# 12

# The Right to a Fair Trial and Access to Justice in the Commonwealth Caribbean

*Hon Mr Justice Stanley Moore*

## Fair trial guarantee

The right to a fair trial features prominently among the human rights and fundamental freedoms guaranteed to persons in the Commonwealth Caribbean by the constitutions, in provisions endearingly termed the bill of rights. The provisions protecting this fundamental human right are presented by the constitutions as aimed at securing the protection of the law. These provisions stipulate that "if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".[1]

Those provisions also require that "any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial", and that in proceedings for such a determination, "the case shall be given a fair hearing within a reasonable time".[2] The fair trial provisions entitle a person being tried to information of the nature of the offence charged, adequate time for the preparation of his defence, the right to legal representation, the right to call witnesses and to cross-examine witnesses called against him, and, *inter alia*, the right to be presumed to be innocent until he is proved or has pleaded guilty.[3]

Such facilities are easily identifiable as the standards traditionally entitling an individual at common law to be afforded a fair hearing of a criminal charge or civil matter, as required by that canon of natural justice captured in the maxim *audi alteram partem*, meaning "hear the other side".[4] But fundamental rights entrenched into a constitution, perhaps more than rights existing at common law, are characterized by evolution and development. So the rights to a fair trial protected under Caribbean constitutions might well be outstripping common law notions of a fair hearing as an entitlement to justice.

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1 Barbados Section 18(1); Grenada Section 8(1); Guyana Article 144(1); Jamaica Section 20(1). *See also* Trinidad and Tobago Section 5(2)(f)(ii).

2 Barbados Section 18(8); Grenada Section 8(8); Guyana Article 144(8); Jamaica Section 20(2). *See also* Trinidad and Tobago Section 5(2)(e).

3 Jamaica Section 20(6).

4 The other broad canon of natural justice at common law is the rule against bias, expressed in the maxim *nemo judex in causa sua*, meaning "no one shall be judge in his own cause".

## Access to justice

Caribbean constitutions do not simply entitle the individual to such fundamental human rights as the right to a fair trial in the enjoyment of justice. They go further and ensure an individual's access to such justice, in a section designed for the enforcement of the protective provisions of the constitutions, the provisions stipulating fundamental human rights.

This section of the constitutions says that if any person alleges that any of the fundamental human rights provisions has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person "may apply to the High Court for redress".[5]

This justice access section adds that the High Court shall have original jurisdiction to hear and determine such application, and may make such declarations or orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental human rights provisions.[6]

This section authorizes the High Court to decline to exercise this jurisdiction in deference to adequate means of redress under any other law. It requires bodies subordinate to the High Court to refer questions of constitutional rights to the High Court. It enables Parliament to augment this jurisdiction. It empowers a rule-making authority to regulate the practice and procedure of the High Court regarding this jurisdiction. These are seen below.[7]

In seeking to access justice under this section to obtain redress for contravention of the constitutionally protected right to a fair hearing, an applicant might face certain issues. One is procedure. Another is the doctrine of alternative adequate means of redress. A third is the ouster clause found in some Caribbean constitutions. The fourth is the question of what remedy is available under the section.

## Originating process

The access to justice section of Caribbean bills of rights, except in Trinidad and Tobago, does not stipulate what originating process should be invoked by a person seeking constitutional redress. It simply says that a person "may apply to the High Court for redress".[8]

The section does add that a stipulated rule-making authority, usually either Parliament or the Chief Justice, "may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section".[9]

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5 Barbados Section 24(1); Grenada Section 16(1); Guyana Article 153(1) [formerly Guyana 1966 Constitution Article 19(1)]; Trinidad and Tobago Section 14(1) [formerly Trinidad and Tobago 1962 Constitution Section 6(1)]. Jamaica Section 25(1) provides that a person may apply to the Supreme Court for redress; Section 25(3) provides that a person aggrieved by any determination of the Supreme Court under this section may appeal from there to the Court of Appeal.

6 Barbados Section 24(2); Grenada Section 16(2); Guyana Article 153(2) (formerly Guyana 1966 Constitution Article 19(2)]; Jamaica Section 25(2); Trinidad and Tobago Section 14(2) [formerly Trinidad and Tobago 1962 Constitution Section 6(2)].

7 *See* nn 18, 10 and 9 and accompanying text. On constitutional references *see*, for example, Grenada Section 16(3) and 16(4).

8 *See* n 5, *supra*. Trinidad and Tobago Section 14(1) specifies originating motion, unlike its 1962 predecessor.

