SHORTER ARTICLES, COMMENTS AND NOTES

THOMAS AND HILAIRE v. BAPTISTE AND THE ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO

RIGHTS ARISING AFTER THE PROMULGATION OF FUNDAMENTAL RIGHT AND FREEDOMS

THE extent to which it is appropriate to interpret constitutional provisions and in particular fundamental rights in accordance with the law and understanding current at the time of their promulgation, is a fundamental issue in any legal regime into which a Bill of Rights is introduced. This is well illustrated in a recent decision by the Judicial Committee of the Privy Council.

While the decision in *Thomas and Hilaire*[1] may be applauded for its result, a number of troubling issues arise from the majority judgment, one of which will be the focus of this note, because of the way it engages certain foundation cases in the jurisprudence of the Bill of Rights in the Constitution of Trinidad and Tobago. The issue has implications too, for the understanding of the operation of other Bills in the Commonwealth Caribbean.

The appellants, convicted of murder, claimed a constitutional right to have their petitions pending before the Inter-American Commission on Human Rights (IAComHR) heard and determined, before the State could execute them. This claim was upheld by the Privy Council. The Court declined to find that to execute the appellants while the petitions pended would constitute a breach of the right not to be subjected to "cruel and unusual punishment or treatment" set out in section 5(2)(b) of the Constitution. It rejected too, arguments based on the legitimate expectation concept and declared that the appalling conditions on "death row" did not breach section 5(2)(b), and that even if they had, the carrying out of a lawful sentence of death could not rendered unconstitutional by reason of inhumane conditions under which condemned persons were held. Lord Steyn dissented on this point.

In May 1991, the government of Trinidad and Tobago had ratified the American Convention on Human Rights and in so doing allowed persons in Trinidad and Tobago to complain of violations of the Convention to the IAComHR.[2] The state had also recognised the compulsory jurisdiction of the Court to give binding rulings on the interpretation and application of the Convention and to which the Commission could refer cases. Their Lordships

1. [1999] 3 W.L.R. 249 (PC).

2. The Commission was *not*, as stated by their Lordships established by the American Convention but in 1960 and is thus an organ both of the Organisation of American States (OAS) and of the Convention. It is also to be noted that Trinidad and Tobago as a member of the OAS, can have "complaints" brought against it before the Commission, by reference to the Charter of the OAS and the *American Declaration of Human Rights* (1948).

affirmed the established principle that the terms of an unincorporated international convention could not "effect any alteration to domestic law or deprive the subject of existing legal rights". To admit the appellants claim was therefore to deny reliance on the Convention, and, it might have been thought, the fact of ratification thereof by the state.

The constitutional provision relied on by the applicants was that stated in section 4(a) of the constitution, that to life, liberty and property, and not to be deprived thereof save by due process of law. The judgment therefore had to find that execution before the Commission proceedings had been concluded would be a breach of due process as set out in section 4(a). According to the Privy Council, the appellants were asserting, the general right accorded to all litigants by the common law, not to have the outcome of any pending appellate or *other legal processes* pre-empted by executive action. The right to have these processes not "rendered nugatory by executive action" before it was completed was "part of the fundamental concept of due process".[3] The proposition just stated is no doubt unobjectionable, even if the common law right may not have been so articulated previously. No doubt, to counter the argument that due process referred to domestic proceedings, the Privy Council was compelled to assert further, that in acceding to a treaty, "for individual access to an international body, the Government made that process for the time being part of the domestic criminal process". The Privy Council therefore must have admitted a *right* of access to the Commission, even though asserting that that was not the issue before the Court, but merely the (general) right at common law as reaffirmed in section 4(a), to see proceedings through to a final determination. This anomaly was perhaps adverted to by two dissenters, Lords Goff and Hobhouse, when they remarked that in asserting a right to have a concluded determination from the Commission the majority were "assuming what they [had] to prove, that the opportunity to invoke the jurisdiction [of the Commission] constituted a legal right and therefore part of the legal process of the Republic".[4]

But the need to find a *common law basis* for the right not to be executed before the Commission's determinations were concluded, was based not only on the demands of the rule regarding non-incorporation, but on an apparent acceptance of "the principles, well established by decisions of this Board that *constitutional protection does not extend to rights created after the constitution* came into force and that it is limited to the rights set out in section 5(2) or rights analogous thereto".[5] The Court then referred to *De Freitas* v. *Benny*; *Maharaj* v. *Attorney-General (Trinidad and Tobago)* (No.2) and *Thornhill* v. *A.G. (T&T)*.[6] It is with the cited passage that the note takes issue, for with it the Privy Council has inverted the jurisprudence of the special savings of existing law against

3. *Op. cit.*, *supra* n.1, at 261(B).

4. *Ibid.*, at 271(A).

5. *Ibid.*, at 260(D). Apart from subclause (b), s.5 of the Trinidad and Tobago Constitution confers procedural rights, such as that to access to counsel on arrest litigated on *Thornhill*; the right "of the remedy by way of *habeas corpus* for the determination of the validity of a detention; the established fair trial rights (albeit not one to a speedy trial)—such as that to legal representation, and trial by an impartial tribunal."

