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THE RIGHT TO LIFE

1. The Meaning of the Right to Life: Introductory and General

The right to life is generally perceived as having a logical primacy in regimes of fundamental rights, though this does not necessarily establish for it a primacy in law. In the works of the early contractarian theorists,[1] it was the identification of the right to life and to preserve it, as assertable by the individual in society against the ruler, that formed the foundation for the construction of other fundamental, or as they were then called, natural rights. This right no law could deny.[2]

The theoretical bases of the right to life will not be detailed here, but they are nevertheless of great significance. Whether for example, the right is seen as compelled by the logic of man living in society as in the contractarian theories[3] or as based on concepts of the individual autonomy or dignity, the individual "aware of [*sic*] his or

1 Specifically of Thomas Hobbes. *Leviathan* (1651) (Dent, 1935). Ch. 14, 87-96.
2 *Ibid.*
3 For a concise treatment of this point, see, Maurice Cranston, *What are Human Rights* (1973) 25-26.

herself as distinct self-directed being"[4] may determine conclusions reached about issues arising in the context of a legally conferred right to life.[5]

In considering in general terms, a right to life as fundamental right, the threshold question as to what it confers is often highlighted by the particular formula used in stating it. The West Indian clauses other than that of Trinidad and Tobago follow Article2 of the *ECHR*, by declaring a proscription on the intentional taking of life, but abandon the model in so far as they omit its first sentence which declares that 'everyone's right to life shall be protected by law'. In literal terms, the West Indian clauses confer an entitlement not to be killed with no positive declaration of the protection of life. It should be the case that a right to life must, however formulated, go beyond an obligation on the state not to take life intentionally and to secure to citizens protection against the taking of life by private persons. Consequently, the minimum obligation of the right to life forbids the state from taking life and requires it as well to ensure a legal regime in which murder and seriously life-threatening action is illegal. As the victim of a murder has no cause of action under the constitution if the state itself has not taken life, the basic function of the state to protect life resides in the obligation earlier described. The remaining issue then, is to determine what other positive obligations if any, are created by a right to life in the West Indian clauses.

It is currently fashionable, certainly in discussion of the right to life as it appears in international human rights codes, to make the right extend to every matter that could possibly be related to preserving and enhancing life. The basis of this approach is to deny a distinction between a *right* to life and life, as the subject matter of the guaranteed right. On this view the right places a broadly sweeping obligation on the state which can include the reduction or 'abolition' of infant mortality, the satisfaction of those basic needs necessary for survival i.e. for life, the peaceful settlement of disputes with other states and the desisting from the testing of nuclear devices for military purposes. The right to life is said to be a corollary of a supposed right to peace. Other corollaries might well include a right to a clean environment and the very dubious right to development, 'developed' by, or better, on behalf of Third World states.[6] The transition it seems is from the protection of a 'legal' right to life to protection of life itself and thence to a guarantee of life of a certain quality. It would be difficult to make the West Indian 'life clauses' embrace these high and worthy goals which are, perhaps in different formulations, reserved for the preambles to the constitutions. It is doubtful that they could sustain challenges based on their denial, a proposition reinforced by the terms of

4 L.J. MacFarlane, *The Theory and Practice of Human Rights* (1985) 18. This basis of a right to or respect for life would not extend to the unborn, or even the feeble minded.

5 These include questions about abortion, capital punishment and even justifiable homicide.

6 For a general discussion of these matters see e.g. McFarlane, *op. cit.*, 18-37.

the redress clauses under which constitutional challenges under the Bills of Rights are brought.[7]

The Canadian case of *Operation Dismantle Inc.* v. *The Queen*[8] is of much interest on the question of the type of governmental action that can sustain a right to life challenge. The court had to consider whether a right to life clause (bearing some resemblance to that of Trinidad and Tobago), could ground a challenge to the Canadian government's decision to permit testing of cruise missiles, as a decision which increased the risk of nuclear war and therefore the risk to life. It was held that governmental action not directed at any member of the political community was not contemplated by the clause.[9] Moreover, the court in effect analogised the government decision to action such as a declaration of war which was not contemplated by the right to life clause.

The West Indian clauses differ from most other provisions of the Bills of Rights, by not stating the interests of defence and the state's police power as a general restraint on the conferred right. It may be however, that the interests of defence is to some extent contemplated by the exemption from the notion of intentional killing which constitutes breach of the right, loss of life occasioned by a lawful act of war. It is to be presumed that the lawfulness of an act of war is to be determined by international law standards and that this question must also carry with it a consideration of the lawfulness of any declaration of war - a matter implicating both municipal and international law - though not one traditionally reviewable at common law.[10]

As to the claim that the right to life imposes or could impose on the state some duty to afford persons within its boundaries the means of survival, the formulation of the West Indian clauses clearly does not contemplate it. It remains the case however, that as the general background to the Bills, the common law was by no means unaccommodating of some concept of what might now be considered welfare entitlements.[11]

The right to life as set out in West Indian constitutions may be characterised, as has Art. 2 of the ECHR, as embodying a right to life as legal concept. This means that the clauses are not protective of life *per se*, though no one may be deprived of his life save as provided by law.[12] The West Indian clauses adopt a criminal law model for the

7 See Ch., 'Enforcing the Fundamental Rights and Freedoms: Redress for Infringement.'

8 [1986] LRC (Const), 421; 3 D.L.R. (4th) 193.

9 It was observed however, in the judgment of Madame Justice Wilson: If, for example, testing the cruise missile posed a direct threat to some specific segment of the population - as, for example, if it were being tested with live warheads - I think that might well raise different considerations. (*Ibid.*, at 453a).

10 See Ch., 'Expression as Crime', under the sub-heading, 'The Bills of Rights and Defence'.

11 See discussions of the phrase, 'security of the person' in Ch., 'The Right to Liberty'.

12 See J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, Oxford University Press, (1969) 31 and 2nd ed., (1987) 37.

creation of a duty, imposed in the first place on the state, to recognise the individual's right to life, and the clauses do distinguish between life and a right to life.

