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The Commonwealth Caribbean and the International Covenant on Civil and Political Rights*

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On 8 November 1996 the Human Rights Committee will end its 58th session. That date will mark the completion of two decades of work by this important treaty-based organ.

This fact alone might be deemed to be sufficient to justify certain, albeit personal, observations with a fair degree of certainty, a certainty that stems from in-depth study, comparison and observation of the progress and developments in the field of human rights which has been achieved at a constantly increasing pace since the collapse of Soviet communism and its Eastern Bloc.

These observations will be mainly confined to the Caribbean region, although most of them are equally applicable to most regions.

The Human Rights Committee has to date examined the reports of nearly all of the 134 States Parties to the International Covenant on Civil and Political Rights (ICCPR). As some of them have entered the fourth cycle of their reporting obligations, the Committee has in fact examined over 300 initial, periodic and special reports.

The aforesaid reports include a rather small number of reports from Commonwealth Caribbean states. This is due to both the limited number of Caribbean states which are parties to the ICCPR, and to neglect of their reporting obligations.

As well as these reports, the Committee has to date dealt with over 710 communications, many with more than one alleged victim, and has completed consideration of all but 150 of them. Of this total, nearly 200 emanated from four Caribbean countries. About 68 of these are still pending. The proportionately high percentage of communications originating from Caribbean states can only be partly explained by the fact that in their vast majority the communications from these states involve the imposition of the death penalty.

The Human Rights Committee consists of 18 members who are independent experts, and it could be said that it has been blessed by a membership whose calibre is higher than average

* [***EDITOR'S NOTE:*** *After this paper was written, in October 1997 Jamaica notified the UN of its withdrawal from the Optional Protocol to the ICCPR. In May 1998, Trinidad and Tobago also announced its withdrawal from the Optional Protocol, purporting to re-accede to that instrument with a sweeping reservation precluding the Human Rights Committee from hearing any cases relating to the death penalty. (At the same time, Trinidad and Tobago also withdrew as a party to the American Convention on Human Rights.)*]

for such committees. Its tasks are threefold:

> (a) It considers the reports of States Parties on measures taken to give effect to the rights recognized by the Covenant. The initial report has to be submitted within one year of the entry into force of the Covenant for that State Party. The periodicity of subsequent reports is five years. The committee may also ask for special reports whenever the human rights situation in a state makes it desirable to do so. It has done this in respect of several countries including those of the former Yugoslav Federation.
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> (b) The second task is consideration of communications (or individual petitions) from complainants against States Parties to the Covenant which are also parties to the Optional Protocol. By now there exists a very important body of jurisprudence of interest to governments, judiciaries, and others.
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> By 3 July 1996, 708 communications had been filed, of which 153 are still pending, including 108 still at the pre-admissibility stage. While 220 were declared inadmissible and 112 were discontinued, after a full consideration of the merits of 223 cases, violations were found in respect of 165 of them.
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> (c) The Committee may also receive and consider a communication by a State Party to the Covenant, that has accepted Article 41 thereof, against another State Party that has also made a similar declaration of acceptance, alleging that the latter is not giving effect to the provisions of the Covenant and thus is not fulfilling its obligations thereunder.
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> No such communications have, as yet, been received and it is my feeling that none is to be expected in the near future, as this type of procedure has in practice proved to be more appropriate for action under regional arrangements between like-minded states, than for action under global mechanisms.

The first two decades of the life of the Human Rights Committee have witnessed, despite understandable complaints by NGOs, considerable progress in the enjoyment of human rights, especially in so far as it concerns Third World and former Eastern Bloc countries. The new Commonwealth countries and particularly Caribbean ones, viewed as a region, have fared quite well. The fact that my theme obliges me to concentrate on certain problems of compliance with international standards in no way detracts from this assessment.

Human rights and the common law

Commonwealth countries, in so far as the application of international human rights standards is concerned, start from a distinct advantage in that most of these standards were first developed in the fertile field of common law. For example, common law countries

were amongst the first to ensure, by means of appropriate mechanisms, the independence of the judiciary.

