CONSTITUTIONAL REFORM

Alfred M. Sears
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PART 14

THE CONSTITUTION: LIMITATIONS IN ENFORCEMENT OF BILL OF RIGHTS

The fundamental rights guaranteed to us under the Constitution contain a number of limitations which impede the effective enforcement of the Bill of Rights under Commonwealth Caribbean constitutions and demonstrate the need for a new Caribbean jurisprudence. The first limitation is the existence of broad derogation clauses in these constitutions. While most of the derogation clauses are fairly standard, however, in The Bahamas Constitution the derogation clauses to the protection from arbitrary search and entry are in the broadest terms excusing any action reasonably required, “in the interest of defence, public safety, public order, public morality, public health, town or country planning, the development or utilization of any other property in such manner as to promote the public benefit." As Professor Lloyd Barnett in the essay “The Present Position Regarding the Enforcement of Human Rights in the Commonwealth” (October 1980) 2 W.I.L.J. 97 cautions, these derogation clauses are “... all imprecise in nature, and leave the door open to unnecessary legislative encroachments."

The second limitation in the enforcement of personal liberties under these constitutions involves the existence of saving clauses, which preserve existing written and unwritten law from invalidation because of inconsistency with provisions of the Bill of Rights provisions. The former Chief Justice of The Bahamas, the Honourable Telford

Georges, in an essay "The Scope and Limitations of the State Machinery" Int'l Comm'n of Jurists and Organization of Commonwealth Caribbean Bar Association, **Human Rights and Development** (1978) speaking of a similar clause in the Constitution of the Republic of Trinidad and Tobago, argues that such a clause "... considerably limits the scope of the machinery of judicial review as a method of enforcement of the rights apparently enshrined in the Constitution. The judicial view ... is that the constitutions create no new rights. They merely preserve existing rights."

The case of *Re Thornhil*l illustrates how rights stated in a Bill of Rights provision in the Constitution of Trinidad and Tobago was weakened by a pre-existing common law rule. Thornhill, who had been arrested on multiple charges, alleged that the police had denied him the right to communicate with the lawyer of his choice. The pre-Republican Constitution of Trinidad and Tobago, Section 2 (2) (ii), stated that no act of Parliament should deprive a person who has been arrested or detained of the right to retain and instruct without delay a legal adviser of his or her choice and to hold communication with him. Therefore, the defendant asked the Supreme Court of Trinidad and Tobago to declare, *inter alia*, that the police had contravened his constitutional right to legal counsel immediately after arrest.

The Attorney-General argued that there was no right to counsel at common law therefore it did not exist under the Constitution, since existing law had been preserved and could not be invalidated even if inconsistent with the Constitution. Justice Telford Georges, then the Chief Justice of Trinidad and Tobago and the trial Judge, rejected this view and stated: "I hold that the right now exists because the Constitution has proclaimed that it has always existed here and that it should continue to exist." The learned Judge

reasoned that the phrase “without delay” must not mean at the convenience of the investigators or at the stage where definable rights could be won or lost, but rather it “... is a right which arises immediately after arrest and that the right to exercise the right should be afforded without delay." The High Court of Trinidad and Tobago rejected this argument and concluded that the Bill of Rights was not intended to enlarge that body of rights which existed prior to the Constitution. However, the principal judgment of the High Court was based on another ground. The Court held that the police are not law servants of the state and as such they act independently; therefore, their actions could not be the basis for recovery for infringement, abrogation or abridgment of a fundamental right.

This decision by the High Court of Trinidad and Tobago elicited widespread criticism from legal commentators in the Caribbean. Dr. Francis Alexis, for example in the essay “After Thornhill: Does Anything Remain of the Bill of Rights?” **West Indian Law Journal,** October 1977, argued that this decision by the High Court was " ... a neat illustration of the dangerous cul-de-sac towards which the courts can be impelled by holding fast to the singularly unfortunate doctrine that the Bill of Rights did not create any right where before there was none.” Regarding the issue of whether the police are public servants or independent agents, Alexis pointed out that, unlike in England where the responsibility for financing the different police services is divided between the central Government and local police authorities, in the Caribbean the financing, maintenance and control of the police services are exclusively by central government, notwithstanding public and police service commissions. Alexis concluded that “Perhaps the ordinary individual’s most frequent contact with the State administration is that with the police ...

If, therefore, the police are excluded from the ambit of the Bill of Rights one may suggest .... that the Court of Appeal in *Thornhil* said an obituary on the Bill of Rights.".

However, this dire prediction was not realized, as the Privy Council reversed the Trinidadian Court of Appeal and held that an arrested or detained person has a right to consult counsel without delay after arrest or detention even while being in police custody thereby affirming the judgment of Mr. Justice Georges at the first instance. The net effect of the saving clauses in Caribbean constitutions has been to weaken and create ambiguity about fundamental rights stated with apparent clarity in the constitutions; thus, undermining the clear intent of the framers of the constitutions of these newly independent countries of the Commonwealth Caribbean.