6. At [1976] A.C. 239; [1979] A.C. 385 and [1981] A.C. 51 respectively.

fundamental rights and freedoms and, distinctly, robbed laws and rights created after the constitution of constitutional effect, a result not demanded by any constitutional provision. Indeed, if "future laws and rights" created by them have no "constitutional protection" and given, that laws in effect at the commencement of the constitution cannot be challenged because of the effect of the special savings clause in some Bills of Rights, the constitutional conferment of fundamental rights becomes if not nugatory and without effect, of very limited significance.

"Rights created after the constitution" one supposes is a reference to "ordinary" legal rights, which would hardly occur in legislation enacted after the Constitution(s) came into force. The statement appears to mean that the constitutional protection effected by the conferral of fundamental rights cannot apply to "future rights or laws" and in the case of Trinidad and Tobago only where these are analogous to section 5 rights. The first question is whether the cases cited do establish this proposition. These cases were concerned with the relation between law extant at the promulgation of the constitutions and the conferred rights and not with that between future law and the rights, though in explicating the issues before it, observations were made by the Privy Council on "future law". Addressing the existing law problems involved not only an examination of the operation of the special savings clauses, but also the underlying understanding on which the Bills were premised. *Maharaj* (No.2), cited Lord Devlin in *DPP (Jamaica)* v. *Nasralla* thusly: "[The Bills] proceed on the presumption that the fundamental rights are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to something in order to see whether or not they conform [to the Bill of Rights] provisions. [Their] object is to ensure that *no future* enactment shall in any matter ... derogate from rights enjoyed at the coming into force of the Constitution."[7] This statement, though noxious in that it *hints* at the idea that current *understandings* of fundamental rights and freedoms, reflect the extent of constitutional recognition to be given to future laws or future rights, hardly means that such laws or rights *cannot* be accorded such recognition.

Thornhill and *Maharaj* (No.2) showed that the appellants enjoyed the constitutionally stated rights under existing law or in the case of *Thornhill* as a matter of settled (existing) executive practice which had been expressed in and converted into a right in the Bill of Rights. Thus, under existing law no one could be committed to prison without a hearing (*Maharaj*) and under existing practice, the police had granted access to counsel to detained persons, even though no statute stated this entitlement and there was doubt as to its status at common law. The saving of existing law against the rights stated in the constitution did not render existing law unlawful, nor was a settled executive practice which was *not unlawful*, made so by the savings clause. Conversely, the clause did not render lawful any action unlawful under existing law—committal in breach of the principles of natural justice. The state, the defendant in the two cases, had focused on existing law to argue that the lack of judicial immunity and therefore the lack of a remedy in the case of *Maharaj*, and a similar lack of remedy under the law as at

7. [1967] A.C. 238, 247, cited in *Maharaj* (No.2) at 395(D). The "presumption" in the *Nasralla* statement was said to underlie the Trinidad & Tobago Bill of Rights in *De Freitas* v. *Benny*, at 244.

the commencement of the constitution, in a detained person refused access to counsel, meant that there was no constitutional protection for the appellants in the two cases and that their action for redress for breach of fundamental right must fail.

Unhappily, the hint given in *Nasralla* was made express in *Maharaj* and this *perhaps* accounts for "the future right" thesis in *Thomas and Hilaire*. Future laws or future rights do not figure in *Thornhill*. Lord Diplock did in *Maharaj*, pronounce to the effect that present (as at the time of the Constitution) understandings of the rights provisions would determine the extent of the protection given were future laws to be measured against those provisions. It was said: "[T]he extent to which, in his exercise and enjoyment of rights and freedoms, capable of falling within the broad descriptions in the section, the individual was entitled to protection or non-interference under the law as it existed immediately before the Constitution. That is the extent of the protection or freedom from interference by the law, that shall not be abrogated, abridged or infringed by any future law." This passage does not however, quite set out the proposition stated in *Thomas and Hilaire*, and at least allows for protection under the constitution, of "new rights" to the extent that the existing law of the *constitutional rights* was capable of embracing the new rights.

A version of the "no constitutional protection for new rights" thesis had occurred in *Fisher* v. *Minister of Public Safety (No.2)* decided by the Privy Council, five months before the case discussed. The Court peremptorily observed that it could not have been a breach of the constitutional provision litigated to "execute without waiting for a decision of the Commission, before 10 July 1973. The Bahamas was not *then* a party to the Organisation of American States. *It follows that it is not in contravention of Article 17 now.*"[8] The date mentioned was that on which the constitution with its fundamental rights and freedoms came into effect. *Fisher* then, was a bald and literal assertion of the idea that a right or an alleged right, created after the promulgation of the constitution would receive no protection thereunder.[9] Noticeably too, no attempt was made to accommodate, the idea, allowed for in the *Maharaj* passage set out earlier, that "future rights" or "future laws", could receive protection, *to the extent that they could be brought within the* "broad descriptions" of *fundamental rights* set out in the Constitution.

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8. (1999) 2 W.L.R. 349, 355 (PC).

9. The Privy Council was very much aware of the *Fisher* decision in *Thomas and Hilaire*, in which it noted "an absence" to a reference to "due process" in the right to life clause in The Bahamas. Moreover, the *Fisher* decision, emphasised the fact that the right to life clause concerned, proscribed deprivation of life unless by sentence of court, such court could only be a domestic court.