However, sometimes this advantage is turned into an obstacle by a reluctance to accept either new related concepts or even further development and broadening of the same principles when they do not have a purely common law pedigree. There is a danger of forgetting that in our contemporary world one cannot nourish efforts for the protection and promotion of human rights solely on a diet of common law precedent.

Often the work and the jurisprudence of international human rights mechanisms, or even bills of rights contained in duly ratified international or regional treaties which under the constitutions of some countries are accorded a superior status to that of municipal law, were deemed to be a form of outside interference, and means were devised to exclude, ignore or doubt their usefulness and validity. In short, there sometimes exists considerable reluctance to accept anything that occurs outside the territorial limits and is intended to amend or improve something that obtains municipally.

Another factor is that the general socio-economic conditions in most of the former colonies did not permit them to bring their legislation up to date, and in some instances some aspects of it remain almost archaic.

International treaties

The 1970s and 1980s were the era of human rights, and many considered that a country would have no claim to respectability unless it acceded to or ratified all available human rights treaties. Thus a number of countries proceeded with ratification or accession without even a rudimentary study of their legislation and the Covenant in order either to enter a reservation, if appropriate, or to ensure substantial compliance with the Covenant's provisions. There were also even a few countries that accepted the Optional Protocol and that was the last time the Committee has heard from them despite a number of communications.

Human rights treaties are not mere exchanges of obligations between states, but are there for the benefit and protection of persons within their jurisdiction. They provide for mechanisms to monitor and ensure compliance and to receive individual petitions (providing, when appropriate, a remedy). Moreover, the Covenant contains no denunciation clauses. These characteristics make it a *sine qua non* for States Parties to have in place, prior to ratification, all that is essential in order to be able to comply with the legally binding obligations that treaties such as the Covenant impose on them.

Failure to give effect to this is one of the reasons why certain countries do not benefit to the maximum extent possible from human rights instruments.

Particular difficulties with compliance

I shall now deal with certain problems, not unique to the Caribbean, that affect compliance with international standards. I shall concentrate mainly on the death penalty and fair trial.

I have already referred to antiquated legislation, and wish to add that this covers not only procedural issues but also such other important matters as intention, malice aforethought, premeditation, provocation, insanity, degrees of murder, diminished responsibility manslaughter, failure to define torture (as distinct from other forms of assault) as a specific criminal offence, problems of identification of culprits, and the voluntary or non-voluntary nature of confessions.

There are inordinate delays in respect of trials and appeals, mostly due to lack of resources, which often turn the question of the availability of the trial record into a modern odyssey. Such delays,together with the absence of an effective scheme of legal aid, funded by the state and assisted when necessary by local bar associations, that would ensure adequate legal representation from arrest all the way to the Privy Council (when applicable) and including constitutional recourses which relate to the conduct of trials, hinder the provision of fair trial.

Today there are a number of procedures whereby such constitutional recourses are dealt with effectively and expeditiously so that delays and duplication are avoided.

Death penalty

In so far as the imposition of the death penalty is concerned, the situation in the Caribbean is in substantial compliance with the letter and spirit of the Covenant in that the death penalty is imposed only for the most heinous crimes, and the mandatory sentence of death is now confined to first degree or capital murder, thereby correcting anomalies due to the old concept of malice aforethought. However, I would like to stress that whilst the Covenant does not prohibit, but only limits, the imposition of the death penalty, it clearly envisages the progressive abolition thereof. Thus the increase in the number of crimes carrying the death penalty, or its reimposition after its abolition, is in all probability contrary to the Covenant.

According to the jurisprudence of the Human Rights Committee, the method of execution is important, as it could violate the provision of Article 7 that deals with cruel punishment. Death by hanging is of doubtful consonance with international standards, and death by gas asphyxiation definitely, according to the Human Rights Committee, violates Articles 7 and 10 of the Covenant.

The mandatory imposition of a death sentence would be contrary to Article 14(5) of the Covenant which provides for review (appeal) of both conviction and sentence by a higher tribunal.

I should also say a few words about what has become known as the "death row

phenomenon", first propounded by the European Court of Human Rights and then taken up by the Judicial Committee of the Privy Council in a case from Jamaica.

