AMENDING TO HANG : THE CONSTITUTION, THE PRIVY COUNCIL AND HUMAN RIGHTS

By

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INTRODUCTION

Issues surrounding the death penalty raises high and passionate emotions in the proponents and proponents of the death penalty. Caribbean governments remain divided on the issue. Even those Governments which are for the death penalty but have not carried it out for years now have a basis for arguing that their inability to carry out those sentences has been due to the decisions of the Privy Council. In this short piece, my aim is to rise above emotions and to deal with some hard truths and realities.

CONTEXTUAL BACKGROUND

The genesis of this dispute over hanging must begin with the type of constitutions which Barbados and the Commonwealth Caribbean, inherited from Britain.

In the case of *Fisher v. Minister of Home Affairs* [1979] 3 All ER p. 21 at p. 25 that these constitutions were based on and inspired by a regional human rights instrument, and that regional human rights instruments themselves had a common ancestry from the *UN Declaration of Human Rights of 1948 and the European Convention on Human Rights of 1953.*
Accordingly, "these antecedents" called for a generous interpretation avoiding the austerity of tabulated formalism suitable to give individuals the full measure of the fundamental rights and freedoms guaranteed by the constitutions. Put in another way, the Privy Council was saying as for as far back as 1979 that the special nature of Commonwealth Caribbean constitutions called for a radical principle of interpretation in that whilst respect was due to the language of the text and the traditions and usages behind the language, it was extremely

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important to be equally guided by the context and social purpose of the laws in question. Full attention was not paid to those words of Lord Wilberforce. They have been accepted as the cornerstone of our constitutions without examining critically the ramifications.
A quick examination of the sentiments expressed in *Fisher* points out that they are not just Euro-centric views. The illustrious Telford Georges said similarly in *Mejia, Bull and Guevara v. AG* (1996) 3 Bz LR 248, relying on *Fisher*:

> *"An identical approach should be adopted to the interpretation of the provisions put in place for the 'enforcement of protective provisions' ... The rights to which persons in Belize are entitled would be gravely imperiled if the provisions for their enforcement were not interpreted in the most generous and purposive manner so as to afford the greatest protection."*

The second point to be noted is that soon after the *Fisher* decision, Commonwealth judges promoted the Bangalore principles, where international human rights treaties and other instruments to which a state is a party were to be taken into account when interpreting the constitutions. For those who believe in the global village concept, a harmonization of laws in the human rights arena may be seen as empowering and enriching global human rights jurisprudence.

Human rights have also become the mantra by which modern governments are judged. To quote from the Attorney General of Belize, Mr. Godfrey Smith *"A New Perspective on Human Rights"* [1]

> "Human rights have today, in a real sense, become the new theology of the modern world. There can be no doubt that the twenty-first century has dawned with the centrality of human rights, not only within states but also between states at the international level. And well should this be so. Human rights are essentially concerned with respect for universal values and the fundamental dignity of the human being.

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[1] 2000 *Caribbean Law Review*: p. 11

Nothing can be more basic than this. The respect for and observance of human rights have become a kind of litmus test to gauge the good governance and legitimacy of a government. This, in turn, has come to exert an increasing leverage between a government and its interaction with the governments of other states in the international community."

The third issue to bear in mind has to do with the fact that all our constitutions contained savings law clauses which the effect of making it impossible for the courts to declare pre-existing laws invalid, even though those pre-existing laws might be in clear violation of fundamental rights provisions. Under these savings clauses, the death penalty has until recently been held as valid as the existing law.

Nicholas Blake, QC, has taken issue with these savings law clauses, describing them as "unfortunate and artificial restrictions on the scope and capacity for growth of the human rights clauses then contain". He takes serious issue with those clauses which say that nothing done under the authority of any law shall be inconsistent with the Constitution to the extent that it authorises a punishment lawful before the coming into the operation of the Constitution. This is what he argues:

"The precise meaning of this and other constitutional provision for pre existing law if the matter of dispute in certain cases, but whatever its meaning and scope of application, it is indicative of the draftsman's intention to preserve and leave immune from constitutional attack on this head at lest, the pre independence punishment of the colonial era. Such a restriction is inconsistent with the *Tyrer* approach of revising and re-characterising such treatments or punishments from time to time to see if they are needed to protect the rights of others or promote the public interest. It is inconsistent with the living tree approach to a constitution. Such arbitrary ouster of the jurisdiction of the national court thirty or more years after independence does not promote the dignity and sovereignty of an independent state whose courts should be best equipped to examine these issues. In the field of punishment, the danger is that the living tree has become a strangled shrub, deserving

to be freed from its confined to yield its fruits to the people it serves".