2. Formulating the Right to Life

Three 'model' statements of the right to life must be considered. Section 4(1)(BEL) states:

> A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.[13]

Section 4(1)(ANT-B) states:

> No person shall be deprived of his life intentionally save in execution of the sentence of the court in respect of a crime of treason or murder of which he has been convicted.[14]

Section 4(a)(T&T) confers:

> The right of the individual to life ... and the right not to be deprived thereof except by due process of law.

All the clauses, save that of Trinidad and Tobago, contain a second subsection which has the effect of exempting from the meaning of intentional killing, death in the circumstances there stated. Considering the first two models, their common feature and therefore a feature of all the clauses save that of Trinidad and Tobago, is that they *deny* the right to life to persons identified in the first subsection and such persons therefore do not *prima facie* have a right to life. These persons are to be differentiated from those coming under the second subsection, but who it is submitted, do not relinquish *prima facie* a right to life and the killing of whom should be demonstrated to fall within the rules of justifiable homicide before it can be said that there has been no infringement of the clause.

The crucial problem of the clauses and a recurrent one in any regime of fundamental rights, is thrown into relief by contrasting the Antigua-Barbuda formulation with the other clauses, barring again that of Trinidad and Tobago. Can states in which the clauses are drafted on the Belize model, make death the penalty for car-stealing or the making of a false income tax return? The clauses seem to give an affirmative answer, once the

13 The St. Vincent clause is in exact terms with that of Belize. Three states, The Bahamas, Jamaica and St. Lucia omit the words "under any law". Other states refer to a criminal offence "under the law" of the particular state.

14 St. Christopher-Nevis follows the Antigua/Barbuda pattern.

penalty is imposed after conviction under a law. The basic issue as to whether law is anything that has the form of law, or whether it must conform to some substantive standard has been adverted to in discussions of the phrases 'due process of law'[15] and 'principles of fundamental justice' and the like.[16] But whilst these phrases at least permit the raising of the question whether a challenged law is valid as conforming to some substantive understanding,[17] the right to life clauses do not contain any phrase from which it is possible to extract, or into which can be read, the proposition that the law referred to should conform to some standard by which its validity may be judged. The issue, though an important one, has not been adjudicated by the courts, in the context of the right to life.

The structure of the Trinidad and Tobago clause makes it susceptible to the argument that two distinct rights have been created,[18] and while it is possible to conceive of circumstances in which it might be thought desirable to maintain that there are distinct rights to life and to non-deprivation thereof save by due process of law - the clause has so far been treated as concerned only with the deprivation of life. The law is largely contained in *Benny* v. *De Freitas*,[19] *Abbott* v. *A-G*,[20] *Branche* Nos. (1) and (2),[21] and *Re Application by Thomas and Paul*,[22].

3. The Right to Life in Two Subject Areas

(a) The death penalty

From remarks made under the previous heading, it is apparent that the issue of the death penalty within the framework of the right to life, has been expressly dealt with and pre-empted in almost all clauses. In several constitutions, in addition to the effect of the special savings clause, the sections proscribing cruel or inhuman punishment make special provision for the preservation of judicial executions.[23] In the St. Lucian case of *In Re Evans Samuel*,[24] the court, in dealing with a challenge to the death penalty under the punishment clause, read that clause with that on the right to life, to deny the applicant's

15 See Ch., 'Due Process of Law in Section 4(a)(T&T)'.

16 See Ch., 'Constitutional Protection for the Criminally Accused'.

17 The phrases are all capable of being used to establish an argument for a substantive understanding of the meaning of the word 'law'.

18 This argument was unsuccessfully made in the *Dismantle* case *supra*, note 8.

19 [1976] A.C. 239.

20 [1979] 1 W.L.R. 1342.

21 No. 118 of 1977, (S.C.); No. 63 of 1977, (C.A.) (March 9, 1979); No. 872 of 1983 (April 29, 1985).

22 [1986] LRC (Const.) 285. Contrast now, *Thomas & Paul* v. *A.G.* (T & T)(July 29, 1987).

23 See Ch., 'Due Process of Law: Section 4(a) (T&T)'; Ch., 3, pps 61-63, 67.

24 No. 301 of 1983 (STL) Civil Court. (October 17, 1983).

claim. In this jurisdiction, existing law is not specially saved as against the fundamental rights and freedoms. In the case of Trinidad and Tobago, the status of the death penalty whether as a 'right to life' or 'punishment' issue is dealt with through the operation of the special savings clause, so that the imposition of the death penalty as provided for by existing law is said to be by due process of law, by virtue of the 'saved' status of the law permitting the imposition.[25] The right to life in the West Indian constitutions does not therefore outlaw judicial executions.

(b) Unborn Life

The right to life clauses have not been used to challenge abortion laws in the West Indies and in most states abortion is still a criminal offence, basically as established in section 58 of the Offences Against the Person Act (1837) [U.K.].[26] Only in Barbados has the law been liberalised in legislation on the familiar model of stated indications for termination of pregnancy and time periods for which specific stated procedures apply.[27] The law is declared to have effect notwithstanding the locally enacted version of the English law referred to. This device should preclude attempts to argue that abortions under the new law can still constitute unlawful action. In short, Barbados apart, there is at present little reason for litigation under the clauses in this area. But debate on the general issue of abortion surfaces from time to time and has given rise to perhaps the only academic comment in the region taking an anti-abortion stand.[28]

The subject is therefore considered here and a statement of the general issue is followed by a very brief outline scheme of judicial approaches to abortion and the right to life. Speaking in broad terms and without reference to any specific formulation of the right concerned, abortion becomes an issue on the basis that the right protects life and that the absence of laws forbidding abortion or the liberalisation of existing law which does, parallels the absence of a law of murder or the liberalisation of the law of murder. The life taken is that of the foetus, which is also deemed a 'person' or individual so as to be right-bearers.

