisional), 21 Jan. 1992 at pp. 99-100 (Mr. Arria).

The upshot of these views would seem to be the acknowledgment by the Security Council that its decision to demand Libya's surrender of its nationals was an instance, if anything, of *æxceptio probat regulam*, rather than any challenge to the existence of the rule.²⁸

The decision of the ICJ on the request for provisional measures in the *Lockerbie* case²⁹ is not inconsistent with this conclusion. The ground of the decision is, however, as far as the majority position of the Court is concerned, that the invocation by the Security Council of its powers under Chapter VII of the United Nations Charter prevails over other obligations of the parties to the case under other international agreements, and that this *prima facie* obligation of the parties was inconsistent with ordering the provisional measures requested by Libya.³⁰

Of course, the dispute between the Security Council and Libya is not being contested in proceedings to which the individual putative fugitives are parties. The question does not directly, therefore, take the form of a typical human rights dispute. But it must be a logical inference from any conclusion that the Security Council is acting lawfully that there is a limit, in international human rights law, on the right of a national to demand trial only by the country of his nationality when that national has succeeded in reaching that haven.

28 Cf., e.g., the remarks of Mr. Arria of Venezuela: "The countries that sponsored this resolution... made the clear declaration that this resolution is exceptional by its nature and cannot be considered in any way as a precedent but is intended only for those cases in which states are involved in acts of terrorism" (U.N. Doc. S/PV 3033 (Provisional), 21 Jan. 1992, at p. 101).

29 *Supra*, n. 20.

30 ICJ Reports 1992 at 126-127.

The consequence would have to follow that the provisions of the human rights instruments which permit a state to refuse to surrender its nationals do not thereby confer on a qualifying fugitive a right in the unqualified terms of the instruments concerned. The limitation on the right of the state to refuse surrender must represent the maximum of the right which the fugitive himself can claim.

**The right of fugitives to the protection of treaty provisions:
extradition of fugitives in the absence of treaty provisions**

The Lockerbie issues have been fought out in international fora as well as in municipal legal proceedings, so as to constitute indisputably the subject-matter of public international law. But more often, surely, the test cases of the law relating to fugitive offenders have tended to be found exclusively in the municipal courts. Given a modicum of adherence to the rule of law, the fugitive offender would *ex hypothesi* have been the subject of incipient or in progress criminal court process, so a municipal forum would always be available or already seised of the problem.

There are two West Indian cases at least, one an opinion of the Judicial Committee of the Privy Council fully reported in the 1990's dealing with the question whether a fugitive can claim, in the state of refuge, the benefit of the absence of a valid extradition treaty between the state of refuge and the requesting state.

In *U.S. v. Bowe*,³¹ the Privy Council held that in Bahamas law a Bahamian citizen could be extraditable to the United States even in the absence of a treaty obligation under inter-

31 (1990) 1 A.C. 500 at 525-527.

national law to render him. This intriguing result arose from the possibility that, by virtue of the clean slate principle of state succession to treaty obligations, treaty arrangements between the United States and Great Britain prior to the independence of the Bahamas had ceased to bind on the independence of The Bahamas. The law of extradition in the municipal law of The Bahamas is based on statute law taking effect by reference to treaties applied under statutory powers, and there was no statutory amendment to delete from the statutory list the treaty hypothetically abrogated on independence. The Board was prepared under those conditions to apply the converse of the well-known rule that a treaty *qua* treaty has no effect in a common law court in the absence of incorporating legislation, to hold that the termination, without legislative recognition, of a treaty which had, when in force, been incorporated in legislation equally had no effect, and that the courts had to extradite the accused on the assumption, compelled by the unupdated statute, that the treaty was still in force. In this reasoning the Privy Council was adopting reasoning of Melville, J. in the 1976 Jamaican case of *R. v. D.P.P. ex p. Schwarz*.³²

For what it is worth, therefore, it appears now to be settled as a matter of West Indian law that a fugitive cannot rely on the absence in international law of a treaty between the requesting state and the state of refuge, if the municipal law provides for the surrender of the fugitive regardless of whether,

32 (1976) 24 W.I.R. 491 at 493-494. The approval of this reasoning was given notwithstanding that the Privy Council evidently considered the actual decision in *Schwarz* possibly erroneous in its conclusion that the offence charged in that case was not an extradition crime. In *Schwarz*, the cooperation between the requesting state and the state of refuge had been relied on by the court as meeting any possible issue of violation of bargain between states. This ground was also the *ratio* of the earlier case of *R. v. Commr. of Correctional Services ex p. Henry* (spelt "Henri" in the case title in the report). (1976) 24 W.I.R. 471.

as a matter of international law, such surrender is required by a treaty in force.

Since it is beyond dispute that there is generally no duty on a state in international law to extradite a fugitive in the absence of a treaty obligation, these cases might *subsilently* go toward supporting the proposition that this privilege of a state of refuge is not a matter of right of which the fugitive offender is entitled to take advantage. It may be conceded, of course, that since the basis of the decision in *Schwarz* was the use of the municipal law test in preference to an international law test, this inference goes too far. But the court did proceed on the basis that customary international law was part of the common law being applied, which would prevail in the absence of statute, and need not be taken as suggesting that the case was one in which the statute posed a problem of contravening international law.

**The right of fugitives to the protection of treaty provisions:
extradition of fugitives in contravention of treaty provisions**

The issues in the American *cause célèbre* of *Alvarez-Machain*,³³ perhaps the most widely discussed official abduction case since Israel's capture of Adolf Eichmann in Argentina for trial in Israel,³⁴ take the argument one stage further than do *Bowe* and *Schwarz*.