The position of the Committee which is held by a fast eroding and thin majority is, in a nutshell, as follows:[1]

> "... While a period of detention on death row of well over 11 years is certainly a matter of serious concern, it remains the jurisprudence of this Committee that detention for a specific period of time does not amount to a violation of Articles 7 and 10(1) of the Covenant in the absence of some further compelling circumstances. The Committee is aware that its jurisprudence has given rise to controversy and wishes to set out its position in detail.
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> The question that must be addressed is whether the mere length of the period a condemned person spends confined to death row may constitute a violation by a State party of its obligations under Articles 7 and 10 not to subject persons to cruel, inhuman and degrading treatment or punishment and to treat them with humanity. In addressing this question, the following factors must be considered:
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> (a) The Covenant does not prohibit the death penalty, though it subjects its use to severe restrictions. As detention on death row is a necessary consequence of imposing the death penalty, no matter how cruel, degrading and inhuman it may appear to be, it cannot, ***of itself***, be regarded as a violation of Articles 7 and 10 of the Covenant.
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> (b) While the Covenant does not prohibit the death penalty, the Committee has taken the view, which has been reflected in the Second Optional Protocol to the Covenant, that Article 6 'refers generally to abolition in terms which strongly suggest that abolition is desirable'....
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> (c) The provisions of the Covenant must be interpreted in the light of the Covenant's objects and purposes (Article 31 of the Vienna Convention on the Law of Treaties). As one of these objects and purposes is to promote reduction in the use of the death penalty, an interpretation of a provision in the Covenant that may encourage a State party that retains the death penalty to make use of that penalty should, where possible, be avoided.
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> In light of these factors, we must examine the implications of holding the length of detention on death row, *per se*, to be in violation of Articles 7 and 10. The first, and most serious, implication is that if a State party executes a condemned prisoner after he has spent a certain period of time on death row, it will not be in violation of its obligations under the Covenant, whereas if it refrains from doing so, it will violate the Covenant. An interpretation of the Covenant leading to this result cannot be consistent with the Covenant's

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1 *Errol Johnson v Jamaica*, 588/1994, views adopted by the Committee 22 March 1996, UN Doc CCPR/C/56/D/588/1994 (5 August 1996).

> object and purpose. The above implication cannot be avoided by refraining from determining a definite period of detention on death row, after which there will be a presumption that detention on death row constitutes cruel and inhuman punishment. Setting a cut-off date certainly exacerbates the problem and gives the State party a clear deadline for executing a person if it is to avoid violating its obligations under the Covenant. However, this implication is not a function of fixing the maximum permissible period of detention on death row, but of making the time factor, *per se*, the determining one. If the maximum acceptable period is left open, States parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.
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> The second implication of making the time factor *per se* the determining one, i.e. the factor that turns detention on death row into a violation of the Covenant, is that it conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death. ...
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> In the present case, neither the author nor his counsel have pointed to any compelling circumstances, over and above the length of the detention on death row, that would turn Mr Johnson's detention into a violation of Articles 7 and 10...."[2]

The views of the members of the Committee who have dissented are quite significant and it is pertinent to include excerpts from the individual opinion of one of them:

> "However, the Committee, conscious of the risks of maximalist application of such a view by States, recognizes that keeping a person under death sentence on death row for a number of years is not a good way of treating him.
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> This position is very debatable for the following reasons:
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> It is true that the Covenant does not prohibit the death penalty;
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> It logically follows from this that execution of the penalty is also not forbidden and that the existence of a death row, i.e. a certain period of time prior to execution, is in this sense inevitable;
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> On the other hand, one cannot rule out the conclusion that no time-lag can constitute cruel, inhuman or degrading treatment by postulating that awaiting death is preferable to death itself and that any sign to the contrary