9 Barbados Section 24(6) (Parliament); Grenada Section 16(6) (Chief Justice); Guyana Article 153(6) (Parliament) [formerly Guyana 1966 Constitution Article 19(6) (Parliament)]; Jamaica Section 25(4) (Parliament). Trinidad and Tobago never had this clause.

One would have thought that unless and until such facilitating capability was utilized,[10] a person could access justice under the section by invoking any procedure known to the law, indeed even by speedy contemporary technological facilities such as facsimile or fax, computers and e-mail.

Yet, while such rule-making capability remained unutilized in Guyana, Olive Jaundoo used the originating motion procedure to protect property rights, only to be faulted by the courts in Guyana for doing so.[11] Ms Jaundoo appealed to the Privy Council. Four years before Ms Jaundoo invoked the originating motion, a Trinidadian had used an originating summons to access justice under the Bill of Rights. The courts in Trinidad and Tobago told him he could not do that.[12]

So access to constitutional justice was being denied the speed both of originating summons and originating motion, and rather was being confined to the slow process of writ of summons. Fortunately, when Ms Jaundoo reached the Privy Council, their Lordships said that in the absence of procedural prescriptions made by the rule-making authority, an applicant could access the courts by any judicially recognized means of originating proceedings in the High Court.[13]

Since then, rule-making authorities have made rules. Parliament in Guyana and the Chief Justice in the Eastern Caribbean have stipulated that an applicant may access constitutional justice by originating motion or by writ of summons.[14] These provisions are so plain that questions ought not now to arise regarding what procedure should be used to gain such access.

Indeed, the courts now hold that it is unconstitutional to require compliance with stipulations additional to those set out in these rules. This arose when the Guyana Teaching Service Commission dismissed a secondary school principal without giving him any trial. In accessing constitutional justice, he did not comply with justices protection legislation[15] requiring that written notice of the intended legal action be given to the public authority concerned and that the action be commenced within a certain time. The Court of Appeal ruled that, among other things,[16] procedural requirements set out in the justices protection legislation could not be used as a condition precedent to the accessing of justice to protect the right to a fair trial.[17]

It would therefore seem that the Caribbean has turned the corner, leaving behind the days when applicants accessing constitutional justice could be readily trapped in run-arounds among the different methods of originating proceedings in the High Court.

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10 This section also enables Parliament to confer upon the High Court powers additional to those granted by the section as appear necessary or desirable for the more effective exercise of the jurisdiction granted by the section, for example Guyana Article 153(5) [formerly Guyana 1966 Constitution Article 19(5)].

11 *Jaundoo v Attorney-General*, (1968) 12 WIR 221 (CA-Guy).

12 *Pierre v Mbanefo*, (1964) 7 WIR 433 (CA-T&T). The report does not specify which rights he sought to protect. *See* now n 14, *infra*.

13 *Jaundoo v Attorney-General*, (1971) 16 WIR 141 (PC-Guy).

14 The Fundamental Rights (Practice and Procedure) Act 1988 of Guyana; The Supreme Court (Constitutional Redress - Grenada) Rules 1968, SRO No 41 of 1968. The Trinidad and Tobago 1976 Constitution Section 14(1) specifies originating motion, unlike its 1962 predecessor.

15 Justices Protection Ordinance of Guyana, Section 8.

16 The Court also said that the facilitating capability mentioned in n 10, *supra* is for facilitating rather than hindering the effective vindication of breaches of fundamental rights: *Mohamed Ali v Teaching Service Commission*, n 17, *infra*, at 176D-E.

17 *Mohamed Ali v Teaching Service Commission*, (1991) 46 WIR 171 (CA-Guy).

## Alternative adequate redress

While vesting the High Court with powers to grant redress by declarations, orders, writs and directions for remedying contraventions of fundamental rights, the access to justice section of Caribbean bills of rights says that "Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".[18]

This alternative adequate redress proviso could easily denude the bills of rights of meaning and substance if the High Court forgets that the Bill of Rights should be construed generously and amply in favour of the individual, for whose protection, generally, the rights have been entrenched and are buttressed by the access to justice section.[19]

A contravention of a constitutionally guaranteed human right is usually also a violation of some ancient common law facility. In fact, the courts had initially been maintaining that the rights protected under the Constitution were nothing more than what had traditionally been available at common law.[20] Even the redress afforded under the access to justice section was confined to redress historically known to the common law, so that coercive remedies were no more available against the Crown under the Constitution than at common law.[21]

There has recently been considerable judicial activism regarding constitutional protection against inhuman or degrading punishment or other treatment, sometimes referred to as cruel and unusual punishment or other treatment. This guarantee has been held by the Privy Council to preclude executing a person on a sentence of capital punishment after an unreasonably prolonged delay. This delay might generally be five years following conviction and sentence,[22] but might at times be shorter.[23] But the Privy Council has grounded this ruling in common law origins, in formal terms anyhow.