In *Alvarez-Machain*,³⁵ the United States Supreme Court considered a challenge to the authority to try a Mexican

33 U.S. v. *Alvarez-Machain* 112 S. Ct. 2188 (1992).

34 See *A.G. (Israel) v. Eichmann* (1961) 36 I.L.R. 5.

35 *Supra*, n. 33.

accused who had been forcibly abducted from Mexico to the United States by United States law enforcement personnel. The Supreme Court acknowledged that the facts disclosed a breach of customary international law, but held that under the law and Constitution of the United States, including the extradition treaty with Mexico which had the force of statute law in the United States, the manner in which an accused came before the court was irrelevant to the jurisdiction of the court to try the accused.

The question of validity of an extradition taking place in contravention of an extradition treaty was therefore engaged, and not merely one of the absence of a treaty. The holding of the United States Supreme Court was that there was no violation of the treaty obligation. The literal reading of the treaty made no reference to the prohibition of forcible abduction without reference to the procedures laid down in the treaty, and the Supreme Court chose to rely on the literal reading.

The arguments put before the Court, to the contrary end, that the extradition treaty by clear inference prohibited abduction outside of its terms, are much easier to understand than the Court's conclusion in the opposite sense. But the fact that the Court was so astute to reach its strange conclusion may be considered to indicate clearly that, had the breach of the treaty been established, the result would have been different, and the fugitive would have been entitled to be released.

There must be admitted to be some difficulty in working from this reasoning to the conclusion that thereby *Alvarez-Machain* establishes a positive right to the fugitive in international law, in that he is entitled to release if recaptured by the requesting state in contravention of treaty stipulations binding the requesting state and the state of refuge.

The decision was, after all, equally authority for saying that capture by the requesting state does not entitle the fugitive to be released even where that capture is the result of a "shocking" breach of international law. And the difference between treaty law and customary international law in this respect seems to stem from considerations of United States constitutional law rather than from international law. Under United States constitutional law, customary international law can apparently not be opposed by the courts to the executive, so that the court could not impose sanctions for the breach by the executive of customary international law. A treaty, however, has the force of an Act of Congress under the United States Constitution, and would therefore have to be applied by the courts. But given that the treaty is clearly enforced under the Constitution as a treaty, and in the clear intention of giving effect to international law, it hardly makes sense to treat its enforcement, to the point of releasing the fugitive, as anything but giving effect to a right under international law.

The logic would seem therefore to require holding that the violation either of customary international law or of international treaty law is an infringement of the rights of the fugitive calling for his release, but that in the case of customary international law the remedy cannot be sought from the United States court, but only from the executive.

This logic seems to have been accepted by the executive branch.³⁶ There has been an at least implicit admission of the

36 See the statement before the Subcommittee on Civil and Constitutional Rights of the United States House of Representatives Judiciary Committee, July 24, 1992, by Deputy Legal Adviser Alan J. Kreczko: "(t)he result of the Supreme Court's action is to confirm that in our system of government, it is the executive branch, not the courts, that will ultimately decide whether (Alvarez-Machain type) arrests are within the national interest" (3 *U.S. Dep't State Dispatch* (1992) 614).

breach of customary international law, with assurances that the action does not represent the normal policy of the United States Government,³⁷ but this has not, on my present information, yet been followed by acceptance of the obligation to release the fugitive.

One consequence of this perspective would seem to be that the protests directed against the *Alvarez-Machain* decision might have been misguided: it was a decision not on rights, but on remedies, and hardly merited the comment from Jamaica, for example, that the ruling was "an atrocity that would disturb the world."³⁸ The fact situation, if left unremedied, might well have been discussed in those terms, and the decision might well be criticised for its approach to treaty interpretation: but it is difficult to envisage, in the state of Jamaican law at the time,³⁹ that a Jamaican court would have come to any different conclusion on analogous facts.

Nor should there have been such a considerable element of surprise at the decision. The general rule of United States constitutional law, widely known as the *Ker-Frisbie* doctrine,⁴⁰ does not admit the release of a prisoner unlawfully brought within the court's jurisdiction even when there is no

37 Kreczko, *loc. cit.*, *passim*, and especially his citation of a letter from President Bush of the United States to President Salinas of Mexico containing unequivocal assurances that his Administration will "neither conduct, encourage nor condone" such trans-border abductions from Mexico (*loc. cit.* at p. 616). The right of self-defence was cited as the justification for such action in extreme cases (*id.*).

38 Quoted in Kreczko, *supra* n. 36. at p. 615.

39 Cf. *King v. Reg.* (1969) 1 A.C. 304 at 319. But *Bennett*, discussed *in extenso* below (see n. 41 and accompanying text), may well have changed Jamaican law also.

40 *Ker v. Illinois* 119 U.S. 436 (1886); *Frisbie v. Collins* 342 U.S. 519 (1952).

international element involved. The decision in *Alvarez-Machain* is therefore "mainstream" even without taking the international law element into account.

It was the willingness of the United States Supreme Court in theory to contemplate that violation of a treaty could lead to an exception being made to the rule which might, on reflection, have seemed to be the anomaly. But if it is an anomaly dictated by respect for international law by virtue of the self-executing treaty system of the United States Constitution, it does seem an anomaly which, by conferring the potential for a fugitive offender to claim a right under a treaty drawn in sufficiently explicit terms, may be considered to show the way to giving extradition procedures human rights protection under international law.