The third limitation in the enforcement of the Bills of Rights concerns the common law rules of construction often applied by the Courts in constitutional interpretation which is based on notions derived from the British doctrine of Parliamentary Supremacy. Sir Leonard Knowles, former Chief Justice of The Bahamas, in regard to the rules of construction applied to constitutional interpretation in the Commonwealth Caribbean, quoted Lord Diplock, who in *Hinds v. The Queen (1976) 2 W.I.R. 372* stated that:

> "To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would, in their Lordships' view, be misleading ... there can be discerned in all those constitutions which have their origin in an Act of the Imperial Parliament at Westminster or an Order-in-Council, a common pattern of style of draftsmanship which may conveniently be described as the Westminster model."

The Privy Council in Minister of Home Affairs v. Fisher (1979) 3 All E. reiterated this principle *R. 21*. At issue here was a provision of the Bermuda Constitution which permitted legislative derogation from the right of freedom of movement of persons who did not "belong to Bermuda.'' The Privy Council held that in construing the constitutional definition of "persons who belong to Bermuda", the common law presumption that the word "child" excludes illegitimate children should not be followed. Lord Wilberforce cautioned that a constitution should not be interpreted like an act of Parliament, but that it requires "principles of interpretation of its own suitable to its character as already described, without necessary acceptance of all of the presumptions that are relevant to legislation of private law."

In spite of the Privy Council's apparently clear position that a constitution should not be interpreted like ordinary legislation, Lloyd Barnett, using the **Nasralla** case as an example, observes that in the Caribbean "frequently in constitutional cases judges state the principle of construction in a form which is indistinguishable from that utilized in the interpretation of ordinary statutes . . . the approach to constitutional interpretation has been largely dominated by English techniques of statutory interpretation."

It is instructive to contrast this practice of Constitutional interpretation in the Caribbean with constitutional practice in the United States. In U.S. constitutional jurisprudence the U.S. Supreme Court is the ultimate guardian of the freedoms and rights of the individual, facilitated through the power of judicial review established by the case **Marbury v. Madison** (1803) 5 U.S. 137. Professor Henry M. Hart in the essay "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic"

66 Harv. L. Rev. (1953) 1362 argues that Protection of the U.S. Bill of Rights is an essential function of the Court the jurisdiction of which cannot be destroyed by Congress. Using the political process rationale developed by Mr. Justice Stone, he contends that the Supreme Court is the guardian of the freedoms of the individual and the protection of minorities against the state and majoritarianism. However, Professor Derrick A. Bell, Jr. in **Race, Racism and American Law** (2nd ed. 1980) contends that the U.S. Supreme Court has not been consistent in maintaining this ''essential function'' with respect to the fundamental rights of African-American citizens, as illustrated by the cases *Plessy v. Ferguson (1896) 163 U.S. 537*, *Dred Scott v. Sandford (1857) 60 U.S. 393* and the *Slaughter-House* (1873) 83 U.S. 36 cases. Bell posits that the Court's role has been paradoxical in this area, swinging from extreme conservatism during the Post Civil War Reconstruction era to healthy activism during the civil rights era, the latter illustrated by decisions such as *Brown v. Board* of Education (1954) 347 U.S. 483, *Loving v. Virginia (1967) 388 U.S. 1*, and *Katzenbach v Morgan (1966) 384 U.S. 641*. Bell concludes that the degree of progress that African-Americans have made away from slavery and towards equality has depended on whether allowing blacks more or less opportunity best served the interests and aims of white society.

However, the U.S. Supreme Court, in an equality revolution begun by the Warren Court, established a dual standard of constitutional review, rational standard and the strict scrutiny standard and has readily found that all disadvantaging classifications resting on race and ethnicity are suspect and violate of the equal protection clause of the Fourteenth Amendment, treating discrimination based on national origin the same as discrimination against African-Americans in such cases as Yick Woo v. Hopkins, Hernandez v. Texas

and Trimble v. Gordon. Justice Black, in *Korematsu v. United States (1944) 323 U.S. 214*, stated that the Court in such situations will use a strict scrutiny standard of judicial review and not the rational basis standard normally applied to legislation:

> "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never will.[78]

Thus, the Court has outlawed invidious group differentiation which is irrelevant to a person's capabilities and contributions. The Court, in the case Plyler v. Doe (1982) 457 U.S. 202 also invalidated a Texas statute permitting local school boards to deny free education to school-aged children of illegal aliens as violating the equal protection clause of the Fourteenth Amendment.

The U.S. Supreme Court has also used the Due Process Clause of the Fourteenth Amendment to extend individual liberties. In *Griswold* Justice Douglas, using a penumbra theory, held that the right of privacy, though not specifically stated in the Bill of Rights, is nevertheless protected against unnecessarily broad state regulation. He posited that some of the explicit provisions of the Bill of Rights created a zone of privacy. He concluded that the right of married persons to use contraceptives fell within this penumbra. In *Roe v. Wade (1973) 410 U.S. 133*, Justice Blackman held that this right of privacy includes a pregnant woman's control over her own body and that her right to abortion was as an aspect of the right of privacy. Professor Lung-Chu Chen in the essay "Institutions Specialized to the Protection of Human Rights in the United States" 1 N.Y.L. Sch. Human Rights Annual 27 (1983) argues that the flexible, contextual approach of the U.S. Supreme Court in constitutional interpretation has resulted in more human rights

protection for more people in more areas, extending to all important value sectors. Caribbean Judges should be encouraged to demonstrate similar flexibility in developing our constitutional jurisprudence in the Commonwealth Caribbean.