The full implications of this ruling might not yet be known. A condemned person who takes out a constitutional motion challenging his scheduled execution, which he may do in a proper case,[24] is entitled to a stay prohibiting his execution pending the determination of his motion, so long as the motion raises a real issue and is not merely hopelessly vexatious.[25] How far these notions might be allowed to drift from their common law moorings is not clear.

As matters stand currently, a clearly spectacular exception to this identifying of the bills of rights with the common law is the Privy Council ruling that the state may be sued under the

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18 Proviso to subsection in n 6, *supra*, but never in Trinidad and Tobago.

19 *Minister of Home Affairs v Fisher*, (1979) 44 WIR 107, at 112 (PC-Ber); *Huntley v Attorney-General*, (1994) 46 WIR 218, at 227 (PC-J).

20 *Director of Public Prosecutions v Nasralla*, (1967) 10 WIR 299 (PC-J).

21 *Supra*, n 13.

22 *Pratt and Another v Attorney-General*, (1993) 43 WIR 340 (PC-J).

23 On the principle that execution should follow sentence as swiftly as practicable, allowing a reasonable time for appeal and consideration of reprieve, a delay of four years and ten months following sentence debarred execution in *Guerra v Baptiste*, [1995] 4 All ER 583 (PC-T&T).

24 Contrary to the intimation that the proper challenge is by criminal appeal against the conviction: *Clarke v Attorney-General*, (1992) 45 WIR 1 (SC-Bah).

25 *Guerra and Wallen v The State (No 2)*, (1994) 45 WIR 400 (PC-T&T), *see* text between n 45 and n 50, *infra*. *See also Reckley v Minister of Public Safety and Immigration*, (1995) 46 WIR 27 (PC-Bah).

access to justice section of the bills of rights for at least certain jurisdictional errors of a high court judge. This happens where the judge secures the arrest and imprisoning of someone for criminal contempt of court without observing the constitutional rights of that person to be afforded a fair trial on the contempt charge.

That is what happened when Lawrence Ramesh Maharaj, a Trinidadian lawyer, was charged, convicted and sentenced to imprisonment for contempt of court by Maharaj J, without being allowed to enjoy the constitutionally protected right to a fair trial. The judge thus committed jurisdictional error, for which the state paid dearly in public law, in *Maharaj v Attorney-General (No 2)*.[26] The Privy Council spelt out that this liability of the state for the judicial error of the judge is one in public law, newly created by the Constitution. Their Lordships explained that this liability of the state would arise only in the most unusual cases, and virtually only in instances of jurisdictional errors by judges involving contraventions of the constitutional right to natural justice.

Another historic case in the matter of access to justice to protect the right to a fair trial under the Constitution, whatever the position at common law, arose in Trinidad and Tobago when Terrence Thornhill was arrested after a shoot-out with the police and charged with shooting with intent to murder.

While he was in police custody from 14 to 20 October 1973, the police denied him a chance to consult his lawyer on some five occasions. He asked the Supreme Court to declare that the police had contravened the guarantee at that time set out in Section 2(c)(ii) of the 1962 Constitution, now set out in Section 5(2)(c)(ii) of the 1976 Constitution, that no person who has been arrested or detained shall be deprived of "the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him".

No case could be found to ground in the common law a right to counsel immediately after arrest or detention. It was only after the promulgation of the 1962 Trinidadian independence Constitution that the United States Supreme Court held that the right to counsel attached during police custody.[27] Nevertheless, in a memorable judgment,[28] Georges J held that an individual has a right to counsel immediately after arrest because the Constitution says so, regardless of whether such a right exists at common law.

Georges J linked this right to the right to be promptly informed of the reasons for one's arrest and the right to be taken before a court. In other words, the right to counsel applies to a prosecution and is part of the right to a fair trial. He granted the declaration sought. The Court of Appeal reversed Georges J and held that no right to counsel immediately after arrest could be enjoyed under the Constitution because no such right existed at common law.