The recovery of fugitives from the state of refuge in contravention of law other than treaty provisions

Suppose there is no breach of a treaty, because there is no treaty to contravene, as there was in *Alvarez-Machain*, but, unlike the situation hypothesized in *Bowe*, the procedure provided by law for pursuing extradition in the absence of a treaty has not been observed. Does this non-observance of municipal law provisions give rise to a claim of breach of human rights in international law? This situation falls in a sense midway between *Bowe* and *Alvarez-Machain*. In *Bowe*, the municipal law machinery was employed, but it is not in the hypothetical situation. In *Alvarez-Machain*, there is a treaty which is not being observed, but in the hypothetical situation there is no treaty in issue.

This middle ground was explored in the 1993 English case of *Bennett*.⁴¹ In that case, the hypothetically assumed facts

41 *Bennett v. Horseferry Road Magistrates' Court* (1993) 3 All E.R. 129.

before the House of Lords were that the English police, in cooperation with the Crown Prosecution Service, had arranged informally with the South African police to route a New Zealand deportee, being ostensibly deported to New Zealand, through London so that he could be arrested on charges pending in Britain. This course would have been adopted in preference to seeking to negotiate *ad hoc* extradition arrangements under statutory authority. The House of Lords held, in a 4-1 majority decision in which there was no hesitation to acknowledge that new law was in the making,⁴² that the court in the exercise of its supervisory jurisdiction had power to inquire into the circumstances by which a person had been brought within the jurisdiction, and if satisfied that it was in disregard of extradition procedures, the court might stay the prosecution and order the release of the accused. In the view of the majority, it was incumbent on a court on such hypothetical facts to decline to exercise its jurisdiction on the grounds that its process was thereby abused.⁴³

In *Bennett*, the violation of international law was hardly so obvious. The abduction took place with the cooperation of the state of refuge, South Africa, in contrast to the situation in *Alvarez-Machain*, where Mexico was protesting consistently against the action of the United States. Indeed, the situation

42 (1993) 3 All E.R. at 151, *per* Lord Griffiths: "(i)n my view your Lordships should *now* declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party" (emphasis supplied), and at 153, *per* Lord Bridge, recognising that the decision was contrary to "the mainstream of authority."

43 *Per* Lord Griffiths, *supra*, n. 42; (1993) 3 All E.R. at 155-156, *per* Lord Bridge. Lord Lowry and Lord Slynn concurred with both Lord Griffiths and Lord Bridge.

was better, from the point of view of apparent illegality, than that in the *Eichmann* case,⁴⁴ where there was abduction without the cooperation of Argentina, but where Argentina had discontinued its protest before the trial.⁴⁵ But both Lord Bridge⁴⁶ and Lord Lowry⁴⁷ spoke in terms of the facts before them as entailing violations of international law. Lord Bridge's discussion in terms of "abduction" was hardly amplified sufficiently to explain the difficulty, but both Lord Griffiths and Lord Lowry were concerned that informal extradition circumvented the rule of specialty, whereby the extraditee could only be tried for the crime for which he was extradited.⁴⁸

It is also quite strongly the position of the majority in *Bennett* that the international law of extradition has more of a human rights context than might have been obvious. Lord Griffith said, *inter alia*:

"Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country... If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition

44 *Supra*, n. 34.

45 36 I.L.R. at 58-59.

46 (1993) 3 All E.R. at 155.

47 (1993) 3 All E.R. at 163.

48 Whiteman, *loc. cit.* n. 1 *supra* pp. 1095 ff.

procedures and depriving the accused of the safeguards built into the extradition process *for his benefit.*"⁴⁹

The House of Lords were therefore not of the view that the rule of specialty was merely a rule protecting the bargain between the state of refuge and the requesting state, and not a matter engaging the rights of the offender except indirectly. On the hypothetical facts of *Bennett*, the cooperation of the South African authorities would surely have been a sufficient answer to any issue of bad faith as between the state of refuge and the requesting state. But the issue is no longer, as it must have been considered in instances where the consent of the state of refuge has been treated as sufficient to waive the rule of specialty,⁵⁰ the protection of the bargain, but at least also the protection of the extraditee. Thus it seems that international human rights law has been perceived as coming to offer the extraditee the protection of the rule of specialty, so that it should follow that it can no longer be waived by the state of refuge.

This is not to contest, of course, that there would be nothing strange about an administrative law justification of the result in *Bennett*, in effect judicially reviewing a decision of the police to circumvent the statutory machinery and providing a collateral remedy to the fugitive as a person aggrieved thereby. But the European Court of Human Rights has shown that international human rights law can mirror this kind of reasoning. Detention for an oblique motive with a view to circumventing the legal requirements of extradition in the law of the state of refuge was held by that Court thereby to be unlawful in *Bozano v. France*, with the result that a

49 (1993) 3 All E.R. at 150 (emphasis supplied).

50 Whiteman, *loc. cit.* n. 1 *supra*, pp. 1100 ff., citing *inter alia* the *Faroutian* case.

justification for detention sufficient to satisfy the ECHR standard for detention was absent.⁵¹ The concern of Lord Griffiths and Lord Lowry with the circumvention of the right of specialty could therefore be seen as simply a further illustration that international human rights law offers protection against *détournement de pouvoir*, and it might have emphasised further the Lords' concern with conformity with international law had they expressly adverted to the standard already set by the European Court of Human Rights.

The divergence of the British and American positions

It is a matter of interest that, as the House of Lords was fully aware in *Bennett*, that decision, when paired with *Alvarez-Machain*, represents a conflict of Anglo-American legal decision in the opposite direction to that which might have been expected. Lord Griffiths did distinguish *Alvarez-Machain* in *Bennett* on the grounds that the decision in that case related to a constitutional defence to the jurisdiction of the court, whereas his speech addressed the exercise of a discretion, given that jurisdiction existed,⁵² but this distinction, in terms of the results of cases, seems essentially procedural only. The House of Lords decision looks like the application of an American type "exclusionary rule" such as has traditionally been rejected by the English common law, and an application, moreover, in an instance where the United States has not sought to extend its own creation.⁵³

51 (1986) 9 E.H.R.R. 297 and (1987) 13 E.H.R.R. 428. In this case, unlike *Bennett*, the claim was brought against the state of refuge for money damages, and the proceedings did not have anything to do with the requesting state nor challenge the propriety of the criminal proceedings there.