While human life as value must be the ultimate source of the criminal sanction against the destruction of unborn life or potential life,[29] the attempt to bring the issue within a right to life debate poses the question whether the guarantee of life to the

25 On this point the Court of Appeal judgments in *Branche* (No. (1) are particularly relevant.

26 For an account of the West Indian law, current save for Barbados, see, P.K. Menon, 'The Law of Abortion with Special Reference to the Commonwealth Caribbean', Vol. 5 Anglo-American L. Rev., 311-345.

27 Medical Termination of Pregnancy Act, No. 4 of 1983. See, P.K. Menon, 'The Medical Termination of Pregnancy Act, 1983, Barbados', in 34 I.C.L.Q. (1985) 630-36.

28 'Minority Report' of R. Carnegie, in *The Report of the National Commission on the Status of Women in Barbados* (1978) 413-421 (Hereinafter, 'Minority Report').

29 *Roe* v. *Wade* 410 U.S. 113 (1973) (Judgment of Blackmun, J.).

individual can be the source or foundation of an obligation on the state to criminalise the destruction of foetuses (at any time after conception)[30] thus making unconstitutional any laws legalising abortion by the removal of criminal sanctions.

Regardless of the exact formulation of the clause litigated,[31] those who rely on the right to life as making abortion unconstitutional, claim that "the unborn, as human beings from conception have a right to life and to full protection of the law and that [the state] cannot constitutionally confer on a doctor the 'right' to kill an unborn person, or upon the mother the 'right' to an abortion."[32]

In establishing the claim set out in the foregoing paragraph, discussion has traditionally begun with the question as to the point at which life begins.[33] More recently it has been argued that foetal growth is "a process of development",[34] a continuum along which no points can be securely marked; that the foetus as potential life, is no less potential before or after quickening or viability and that as a result, the state's interest in potential life extends throughout pregnancy, though becoming compelling only after viability.[35] Finally, the very notion of viability is itself coming under threat, or is perhaps being substituted for by the capability of a foetus to survive outside the body of a mother, albeit with the aid of artificial devices.[36]

Difficulties about timing the beginning of life, have led to the right-to-lifer's claim that foetal life is to be protected after fertilisation, (or shortly thereafter), as well as to the more subtle argument that because of uncertainties as to the commencement of life, one should so to speak, take no risks. So that in any setting of life against other values,

30 Some anti-abortion proponents, and judicial decisions taking this view have been prepared to settle for a period of 14 days after conception. See e.g., the opinion of the West German Bundesverfassungsgericht, *Abortion Reform Law Case* 39 BVerfG 1 (1975), abstracted in *Comparative Constitutional Law*, Murphy and Tanenhaus (eds.) (1977) 422-429.

31 In *Roe* v. *Wade*, a right to life clause was not as such litigated and the argument against criminal sanctions on abortion, was premised on a privacy right in the woman. This right was linked, in one judgment only, to First Amendment liberty.

32 *Dehler* v. *Ottawa Civil Hospital et al* (1979), 101 D.L.R. (3d). 686, 699.

33 Views as to the time life begins - viability, or quickening in common law terminology, have changed through the ages. At common law there was no crime of abortion before quickening, at the 14th week or thereabouts. Per Matheson, J. in *Borowski* v. *A-G (Can) and Minister of Finance*, 4 D.L.R. (4th) 112, 114; see also Menon, *supra*, note 26 at 334, stating a somewhat different time. It was similarly once the view of the Roman Catholic Church that the foetus was vested with life only after the 40th day. See, A. Eser, 'Reform of German Abortion Law' (1986). 34 Am. J. of Comp. Law 369, 370.

34 *Abortion Reform Law Case, supra*, note 30.

35 *Akron* v. *Akron Centre for Reproductive Health Inc. et al* 462 U.S. 416 (1983). Viability however, was the point at which the foetus was capable of meaningful [(!)] life outside the mother's womb.

36 See *Roe* v. *Wade, supra*, note 29 at 162-3; compare *McFarlane, op. cit.*, at 22.

foetal life should be protected without reference to periods and time scales within pregnancy.[37] It should also be noted that in whatever way the abortion issue comes before courts, the latter are at pains to deny that they are indulging in an exercise which sets a point at which human life begins.[38] In considering abortion in a right to life setting, the leading cases adopt a variety of approaches. In the couple of Canadian and English cases here considered, a sort of formalism operates whereby courts seek a right-bearer in law as the person or the individual in whom the right is conferred.

In *Borowski* v. *A-G (Can) and Minister of Finance*,[39] it was held, on a challenge to a law permitting therapeutic abortions, that a foetus does not fall within the meaning of the word everyone, in the clause: "everyone has the right to life ... and the right not to be deprived thereof except in accordance with the principles of fundamental justice".[40] There was nothing in existing law to base a conclusion that foetal life was to be protected under the Charter. The significance of the judgment lies in its rationale. The court admitted the logical possibility of some status in law for the unborn, but determined that it was for Parliament to take the necessary steps to make 'everyone', include in law, unborn beings.[41] The court, in an issue fraught with policy implications, denied to the judicial review task a positive law-creating purpose, by the refusal to ascribe to or extract from the fundamental law a value to be expressed as a rule of law, forbidding or permitting abortion.[42]

The formalism that might be attributed to the Canadian decision is also to be seen in *Paton* v. *Trustees of B.P.A.S.*[43] and to a lesser extent in *C.* v. *S. and Another.*[44] In these cases, the challenge was not to legislation, nor was the claim directly premised

37 This is the general thrust of Carnegie's argument in *Minority Report, supra,* note 28.

38 See e.g., *Wade, supra*, note 29 at 159; *Paton* v. *Trustees of B.P.A.S. et al.* [1978] 2 All E.R. 987.

39 *Supra*, note 33.