Happily, the Privy Council[29] reversed the Court of Appeal and restored Georges J. In doing so, the Privy Council paid respectful tribute to the lucidity and cogency of the judgment of Georges J.

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26 (1978) 30 WIR 310 (PC-T&T).

27 *Escobedo v Illinois*, 378 US 478 (1964).

28 *Thornhill v Attorney-General*, (1974) 27 WIR 281.

29 (1979) 31 WIR 498 (PC-T&T).

In the rare situations presented by *Maharaj* and by *Thornhill*, the alternative adequate redress proviso poses no danger, since there is no redress apart from that afforded by the Bill of Rights. But outside those unique circumstances, the tendency of the courts is generally to ground the rights and remedies of the bills of rights in the laws as they existed at the commencement of the constitutions.

This means that an over-zealous readiness by the courts to present an applicant with the alternative adequate redress proviso might constrain an individual almost always to seek access to justice for violations of his or her rights, not under the remedies provisions of the bills of rights, but common law. This will be a sad disservice to those provisions.

This would be all the more unfortunate in light of the possibly expanding role of the right to a fair trial. This right might soon apply to a body reviewing sentences after a trial and advising on prerogative-type powers of pardon or mercy, a development occurring even at common law today.[30] Because of this right, even in the absence of an irregularity in a trial, a conviction may exceptionally be quashed if, due to the conduct of counsel, a defendant's case is not fairly put before the jury; or if counsel fails to advise separate representation because of a risk of conflict of interest where he represents more than one accused in a criminal trial.[31]

Not that it is being suggested that access to constitutional justice should be allowed to become the only or even the normal process of protecting rights and freedoms. Courts at common law stay criminal prosecutions for constituting an abuse of the process of the court where the accused is unlawfully apprehended out of the jurisdiction, illegally brought into the jurisdiction, or prosecuted on the basis of confessions coerced out of him. Such abuse of the process of the court is an affront to justice and a violation of the right to a fair trial. Constitutional access need not be sought. A submission to the trial judge to stay the prosecution suffices for the House of Lords.[32]

Where such an effective adequate alternative means of redress exists, it may at times be proper to require a person to utilize it and not invoke the access to justice section of the Bill of Rights. Take the case where the Trinidadian teacher was transferred by the Teaching Service Commission from one school to another in the absence of circumstances suggesting disciplinary punishment. Regulations entitled him to make representations to the Commission for a review of the order of transfer. He never made representations.

Rather, he sought to access redress under the Constitution. He suggested that he had property in the position from which he was being transferred, which property was protected by the Constitution, but which was contravened by the transfer. He also indicated that the transfer contravened the constitutionally guaranteed protection of the law.

The Privy Council dismissed these submissions as frivolous. In that setting, in *Harrikissoon v Attorney-General*,[33] the Privy Council protested that the value of the remedies section would

30 *Reckley v Minister of Public Safety, supra*, n 25, at 32; *Guerra v Baptiste, supra*, n 23, at 588. *See also Huntley v Attorney-General, supra*, n 19 (judge classifying previous murder convictions into capital and non-capital). But *see Reckley v Minister of Public Safety and Immigration (No 2)*, [1996] 1 All ER 562 (PC-Bah); *Wallen v Baptiste (No 2)*, (1994) 45 WIR 405 (CA-T&T). *See also* now *Doddy v Secretary of State for the Home Department*, [1993] 3 All ER 92 (HL).

31 *Crosdale v R*, (1995) 46 WIR 278 (PC-J); *Sankar v The State*, (1994) 46 WIR 452 (PC-T&T); *Mills v R*, (1995) 46 WIR 240 (PC-J).

32 *R v Horseferry Road Magistrates Court, Ex parte Bennett*, (1994) 98 Cr App R 114.

33 (1979) 31 WIR 348 (PC-T&T).

be diminished if it is allowed to be misused as a general substitute for invoking judicial control of administrative action.

Clearly, the *Harrikissoon* principle must be kept in its proper context, namely, where an alternative adequate remedy exists but is not pursued, and where the allegation of the human rights violation is frivolous, and where there is the brooding shadow of an ouster clause intent on precluding judicial review.[34] That is, instances where if there is unlawful administrative action it involves no real contravention of any guaranteed human right.