52 (1993) 3 All E.R. at 148.

53 See (1993) 3 All E.R. at 162, *per* Lord Lowry.

It is an indication, moreover, of the new direction adopted by the House of Lords that the executive in the United States defended the decision in *Alvarez-Machain*, before *Bennett*, as one applying a rule which would have obtained also in Britain.⁵⁴

The rights of the fugitive offender and the rights of offenders generally

The question could, of course, also be asked to what extent the fugitive offender's position is one of loss of rights by comparison with other offenders. The discussion above has not considered those human rights which would apply to all offenders, whether fugitive or not, notwithstanding that relevant issues not infrequently arise in extradition cases. But obviously the case could be argued that a fugitive offender, who is a fugitive by virtue of having escaped from the requesting state, thereby ought to forfeit some rights which he would otherwise enjoy.

One context in which this issue can arise relates to instances where the extraditee has been returned to the requesting state without any illegality or other wrongdoing on the part of the authorities of the requesting state but as a result of an illegality in the state of refuge.

One case which may be considered to cast oblique light on this problem is *R. v. Governor of Pentonville Prison ex p.*

54 Kreczko, *loc. cit.* n. 36, at p. 615: "... the core holding of the Court - that domestic courts generally retain jurisdiction over an individual without regard to how the individual was brought before the court - is not unique to US jurisprudence. It is our understanding that this judicial approach is followed in, for example, the United Kingdom..." As to the issue of narrowing the point to one of jurisdiction, see *supra*, n. 52 and accompanying text.

Chinoy.⁵⁵ This case considered, in the context of the requested extradition of an alleged offender from Britain to the United States, the question of admissibility of illegally obtained evidence under the modern English legislation in the Police and Criminal Evidence Act 1984. This controversial question was, of course, by no means confined to fugitive offenders. But in this case, the illegality in question was illegality, not under the law of the forum, but under French law,⁵⁶ and the Divisional Court seemingly considered that, although the breach of French law was a relevant part of the circumstances, the crucial test in favour of admissibility was that the evidence was not obtained by sufficiently unlawful means to lead to their exclusion by the test of English law.⁵⁷ It may be possible, however, that the authority of *Chinoy* has now been destroyed by *Bennett*: *Chinoy* actually went so far, in the context of this point, as to describe the acquisition of evidence by unlawful means as "legitimate,"⁵⁸ which does not easily accord with the "philosophy"⁵⁹ of *Bennett*. On the other hand, even in *Bennett* Lord Lowry was of the opinion that if the British authorities were in no way involved in the unlawful conduct whereby the accused was brought before the court in

55 (1992) 1 All E.R. 317.

56 (1992) 1 All E.R. at 332, *per* Nolan, J. (as he then was).

57 (1992) 1 All E.R. at 332-333.

58 "I consider that the magistrate was fully entitled to reach his... conclusion that... the methods used were legitimate... Our law has always acknowledged the fact, unpalatable as it may be, that the detection and proof of certain types of criminal activity may necessitate the employment of underhand and even unlawful means" ((1992) 1 All E.R. at 332-333).

59 So described by Lord Lowry in (1993) 3 All E. R. at 162.

the requesting state the problem of abuse of the process of the court would not arise.⁶⁰

Constitutional law issues

Perhaps it may appear strange, especially given the diligence of the examination of the case law which has been necessary to try and find any significant protection of the fugitive offender in the international law of human rights, that this presentation should have concentrated on international law so exclusively, and set the constitutional law issues to one side. Human rights law is, after all, an aspect of constitutional law also, and not only of international law.

It is in municipal Constitutions and other legislation, moreover, that the most detailed regulation of the position of the fugitive offender is to be found, or that the best illustrations of the problems of the modern law relating to fugitive offenders should be found in cases before the national courts.

Under the West Indian Constitutions, there is typically, except in the case of Trinidad and Tobago, a specific provision resembling article 5(1) (f) of the ECHR in providing that detention for the purposes of extradition is a permitted infringement of personal liberty.⁶¹ This is therefore an in-

60 (1993) 3 All E.R. at 163-164. Cf. the decision of the European Court of Human Rights in *Stocké*, *supra*, n. 6.

61 See the following provisions:
Antigua and Barbuda Constitution, s. 5(1) (b) and (j);
Bahamas Constitution, s. 19(1) (a), and (g);
Barbados Constitution, s. 13(1) (a) and (i);
Belize Constitution, s. 5(1) (a) and (i);
Dominica Constitution, s. 3(1) (a) and (i)
Grenada Constitution, s. 12(1) and (3) (c) and (g);

stance where the only concern of the text of the Constitutions is to exclude the claim to a right on the part of the fugitive offender, rather than to enhance any such right. There is also ordinary legislation, whether in the form of "applied" United Kingdom legislation or not, giving a statutory force which would not, in the absence of such legislation, avail for extradition treaties concluded on an *ad hoc* basis with other countries. Where the other countries are members of the Commonwealth, there is a legislative system, the Fugitive Offenders Act,⁶² which is not dependent on a network of treaties for its implementation. This legislative framework outside the Constitution largely predates the development of modern human rights law.

