

DEPORTEES AS SCAPEGOATS
- A CRITIQUE OF A BILL ENTITLED
AN ACT TO AMEND THE CRIMINAL
JUSTICE (ADMINISTRATION) ACT 1993

The Minister of National Security and Justice representing the collective decision of the Cabinet, has piloted a Bill through the House of Representative entitled "An Act to Amend the Criminal Justice (Administration) Act." The Bill has been passed by the House with one abstention, that of The Honourable A.J. Nicholson (of Counsel) and is now on its way to the Senate.

This Bill which is commonly called the "Deportees Bill" has been loudly protested by groups and persons far and wide and many and varied. It has been labelled as "unconstitutional", a "fetter on freedom", "illegal", a "breach of our citizens fundamental rights and freedoms", and even "immoral."

The main sections of the Bill are sections 54 (B) and 54 (C) and these are as follows:

Section 54(B)

- (1) The Minister may, by order, upon application by the Commissioner and upon being satisfied that it is necessary so to do in the interest of public safety or public order, designate as a restricted person any Jamaican citizen-
- (a) Who has been convicted of a specified offence in a foreign state;
 - (b) Who has been returned to Jamaica pursuant to a deportation order made in the foreign state or at his election in lieu of deportation; and
 - (c) Whose conduct and activities have been of such a nature that he may be reasonably regarded as constituting a threat to the public safety or public order of Jamaica.
- (2) An order under subsection (1) may impose on a restricted person such restrictions as to residence, reporting to the police, registration, the use or possession of firearms or other weapons, or otherwise as the Minister may deem to be necessary in the interest of public order and public safety.
- (3) The restrictions referred to in subsection (2) shall be in force for such period not exceeding twelve months as the order may specify.

Section 54(C)

- (1) Every restricted person, shall during the period specified in an order under section 54b be under the supervision of the police and shall be subject to the requirements of subsections (2) and (3).

(2) The requirements referred to in subsection (1) are that the restricted person shall-

- (a) notify his place of residence and such other particulars as may be prescribed, to the registration officer of the parish in which he resides;
- (b) once in each week or at such time as the registration officer of the parish in which he resides may require, report in person to such officer;
- (c) if at any time he is absent or likely to be absent from his residence for a period exceeding seven days supply to the registration officer of the parish in which he resides his current address and every subsequent change of address including his return to his residence;
- (d) forthwith supply to the registration officer of the parish in which he resides, particulars of any circumstances affecting or likely to affect in any manner the accuracy of the particulars previously supplied by him pursuant to any of the preceding paragraphs;
- (e) upon reporting to the registration officer pursuant to paragraph (b), produce to the registration officer, the registration certificate furnished to him under section 54e.

The Bill in section 54(A) defines specified offence as "an offence constituted by an act or omission which if it took place in Jamaica (or in case of an extra-territorial offence, in corresponding circumstances outside Jamaica) would constitute an offence specified in the Second Schedule would be punishable under the law of Jamaica with imprisonment for a term of two years or any greater punishment"

The Second Schedule lists the following categories of offences-

1. Felonies or indictable misdemeanors involving injury to person or substantial injury to property
2. Offences against the Dangerous Drugs Act.
3. Offences involving the use or possession of a firearm.

The Bill in its present form raises a number of issues. These I would submit are as follows:

1. Is it constitutional?
2. Is there any factual foundation for the Bill?

3. Is it logically consistent?

4. Is it necessary?

It is prudent, before dealing with these issues to put the Bill in its Legislative context. There is at present, an Act known as the Criminal Justice (Administration) Act. Part II of this Act deals with "Habitual Criminals." Part II contains sections 43 to 55 (inclusive) of the Act. The present Bill seeks to amend this Act to add sections 54(A) to 54(M) inclusive and two schedules.

The present Act provides in Part II that Habitual Criminals may be placed in preventitive detention and that certain repeat offenders may be registered by the Police and may be placed under the Supervision of the Police.

