THE CONCEPT OF DUE PROCESS IN THE TRINIDADIAN CONSTITUTION

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Section 4(a) of the 1976 Constitution of Trinidad and Tobago recognises "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law". This section is not new, having appeared in the 1962 Independence Constitution as well.[1] The phrase "except by due process of law" constitutes an important qualification of the rights recognised in this section, but until 1978 at least, its meaning was not clear. It is argued that the current interpretation of the meaning of "due process" is so restrictive as to rob the section of its substance. By this formulation the operation of section 4(a) is arrested and limited. In this argument, Max Weber's system of ideal types is used to point out the possible shortcomings of the decision in question as well as to suggest the thrust of an alternative interpretation.[2]

The due process clause has been examined in upwards of a dozen Trinidadian cases,[3] and the individuals alleging infringement of a right under this section have been successful in three of these.[4] From these cases the most unequivocal statement on the nature of due process appears in the dictum of the late Lord Diplock delivering the decision of a Privy Council in the 1978 case of *Maharaj* v. *The Attorney General of Trinidad and Tobago (No. 2)*, where he said:

> It is only errors in procedure that are capable of constituting infringement of the rights protected by (the due process clause) and no mere irregularity is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their lordships do not think this can be anything other than a very rare event.[5]

This passage has been cited with approval and followed in successive cases, such as *Chokolingo* v. *The Law Society of Trinidad and Tobago,*[6] *Thornhill* v. *A.G.* (at the Privy Council level),[7] and *Nanan* v. *Registrar of the Supreme Court.*[8] In *Chokolingo,* Sir Isaac Hyatali C.J. rejected the submission by counsel that Lord Diplock's remarks were *obiter,* so it appears that the Privy Council dictum is now considered to be persuasively authoritative, if not binding, on Trinidadian courts.[9]

It is significant that in asserting the procedural nature of due process, the law lords drew a general equation between their interpretation of due process and the principles of natural justice. The expression "due process" is no longer in general use in English jurisprudence,[10] though the idea is English in origin.[11]

In the United States, where it is of major importance, the concept is thought to have been imported into the colonies both through the institution of the received English law and from writers such as Black-

stone.[12] References to due process occur in the Fifth and Fourteenth Amendments to the American Constitution. The Fifth Amendment says *inter alia* that "no person shall be deprived of life, liberty or property except by due process of law. . ."[13] In its American formulation, the idea is a controversial one, being by one estimate involved in more litigated cases than have all the other clauses in the U.S. Constitution combined.[14] Due process is seen to contain a procedural as well as a substantive element; it amounts to a constitutional guarantee that no person shall be deprived of life, liberty or property for arbitrary reasons.[15] A deprivation is only constitutionally supportable if the deprivation flows from or is prescribed by reasonable legislation, reasonably applied (in the sense of being for the purpose of the legislation itself).[16] When the individual interest involves a fundamental right, the test of substantive due process is whether a "compelling state interest" is advanced by the regulation and whether the regulation is the "least restrictive method" available to effectuate the competing state interest.[17]

The decision in *Maharaj* and its apparent acceptance by the Trinidadian courts as an authority on the interpretation of section 4(a) has tended to exclude the possibility of a substantive interpretation of due process and it is the argument of this comment that this is an undersirable development. In judicial dicta, the point has been made that the concept of due process as it appears in the Trinidad Constitution is different in meaning from the expression as used in the American Constitution.[18] It is indeed true that the doctrine of substantive due process in the American system seeks to protect rights that are already expressly protected in section 4, such as the rights to freedom of speech, religion and association. The American interpretation of due process has a unique and fascinating history which must be read in the context of the background and particular provisions of the American Constitution.[19] But recognition of some overlap between what the Americans call substantive justice and the rights guaranteed in s.4 of the Constitution is not in itself a persuasive argument against the need for a substantive element in due process as it occurs in s. 4(a). To hold otherwise is to presuppose that the Bill of Rights provisions in the Trinidadian Constitution, as presently interpreted, constitutes a gapless system of rules.[20]

Max Weber's typology is based on two distinctions. The first contrasts those types of legal thought that are rational in the sense that they are guided by general rules with those that are irrational; the second contrasts formal and substantive types of legal thinking, and considers the difference between law which relies on abstract legal propositions and a system based ultimately on non-legal values. Taken together, these two distinctions yield a fourfold classification of the law. The two categories which are most useful for an examination of the due process clause are *Substantive Rationality,* typified by a system in which lawmakers consciously follow clearly conceived and articulated general principles of some kind, and *Formal Rationality*, in which general laws are followed in such a way that only "unam-

biguous general characteristics of the facts of the case are taken into account".[21]

