HUMAN RIGHTS AND THE SUPPRESSION OF CRIMINAL ORGANIZATIONS,

A balancing exercise

The crime and complex composition of the nation's violence culture have consistently and persistently given successive administrations a long pause. There have been successful machinations by the security forces to either contain or limit violent offspringing from intelligence based operations but nothing to date that can be emulated as being enduring.
Different political institutions, when publicly provoked, have drawn upon emergency powers under the constitution to buttress their national security apparatus, which puts into sharp perspective a need to think outside the box.

Charter of Fundamental Rights and Freedom and the New Bail Act

In many ways, a comparative reading of the repealed Chapter 3 of the Constitution with the new Charter of Fundamental Rights and Freedoms, reveals that the latter is more liberal and detention friendly than the former. Given the complexities of criminal investigations in the modern technologically advanced world and the procedural niceties the crown has to satisfy, in order to maintain order, governments have had to become more friendly to the idea of detention without Charge in the interest of maintaining public order.
Furthermore, legislation had to be introduced to not only deter criminal actions but also organizations. This is evident with the introduction of the Anti-Gang legislation that has reaped significant success in recent months.

Western developing worlds no doubt are looking at the successes of the El Salvador Gang Crack in considering same a necessity to violate individual human rights to attain peace and public order. The number of States of Public emergencies which have been declared during this administration, is evidence enough, that abridging civil, human rights is something that must be done to curtail gang activities and violent crimes.
The use of these emergency powers has not been without difficulties both political and legal, which I would submit are tempering and significantly relieving given the collateral abuse and lack of or ineffective safeguards during implementations.

The New Bail Act

The new Bail Act has taken the ambit much further, swinging in the direction of public protection over individual civil liberties with the significant expansion of the ambit of pre-charge detention and mechanisms for pre-charge Bail. The pre-charge detention under the Bail Act focuses more on the investigative sterility of a case to be laid before the court rather than detentions in relation to public interest. It cannot be deemed unreasonable, however, to expect violence producers / influencers to be removed from society to regain public order given that charges may flow in the least from the Anti-Gang legislation.

I do find it heavily problematic and a bit pre-mature how and who shall be the deciding official for the purposes of section 5 of the Bail Act. The Act is silent on how the deciding official is to be chosen which is cause for concern, this is specifically in relation to the inclusion of Justices of the Peace. This question includes who chooses the Justice of the Peace, it creates a possibility for Justices of the Peace who are close to the families of the accused persons being placed in unfavorable judicial roles to consider the granting of bail to their families once the matter has not yet been considered by a Justice of the Peace engaged by the arresting officer.

Secondly, the Charter of Fundamental Rights and Freedoms is in conflict with the new Bail Act in specific circumstances. I will firstly lay out the relevant sections of the Charter of Fundamental Rights and Freedoms;

Section 14(1) reads,

"No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances;

f. The Arrest and detention of a person –
(i) for the purpose of bringing him before the competent legal authority on reasonable suspicion of his having committed an offence; or
(ii) where it is reasonably necessary to prevent his committing an offence;"

Section 14 (3) reasons

"Any person who is arrested or detained shall be entitled to be tried within a reasonable time and –

(a) Shall be –
    a. Brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and
    b. Released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or
(b) If he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph."

It is important to add finally, section 14(4);

"Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody."

Whereas subsection 6(1)(b)(ii) purports to grant the jurisdiction to a parish judge to deny bail to an accused who is not yet charged, I find that this is in direct conflict with section 14(3) of the Charter of Rights and Freedoms. For ease of reference, I shall include said section below;

(6)(1)(b)(ii) – For the purposes of deciding the question of bail in a case falling under where bail is not granted to the defendant under paragraph (a), a constable shall bring the defendant before a judge of a Parish Court within Forty-Eight hours after the period limited under section 5(1)(a) (Pre-Charge Bail provision) for the question of bail to be determined having regard to the matters specified in section ….and in any case where the Judge of the Parish Court denies bail to the defendant, the judge shall specify the period within which the defendant shall be brought back before a Judge of the Parish Court for the question of bail to be reconsidered having regard to the matters specified in section….."

Section 14(3) of the Charter of Fundamental Rights and Freedoms does not create the discretion for such a person detained to be ordered to remain in custody as it only creates a space for the "court" to release such person unconditionally or upon reasonable conditions. In my view, upon reasonable conditions may mean as strict as the court deems fit having regard to the circumstances but a person who is not charged is entitled to either of the two options. Therefore, section (6)(1)(b)(ii) is inconsistent with the constitution only to the degree where it provides for the detention for be extended without the accused being in the least on bail.