40 Section 7 of the Canadian Charter of Rights and Freedoms.

41 A status of some kind or other, for the unborn exists in many branches of the law and is evidenced in the familiar phrases: a 'life in being'; child *en ventre sa mere.* For a survey of this status in the common law and otherwise, see K. Weiler and K. Catton, 'The Unborn Child in Canadian Law' 14 Osgoode Hall Law Journal, (1976) 643. On the issue of principle see, L. Tribe, *American Constitutional Law* (1979) 926 thus: [T]he government's "general obligation" to protect life can reasonably be thought to extend to the human foetus "from the moment of conception". It must be conceded that such a line reflects an entirely intelligible moral impulse.

42 On the issue of abortion and judicial review in the political process, see Carnegie's observation on *Roe* v. *Wade*, in *Minority Report, supra*, note 28 at 420 as follows: [T]his is law reform by the non-democratic mechanism of judicial review rather than by the result of deliberation by democratically elected legislators. See also Tribe, *op. cit.*, at 929-30.

43 *Supra*, note 38. See too the proceedings under the ECHR, 3 E.H.R.R. 407.

44 [1987] 2 W.L.R. 1108.

on a right to life in a foetus. However, in both cases the father's claim to a right to have a say in the decision to have an abortion was seen to be parasitic on some legal status, as human being, in the unborn child. The denial of such status, as in *Paton*, resulted in the defeat of the father's claim.

Courts may however, take an approach other than a formal one, by setting value against value, that of life against say, the autonomy attributed to the woman who decides on an abortion. The choice ultimately depends on giving more weight to one value than the other but the right to life as constitutionally guaranteed can be legitimately used to weight the life value more heavily than the other. This is evidenced in the German *Abortion Law Reform*[45] case where it was said: "Pregnancy belongs to the private sphere of a woman, whose protection the basic law guarantees" through the rights to free development of personality and to dignity.[46] But because the "foetus is an autonomous human being under protection of the Constitution", through the right to life clause[47] "termination of pregnancy has a social dimension which opens it to public regulation and demands regulation".[48] The liberalised law was thereupon struck down.

A different form of the conflict of values occurred in *Roe* v. *Wade* where the criminalising of abortion was attacked. The court expressed as law, the value of personal autonomy, by stating a constitutional right to privacy.[49] Once enunciated, this right could be limited by a sufficiently strong state interest, that in the health of the mother, which could permit regulation. This was embodied in the trimester system. So that the privacy right became a right to an abortion on demand in the first three months with the sole proviso that the procedure be carried out by a medically qualified person. The state could thereafter demand reasonable regulation for the last two trimesters.[50]

A somewhat subtle rendering of the value against value form of the debate is that given by Carnegie. On the assumption that the foetus is a human being, it is quite plausibly argued that a liberalised abortion law can be seen as wilful destruction of a human life and therefore the "negation of the value of respect for human life."[51] On the other hand, the argument continues, "if the foetus is not a human being" the value prejudiced by anti-abortion laws is, "the much less fundamental value of the freedom [of the woman] to suit her own convenience."[52] The statement underweights the value in

45 *Supra*, note 30, at 424 (11 para. 2).

46 Art. 2(1); and Art. 1(1) of the Basic Law of the Federal Republic of Germany.

47 Art. 2.(2) sentence 1: Everyone shall have the right to life and to the inviolability of his person.

48 *Supra*, note 30 at 424, (II para. 2).

49 *Supra*, note 29. In fact 'privacy' was rather more implied than express, as only one reference to it was made in terms. See, 'The Rights to Privacy and Private and Family Life, in Ch., 'Three Liberty Rights'.

50 Right to life considerations were not totally ignored, and it was asserted that where a foetus was capable of life independent of its mother, its abortion could be proscribed. *Supra*, note 29 at 163-164.

51 The possible complexities of 'respect' are ignored.

52 'Minority Report' *supra*, note 28 at 416.

opposition to 'life' or 'respect for life', by converting 'autonomy - liberty' into 'convenience' and by implication, converting the mental pain associated with taking to term an unwanted pregnancy, into inconvenience. Mere inconvenience then can be easily outweighed by 'life'. But the subtlety and the flaw in this part of the argument is that it does not in fact set the pregnant woman's convenience (which is hardly a value at all) against the value of respect for life, for the prejudice to the woman's convenience hardly derives from and is not logically associated with the possibility, (or even fact) that the foetus is not a human being. In the result the argument simply states that no value is prejudiced by a restrictive abortion law.[53]

The Barbados legislation cited earlier is the only abortion law in the region which is susceptible to challenge as infringing the right to life.[54] However, those who would want to challenge it could hardly bring themselves within the redress clause of the relevant Bill of Rights as persons affected by the legislation. Moreover, it is unlikely that a Barbadian court would accept the speculative arguments presented elsewhere, that persons not within the redress clause but wishing to canvass an issue, as constitutional issue, might be able to derive 'standing' to bring an action from the Supreme Law Clause.[55]

4. Intentional Killing Not Infringing The Clause

Section 4(2)(BEL) states:

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable -

(a) for the defence of any person from violence or for the defence of property;

(b) In order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence.

or if he dies as the result of a lawful act of war.

53 Carnegie's conclusion is however, logically unobjectionable in the assertion that if there is doubt about the human nature of the foetus, "the importance of the value of respect for human life should dictate that the law should maintain the present restrictions on abortion."

54 According to reports a liberalising reform of the law is being considered in Guyana.

55 See Ch., 'Enforcing the Fundamental Rights and Freedoms: Redress for Infringement'.

The second subsection of the right to life clauses state a limitation on the right as justifiable homicide.[56] The subsection does not however merely indicate the non-absolute character of the right; it also expresses the proposition that the concept of justifiable killing does not without more, obliterate the right to life of the person killed and certainly does not do so as for persons specified in the first subsection, who are declared not to have the right at all.