So as to put the case fairly, it should be pointed out that the exploration of legal avenues to get round the stultifying savings clauses is also not just an Eurocentric view.

Prof. Simeon McIntosh has described the saving clauses as "constitutional contradictions". And in the case of the Belize Constitution Henry J, President of the Court of Appeal, read section 21 (which protected existing laws for 5 years after independence) in combination with section 134(1), which also saved existing laws but required that they be read with such modifications to bring them into conformity with the Belize Constitution. He found that:

> "... the object of section 21 [of the Belize Constitution] was to ensure that during the five years following independence no attacks were to be launched against the constitutionality of existing laws. The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with some modifications, adaptations, qualifications, and exceptions as may be necessary' to bring them into conformity with the Constitution." (*San Jose Farmers Cooperative Society Ltd v Attorney General* (1001) 3 Bz LR 1.)

The fourth issue to bear in mind for the purpose of this discussion has to do with the adjudicating style of the Privy Council whereby in the main, our constitutions have been interpreted not as *sui generis* documents but as extensions of the common law. Derrick McKoy, rightly criticised this approach as "the common law phenomenon in constitutional interpretation" [(1993) 18 WILJ 1, at p. 12] of our constitutions.

Granted that we have lived with the pull of all these contending forces. To date, you may question, what has triggered the present crisis? Three things broadly speaking, I dare to submit.

The Role of the Privy Council

Since *Pratt v Morgan* the Privy Council has mounted a consistent assault on some of our most cherished fundamental public law precepts, such that – to quote a Caribbean expression – it could be said that the Privy Council is indeed rocking the cradle. It has virtually abolished the death penalty since *Pratt and Morgan* and the cases following after it; it has decreed that by ratifying a treaty and participating in the process of an international body, a state generates legitimate expectation that the executive will not act inconsistently with its international obligations to the detriment of the individual. (*Thomas & Hilaire v. Trinidad)*; it has held that it is unconstitutional to execute a man whilst his petition for international redress is outstanding where that petition might lead the government to commute his sentence, (*Neville Lewis & Ors v. Jamaica*); it has also held that during the proceedings of the Mercy Committee, procedural fairness has to be exercised, thus overturning a long line of cases which said that the legal rights end when mercy begins, that the right to access to the international body is constitutionally protected, and that there is duty to provide reasons when the State convenes as a Mercy Committee.

For the adherents who support these decisions, their justification is that the constitution guarantees equal protection of the law and that such protection cannot end at the assize court. Equality of protection for fundamental rights is far too serious an issue to be so lightly sacrificed.

There are strong local supporters for this view.

H. Aubrey Fraser, an eminent Caribbean jurist and then Director of Legal Education at the Norman Manley Law School in Jamaica, writing in 1983, hailed the dissenting judgment in *Riley and Others v. Attorney General* with the words:

> "... a resonant voice of hope has found expression in a dissenting judgment which deserves to join that honourable roll of dissenting judgments which, in the passage to time, have adorned the common law, by their common sense, their fairness and their recognition of individual rights and freedoms."

In that case the Privy Council had by a slim majority of 3 to 2 rejected the

argument that prolonged delay in executing the death sentence constitutes inhuman and degrading punishment under the Bill of Rights. Fraser ended his article in this way:

> "If it were possible to look into the future it might be within the justifiable expectation of the present generation of lawyers in Jamaica, and other countries of the Commonwealth Caribbean, that the enlightenment offered in this dissenting judgment ... might, within this decade, reach beyond the realm of hope, to rescue some of the condemned who, since the middle years of 1970s and onwards, have been awaiting with anguish the execution of their lawful sentences."

He expressed the hope that that dissenting judgment would prevail, preferably first, he said, somewhere in the Commonwealth Caribbean within the decade, in 1993, Fraser's hope and prediction did come to pass in the judgment of *Pratt and Morgan*, except that he did not live to see it, nor did the decision emanate from Caribbean courts as he had hoped.

On the other side are those who see the protective role of the Privy Council as a frontal usurpation of the executive authority of the state. No less a leading legal luminary than the present Chief Justice of Barbados has so stated publicly in his previous capacity as Attorney General.

