



NOTES AND COMMENTS

DUE PROCESS OF LAW IN TRINIDAD AND TOBAGO CONSTITUTION

IN A recent case¹ the Court of Appeal of Trinidad and Tobago had occasion to interpret the term “due process of law” as used in the Constitution.² The appellant in the case, Lt. Rex Lasalle, was an officer in the Defence Force of Trinidad and Tobago which was established by the Defence Act, 1962. In June 1970, he was charged, along with some others, with offences, *inter alia*, of mutiny contrary to the provisions of the Act, and was sent for trial before a court-martial. The court-martial was constituted under the provisions of an amending Act—the Defence (Amendment) Act 1970—which enabled the convening officer of the tribunal to appoint officers who were not military officers within the meaning of section 89(4) of the Defence Act, and consisted of five military officers and a judge from Ghana who was not a military officer.³

Objections to the jurisdiction of the military tribunal so constituted having been overruled, a notice of motion was filed in the High Court on behalf of the appellant seeking declarations, *inter alia*, to the effect that the Defence (Amendment) Act, 1970 was *ultra vires* the Constitution and that the court-martial convened under the Act was illegal and unconstitutional. Braithwaite, J., upheld the constitutional validity of the impugned Act,

1. See : Trinidad and Tobago Court of Appeal : *In re Application of Lt. Rex Lasalle*, Civil Appeal No. 2/71, Action No. 2339/1970—decided on 12th May 1971.

2. Chapter I of the Constitution of Trinidad and Tobago concerns “the recognition and protection of human rights and fundamental freedoms” and is modelled on the Canadian Bill of Rights, 1960. What is relevant in the present context is s. 1(1) of the Constitution which says :

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex the following human rights and fundamental freedoms, namely, the right of the individual to life, liberty, security of the person, and the right not to be deprived thereof except by due process of law.

3. S. 2 A of the Defence Act, 1962 as amended by s. 2 of the Defence (Amendment) Act, 1970, provides :

Notwithstanding any rule of law to the contrary, if any court-martial is required to be convened in any circumstance in which, in the opinion of the convening officer, the necessary number of military officers having the requisite qualifications is not available to form the court and cannot be made available with due regard to the public service and the interests of Justice, the convening officer may appoint any person as defined in subsection (4), as president in lieu of a military officer or as any other member of the court in lieu of or in addition to a military officer or military officers.



and dismissed the motion. Lt. Rex Lasalle appealed. The question which was to be decided in the appeal was the constitutional validity of the Defence (Amendment) Act, 1970, which, it was alleged, infringed certain fundamental rights of the appellant enshrined in the Constitution and was not passed in accordance with the procedure laid down in the Constitution; in particular :

[W]hether the omission by Parliament to pass the Amending Act in accordance with the provisions of the Constitution had the effect of depriving the appellant of his right to life, liberty or security of his person as a consequence of the establishment of a court-martial, which, but for the provisions of the Amending Act, could not otherwise have been established, and which by virtue of the provisions of the Act, became empowered to impose a sentence of death or imprisonment in the event the appellant was found guilty of mutiny.

On behalf of the appellant it was argued : section 1 (a) of the Constitution guarantees the “right... to life, liberty, security of the person and enjoyment of property, and his right not to be deprived thereof, except by due process of law”; the expression “due process of law” is equivalent to the “law of the land” which means basically the common law system of trial by a jury of his “peers”. So far as the military are concerned, trial by court-martial for military offences has been rendered legal by statute and has thus become part of the law of the land; the Defence (Amendment) Act, 1970, however, could not be included in the definition of “due process of law”; it had the effect of depriving the appellant of his right to be tried by a tribunal composed of officers who could legally have comprised the court; it is, therefore, contrary to the law of the land and so against section 1 (a) of the Constitution.

Two interesting submissions made for the Attorney-General were :

- (1) there is and should be a strong presumption of constitutionality in respect of an Act of Parliament;
- (2) the purpose of section 1 (a) of the Constitution is to avoid discrimination by reason of race, origin, colour, religion or sex; if an allegation of discrimination is not made, there can be no breach of the provision in as much as the overriding consideration is that the rights therein recognised and declared are rights which are to be enjoyed without discrimination, and consequently the Defence (Amendment) Act 1970, which is not discriminatory in its terms, would be valid notwithstanding any other constitutional provisions.

The court held that the Defence (Amendment) Act, 1970 was not *ultra vires* since it left intact both the substantive and procedural provisions of the Defence Act, 1962 and that the procedural changes brought



about by the former were lawful under the Constitution and adequately fulfilled the prescription of due process. Tracing the development of the concept of “due process of law” from chapter 39 of Magna Carta and the subsequent English legislation in 1354 (28 Edw. III chap. 3), Justice Aubrey Fraser observed that it was not of any importance to consider whether the phrases “the law of the land” appearing in the former and “due process of law” appearing in the latter, were intended to be coincidental in their meaning, but what was more important was to examine the actual development of common law as a pragmatic system of rules and principles fashioned by the courts to meet the changing needs of society. Justice Aubrey Fraser distinguished between procedural “due process” and substantive “due process”. Since the present appeal concerned a matter of procedure he pursued the meaning of “due process of law” as it related to procedure only. He examined the development of some rules of common law with regard to criminal procedure and their incorporation as part of the law of the land fulfilling procedurally certain aspects of the concept of “due process of law”. As an example, he has mentioned the development of police powers of arrest which acquired constitutional importance only after the establishment of the police force as a public service though powers of arrest had existed before. “Due process of law”, he says :

[I]n so far as procedure in criminal matters is concerned, does not connote a collection of rules and principles which have become fixed and immutable and thus incapable of development.