One statement of the English (common) law on justifiable homicide as it existed before the Criminal Law Act (1967) [U.K.], explains it or at least some of its rules as based on reason or utility.[57] Taking the four situation-categories stated in the West Indian sub-clauses, a utilitarian basis is evident, particularly where killing is justified in defence of interests other than life, as in deterring those in detention from escaping custody. This goal is implicitly stated to weigh more heavily on balance than loss of the person's life.

But the contention that even the categories of persons in sub-paragraph (a) to (d) have not forfeited a right to life is *denied* on a purely utilitarian perception of the rationale of justifiable homicide. Defining the scope of fundamental rights in utilitarian terms is currently unfashionable[58] and in assessing justifiable homicide in the specific context of a criminal system and a system of rights, it has been claimed that the utilitarian model denies to the aggressor - the person killed - some form of retained moral right which translates into an aggressor's retained right to life.[59]

Whatever the historical basis of justifiable homicide in the common law, it can be explained (moreso in cases of defence against serious violence) in terms other than the utilitarian, since the person who kills remains subject to the restraints of certain rules of the law in this area and this constitutes a recognition that the aggressor is not stripped of his right to life or his autonomy or dignity, for those who prefer these terms.

Looking now to the applicable law of justifiable homicide as a fetter on the right concerned, a major and initial difficulty resides in the words "as are permitted by law". If the reference is to the law extant on promulgation of the constitution (thus freezing the legal concepts which inform the limitation), this would be the English common law with its inevitable obscurities and uncertainties and which applies in principle to agents of the state who kill, in the same manner as it does to ordinary persons.[60]

56 'Justifiable' in the introductory words of the sub-clause admits, in the context, of an understanding referrable to this branch of the law.

57 *Russell on Crime*, (12th ed., 1964), 434-57.

58 See e.g., J. Rawls, *A Theory of Justice* (Oxford University Press) (1971); R. Dworkin, *Taking Rights Seriously* (London: Duckworth), (1977).

59 For a leading exposition of this view, see, George Fletcher, *Rethinking Criminal Law*, (Boston: Little Brown), (1978) especially, chapter entitled, 'The Theory of Justification and Excuse.'

60 For two accounts of this law, see, *Russell on Crime, supra*, note 57, and Smith and Hogan, *Criminal Law* (1st ed.), (1965). The last named authors claim that the common law has been displaced by S.3 of the Criminal Law Act (1967), but it has been suggested that this is not necessarily the case, certainly for justifiable homicide

The identification of the principles and rules of the law of justifiable homicide up to the enactment of the Criminal Law Act (1967) [U.K.], leaves the problem of determining the way in which these principles applied or are currently applicable to each of the four situation-categories set out in the second sub-clause. It is notable that a principal line-drawing device at work in the common law, namely the distinction between felonies and misdemeanours and one which was crucial to the law of justifiable homicide in certain cases, does not appear in the West Indian sub-clauses. The problem of the sub-clauses is therefore that of a tension between the proposition that the law referred to in the sub-clauses is the common law and what may be a divergence from that law in the express provisions of the sub-clauses themselves.

Two, or possibly three principles figure in the common law of justifiable homicide where the aim of the law is to justify the deadly repulsion of violence offered the killer by the person killed. The authorities agree that for the situations of justifiable homicide established at common law deadly force could be deployed where it was the only means by which to accomplish the permitted goal. This is the principle of necessity in justification, and is to be distinguished from necessity as a defence in excusing a charge of homicide.[61] Necessity is generally taken to include a principle of immediacy, that is, that there must be an immediate need to use force.[62] This in turn seems to contemplate those cases in which force is offered by the person killed and may therefore not in fact be applicable to all cases of justifiable homicide.[63]

Necessity is qualified by a principle of proportionality, that the force used be proportionate to that offered. An extra-judicial pronouncement of the principle is often cited in support, though certain of the older cases contain statements which illustrate and combine the principles of necessity and proportionality.[64]

Two statements of proportionality from the extra-judicial source illustrate, it is submitted, two significantly divergent versions of the principle, though the point is not made by commentators. In the one, proportionality relates to force quantified against

based on self-defence. See A. Ashworth, 'Self defence and the Right to Life' [1975] 34 C.L.J. 282, at 284.

61 H.L.A. Hart, takes the view, hardly correct, that the distinction is no longer made or important in law. His description of justification is however useful thus: "In the case of 'justification', what is done is regarded as something which the law does not condemn, or even welcomes." *Punishment and Responsibility* (Oxford: Clarendon), (1965) 13-14.

62 See e.g., Williams, *Textbook of Criminal Law*, (2nd ed., 1983) 494 and 498.

63 Moreover, it has recently been held that the acts of self-defence which may be relied on as a defence in criminal proceedings are not limited to those done in response to actual or imminent violence. See *Attorney-General's Reference* (No. 2 of 1983), [1984] 1 All E.R. 988. (Violence anticipated and preparations made for it).

64 As in *Smith* (1837), 8 C.&P. 160, 162 in which it was said that a man could justifiably kill, where "it was necessary to protect his own life or to protect himself from such serious bodily harm as would give rise to reasonable apprehension that his life was in immediate danger". Cited in *Criminal Law, supra*, note 60 at 232.

force, so that the school bully cannot be shot if that is the only way to stop his tactics as the principle of necessity alone might dictate.[65] But proportionality may require a setting of the force used against the end to be served by the justifiable homicide, so that "the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent."[66] The last described aspect of proportionality is of great significance in those cases of justifiable homicide which appear not to require a showing of force from the person killed, as in the widely phrased paragraph (d) of the West Indian subclauses.

Though proportionality is a qualification on necessity, it may itself be qualified, in certain circumstances. In *Attorney-General for Northern Ireland's Reference*, (No. 1 of 1975),[67] it was stated that "even a reasonable man could only act intuitively", in the heat of the moment. 'Intuitively' appears to mean, instinctively or automatically and allows an accused to shoot to kill where he has at his disposal a loaded fire-arm, since "the postulated balancing of risk against risk, harm against harm ... is not undertaken in the calm analytic atmosphere of a court room."[68] This was a case which in terms of justifiable homicide involved killing for the prevention of crime (or possible crime) and not a response to violence or a threat to the accused.