The study of the topic in constitutional law, let it be said, also gives rise to an analogy with the problem in international law, of distinguishing between rules which are for the benefit of the fugitive offender and rules which may benefit such an offender incidentally, but are based on some other objective.

In all the four cases discussed above, after all, the court was obviously at pains to speak to the relationship between the executive power and the other branches of Government. In *Bowe*, the point had relatively formal importance, the identification of the proper signature on the committal warrant. In *Alvarez-Machain*, the freedom of the executive to conduct foreign affairs obviously played an important part in the decision. In *Bennett*, there is at stake a court rethinking its

Guyana Constitution, s. 139(1) (a) and (i);
Jamaica Constitution, s. 16(1) and (3) (e);
St. Christopher and Nevis Constitution, s. 14(1) and (3) (c) and (g);
St. Lucia Constitution, s. 3(1) (a) and (i);
St. Vincent and the Grenadines Constitution, s. 3(1) (a) and (i).

62 Now consolidated in the United Kingdom in the Extradition Act 1989.

traditional tenderness towards the law enforcement strategies of the executive.

Bennett may be considered, however, to have human rights constitutional law implications, by giving the subject the benefit of judicial review of decisions of the law enforcement authorities for improper motives. This aspect was spelt out in the case in some detail, the court not going back, for example, on the principle that illegality in which there is no complicity of the prosecution or the police in the state of the forum would not prejudice the triability of the fugitive.

Conclusion

It should by now be apparent that the recent case activity relating to fugitive offenders has by no means succeeded in providing clear solutions as much as in highlighting questions. There does seem to be one relatively novel perspective arising: the transmutation of old extradition inter-state law into modern human rights law, a process which may have caught us unawares. But the prognosis for early clarification may not be promising. This is an area, like the law relating to sovereign immunity, where the action takes place in municipal fora rather than international fora, so as to threaten a lengthy period before anything like consensus can emerge. Perhaps there is a case for moving to substitute for the bilateral network of extradition arrangements traditionally characteristic of the subject-matter a general multilateral arrangement, not, like the Montreal Convention, limited *ratione materiae*,⁶³ which could do for the world community what the Fugitive Offenders Act system to some extent does for Commonwealth countries and the European Convention on Extradition 1957 does for its participating states. But this must lie a long way in the future.

63 Montreal Convention, *supra*, n. 18, arts. 1, 5, 7 and 8.2.

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THE EXTRADITION AND RETURN OF FUGITIVE OFFENDERS - APPLICABILITY OF HUMAN RIGHTS CONSIDERATIONS *Case Studies and Discussion*

*Endell L. Thomas**

Introduction

The "Bill of Rights" provisions in the Constitutions of the several Commonwealth Caribbean States except that of Trinidad and Tobago anticipate situations relating to the subject of this particular topic. For example the Barbados provision is as follows:

Sec. 13(1) "No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say-

- (a) "... in execution of the sentence or order of a court whether established for Barbados or some other country, ... (my emphasis)

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- (b) "....."
- (i) "... for the purpose of effecting the extradition... of that person from Barbados."¹ (my emphasis)

As may be expected, the human rights most likely to be affected by extradition action are primarily the right to personal liberty and security of the person, freedom of movement and freedom from torture and inhuman and degrading treatment. It is within the context of the right to personal liberty and security of the person that attention will be focused in the few cases to be discussed.

Case Studies

(1). The first case to be discussed is that of *Makomberedze v. Minister of State (Security)*², a case from Zimbabwe. It is the only one of the few to be discussed that raised directly the issue of the right to personal liberty as protected by the Constitution. The relevant section of the "Bill of Rights" in the Constitution of that country on the right to personal liberty is similar to that of the respective Constitutions of all the Commonwealth Caribbean States save that of Trinidad and Tobago. It is as follows:

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- 1 (i) S.1 1966 No. 1455. See also Constitutions of
(ii) Antigua, S.1 1981 No. 1108, Sec.5(1) (b and j)
(iii) Bahamas, S.1 1973 No. 1080, Sec.19 (1) (a and g)
(iv) Belize, S.1 No. , Sec. 5 (1) (a and i)
(v) Dominica, S.1 1978 No. 1027, Sec.3(1) (a and i)
(vi) Grenada, S.1 1973 No. 2155, Sec.3(1) (a and i)
(vii) Guyana, Act. No. 2 of 1980, Sec.139 (1) (a and i)
(viii) Jamaica, S.1 1962 No. 1550, Sec.5(1) (b and j)
(ix) Saint Christopher /Nevis, S.1 1983 No. 881, Sec.5(1) (b and j)
(x) St. Lucia, S.1 1901 of 1978, Sec.3(1) (a and i)
(xi) St. Vincent, S.1 1979 No. 916, Sec.3(1) (a and i)

- 2 (1987) L.R.C. (Const.) 504.

- S.13 (1) "No person shall be deprived of his personal liberty save as might be authorized by the law and any of the cases specified in subsection.
- (2)
- (3) Any person who is arrested or detained shall be informed as soon as reasonably practicable in a language that he understands of the reasons of his arrest and detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him.³

The facts of the case are: On July 3, 1980, the applicant, a citizen of Zimbabwe by birth, was arrested and detained for a few days by the Special Branch Police of Zimbabwe on the instructions of the Minister. *He was not informed of the reason for his arrest and detention, nor placed on any charge, nor allowed to communicate with any one, Counsel included.* He was then handed over⁴ to the Mozambique Authority where he was kept in detention camp for some 20 months until released in March 1982. (my emphasis)

On his return to Zimbabwe he applied to the High Court for redress alleging breach of his fundamental right to liberty as guaranteed by the Constitution and on those facts the court had little difficulty in finding for the applicant and awarding damages.