2 Ibid, para 8.

> emanating from the Committee would encourage the State to proceed with a hasty execution.
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> This reasoning may be considered excessively subjective on two counts. In an analysis of human behaviour, it is not exceptional to find that a person suffering from an incurable illness, for example, prefers to take his own life rather than await the inevitably fatal outcome, thereby opting for immediate death rather than the psychological torture of a death foretold.
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> As to the 'message' which the Committee refuses to send to States lest the setting of a time-limit provoke hasty execution, this again is a subjective analysis in that the Committee is anticipating a supposed reaction by the State. ...
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> I therefore believe that being on death row cannot in itself be considered as cruel, inhuman or degrading treatment. However, it must be assumed that the psychological torture inherent in this type of waiting must, if it is not to constitute a violation of Article 7 of the Covenant, be reduced by the State to the minimum length of time necessary for the exercise of remedies.
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> Consequently, the State must:
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> - Institute remedies;
> - Prescribe reasonable time-limits for exercising and examining them. ...
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> However, since the Covenant does not prohibit capital punishment, its imposition cannot be prohibited, but it is incumbent on the Human Rights Committee to ensure that the provisions of the Covenant as a whole are not violated on the occasion of the execution of the sentence.
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> Inevitably, each case must be judged on its merits: the physical and psychological treatment of the prisoner, his age and his health must be taken into consideration in order to evaluate the state's behaviour in respect of Articles 7 and 10 of the Covenant. Similarly, the judicial procedure and the remedies available must meet the requirements of Article 14 of the Covenant...."[3]

Although subscribing to the logic of the majority view, I do believe that there might come the time when prolonged incarceration on death row may itself amount to "compelling circumstances". The solution does not lie in a fixed cut-off date but should depend on individual circumstances.

My last point on the question of the death penalty is simply a plea to States Parties to respect what we call "Rule 86 decisions"[4] by the Committee requesting the State Party not to execute the sentence until the Committee completes consideration of the case. To do

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3 Ibid, p 11.

4 Rule 86 of the Committee's Provisional Rules of Procedure.

otherwise is not just a violation of an obligation under international law but also a complete disregard of what is perhaps the most valuable gift to mankind, the right to life.

There have been dozens of instances of compliance with Rule 86 decisions and two regrettable instances[5] of non-compliance. These two cases highlight the problems which have arisen from fixing a maximum specific time limit on death row which does not in practice allow sufficient time for the exhaustion of all possible appeals.

Fair trial

In the field of human rights the quintessence of protection is to be found in the courts of law, and its embodiment is the fair trial. It should be realized that constitutions, even those that have included verbatim the texts of international instruments, contain only minimum standards, which at the international level are frequently supplemented by subsequent instruments and the practice and jurisprudence of human rights organs.

There are a lot more difficulties in respect of fair trial, most of which are systemic in the sense that protection emanates from the Constitution, municipal laws and existing common law principles and that international obligations seem to be immaterial if they cannot be found in any of the above. The most recent example was the Privy Council's June 1996 decision in *Director of Public Prosecutions v Tokai*,[6] a Trinidad and Tobago case that involved an unacceptably long delay in bringing the accused to trial.

The above, coupled with the almost universal lack of enabling laws or mechanisms that permit the implementation of views or decisions of international treaty bodies, makes ineffective the protection that states have voluntarily covenanted to ensure to both citizens and aliens within their jurisdiction.

Trial without undue delay is one of the most frequent grounds for complaints and covers not only preliminary enquiries and first instance trials but also appeals. A lot more importance is attached to the former, as trials involve witnesses and their power of recollection.

A lot of what has already been said in respect of the death row phenomenon is relevant to this, and delays in preparing the record of trials or appeals or providing written reasoned judgments have also often accounted for inordinate delays, although in this regard matters have recently improved greatly in the region.

Legal aid is another one of the problems faced in respect of fair trial. Legal assistance should be assigned to an accused person, without payment if he does not have sufficient means to pay for it, throughout the criminal process. Preferably it should start upon arrest and continue to the very end of the appeal process including such constitutional or other recourses as would adjudicate on the fairness of the trial.

5 *Glen Ashby v Trinidad and Tobago*, 580/94; *Rockliffe Ross v Guyana*, 702/96.

6 [1996] 3 WLR 149.