Sections 43, 47 and 54 of the Present Act are as follows:

Section 43. For the better supervision of criminals, a register of all persons convicted of crime in this Island shall be kept under the management of the Commissioner of Police, or of such other person, and in such place as the Minister may appoint, and in such form, with such evidence of identity, and containing such particulars, and subject to such regulations as may from time to time be presented by the Minister: all expenses incurred, with the sanction of the Minister, in keeping such register, shall be paid out of the Consolidated Fund.

Section 47. Where any person shall be convicted on indictment of a crime, and a previous conviction of a crime shall be proved against him, the Court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the Police for a period of seven years, or such less period as the Court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

Every male person subject to the supervision of the Police under this Part, who is at large, shall notify the place of his resident to the Chief Officer of Police of the parish in which such residence is situated, and shall, whenever he changes such residence within the same parish, notify such change to the Chief Officer of Police of that parish; and whenever he changes his residence from one parish to another, shall notify such change of residence to the Chief Officer of

Police of the parish which he is leaving, and to the Chief Officer of Police of the parish into which he goes to reside; moreover every person subject to the supervision of the Police shall once in each month report himself, at such time as may be prescribed by the Chief Officer of Police of the parish in which such person may be, either to such Chief Officer himself, or to such person as that officer may direct, and such report shall be made personally or by letter, as such Chief Officer directs.

If any person, subject to the supervision of the Police under this Part, remains in any place for forty-eight hours without notifying the place of his residence to the Chief Officer of Police of the district in which such place is situated, or fails to comply with the requisitions of this section on the occasion of any change of residence, or with the requisitions of this section as to the reporting himself once in each month, he shall, in every such case, unless he proves, to the satisfaction of the Court before whom he is tried, that he did his best to act in conformity with this Part, be guilty of an offence against this Part, and upon conviction thereof in a summary manner before a Resident Magistrate's Court, he shall be subject to be imprisoned, with or without hard labour, for a period not exceeding one year.

Section 54(1) Where a person is convicted on indictment preferred in the Supreme Court and such person admits that he is, or is found by the Court to be, a habitual criminal within the meaning of this section, the Court, if of the opinion that such person is leading persistently a dishonest or criminal life and that it is expedient that he should be kept in detention for a lengthened period of years, may pass a sentence ordering that he be detained during the Governor General's pleasure, and such detention is hereinafter referred to as "preventive detention"; and a person on whom such a sentence is passed shall while undergoing the sentence of preventive detention be deemed for all purposes to be a person convicted of a felony.

(2) A person shall be deemed to be a habitual criminal who has at least four times previously to the conviction on the said indictment been convicted on indictment of a crime, whether any such previous conviction was in the Supreme Court or in a

Resident Magistrate's Court.

It is in this context that the Bill has been laid.

Is the bill Constitutional ?

Sections 16(1) (2) and (3) of the Constitution of Jamaica states as follows:

Section 16(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Jamaica, the right to reside in any part of Jamaica, the right to enter Jamaica and immunity from expulsion from Jamaica.

- (2) Any restriction on a person's freedom of movement which is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.
- (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
 - (a) Which is reasonably required in the interest of defence, public safety, public order, public morality or public health; or
 - (b) for the imposition of restrictions on the movement or residence within Jamaica of any person who is not a citizen thereof or the exclusion or expulsion from Jamaica of any such person; or
 - (c) for the imposition of restrictions on the acquisition or use by any person of land or other property in Jamaica; or
 - (d) for the imposition of restrictions upon the movement or residence within Jamaica of public officers, police officers or members of a defence force; or
 - (e) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence or to undergo imprisonment outside Jamaica in execution of the sentence of a Court in respect of a criminal offence of which he has been convicted.

At first blush it would appear that whatever the Constitution gives in terms of protecting our citizens freedom of movement it also takes away.