Happily, the courts have been confining *Harrikissoon* to its proper setting and thereby not allowing the alternative adequate redress proviso to cancel the promise of the Bill of Rights. Accordingly, when asked to discreetly decline constitutional jurisdiction under this proviso, the courts lean against submissions to do so *in limine* and insist that this discretion can only be properly exercised after a hearing on the merits.[35]

## Ouster clauses

Some Caribbean constitutions contain ouster clauses which provide that the question whether certain public functionaries, like the services commissions, have properly exercised powers vested in them by the Constitution "shall not be enquired into in any court".[36]

Constitutions in the OECS countries[37] do not have these ouster clauses. They do provide that in the exercise of functions under the Constitution by certain functionaries, these functionaries, like the service commissions, "shall not be subject to the direction or control of any other person or authority".[38] But they explicitly add that no such provision shall be construed as precluding a court from exercising jurisdiction regarding any question of whether that functionary has exercised those functions in accordance with the Constitution or any other law.[39] So there is no question of an ouster clause hindering access to justice in the OECS countries.

But even where the ouster clause appears, the courts do not readily allow that clause to preclude access to them to determine applications for redress for contraventions of fundamental rights. The courts kept open access to them despite the ouster clause when a Guyanese deck-hand was dismissed by the Public Service Commission without being afforded the constitutional right to be heard in the determination of his civil rights and obligations. The dismissal order was quashed.[40] This approach has been followed consistently under the constitutions,[41] reflecting settled common law principles made

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34 *See* text between n 35 and n 41, *infra.*

35 *Mitchell v Attorney-General* (No 10), (1986) 3 OECS LR 246 (CA-Gda); *Kent Garment Factory Ltd v Attorney-General*, (1991) 46 WIR 177 (CA-Guy).

36 Guyana Article 226(6) [formerly Guyana 1966 Constitution Article 119(6)]; Trinidad and Tobago Section 129(2) [formerly Trinidad and Tobago 1962 Constitution Section 102(4)].

37 Organization of Eastern Caribbean States. In addition to Grenada, this comprises Antigua and Barbuda, Dominica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, and Montserrat.

38 Grenada Section 83(12). These countries do however have the ouster clause regarding the question whether the Head of State has received or acted in accordance with appropriate advice: Grenada Section 108.

39 Grenada Section 111 (11).

40 *Evelyn v Chichester*, (1970) 15 WIR 410 (CA-Guy).

41 *Re Sarran*, (1969) 14 WIR 361 (CA-Guy); *Re Langhorne*, (1969) 14 WIR 353 (CA-Guy). An anomaly was *Re Fisher*, (1966) 9 WIR 465 (SC-J).

famous by the House of Lords in the celebrated *Anisminic* case.[42]

When an ouster clause bars access to the courts successfully, it is generally because the court has held that the allegation of the human rights contravention is frivolous and vexatious, or the functionary acted within jurisdiction, or the alleged wrong could properly have been remedied by recourse to administrative relief.[43]

## Nature of the remedy

An applicant having successfully established a contravention of his right to a fair hearing, the question arises of what justice he is able to access, meaning what redress or remedy he can obtain under the access machinery of the Constitution.

The courts have been applying to the Constitution the traditional common law restraint against issuing coercive remedies against the Crown.[44] Even at common law, though, coercive remedies have long been issued against ministers when not acting for the Crown under law powers as such, but rather when acting as *persona designata* exercising statutory powers.[45] Indeed, in 1993 the House of Lords expressed itself as disposed to applying its contempt of court powers to ministers.[46] These considerations might well have meaning for the redress available under Caribbean constitutions.

One here recalls the order of the Privy Council that Trinidad and Tobago pay compensation to an individual whom a high court judge committed to prison for contempt of court without observing his right to a fair trial.[47] That was a landmark decision, creating a new remedy.

A rather interesting development is the use of the conservatory order in constitutional motions. Its application is particularly striking when used to stay the carrying out of the death sentence after prolonged delay following the imposition of the sentence.

Take that colourful case where the death warrant had already been read to two Trinidadians, one of whom was Lincoln Guerra. Constitutional motions were filed on their behalf asking the High Court to rule that the delay of four years and ten months following their conviction and sentencing for murder was so prolonged and unreasonable that the constitutional protection from cruel and unusual punishment or treatment debarred the state from proceeding with their execution.

The constitutional motions were dismissed by the High Court and appeals were on the way to the Court of Appeal. The appellants could not be sure that, if the Court of Appeal dismissed the motions, that Court would order a stay of execution pending appeals on the motions to the Privy Council. Before the Court of Appeal could decide either the appeals

42 *Anisminic v Foreign Compensation Commission*, [1969] 2 AC 147 (HL).