It may seem arguable that section 14(4) of the Charter of Rights and Freedoms entitles the court to keep a detainee in custody, but that section is qualified to those detainees who are awaiting trial. It cannot be sound to conclude that an uncharged accused is awaiting trial.

By further extension, the extension of a pre-charge detention under S. 7 of the Bail Act by six (6) months can only be engaged if it is that the person has been placed on bail. For the purposes of National Security, the detention of a person to restore public order or to prevent the advancement of criminal gangs must also relate to the individual's ability to communicate with those under his authority and often times, though questionable in the current dispensation, demands that the individual remains in the care of the state and free from access devices. Nothing in the act prevents the court from limiting his access to electronic devices whilst on bail but that may require supervision to be enforceable which is virtually impossible given the limited resources of the police.

To take the issue where we started, it is conclusive, in my mind, that there is no vehicle under the present dispensation of our legislature that allows for the abridging of rights to an individual rather than the public at large within our jurisprudence. It is necessary I believe to be able to restrict both movement and access to resources of those individuals or organizations involved in Gang Related Activities which shall include detention amongst other measures. Policy should be developed to slow their financial, economic, and political advances in communities rather than slowing down and adversely affecting the public on a whole.

Policy Suggestion by Leader of the Opposition

In November 2022, the Leader of the Opposition, Mark Golding, opened the conversation for the spearfishing of violence producers rather than the ad hominem approach being engaged by the security forces. When a state of public emergency is declared, it is usually accompanied by curfew orders, which without doubt affects the economic livelihood of a community on a whole. This is usually more impactful on those in socio-economic circumstances as advanced military operations are usually employed in these zones which directly interferes with their daily lives. To advance this point, the geo-economics is more glaring given that the professional class, service class or group otherwise exempt from these curfew orders do not usually reside in these communities that are subject to advance military scrutiny during declarations of States of Public Emergency.

After the declarations, the security forces have concluded, having noticed the pattern that the leaders of criminal organizations usually evade to neighboring parishes to escape the scrutiny and the abridging of basic rights. The law does provide for such persons to be brough back within the jurisdiction of the public emergency dependent on where they are resident, but the overall danger is that the gangs may take satellite routes elsewhere rather than being diminished in scope given the advanced security measures. States of Public Emergencies may give vacating gang leaders an opportunity to expand their operations rather than inhibit them.

The individual based abridging of rights, as Mr. Golding, is therefore the better way of dealing with the issue. Mr. Golding suggested that the mechanisms should be put in place for an ex parte application to be made to the Supreme Court, supported by evidence on affidavit, that would result in the detention of violence producers without charge for a period of time. I would

submit that the period of forty-two (42) days suggested by him is too short and rather, that section 14(3) of the Charter of Fundamental Rights and Freedoms should be amended to accommodate the detention without bail of persons by a competent authority.
This would allow a judge of the Parish Court to exercise the authority contemplated by section (6)(1)(b)(ii) of the Bail Act of 2023. This would allow a parish court judge to do what is being suggested by Mr. Golding given that the Criminal Justice (Supreme of Criminal Organizations) Act already forms part of Part 1 offences in the First Schedule.
Further, section 7 of the Bail Act of 2023 would have to be amended to allow for the further extension of the detention of a person even if they have not been granted bail by and under section 5 and 6 of said legislation.

The conversation and policy ought not to stop at that point, however. In order to appropriately deal with domestic gangs, the government ought to make advances in tackling the financial culture and access of these criminal organizations. The United States passed the Foreign Narcotics Kingpin Designation Act in December 1999 which was a deliberate attempt at cutting access from persons and organizations believed to be, with proper intelligence, involved in the trafficking of Narcotics.

A similar approach may be necessary to cut access, resources and reach to organizations and individuals who are sympathetic to Gang Activities. These declarations under the Narcotics Kingpin Designation Act are not taken or made lightly and are made by the President of the United States. Similarly, in we were to adopt a similar approach, the mechanisms must be put in place for those declarations to be made by the Governor General, someone who is perceiving to be free from political machinations. Such a legislation must create a higher level of scrutiny for such persons or organizations when dealing in or considering their financial affairs on the island. These declarations do not have to be made publicly but by notice to the individual or organizations and to the Bank of Jamaica and other regulatory authorities. Such designation must allow for an application to be made by the individual or organization challenging the designation which would be done inter parties with limited disclosure being given to them, their attorneys to prepare appropriately.