Weber's ideal types are intellectual constructs, designed to be employed for heuristic purposes. It is thus very unlikely that a given system will display all the attributes of a particular type. This being said, however, one may still go on to assert that Lord Diplock's formulation in *Maharaj* nevertheless bears much resemblance to Weber's formally rational model, especially that aspect known as *Logical Formal Rationality*. This quality is found in legal systems where rules are formulated by the use of generic concepts of an abstract character; in Weber's words, the law is valid in so far as "the legally relevant facts are determined in a process of logical interpretation of meaning and as fixed legal concepts are thus created and applied in the form of strictly abstract rules".[22] Law in this model is self-justifying. It requires no appeal to moral or political values for legitimacy. Religious, traditional and ethical principles recede in importance as the law is progressively 'unmarked".[23]

The procedural view of due process as taken by the Privy Council in *Maharaj* may be seen as an attempt to 'unmark' this area of the law. But it is very doubtful whether this type of reasoning is appropriate in the interpretation of a constitution. The constitution exists as a unique piece of legislation within any legal system of which it forms a part; it can be seen as a crystallisation of opinion as to how law is to operate in society. This is especially true when we look at the preamble, with its broad references to "social justice" and "the recognition that men and institutions are to remain free only where freedom is founded upon moral and spiritual values and the role of law". Logical legal rationality can hardly apply to a piece of legislation which is to be construed liberally and not necessarily according to the rules applied to ordinary Acts of Parliament.[24]

Thus the decision of the Law Lord in *Maharaj*, it is argued, was subject to two limitations. The first was the assertion of the identity of natural justice and due process; the second was the distinction between the procedural and the substantive, or in Weberian terms between substantive and logical legal rationality, which cannot be maintained if full and liberal effect is to be given to the rights declared in Chapter 1 of the Constitution. In such interpretation, resort should be had to the tenets of *Substantive Rationality*, in which systems laws are conceived and articulated according to the general principles such as those of a religion, a system of ethical thought or a nation's *raison d'être*. Within this framework, there can be no boundary between law and those principles which inform the law; there is, according to Weber, "a material rationalisation of the law" in the sense that the goal of the system is the rationalisation of these ideals.[25]

A substantive element in the interpretation of due process is not easy to implement. There always exists the fear that the width of judicial discretion in this respect will be used as a "blank cheque" to alter the meaning of the Constitution as written. A restrictive interpretation is always safer. Even in the United States, as the number of Reagan

appointees to the Supreme Court increases, there is the danger of the erosion of the liberal interpretation of the Constitution in relation to civil liberties under the Warren Court. The current President seems intent on ending what he has called the years of "political action or social experimentation"[26] by the bench. Because of this, along with the move towards the so-called doctrine of original intent, under which the court avoids rulings not clearly envisioned by the framers of the Constitution, there is evidence that the concept of due process in the United States may become increasingly circumscribed.

The necessity for the introduction of a standard of fairness in relation to constitutional guarantees is, however, emphasised if we accept the assertion that a formal legal system has both a positive and negative meaning. In the negative sense, the system is one which eschews all ethical ideals; positively understood, the system is one that seeks to guarantee individual freedom, to open opportunities and to liberate capacities by maximising the predictability of the legal order itself.[27] The constitutional guarantees of fundamental rights were introduced in the belief that the system would operate in the positive sense, but because of restrictive interpretation such as seen in *Maharaj,* there is the danger of the imposition of formal rationality in the negative sense. By seeking to limit the substantive element which is necessarily inherent in the concept of due process, the courts may truncate the meaning of s. 4(a) and violate the spirit of the Bill of Rights provisions. It is hoped that the injection, in Weberian terms, of a degree of substantive rationality will give s. 4(a) added authority by linking the intended functions of the sections to its means, and thus ensure that the balance between social order and social justice in this area of the law will not be set awry.

NOTES

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1. S. 1(a), Trinidad and Tobago Constitution Order in Council 1962.
2. One author has suggested that if a new sociology of law is to be developed to suit the needs of developing countries, what is needed is a new set of ideals along Weberian lines. This may be true, but it is doubtful whether how much of this would be a change in the distinctions at base of the typology; it may be that what is needed is further refinement of the existing categories. In any event, the original Weberian types proved to be very suitable for the purposes of this essay. See further David Trubex, "Towards a Social Theory of Law: An Essay on the Study of Law and Development", (1974) 82 Yale L. R.[1]
3. These include: *Thornhill* v. *A. G.* (1981) A.C., 61. (P.C.), (1976) 31 W.I.R., 499 (C.A. and P.C.), (1974) 24 W.I.R., 281 (H.X.); *Nanan* v. *Registrar of the Supreme Court,* (1979) 30 W.I.R. 420 (C.A.); *Choko-*