Some in the Caribbean view this as unwarranted whittling away of the death penalty through the back door. The fall out from *Pratt and Morgan* and similar cases is that there is today a strident public call in some quarters to revisit the position of the Privy Council as the ultimate Court of Appeal for most Commonwealth Caribbean countries. For reasons soon to be stated, it is not a certainty that repatriating the final court of appeal to the Caribbean would solve this particular problem. That is why the writer supports the creation of the Caribbean Court of Appeal on other more substantial grounds, rooted in its original jurisdiction, compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty of Chaguaramas.

The Human Rights Dimension

Irrespective of what views we hold on human rights, there is no gainsaying the fact that the subject has become one of universal application and debate. The Attorney General of Belize, Mr. Godfrey Smith puts it very well thus:

"Whether the death penalty is a human rights issue goes way beyond the Privy Council. It is now part of a strong international movement supported by powerful countries, economic unions, international and regional bodies to persuade other countries not to use the death penalty. The existence of the movement and the prominence of the debate are not surprising. The most important human right is, after all, the right to life. Of what use are the other rights without the right to life? Of course, the conditions and circumstances that conduce to making that life itself worth living are part and parcel of the totality of human rights.

Ought the State as part of its criminal justice system, to stipulate and exact the death penalty? Is the death penalty itself compatible with that most elemental of human rights, the right to life? Should penal reform not be about reforming and rehabilitating the offender and is the exaction of the death penalty not antithetical to this? What constitutes international standards of fair trial?

Placed on one side are the traditionalist law and order brigade. They view the issue as simply one of upholding and applying the law. For them, hanging – the stipulated statutory method of implementing the death penalty in almost all Commonwealth Caribbean states – is the surest antidote to the rise in more serious crimes of violence such as murder. On the other side are those who strongly feel that societies have come a long way and that punishment should be reformatory of the criminal and that the imposition of the death penalty, quite apart form its irreversibility, debases society and represents a cruel and inhuman punishment. They also contend that the death penalty has not empirically, in any event, resulted in a reduction of crimes live murder. In other words, its effect as a deterrent is insignificant." (*op cit)*

Constitutional Amendment in Barbados

In a move designed to reverse the trend in these decisions, the Government of Barbados has signaled its intention to amend the Constitution. The Bill attempts to do the following:

(a) to ensure that the execution of a convicted murderer after five years on death row cannot be ruled unconstitutional; and

(b) to ensure that the mandatory death penalty cannot be ruled unconstitutional by the courts.

Clearly, these amendments are designed to reverse the *Pratt and Morgan* line of cases to date.

This is where Prof. Simon McIntosh comes in. He argues that the Government's move rests on "flawed assumptions regarding the normative character of a democratic constitution with an entrenched bill of fundamental rights".
He seeks to justify this view on two principal grounds: firstly, he argues that the fundamental rights provisions comprise the substantive moral constraints on state power. If the one accepts that premise, then it is his argument that these provisions cannot be amended without the constitution as a whole losing its essential character as a document of moral principle. To quote his own words:

> "On this view then, the amending of a democratic constitution according to its own terms must indeed be according to the foundational terms of that constitution. For the amending of a democratic constitution does not seek a radical transformation of the character of the constitution and of the political society. Neither does it seek to deconstitute and reconstitute the constitutional order, or to abandon its primary principles."

And in a jab at the proponents of the majoritarian principle, he concludes that these constitutive and regulative norms of debate in a democratic society cannot be transformed or abrogated by majority decisions. "They are beyond revision, even by the people themselves".
Secondly, Prof. McIntosh argues that the constitution vests final interpretive authority to the judges in the enforcement of the constitution. He therefore advises that obedience to the judicial oath would require the judges *not* to accept the State's interpretation of say what is cruel and unusual punishment but to make that determination themselves. The implication clearly is that the proposed constitutional amendment is not only unconstitutional; it is an exercise in futility.

Clearly, issue is joined on these proposed amendments. One can only argue that these views are not free from difficulty especially in a jurisprudential system owes so much to positivist thinking. But here it is on the table.

CONCLUSION

It is hoped that the issues raised in this article will raise the debate on the death penalty from its emotional quagmire onto a plane where lawyers can discuss on the basis of legal arguments and principles.