CONSTITUTIONAL REFORM

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PART 10

RIGHT TO LIFE AND PROTECTION FROM INHUMAN TREATMENT: THE DEATH PENALTY

The Bahamas has executed by hanging 50 condemned persons from December 1929 to January 6, 2000, pursuant to the sentence of death pronounced by the Supreme Court of The Bahamas. There is presently one condemned prisoner awaiting execution. The murder rate is currently at 94 and climbing. Therefore, the fear of violent crime has elicited a public cry for a solution to crime. For some the resumption of hanging is the answer, in spite of the compelling evidence that capital punishment is not a deterrent to the rising rate of violent crime and the risk of wrongful convictions.

Professor Ann Spackman, in her book **Constitutional Development of the West Indies** 1922-1968 (1975) at page 21, argues that one of the legacies of plantation slavery, colonialism and racial oppression in the Caribbean is the continuing "emphasis on coercion and control" and the existence of harsh laws enforced in a punitive spirit during most of the historical experience of the Caribbean since 1492. Lloyd Barnett, Q.C., in an essay entitled "The Present Position Regarding the Enforcement of Human Rights in the Commonwealth" in the **West Indian Law Journal** (November 1980), counters that the Commonwealth Caribbean, in addition to having legacies of slavery and colonialism, has also been the beneficiary of the Common Law which flowered into passionate self determination and aspiring constitutionalism.

However, the challenge facing constitutional jurisprudence in the Caribbean is to move away from the English techniques of statutory interpretation, applicable to ordinary legislation,

when interpreting the Constitution that requires a more flexible and purposive interpretation, informed by International Human Rights Instruments and the evolving global standard of human rights, human decency and norm of respect. The Privy Council, in **A.G. of Gambia v. Jobe** (1985) held that there should be a liberal and contextual construction of the Constitution to give effect to the intent and purpose of the Constitution.

The tension between the punitive application of the law and restorative justice approach is most vividly illustrated around the issue of the death penalty in The Bahamas. Articles 16, 17 and 30 of the Bahamian Constitution provide:

> **"16. (2) No person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.**
>
> **(2) A person shall not be regarded as having been deprived of his life in contravention of this Article if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justified - . . ."**
>
> **17. (1) No person shall be subjected to torture to to inhuman or degrading treatment or punishment.**
>
> **(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10th July 1973.**

30. (1) . . . Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Articles 16 to 27 (inclusive) of this Constitution to the extent that the law in question –

(a) is a law (in this Articles referred to as 'an existing law') that was enacted or made before 10th July 1973 and has continued to be part of the law of The Bahamas at all times since that day."

Saving clauses, such as contained in Article 17 (2) and the general saving clause contained in Article 30 (a), which were intended to be transitional until law reform removed existing laws inconsistent with the Constitution, are sometimes used to limit the enforcement of personal liberties granted by the Constitution. Chief Justice Telford Georges, in an essay entitled "The Scope and Limitations of the State Machinery" in **Human Rights and Development** (1978) at page 45, argued, with respect to a similar clause in the Constitution of Trinidad & Tobago, that such clauses ". . . 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."

Article 30 (a) is construed as saving Section 312 of the Penal Code that pronounces that the death penalty is the punishment for murder as being compatible with and not in contravention of any of the fundament rights and freedoms contained in Articles 15 to 27. Until 2011 the mandatory sentence of death by hanging was applied upon the conviction of murder and treason.

However, the Privy Council, informed by the evolving jurisprudence in Europe, has forced the Commonwealth Caribbean to conform to the evolving standard of human decency and human rights in the application of the death penalty. In 1993 the Judicial Committee of the Privy