The proponents of the Bill argue that it is Constitutional as the Bill is being enacted to ensure public safety and that Section 16(3) of the Constitution provides that nothing contained in or done under the authority of any Law (such as the Bill) shall be held to be inconsistent with or in contravention of this section to the extent that the Law in question makes provision which is reasonably required in the interest of public safety. This begs the question. Is it reasonably required in the interest of public safety?

Before answering this question however one needs to revert to the pre-constitution legal history of Jamaica. Their Lordships in the Judicial Committee of the Privy Council in the recent Judgment in Privy Council Appeal No. 10 of 1993 Earl Pratt and Ivan Morgan vs the Attorney General of Jamaica and the Superintendent of Prison, St. Catherine Jamaica have stated unequivocally that "the primary purpose of the Constitution was to entrench and enhance pre-existing rights and freedom, not to curtail them" As this is the law in so far as the interpretation to Constitution is concerned one therefore has to look to the rights and freedoms which existed before the Constitution became Law. What were these rights and freedoms? Did the citizen have the right to unfettered freedom? Could he move about as he pleased without any restrictions being put on him once he had not been convicted of a crime or suspected of a crime and held in lawful detention by the authorities.

In my opinion the pre-constitution law in Jamaica was the law of England. The Law of England has as its focal point the supremacy of Parliament. Parliament has unlimited jurisdiction to make Laws presumably in the public interest for the public good and/or for public safety. If this is so then certainly in the pre-constitution period in Jamaica Parliament could have passed such a Law. Is the right to freedom of movement a commonlaw right so enshrined that Parliament in its ultimate sovereignty could pass no Law curtailing it?

The freedom of movement is a part of what English Law considers the liberty of the subject. The liberty of the subject is so strongly favoured under English Law that even an alien engaged in war time hostile activities against the crown is entitled to the protection of his liberty as fully as a British subject for example see the case of Johnson v Pedlar 1921 2 Appeal cases 262. The liberty of the subject is so jealously guarded by the English Court that they will allow nothing to interfere with it, save for Acts of Parliament lawfully passed. Thus a person whose liberty has been unlawfully or illegally curtailed or restricted in any way may bring an action in the commonlaw Courts whether it be for false imprisonment or by way of Habeas corpus.

The present Bill seeks to fetter the freedom of movement of persons who have already been convicted and punished for crimes in a foreign Jurisdiction. There is no Law by which foreign convictions are recorded in Jamaica. Therefore in Jamaican terms many not only have unblemished antecedents but are not even "suspected" persons. Did the Law in the pre-constitutional period allow the Police to restrict the freedom of movement of persons not charged with the commission of crimes.

The Common Law is curious in that whilst the Police and the other Authorities of the State are subject to the Rule of Law, Parliament whilst sitting is not. Thus Parliament could pass a Bill restricting the freedom of movement of a particular class of citizens. The Courts could find that the Police in restricting the freedom of movement of the citizen had no proper or sufficient basis to do so. However the Law passed by the Parliament would not be unconstitutional.

What then is the true position? Is the act constitutional or is it unconstitutional? In my opinion whilst it runs contrary to the spirit of the present constitution it is constitutional.

Is there any factual foundation for the Bill?

The Memorandum of Objects and reasons for the bill states as follows, "In recent times there has been upsurge of unusually violent crimes. This new wave has been particularly disturbing and appears to bear some relationship to the deportation of an increasing number of Jamaicans who have been convicted of violent crimes. The Criminal Justice Administration Act makes provisions for the Police supervision of persons who have been repeatedly convicted under the Jamaican Law. However no similar machinery exists in relation to criminals deported to Jamaica whose conduct appears to pre-dispose them to be a continuing threat to public safety and public order. This Bill therefore seeks to amend the Criminal Justice Administration Act to impose subject to Constitutional safeguards supervisory restrictions on the movement of such persons"

Nowhere in the Memorandum of Objects and Reasons nor in the debate in the House has any empirical evidence been provided by the proponents of the Bill to substantiate the basis as set out in the Memorandum of Objects and Reasons. For example no statistics have been produced showing the number of persons deported to Jamaica for violent crimes. The number of such persons who have been so deported who have been convicted for violent crimes. The number of persons so deported who have been arrested and charged for violent crimes upon their arrival in Jamaica. We are told that over the last three (3) years somewhere in the region of 3,000.00 persons have been deported. What percentage of them have been convicted of violent crimes in Jamaica?