Finally, one comes to the concept of reasonableness. It is a question whether the principles of necessity and proportionality stated above, together constitute reasonableness in the common law of justifiable homicide or whether there was a distinct, albeit generalised concept of reasonableness at work in that law.[69] Some commentators hold that "reasonableness has always been a limitation at common law", whilst others maintain that the words, "use of such force as is reasonable in the circumstances", in section 3 of the Criminal Law Act (1967) [U.K.], is comprised of the principles of proportionality and necessity.[70]

If the word 'law' in the phrase "as are permitted by law", refers to the common law and 'reasonableness' is not part of that law, the West Indian clauses could merely involve an application of the principles of necessity and proportionality. But reasonableness as a distinct concept, may well be a desirable element in the law, particularly in those cases of justifiable homicide which do no necessarily involve the repulsion of force and in which life is not balanced against life. Moreover, a general concept of reasonableness may be derivable from the phrase "reasonably justifiable" which occurs in the West Indian sections.

Killing to prevent crime as in sub-paragraph (d) perhaps best illustrates the need for the general concept, especially where reasonableness is considered in connection with a difficult problem of the law of justifiable homicide, conveniently described as that of

65 This example occurs in the *Report of the Royal Commission on the Law Relating to Indictable Offences* (1879) C. 245, at p. 44.

66 *Ibid.*, at p. 11.

67 [1977] A.C. 105.

68 *Ibid.*, at 138.

69 See, 'Self-defence and the Right to Life', *supra* note 60 at 285 and footnote 15.

70 Smith and Hogan, *Criminal Law* (5th ed., 1983) 325.

"*mens rea*". In particular, despite the 'objective' connotation of 'reasonable', the circumstances to be included must it seems take into account the subjective belief of the killer and his assessment, made 'intuitively' as described above, of the need to use force. This is so even where justifiable homicide is treated as if it were a crime involving "standards of care, of self-control, of foresight or caution or of reasoning power to be expected of a 'reasonable man'".[71] The sorting out of an alleged intention to kill from the intention to effect one of the permitted purposes of the use of deadly force, along with the question as to the likely result of the force actually used, contribute to the complexity of the law, more so when it is set against a right to life in the person killed.

A brief examination of the heads of justified killings in the West Indian clauses, starts with sub-paragraph (d), the prevention of the commission of a criminal offence by the person killed. This ground for justifiable taking of life is one added to the pattern provided in Art. 2(2) of the ECHR. It does not differentiate between the types of crimes for the prevention of which it is permissible to take life. But the guaranteed right itself suggests that there should be some differentiation. A possible approach may be that argued for by one author considering section 3 of the Criminal Law Act (1967) [U.K.], namely that the killing is protected where the crime to be prevented itself involves the taking of life or the inflicting of grave physical injury.[72] Admittedly, this would largely cover the situations envisaged in sub-paragraphs (a) to (c). But any other view either renders the section a general licence to kill criminals or highlights the superfluity of the sub-paragraph itself.

On the foregoing perception it would be unconstitutional to shoot to kill a member of an illegal organisation for that reason, even though such membership constitutes a criminal offence. Such shooting by the police was however given indemnity under Dominica's now repealed unlawful associations legislation. But it should be the case that a genuine or reasonable perception that a member of an illegal organisation was about to commit an act of violence could justify killing him.[73] The scope for suspect or over-broad application of this proposition must be noticed. In *Attorney-General for Northern Ireland's Reference* (No. 1 of 1975), Lord Diplock appears to endorse a killing where it was reasonably believed that if the person got away he would be "likely *sooner or later* to participate in acts of violence".[74] The statement could possibly justify the shooting to kill of anyone reasonably believed to be a member of an unlawful organisation where the latter is known to commit acts of violence even in the absence of the imminence or near imminence of the commission of an offence.

Paragraph (c) of the clauses dealing with suppression of riots and insurrection, and which appears in Art. 2 of the ECHR model, states an instance of justifiable homicide

71 *Supra*, note 67 at 133D. It is not clear that Lord Diplock in referring to "some classes of offences", was in fact treating justifiable homicide as a species of offence - a proposition which is conceptually feasible.

72 Smith and Hogan, (5th ed.,) at 325.

73 See generally, the case cited at *supra*, note 67.

74 *Ibid.*, at 135G. (Emphasis added).

well established in the common law.[75] It may be relevant to notice here however, that the emergency provisions of most West Indian Bills of Rights do not provide for the suspension of the sections conferring the right to life during a period of emergency.[76] It should therefore be the case that the deploying of deadly force to suppress a riot or similar assembly where it has not been determined that some threat to the state exists, is to be subject to most rigorous scrutiny.

Paragraph (b), relating to the killing of a fleeing offender or detainee, also finds a parallel in the ECHR and in the common law. The latter however, drew a number of distinctions in this matter, such as between resisting arrest or fleeing therefrom. This head of justification is one in which the person killed need not offer violence to the killer. In this type of situation the concepts of proportionality and reasonableness must look closely at the harm to be prevented, as weighed against the use of deadly force.

Paragraph (a) of the West Indian clauses, killing to defend against violence, adds to the ECHR model, a protection for killing 'for the defence of property'. This latter basis of justification is not likely to involve agents of the state who are normally the main concern of the constitutionally conferred right. Since however, a guarantee of a right to life is seen as importing a duty on the state to maintain a legal regime in which killing is illegal, a constitutional protection for killing by private persons, for the reason stated is of grave significance. Comments made as to the standard of scrutiny in paragraph (b) cases, apply to the property aspect of this paragraph.