lingo v. *The Law Society of Trinidad and Tobago (1978) 30 W.I.R. 420 (C.A.); Mootoo* v. *A.G.* (1978) 30 W.I.R. 44 (P.C.); *Maharaj* v. *A.G. (No. 2)* (1978) 30 W.I.R. 310, (P.C.), (1976) 29 W.I.R. 325 (C.A.); *Faultin* v. *A.G.* (1978) 30 W.I.R. 351 (C.A.); *Trinidad Island-Wide Cane Farmers v. Seeraram* (1975) 27 W.I.R. 329 (C.A.); *DeFreitas* v. *Benny* (1975) 3 W.L.R. 388, (1975) 27 W.L.R. 318 (P.C.), (1974) 26 W.I.R. 523 (C.A.); *Lassalle* v. *A.G.* (1971) 18 W.I.R. 379 (C.A.); *Bazie* v. *A.G.* (1971) 18 W.I.R. 113 (C.A.) See also the following unreported cases: *Branche* v. *A.G.* No. 63 of 1977 (C.A.); *A.G.* v. *Morgan* No. 11 of 1983 (C.A.) *re Application of Sumair Bansraj,* No. 729 of 1983 (H.C.). In 1985, Kitson Branche made further applications to the court on grounds involving alleged breach of due process, but the reports of these decisions were not available at the time of writing. He was unsuccessful.

4. *Thornhill* v. *A.G.* (1981) 61 (P.C.); *Trinidad Island-Wide Cane Farmers* v. *Seeraram* (1975) 27 W.I.R. 329 (C.A.); *Maharaj* v. *A.G.* (No. 2), (1978) 30 W.I.R. 310 (P.C.).
5. (1978) 30 W.I.R. 310 at 321.
6. *Ibid.*
7. (1981) A.C. 61 (P.C.).
8. (1979) 27 W.I.R. 281 (H.C.).
9. It is doubtful whether this aspect of Lord Diplock's dictum is binding in the Trinidadian Courts through *Stare Decisis,* even though Hyatali C.J. impliedly says so by rejecting the argument that the remarks were made *obiter*. But the remarks of Lord Diplock were certainly not part of the *ratio* of the decision, and more specifically it was not part of the reasoning of the issue whether the failure of Majaraj J. to inform the applicant of the nature of the contempt of court with which he was charged was breach of s. 1(a) (now s.4(a); this issue was dealt with separately and answered in the affirmative prior to the making of the statement on question 9: see p. 319, 30 W.I.R. where the question as to breach was settled; Lord Diplock's discussion of the procedural nature of s. 4(a) occurred while he was considering whether the applicant was entitled to monetary compensation for this breach. Here it was clearly *obiter:* see p. 321, *op. cit*.
10. W.S. Tarnopolsky, *The Caribbean Bill of Rights, Toronto, (1975), p. 149. See also H.E. Groves, Due Process of Law,* (1962) 4 Malaya L.R., 1 at p. 3.
11. 16 Am. Jur. Constitutional Law, 816 (1979).
12. Grover, *op. cit.*
13. The due process limitation was extended to the states in the Fourteenth Amendment. The relevant words of that amendment are ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . .".
14. Tarnopolsky, *op. cit.*, p. 149.
15. Annot., 98 L Ed 852 (1953).
16. *Ibid.*
17. *People* v. *Santiago* (2d Dept) 51 App Div. 2d 1, 379 NYS 2d 843, in 16A Am Jur 2d 816.
18. *Maharaj* v. *A.G.* (No. 2) 1977 29 W.I.R. 325, at 341, per Hyatali C.J. in the Trinidadian Court of Appeal.
19. *Ibid.*
20. Under a gapless system of rules, all fact situations can be subsumed. Perhaps not entirely co-incidentally, the presupposition of total compre-

hensiveness is also a feature of logical legal rationality. See further Roger Cotterell, *The Sociology of Law*, (London, 1984) at p. 193.

21. Quoted in Anthony Kroman, *Wax Weber*, (Stanford, 1983). On the various ideal types in general, see Max Rheinstein, Ed. Introduction to Max Weber *On Law in Economy and Society* (Cambridge, Mass., 1954); Anthony Giddens, *Capitalism and Modern Social Theory, (Cambridge, 1971); Cotterell, op. cit.*
22. Quoted in Rheinstein, xlix.
23. Max Weber, *On Law in Economy and Society*, p. 298.
24. *Minister of Home Affairs* v. *Fisher*, (1980) A.C. 319, (P.C. on appeal from Bermuda).
25. Kroman, *op. cit.*
26. Quoted in *Time* November 4, 1985, p. 43.
27. Kroman, *op. cit.*, p. 95.