It should be of some interest to us all to be burdened with part of the judgment of Ebrahim, J. quoting from Reynolds, J.

3 Quoted from the judgment, *ibid.*, p. 506 f-g.

4 According to the Trial Judge the applicant was "finally dumped across the border into Mozambique." *Ibid.*, p. 507 d-e.

in the case of *Ronald J. Allan v. Minister of Home Affairs* (HCH 202/85 unreported) p.8.

"Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost 800 years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson: 'The God who gave us life gave us liberty at the same time.' Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the Courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved."⁵ (my emphasis)

Ebrahim, J. also observed that "no formalities relating to his deportation or extradition to a foreign country were complied with."⁶ Whatever our problems in the Commonwealth Caribbean, it is difficult to envisage the Police in one of our Commonwealth States duplicating what happened in Zimbabwe to the extent of handing over the arrestee to the authorities of another State. It could be that the water divide between and among us will be a stumbling block to such eventuality.

It is submitted that the quote above is important for two reasons. First, Zimbabwe like the Commonwealth Caribbean States went through British Colonialism with its attendant English Common Law jurisprudence: it is a credit in these circumstances that their Courts recognize that human rights

5 *Ibid.*, note 2 p. 507 a-c.

6 *Ibid.*, note 2 p. 507 d-e.

existed 'long before Magna Carta' -or for that matter long before the English Common Law which owes its development from 1066, whatever the history of its pieces, and on which some of our Commonwealth Caribbean Courts anchor their appreciation and understanding of human rights. It is that intellectual capacity to have a universal philosophy of the subject of human rights that is more likely to lead to the much advocated liberal approach to the subject than the locking of one's frame of mind of the subject in the common law, however much the common law may have served us in the past.

The second is with respect to the statement about its 'own long and bitter struggle' which evinces that court's appreciation of locating the right and giving it its relevancy within the historical development of the particular society rather than give the impression that it was hacked out somewhere else to be copied and applied by them. Compare the approach of the Court of Appeal in the case of *Collymore v. A.G.*⁷, a case from Trinidad and Tobago - in deciding on the right to strike, by a reference to the historical development of workers' organisations and trade unions in England. Not one word about their struggle in Trinidad and Tobago or the wider Caribbean, a feature alluded to by Dr. Barnett earlier in his presentation.

(2) Focus now will be on a few cases from the Commonwealth Caribbean that, unlike the one just referred to, did not in any way directly raise the issue of breach of the constitutionally protected fundamental right to liberty.

*R. v. D.P.P. ex parte Schwarz*⁸ is a case from Jamaica. The relevant provisions in the "Bill of Rights" of the Constitution

7 (1968) 12 W.I.R. 5.

8 (1976) 24 W.I.R. 491.

of Jamaica are similar of those of Barbados already stated in the introduction with the two exceptions relevant to our subject.

The applicant in this case, a Jamaican, was convicted *in absentia* by a court in New York, U.S.A. on a charge of conspiracy with others to import, sell and transport dangerous drugs, she having fled the State during the trial and returned to Jamaica. It was in these circumstances that she was arrested under extradition proceedings and committed to jail by a Magistrate for the Parish of St. Andrew to await her return to the United States.

She applied to the Supreme Court for a Writ of Habeas Corpus arguing *inter alia* that (i) there was no proper proof before the court of her conviction and (ii) the offence for which she was charged is not an extraditable offence. The Court ruled in her favour on both issues and ordered her release. On the issue of no proper proof of conviction, the Court considered *inter alia* Sections 10 and 14 of the Extradition Act which are as follows:

Sec. 10 "In the case of a fugitive criminal alleged to have been convicted of an extradition crime, if such evidence is produced as (subject to the provisions of this Act) would, according to the law of Jamaica, prove that the prisoner was convicted of such crime, the resident magistrate shall commit him to prison, but otherwise shall order him to be discharged."

Sec. 14 "Depositions of statements on oath, taken in a foreign State, and copies of such original depositions or statements and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act." (my emphasis)

The only evidence of the conviction of the applicant in the Magistrate's Court was the affidavit evidence of two witnesses who said they were present in Court at the time when the jury announced it had found the applicant guilty. The Court reviewed a number of cases on the issue of proof of conviction, all of which pointed in one direction - production of the certified record of the Court - and so rejected the submission that the affidavit evidence was a proper proof of conviction.

On the issue of the offence charged not being an extraditable offence, after reviewing the facts and the extradition regime in place, Melville, J. said:

"Applying the strict construction rule for which Mr. Ramsay contended, and which has always been consistently applied to the provisions of the Extradition Act, *as the liberty of the subject is involved*, I held that the writ must go as the crime for which the applicant's return was sought was not an extradition crime in the circumstances."⁹ (my emphasis)

The judgment does not indicate whether the issues were ever raised before the Magistrate and if so how he dealt with them. Hopefully that there are Magistrates in attendance at this forum, they will take note of the need to be ever vigilant in the protection of a person's right to liberty even though the issue of fundamental human rights is not raised before that Court, for the Supreme Court certainly had that in mind when as quoted above, it mentioned that "the liberty of the subject is involved."

The next case is that *U.S. v. Bowe*,¹⁰ a case from the Bahamas. Shorn of what is not relevant for the purpose of this

9 *Ibid.*, p. 198 I.