Killing in defending from violence, is perhaps the most acceptable ground for the justified use of deadly force whatever the theoretical rationalisation used and as stated earlier, the restraints in the law on the use of such force do give recognition to the aggressor's right to life. It is to be noticed in conclusion that there has been a remarkable absence of any discussion of the limitations on the right to life discussed here in a constitutional cause of action, although in at least one jurisdiction the fact-situations which could give rise to litigation raising the issue are or have been an everyday occurrence, namely, the shooting of civilians by the police and occasionally by members of the military.

5. Official Killings In West Indian Jurisdictions

Official killings other than in execution of a sentence of a court, curiously but accurately described as extra-judicial, concern in practice the killing of civilians, usually by shooting, by the police and less often in the West Indies by members of the Defence Forces.[77] Implicated in this area is all that body of law which protects the right to life

75 See Smith and Hogan, (1st ed.,) at 231-38 and authorities there cited.

76 In the case of Trinidad and Tobago, provision is made for the suspension of sections 4 and 5 which contain all the rights conferred in the constitution.

77 Deaths in police custody or institutions of the state such as prisons and mental institutions are perhaps not properly considered under this heading, but clearly have implications for a right to life. Deaths in police custody are familiar in at least one

and which comes into operation subsequent on a death - such as that relating to inquests and all those procedures which seek to establish the responsibility for death and otherwise regulate 'unnatural' deaths.

A high incidence of police killings in any society must indicate a problem in the political system and thereafter, one in the system of law and order. For what ever the circumstances of these or indeed 'private' killings, the creation and execution of law and order policies is itself part of the business of the political system and of the government at any given time.

In Jamaica, where shooting at human targets is a national pastime, there is not unnaturally, an extremely high number of persons shot to death by the police annually.[78] But beyond this is the popular perception that the shooting culture has its genesis in the arming by politicians, of their supporters and aides. A Jamaican law teacher has claimed authorship of these words:

> Is it right that we, as a society should blind our eyes to the fact that they did not acquire their guns innocently neither did they purchase them legitimately? Many of them were probably given guns by *persons in authority* who had access through illegal channels.[79]

It appears to be the case that in this state political violence is no longer a mere weapon but has become a form of political discourse (if such is possible) within or alongside the framework of parliamentary democracy with its ballot-box and parliamentary debate. A "ballot-bullet" system operates and violence is rendered in a manner in keeping evidently, with an element in the national psyche. The significance of the foregoing resides in the apparent fact that lawmakers are the instigators of a violence of which police killings must be considered a part. If this is so and it becomes more established than is already the case, the right to life, as part of the law and constitution could become along with these latter, an irrelevance.

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of the jurisdictions considered, namely, Guyana. (See, successive reports of the Guyana Human Rights Association).

78 According to figures compiled by the Jamaica Council for Human Rights 231 civilians and 1 policeman were killed in 'shot-outs' in the period January to December of 1984. The figure given by the Ombudsman for the same period was 291, a rise of 19% on the figure for the previous year. (The figures appear in a copy of an updated lecture delivered by that officer at the Jamaica Police Academy).

79 The passage occurs in Human Rights Update - Vol. 1.1 No. 1 (December 1984) 4. (Emphasis added). Consider the declaration of an elder politician in 1976 to the House of Representatives during a debate on the declaration of a state of emergency thus: "I myself with but few exceptions have a record which is unrivalled among Jamaican politicians. I have constantly advised people not to be violent even when it is not to my political advantage". (Proceedings of the Honourable House of Representatives. Sessions 1976-77, p. 986.)

In other parts of the Commonwealth Caribbean police shootings and the gunning down by civilians of other civilians, particularly on the street, had until fairly recently, been practically unknown. Signs of an impending change are however clearly present. In Guyana eight police killings were reported by the state owned *Chronicle* for the year 1987,[80] whilst in Trinidad and Tobago in the same year, five shootings of civilians by the police in a short period gave rise to public concern which in turn led to the speedy setting up of an inquest with the Chief Magistrate as Coroner.[81]

Barbados has recently produced some law on the extent of the state's duty to prosecute official killings, though the issue was not discussed or at all conceived in these terms, nor was the right to life mentioned. In this jurisdiction, it appears to be the perception of the police certainly, and one suspects of other parts of officialdom, that a thorough judicial investigation of a police killing is not in the interest of the police and is somehow subversive of law and order.

In 1970, a Coroner's inquest ended in the issue by the coroner of warrants of arrest for three policemen. There followed the filing of writs of *habeas corpus* and ultimately, the grant of an order of prohibition against the coroner preventing him from proceeding further. The arrest and committals on bail and in custody of the officers were declared a nullity.[82]

In more recent litigation, the unnatural death concerned had followed the arrival of seven policemen armed with weapons and search and arrest warrants at the house of the deceased. Here too, but well before the Coroner had called all witnesses, an order of prohibition was sought. The dangers of a review of an inquest before its termination are detailed in the coroner's inquisition.[83] The order of prohibition was refused, but the

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80 Under the heading 'Police Killings', the *Guyana Human Rights Report 1987* states: Complaints of Police Killings have been received from a number of sources. Apart from the eight persons noted in the *Chronicle* during the year, the GHRA has received unconfirmed reports of others. (Georgetown, Guyana. 1987.

81 The writer has been informed by a former senior police officer of the sharp departure from the speedy and well regulated system of inquests which prevailed in pre-independence Trinidad and Tobago. Failure "to hold inquests into police killings" has been identified as a 'human rights' issue in St. Vincent-Grenadines. See Report "Police Killings seen as a Major Problem". *Barbados Advocate*, August 4, 1987. The caption refers however, to the Jamaica situation.