43 *Harrikissoon v Attorney-General*, n 33, *supra*.

44 *Jaundoo v Attorney-General*, n 13, *supra*.

45 *Padfield v Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (HL).

46 *M v Home Office*, [1993] 3 All ER 537 (HL).

47 *Maharaj v Attorney-General (No 2)*, n 26, *supra*.

on the motion or the application for a stay of execution pending final determination of the motion by the Privy Council, the petitioners asked the Privy Council for a conservatory order to prevent their execution until final adjudication on the motions by the Privy Council.

It should be explained that shortly before this, another condemned Trinidadian, Glen Ashby, was executed while his appeal on his constitutional motion was on the way to the Privy Council, the Court of Appeal not having granted a stay of execution.

In the *Guerra* case, their Lordships confessed to having great anxiety that making the conservatory order prayed for, before the Court of Appeal decided the constitutional motion or the application for a stay, would not encroach upon the jurisdiction of the Court of Appeal. But they also wanted to protect their jurisdiction and have it available for petitioners, which cannot be done if petitioners are executed before their appeals to the Privy Council are decided, as happened with Glen Ashby.

Caught thus between a rock and a hard place, the Privy Council granted the conservatory order as prayed. This directed that if the Court of Appeal dismissed the constitutional motions and refused a stay, and if the petitioners appealed to the Privy Council within the time limits set out in the relevant rules, the death sentences should not be carried out until after determination of the appeals by the Privy Council.[48]

What prevailed was the commitment to ensuring that the right to a fair trial of one's constitutional motion is preserved and that there is access to justice. The Privy Council said that the executing of petitioners before they had an opportunity to exercise their rights of appeal to the Privy Council "would plainly constitute the gravest breach of the petitioners' constitutional rights".[49]

The day after the Privy Council made the conservatory order, the Court of Appeal dismissed the constitutional motions. The Court granted leave to appeal to the Privy Council but deemed it futile to consider making a conservatory order when the Privy Council had already made a contingent conservatory order. The Court was peeved that the order had been made. To the Court, the pre-empting of the Court by counsel going to the Privy Council before the Court decided the conservatory application was "improper conduct" and "a determined effort to undermine and erode public confidence" in the Court.[50]

Nor did the Court of Appeal spare the Privy Council. The Court considered that the effect of the Privy Council's contingent order was to compel the court to exercise its discretion in a particular manner, which the court branded as "incomprehensible". The Court said it was "indeed unfortunate that their Lordships did not appear to consider the full implications of their order before embarking on this course of action". The Privy Council, the Court added, gave the impression that the Court was not capable of ensuring or could not be trusted to ensure that the right of appeal to the Privy Council is respected, making it, the Court lamented, "certainly a sad day for the administration of justice in this country".[51]

If there has to be such an exchange between a Caribbean Court of Appeal and the Privy

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48 *Guerra and Wallen v The State (No 2)*, *supra*, n 25.

49 Ibid, at 403C.

50 *Wallen v Baptiste (No 2)*, (1994) 45 WIR 405, at 445J (CA-T&T).

51 Ibid, at 446B.

Council, let it be concerned with ensuring access to justice to protect the right to a fair trial of one's constitutional motion for trying of a contention that prolonged delay protects one from being executed. Nor was this a mere pyrrhic victory for this noble virtue. The four years and ten months' delay that had elapsed since Guerra had been sentenced for murder was so prolonged and unreasonable that the constitutional protection to freedom from cruel and unusual punishment prevented the state from executing him.[52]

## Conclusion

During the first fifteen years or so of the promulgation of the independence Caribbean constitutions, the courts tended to be rather restrained or conservative in affording constitutional applicants sufficient access to justice.

Since 1978, though, with the leading case of *Maharaj v Attorney-General (No 2)*, the courts, especially the Privy Council, have been more venturesome. They are now better implementing the principle that in order to ensure individuals the full measure of the guaranteed human rights, the Bill of Rights should be given a generous interpretation.[53] This entails protecting the access to justice enshrined in the remedies section of the Bill of Rights, a commitment which motivated the Privy Council into taking that rather assertive step to prevent execution first and trial afterwards.[54]

A good measure of the maintenance of the rule of law will be the extent to which the courts safeguard this access to justice as we head inexorably towards the 21st century.

52 *Guerra v Baptiste*, n 23, *supra*.

53 *See* n 19, *supra*.

54 *See* text after n 45, *supra*.