10 (1989) 3 A.E.R. 315 (P.C.); (1990) A.C. 500.

study, given the existing statutory and treaty regime for extradition between the Bahamas and the U.S.A., on 2/10/85 the U.S. Government requested of the Minister of Foreign Affairs of the Bahamas the extradition of Bowe to answer charges of conspiracy to import cocaine from Columbia into the U.S.A. via the Bahamas in breach of U.S. laws. The statutory regime required that under Sec. 7 of the Act, on such a request, an order to proceed must be issued by the Governor General on which order a Magistrate will issue a warrant for the arrest of the person so requested. In fact an order to proceed was issued and signed by the Minister of Foreign Affairs instead of the Governor General and on that order the Magistrate issued a warrant for the arrest of Bowe and he was so arrested.

The fugitive's application to the Supreme Court for certiorari to quash the warrant and prohibition to prohibit the extradition proceeding on the ground *inter alia* that the Sec. 7 order having been signed by the Minister and not the Governor General was invalid was dismissed. He was subsequently discharged by the Magistrate on the hearing of the extradition proceedings on the ground that the offence alleged did not constitute an extradition charge. Again he was arrested in a warrant for the same offence issued by the Magistrate pursuant to another Sec. 7 order to proceed, again signed by the Minister instead of the Governor General.

It would appear that before the Magistrate the fugitive raised again the issues raised before the Magistrate in the first extradition proceedings when he was discharged but the Magistrate ruled against him this time, and decided to hear the matter on its merits. The fugitive again applied to the Supreme Court for certiorari and prohibition and that Court ruled the application to be premature as the proceedings before the Magistrate were incomplete. The Court of Appeal allowed an appeal by the fugitive from the ruling of the

Supreme Court and remitted the matter to it for hearing. Alas, the Supreme Court quashed the Magistrate's court proceedings on the ground that an order to the Magistrate under Sec. 7 must be signed by the Governor General and not the Minister and consequently ordered the release of the fugitive.

Somewhat pathetic one may say of the Supreme Court's decision on two occasions refusing the application and only on a remit by the Court of Appeal on the second occasion that it eventually found for the applicant. The facts are not in dispute and the particular statutory provision is as clear as a pikestaff giving rise to a patent issue of lack of jurisdiction on the part of the Minister on whose order the Magistrate's warrant for the arrest of the fugitive was issued. An issue of lack of jurisdiction in a functionary, even if not expressly so pleaded - on the facts of this case it was clear as daylight - is a fundamental principle of the common law jurisprudence and ought to have been easily spotted the first time it was raised.

It is for that reason Lord Lowry in the Privy Council appeal in the matter, in advising that generally in such matters, the entire case including all the evidence which the parties wish to adduce, should be presented to the Magistrate before either side applies for a prerogative remedy, went on to state that:

"... Only when it is clear that the extradition proceedings must fail (*as when the order to proceed is issued by the wrong person*) should this practice be varied."¹¹ (my emphasis)

Alternatively the Minister's signing of the order on which the Magistrate's warrant was issued raises an issue of breach of an aspect of the rule of law principle that is one of the corner stones of our legal system to the extent that it finds a place in

11 *Ibid.*, p. 328 g-h.

the Preamble of the Constitution of some of our Commonwealth Caribbean territories - that of the Bahamas included.¹²

A very similar situation arose in a recent case from Trinidad and Tobago.

Based on the statutory and treaty extradition regime between Trinidad and Tobago and the U.S.A. from the colonial period similar to that in Bowe's case above, the U.S. government made a request to the Minister of Foreign Affairs in Trinidad for the return of one Lolita Saroop to answer drug charges in the U.S Virgin Islands. Based on that request the Minister issued an order to the Magistrate for his warrant for the arrest of Saroop and she was in due course arrested.

Before the Magistrate in the extradition proceeding Counsel appeared on her behalf and submitted *inter alia* that the Minister of Foreign Affairs had no authority to issue such an order to the Magistrate for a warrant for her arrest but this was overruled and so she was committed to prison to await her return to the U.S. Virgin Islands.

She then applied to the High Court for leave to apply for judicial review¹³ of the decision of the Magistrate to commit her, again arguing *inter alia* that the Minister of Foreign Affairs had no authority to order the Magistrate to issue any warrant for her arrest. This time also the High Court ruled against her.

12 Note 1(i) 2nd para. thereof.

13 In the matter of an application by Lolita Saroop for leave to apply for Judicial Review (H.C. T. & T.) Unreported, Suit No. 2115 of 1993. Judgment dated 24-11-93.

She then applied to the High Court for a Writ of Habeas Corpus¹⁴ this time arguing as before *inter alia* that the Minister of Foreign Affairs has no authority to order the Magistrate to issue a warrant for her arrest, the competent authority is the President. Alas, this time the Court ruled in favour of the applicant, holding the order to the Magistrate must be signed by the President of Trinidad and Tobago and therefore the order signed by the Minister of Foreign Affairs is a nullity and all proceedings founded on it are null and void and of no effect. Consequently the Court ordered the release of the applicant.

It does appear that not only 'great minds think alike,' one can equally say 'political minds and learned minds also think alike.' That apart, what pyrrhic victory in both cases as a subsequent order was then signed by the Governor General in the case of the Bahamas and the President in the Trinidad and Tobago case on which warrants of arrest were then issued and both fugitives again arrested and proceedings duly set in train for their extradition.

Next is Biggs¹⁵ case from Barbados. The facts are as follows - The applicant fugitive Ronald Biggs, one of the train robbers of the U.K. in the 1960s was convicted at the U.K. Assize Court on 16/4/64 and sentenced to some 30 years imprisonment. He escaped from prison in 1965 and fled the country. Somewhat mysteriously he turned up in Barbados whence proceedings began for his extradition to the U.K. and on those proceedings the Chief Magistrate committed him to prison to await his delivery to the U.K. authorities.