Council, in the case **Pratt and Another v. Attorney General of Jamaica** (1993), held that the execution of the death penalty after 5 years was unconscionable delay and would constitute a contravention of Article 17 (1) of the Constitution, except where the delay had been the fault of the accused. This ruling resulted in scores of condemned prisoners in The Bahamas having their death sentences commuted to life imprisonment due to delay. In 2000 the Privy Council, in **Neville Lewis,** overturned **Reckley v. Minister of Public Safety and Immigration** (1996) and held that (a) a condemned prisoner has a right to the secure protection of the law and to due process which would be denied if he were to be executed before the completion of a hearing before the Inter-American Commission on Human Rights; (b) that a condemned prisoner who applied for mercy had a due process right to know what material had been placed before the Prerogative Committee on Mercy and be afforded the right to make representations and know the reasons for the decision which process is subject to judicial review; and (c) that the passage of time and their treatment in prison may constitute inhuman or degrading treatment. In **Henfield and Ricardo Farrington v. A.G. of The Bahamas,** the Privy Council reduced the period by which The Bahamas must execute a condemned prisoner from 5 years to 3 ½ years due to an oversight that The Bahamas is a party to the Inter-American Commission on Human Rights. The 5 years rule was subsequently reinstated. The Privy Council, in **Forrester Bowe, Jr. and Trono Davis v. The Queen** (2006), held that section 312 of the Penal Code Act that declares the mandatory sentence of death for the conviction of murder "should be construed as imposing a discretionary and not a mandatory sentence to death." Consequently, the mandatory sentences of death imposed on Forrester Bowe, Jr. and Trono Davis were quashed and the cases were remitted to the Supreme Court for consideration of appropriate sentences.

In light of the Privy Council's ruling in **Forrester Bowe, Jr.**, the Parliament of The Bahamas amended the Penal Code Act in 2011, by removing the mandatory sentence of death for the conviction murder and setting out the circumstances that will attract the death penalty of a person convicted for murder, such as the murder of a member of the police force, a prison officer, a member of the defence force, a judicial officer, a witness, a juror, the murder of a person during the course of a felony or the murder of more than one person.

The trend in judicial reasoning by the Privy Council, informed by the evolving standard of human rights and human decency, will eventually lead, in my opinion, to a judicial finding that the death penalty is contrary to human rights and human decency. The reaction in The Bahamas and the wider Commonwealth Caribbean to this trend has been a desperate effort to retain the death penalty. In this context, some advocates have proposed delinking The Bahamas from the Privy Council as the final appellate court for The Bahamas in favour of either the establishment of final appellate court in The Bahamas or by accepting the compulsory original jurisdiction of the Caribbean Court of Justice.

The Bahamian society, on reflection, must determine whether the death penalty is a deterrent to crime or cold-blooded killing by the State, which brutalizes the offender and the society. When the State kills does it lessen its offensiveness and elevates killing into principle? If the justification is the principle of "an eye for an eye", should we not also advocate that rape be undertaken by the State as a punishment for rape? Chief Justice Gubbay of the Supreme Court of Zimbabwe, in the case **Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General and Others** (1993), argued that retribution is not a sound rationale for the death penalty as follows: "Because retribution has no place in the scheme of civilized jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional

rights. Humaneness and dignity of the individual are the hallmarks of civilized laws. Justice must be done dispassionately and in accordance with constitutional mandates. The question is not whether this court condones the evils committed by the four condemned prisoners, for certainly it does not. It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death, is consistent with the guarantee against inhuman, or degrading punishment or treatment."

The European Court of Human Rights in the case **Soering v. the United Kingdom** (1989) abolished the death penalty in the European Union. Similarly, South Africa, Australia, India, New Zealand, Namibia, The Gambia, for example, have also abolished the death penalty. In the United States, 18 states have abolished the death penalty.

In The Bahamas, without an adequate public defender's system, there is a significant risk that innocent persons may be wrongly convicted for murder, since most defendants in capital cases tend to be poor African Bahamian men, sometimes with mental problems and background of abuse. There needs to be a more disciplined focus on the causes of crime in The Bahamas and the comparative deterrence of the death penalty in relation to life imprisonment.

RECOMMENDATION

1. The Government should commission the College of the Bahamas and the Eugene Dupuch Law School to conduct a scientific study to determine the comparative deterrence between the death penalty and life imprisonment to inform public education and policy on the issue of the death penalty.

2. The Law Reform Commissioner should be directed to conduct a comprehensive review of all “existing laws” that may be saved under the “existing law provisions” of the Constitution and recommend amendments to ensure consistency of all laws with the Constitution.