Referring in particular to the words “due process of law” occurring in section 1 (a) of the Constitution he observes that the words import the rejection of arbitrariness in procedure or adjudication and seek to establish the invariability of fair procedure in addition to a fair hearing in accordance with the principle of natural justice. His Lordship views it as a three-dimensional concept, potentially capable of being adapted and interpreted from time to time, as justice may demand, for the readjustment of imbalance and to meet the ever-changing needs of social growth.

Justice Aubrey Fraser has cited with approval the following *dictum* of Macdonald, J., in *R. v. Martin*,⁴ in which the appellate division of the Supreme Court of Alberta interpreted the term “due process of law” occurring in the Canadian Bill of Rights:

[I]t means the law of the land as applied to all the rights and privileges of every person in Canada when suspected of or charged with a crime, and including a trial in which the fundamental principles of justice so deeply rooted in tradition apply.

4. (1961) 35 W.W.R. 385.



Referring to the words “procedure established by law” in article 21 of the Indian Constitution,⁵ his Lordship observed that it was not possible to give the due process clause a restricted meaning as those words had, and that “due process of law” should be construed, as had been done in Canada and in the United States, “as a restraint upon action or limitation on law which affects personal liberties to a degree of unreasonableness or arbitrariness which is coloured by discrimination or otherwise”. “Due process of law” before deprivation of individual rights is, in his view, intended basically to ensure the individual against oppressive or arbitrary use of authority.

Similar views have been expressed by Justice Phillips in his separate judgment. Approving Prof. Holdsworth’s views, his Lordship says that the term “due process of law” connotes adherence, *inter alia*, to the following fundamental principles : (a) reasonableness and certainty in the definition of criminal offences; (b) trial by an independent and impartial tribunal; (c) observance of the rules of natural justice.

In Justice Phillips’ view, the effect of the “due process” clause is to entrench, not any particular form of legal procedure for adjudication of the rights of the individual, but rather the individual’s fundamental right to justice, that is to say, adjudication of his rights by a fair, independent and impartial tribunal in accordance with the established legal principles of a democratic society.

The case is of particular interest to constitutional lawyers. The decision has affirmed that the Constitution of Trinidad and Tobago guarantees every citizen the right not to be deprived of his (right to) life, liberty, security of person and enjoyment of property except by due process of law. In construing the “due process” clause, the learned Justices have traced the historical development of the concept from its origin in the Magna Carta to the present day, and have drawn upon the writings of classical as well as modern jurists. The U.S. Constitution and the Canadian Bill of Rights have been found to be of particular relevance; various English, American and Canadian cases have also been cited. The judges have approved the earlier interpretations given to the “due process” clause. Justice Aubrey Fraser has drawn a distinction between procedural “due process” and substantive “due process”. He has stressed the evolving nature of “due process of law” in so far as the criminal procedure is concerned, and has expressed the view that it is not necessary or even possible to venture a comprehensive definition of the phrase “due process of law” such as might be of permanent application.

Justice Aubrey Fraser has also explained the distinction between “due process of law” as understood in Anglo-American jurisprudence and “procedure established by law” as used in the Indian Constitution.

5. Art. 21 of the Indian Constitution says “No person shall be deprived of his life or personal liberty except according to procedure established by law”.



His Lordship has pointed out : (a) that in the cases of *A.K. Gopalan v. The State of Madras*,⁶ and *The State of Bombay v. Atma Ram Sridhar Vaidya*⁷ it was held by the Supreme Court of India that “procedure established by law” meant procedure enacted by the legislature, *i.e.*, state-made procedural law, and not any rule of natural justice; (b) that the Constituent Assembly in India specifically rejected the phrase “due process of law” as being too imprecise, and instead adopted the phrase “procedure established by law” in the Constitution of India. The phrase “procedure established by law” does not, in Justice Fraser’s view, mean “due process of law”, but has only a comparatively restricted meaning.

According to Justice Phillips the term “law” as used in the expression “due process of law” is not a mere synonym for common law or statute, and thus differs from the meaning assigned to it by the Supreme Court of India when dealing with the construction of article 21 of the Indian Constitution. He has also examined in this context the meaning of the term “equality before law”, and has made the pertinent observation that the fundamental rights and the freedoms guaranteed by the Constitution do not owe their existence to it, but are previously existing rights for the most part is derived from the common law.

This is the first occasion on which the “due process” clause in the Constitution of Trinidad and Tobago has been interpreted by the state’s highest court. It is interesting to observe how the expression “due process of law”, rooted in the Magna Carta which guaranteed the basic liberties of the British citizen, has dropped out of use in English jurisprudence but has become an important feature of the judicial systems of the countries to which it has migrated.

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6. (1950) S.C.R. 88.

7. (1951) S.C.R. 167.

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