The Government needs to provide us with hard statistics if its advocacy of the Bill is to be accepted. Until that is done it would be reasonably fair for any person to think that this was a knee-jerk reaction by a Government wholly incapable of addressing the issue of violent crimes by way of the traditional methods.

Is it logically consistent?

The Bill is certainly inconsistent with the present Criminal Justice Administration Act. The present Criminal Justice Administration Act speaks of habitual criminals that is persons who have at least four times previously to the conviction on the said indictment being convicted on indictment of a crime. The Memorandum of Objects and Reasons alludes to this when it states that the present Act makes provision for Police supervision for persons who have been repeatedly convicted under the Jamaican Law.

The Deportee Bill as it presently is makes for a person who has had one conviction of a crime of a specified offence abroad to be liable to Police supervision even though that person has been convicted and has served his sentence and has then been deported. This it is submitted makes a mockery of the entire penal system and of the entire purpose of the Courts. A man who is convicted once of a crime for which he gets a sentence in excess of two years and who then is to be supervised on his return afterwards merely because he has been deported is to subject him to a form of double jeopardy which certainly is contrary to the Rule of Law. The Law ought to be that where credible evidence is presented by the Policing authority before a Court, not before a Minister, then that Court upon being satisfied that that person is a threat to public safety could make an order restraining the liberty of that person.

The Memorandum of Objects and Reasons deals with violent crimes. It is a well known fact that many of the so-called "dons" and "barons" have never ever committed a violent crime in their lives. They act like Chief Executives of companies and may or may not give directions of a violent nature to their subordinates and underlings. If such a person was convicted for example of conspiracy to trafficking dangerous drugs would such a person be deemed a violent person. The answer it would seem is not. However such a person is covered by the Act. If such a person is included then why not include persons who have embezzled millions of dollars or who have defrauded persons of millions of dollars by fraud or by the stock market manipulation in the United States. Are their crimes any less serious. What is the basis therefore for deciding these crimes? Is there any data empirical or otherwise to support it? Unless the Government answers these questions effectively then persons would be entitled to think that the Bill is crude and arbitrary in its outlook.

Is the Bill necessary?

The Bill could only be necessary because we have a Police force which is totally inefficient , much corrupted and incompetent. A Police Force which has failed by normal policing work whether it be by way of having informants, by way of doing undercover work or by any other methods to detect crime or if needs be to effect arrests after crimes have been committed. A Police force which merely goes about rounding up men in a manner reminiscent of the Police Chief in the movie Cassablanca saying to his subordinate "round up the usual number of men." The Present Bill is arbitrary, capricious and whimsical and gives power to the Police which it ought not to have in any true democracy. The Police as with any other body in a true democracy ought to be subject to the Rule of Law and the Rule of Law is against the arbitrary use of power. The granting of arbitrary power to persons merely on the basis that because a man has been convicted of a crime that is sufficient basis to supervise him, to watch him like a hawk, to hound him, to require that he report, that he cannot move from one place to another upon penalty of imprisonment is to give arbitrary power to an already overburdened inefficient for the most part corrupt Police. In my opinion the Bill is not necessary.

The Bill offends against public perception sensibility and any Bill which so out-rages the sensibility of the public ought to be rejected by a Parliament, sensitive to the needs of the its citizenry and to those persons who elected its members. It is my hope that, given the nature content and the volume of the outcry against this Bill that even at this eleventh hour our Parliament will become so sensitised that the members of the Senate will follow the public mood and will vote against the Bill.

WALTER SCOTT
NOVEMBER 15, 1993.