There should be in place a system of legal aid that ensures not only availability but also adequacy of legal representation. Time and again, in going through the records of trials and appeals, the Human Rights Committee has been struck by the apparent inadequacy of representation, often due to lack of interest because of ridiculously low fees. The question of adequacy could also be raised in respect of privately engaged counsel and this is an issue where the bench can also play an important role.

There also exist difficulties connected with inadequate time for preparation of a defence, lack of efforts to trace witnesses, stereotype defences, such as is sometimes the case with alibi, with the accused making unsworn statements from the dock, and delay at police stations, either in informing a suspect of the reasons for his arrest and detention, or in bringing him before a magistrate for a remand order. The question of the admissibility of confessions also frequently raises problems, particularly as such confessions are often the only evidence in an otherwise weak prosecution case.

Conclusion

Human rights are the birthright of every woman and man on the planet. They are too precious to depend for their implementation on the largesse of governments or the "length of the Chancellor's foot". They are too vital to be employed by the great powers as a tool to combat totalitarianism or authoritarianism and even then only when economics and geostrategics permit it. And they are too urgent, after years of neglect, to be dehumanized by being given low priority in state planning and projections. It is the duty of all of us to promote their application before it is denied to us.

Although it is true that developing countries face more problems in applying social and economic rights with indirect effects on civil and political rights, there is no human rights paradise and even wealthy developed countries, especially when facing problems connected with internal security, insurrection, crime, immigration or other social problems resort to action that gives the basic principles of human rights a very wide berth.

My long association with the Caribbean and with human rights permit me a number of suggestions.

Firstly that, as is the case almost everywhere, steps are urgently needed to improve awareness, not only because awareness is the necessary prerequisite to claiming one's rights, but also because it will remedy the anomaly of a region with the Caribbean's sophistication, humane approach to problems, and dedication to democracy having a rather poor record of acceptance of basic international human rights conventions such as the two Covenants.

The local bar and other lawyers' associations have a particular responsibility to improve their knowledge of international human rights law and act as the catalyst that would ensure its eventual entrenchment in systems that have closed their shells to it.

Given the very nature of human rights, with the Universal Declaration being considered part of customary international law, the fact that acceptance of its tenets has now become an important factor in international relations and almost a precondition to the granting of economic aid, and the acceptance by all that efforts to improve states' compliance with human rights norms is not considered to be interference in their internal affairs, governments in the region should urgently consider, *inter alia*, the following:

(a) entrenchment of international human rights instruments in their legislation and/or establishing a bill of rights with a ranking higher than ordinary municipal legislation;

(b) the initiation or completion of a thorough study of their laws, regulations and jurisprudence so as to ensure consonance with the provisions of international instruments applicable to them;

(c) given that constitutional provisions in respect of human rights are rather limited, and may in many cases permit infringements which are prohibited by international instruments, governments should also take all measures necessary to ensure that views, recommendations and decisions of international organs or mechanisms supervising the implementation of human rights treaties and/or dealing with individual petitions or communications are implemented, by means of enabling legislation or some other process, as soon as possible;

(d) governments should also improve, as necessary, human rights provision in their constitutions or basic laws, and provide additional protection by introducing new institutions such as independent national human rights commissions, ombudsmen, and, when applicable, by accepting provisions in international conventions such as the (first) Optional Protocol to the Covenant on Civil and Political Rights;

(e) improve generally, in the case of the Covenant, co-operation with the Human Rights Committee and in particular give full and not incomplete or stereotype replies to allegations in communications under its Optional Protocol and also accelerate the rate of compliance with the views of the Committee; and

(f) include the subject of human rights in the curricula of schools, universities, police and military academies, and in bar examinations.

The above will help to maximize the benefit from international human rights treaties. However, as we all realize, it sometimes happens that a country does not have the economic or human resources to do what is necessary in the field of rights and freedoms. Such a lack of resources can lead, among other things, to delays in producing periodic reports to the Committee by most, if not all, countries of the region. In that case they should turn to

regional or UN advisory services that are there to help. The Human Rights Committee and its individual members, at least in so far as the Covenant on Civil and Political Rights is concerned, are quite willing to lend a helping hand on this.