14 In the matter of an application by Lolita Saroop for a Writ of Habeas Corpus ad Subjucendum - (H.C. T.& T.) Unreported, Suit No. 3040 of 1993 dated 24-11-93.

15 Ronald A. Biggs v. The Commissioner of Police, Unreported judgment, Div. Court Barbados, No. 16 of 1981.

Sec. 33 of the Extradition Act 1979 is as follows:

"The Minister responsible for external affairs may by order, *subject to negative resolution*, designate any Commonwealth Country as a Commonwealth Country to which Part I applies." (my emphasis)

The Minister did in fact by Statutory Instrument No. 74 of 1980 make such an order i.e. 'The Designated Commonwealth Countries Extradition Order, 1980.' On the evidence before the Magistrate during the hearing however, the Order of the Minister contained in the Statutory Instrument No. 74 of 1980 had not been laid in Parliament.

The fugitive appealed to the Divisional Court against the order of the Chief Magistrate on the ground that the Chief Magistrate erred when he held that the requirement of the Act to lay in Parliament the relevant Statutory Instrument made under the Extradition Act 1979 was merely directory and not mandatory and therefore noncompliance with such laying requirements did not invalidate the Statutory Instrument.

After referring to *inter alia* Sec. 41(7) of the Interpretation Act as to what "subject to negative resolution" shall mean; and to Sec. 37 where it is provided that in any enactment made after June 1966 the expression "shall" shall be construed as imperative, the Court held that failure to lay in Parliament the Statutory Instrument in accordance with Sec. 33 of the Act is fatal and that the Statutory Instrument is therefore invalid. The Court consequently quashed the order of the Chief Magistrate resulting in the discharge of the applicant from prison.

It will be remembered that Dr. Barnett in his presentation earlier on quoted from the judgment of Mr. Justice Jim Davis as he then was in the case *A. Thomas and K. Paul v. A.G. of T.&*

T.¹⁶ about the need for complying with 'the minutiae of entitlements commanded by ritual and due process.' That was a case concerned with the right to life canvassed under the Bill of Rights in the Constitution. It is submitted that where the liberty of the subject is involved, whether raised under the banner of the 'Bill of Rights' provision in the Constitution or otherwise, the principle is equally applicable and appears to have been put to use in the few cases discussed above.

The last case I will burden you with is *Bennet v. Horseferry Road Magistrates' Court*,¹⁷ a House of Lords decision and therefore of quite some significance to all the Commonwealth Caribbean States in so far as all in one way or the other have adopted the common law of England as part of the laws of their respective legal system.

The applicant fugitive in this case was a New Zealander living in South Africa and was wanted by the Police in England to answer criminal charges. There was no formal extradition arrangements between the United Kingdom and South Africa. However, by collusion between the English Police and their South African counterpart, the applicant was arrested by the South African Police and put on a plane bound for the United Kingdom and so he was arrested on arrival at Heathrow airport.

He was eventually committed to stand trial on a number of charges: he then began proceedings for judicial review challenging the committal.

16 H.C., Unreported, Nos. 6346 and 6347 of 1985, dated 29-7-81.

17 (1993) 3 A.E.R. 138.

There were conflicting decisions of the Divisional Court on the issue of whether *that* Court in the exercise of its supervisory jurisdiction had power to enquire into the circumstances by which a person was brought within the jurisdiction. Their Lordships, after reviewing those decisions, referred to a number of cases from Australia, Canada, New Zealand, South Africa - yes SOUTH AFRICA- and the United States and unanimously resolved that the Court had such jurisdiction, a decision in line with the majority decision in the case of *U.S. v. Humberto Alvarez-Marchain*,¹⁸ the facts of which were referred to earlier by Professor Carnegie in his presentation.

Much comfort certainly was received from the South African case as two of Their Lordships found it necessary to quote therefrom. One of them, Lord Griffiths, quoted the entire headnote. The other, Lord Bridge, also quoted part of the headnote and later alluded to the fact that Stevens, J. one of the minority opinion in the *U.S. v. Alvarez-Marchain* case,¹⁹ also referred to the South African case on which he commented thus -

"The Court of Appeal of South Africa - indeed, I suspect most courts throughout the civilized world - will be deeply disturbed by the 'monstrous' decision the Court announces today. For every Nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character."

Here are some excerpts from the quotes of their Lordships from the South African case:

18 (1992) 112 S. Ct. 2188.

19 *Ibid.*, p. 2206; see note 17 p. 154 g-h.

"... The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as a tantamount to abduction and thus constituted a serious injustice.

...

The Court further held that the above rules embodied several fundamental legal principles, *viz* those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court *with clean hands*, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the State was involved in the abduction of persons across the country's borders."²⁰

The highwater mark of this case is first its parallel with the recent Privy Council decision in the *Pratt & Morgan v. A.G.*²¹ case referred to earlier by Dr. Barnett, in relying on a minority opinion as the more forward looking, liberal view the law should reflect and thus abandoning the traditional less for-

20 Note 17, p. 149 b-f; 153 f-h.

21 Privy Council Appeal No. 10 of 1993.

ward looking approach. Another is the strong support gained from the South African case, a country one may not have expected to be so progressive in this respect.

Conclusion

The point was made earlier, that the few Commonwealth Caribbean cases discussed, unlike that from Zimbabwe, were not canvassed under the 'Bill of Rights' provision of the respective Constitution. There is no doubt however, that ultimately the judgments and results were in the spirit of protecting the right to personal liberty as they resulted in the release of the applicants, however short-lived, in two of the cases. One can therefore say, like the Frenchman who was speaking prose all the time without knowing it, that the Courts in the Commonwealth Caribbean were certainly protecting fundamental human rights - knowingly for sure - without expressly saying it.

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