82 Records in this case are unobtainable. An account appeared in the *Sunday Sun* (BDS) November 1, 1987.

83 These include the risk of the revelation in the Coroner's affidavit of matters not revealed at the inquest but of matters of which he had knowledge and which could have enabled the tailoring of subsequent evidence at the inquest and the concealment of evidence to avoid or escape civil or criminal action. Premature review also encouraged "interested parties" to argue the merits of their case" and could cause delay, defeating one of the main objects of the inquest, namely to gather facts whilst the events were still fresh in the minds of witnesses. (At page 15 of the inquisition).

case or better, the judgment, had implications for subsequent proceedings for review of the decision not to prosecute the officer concerned. The same judge heard both matters and in the second proceeding, clearly relied only on evidence before the Coroner at the time of the first proceeding.

The Coroner, though finding that one of the seven officers had murdered the deceased, did not commit him - restrained perhaps by the knowledge of the 1970 matter for which there appears to be no extant record. In the second proceedings referred to, *In the Matter of the Application of Cynthia King, Mother of Grantley Farmer* (Deceased) v. *The D.P.P. et al.*,[84] one of the bases of the claim for review of the decision not to prosecute the officer was that the decision conflicted with section 18 of the Barbados constitution which confers procedural protections on a person charged before a court. There is however, no reference to the section in the judgment and nothing to indicate argument on it before the court. The right to life was not mentioned.

Aside from the discussion of technicalities about the power of coroners in Barbados law to commit persons to stand trial,[85] the focus of the judgment was the question of the court's review powers. The case appears to be authority for the following propositions:

(i) Section 117(10) of the Constitution allows the court jurisdiction to review the exercise by the D.P.P. of his powers under section 79 of the Constitution.[86]

(ii) The informing idea of judicial review is the distinction between action by any authority within its jurisdiction and action not within its jurisdiction.[87]

84 No. 307 of 1988. (S.C.)(BDS).

85 The power of commital which coroners in the state have always taken themselves to have, enhances the protection that this area of the law gives to the right to life (if not to life itself) and gives recognition to the state's duty to vindicate it. The factor of prejudice involved in the power of a coroner to declare that a person has murdered another is not overlooked; but the power does not condemn the person named. In any event, as the *Farmer* litigation itself demonstrates, the finding of a coroner that a murder has been committed does not apparently establish a *prima facie* case of murder.

86 The powers under section 79 are to institute and undertake criminal proceedings, to take over, continue and discontinue them at any stage before a judgment is delivered. Both the judgment and argument before the court treated the *nolle prosequi* power as totally separate and distinct from the power to stop prosecutions stated by section 79. The impression was left that the first power was not reviewable. If this be the case the *nolle prosequi* power can be deployed to avoid judicial review of a decision not to prosecute.

87 The judgment cited the *Anisminic* case, [1969] 1 All E.R. 208 as one of the sources of law in the subject area before the court. It is not clear what the ramifications of this case are for the proposition stated, where *Anisminic* is seen as establishing lack of jurisdiction consequent on an error of law.

(iii) A reviewing court has to distinguish between mistakes made within jurisdiction and those made outside it.[88] (From this point the judgment appears to have proceeded on the basis that the D.P.P. had acted within his powers in the first place to refuse to order a prosecution).

(iv) A decision would only be actually reviewed and declared wrong where an applicant showed that no person in the position of the decision maker could have come to the decision complained of, under the *Wednesbury* test of unreasonableness.[89] Lord Diplock's restatement of that test in *C.C.S.U.* v. *Minister for the Civil Service*, was cited in support: It [the test] applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

The short conclusion then is that a decision by the state not to prosecute where one of its agents has killed, will in practice never be reviewed. Or, will be reviewed only when it is proved to the satisfaction of the court that the decision is insane or egregiously immoral.

An important issue raised by the *Farmer* litigation relates to the reviewer's handling or perception of the facts on which the decision-maker came or could come to a decision. The judgment took account of the particular facts, on the basis of which the D.P.P. came to the conclusion but there was no consideration of the weight (if any) the decision-maker should have given to other highly relevant evidence. The reviewing judge in his own assessment was of the view that certain civilian witnesses were unreliable - a view already expressed by him in the prohibition proceedings - and one clearly accepted by the D.P.P., but quite opposed to that of the Coroner. The weight to be accorded other evidence including medical testimony, which itself could have demanded a different decision and in the light of which the police had readjusted their story at the resumed hearing of the inquest, was not considered.[90] It seems therefore that the reviewer may only consider those facts which actually based the decision, without establishing whether the omission to take into account certain other facts, itself goes to the irrationality, immorality or procedural impropriety of the decision to be reviewed.

Another issue raised by the proceedings is that of redress for infringement of the right to life, as clearly, the action for judicial review has been shown to be of little use

88 The point raised in note 87 is again raised here. Moreover, it is uncertain whether the purport of this point is that mistakes within jurisdiction are not reviewable.

89 *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corp.* [1947] 2 All E.R. 680.

90 The following passage occurs at page 45 of the inquisition: "It is clear that it was only after these police officers heard the medical evidence, that Farmer was likely to be incapable of using his right hand to strike at Sargeant Bowen's head, that they varied their stance and gave evidence that Farmer attacked Bowen with the cutlass using both hands." The point goes directly to the issue of whether or not there was a case of justifiable homicide which, in 'right to life' terms, was the issue before the Director of Public Prosecutions.

as a device for a vindication of the right. The ultimate question is as to the relation between the review action and that for constitutional redress and the suitability of the action for judicial review as a means of redressing alleged infringement of the fundamental rights. An action under the redress clause claiming a breach of the right to life, would have required a different analysis from that actually used in the case considered and which was concerned with the standard to be applied before review of a decision of a state official was undertaken. As a right to life issue there would have been state action and the onus would have been put on the state to demonstrate that the killing by its agent fell within a situation provided for by the constitution as justifying the deprivation of life.

The state of the right to life in any country, particularly as it implicates extra-judicial killings is an important indicator of the existence of rule by law and the actual relevance of the law and constitution to the life of the polity.

8

THE RIGHT TO PERSONAL LIBERTY AND TO SECURITY OF THE PERSON

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