‘The Protection of the Law’: Constitutional Law, Human Rights and Social Justice in the UK and the Commonwealth Caribbean

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“*Human rights on paper are meaningless if they cannot be enforced*.”

- Rt Hon Harriet Harman MP,

Chair of the Joint Committee on Human Rights

Today we’re going to be examining, comparing and contrasting the judicial protection of human rights in the UK and in the Commonwealth Caribbean.

Many countries around the world have a Bill of Rights as part of their national constitution, protecting an enumerated list of fundamental rights and freedoms. And in some countries, the courts have the power to strike down or disapply legislation that they find to be in breach of the Bill of Rights.

As we will see, the countries of the Commonwealth Caribbean each have this kind of constitutionally entrenched Bill of Rights. But the UK does not. The UK does not have a codified constitution as such. And the UK political system is traditionally based on the sovereignty of Parliament.

In this lecture, we are first going to look at the judicial protection of human rights in the UK under the European Convention on Human Rights and the Human Rights Act 1998. Then we are going to compare and contrast this to the model that has been instituted in the former British colonies of the Commonwealth Caribbean. We are going to ask whether either model effectively protects human rights, and how they could be improved.

The UK’s Human Rights Framework

The story of the judicial protection of human rights in the UK is bound up with the European Convention on Human Rights. This is not the only international human rights treaty to which the UK is a party, but it is by far the most important one in practice.

The UK has been a party to the European Convention on Human Rights since 1951. In fact, it was the very first nation to ratify the Convention.

However, for the next fifty years until the Human Rights Act 1998 came into force in 2000, the Convention was not incorporated into domestic law. I will explain what this means. The UK has what is known as a “dualist” legal system, in contrast to the “monist” legal systems of some other countries. When the UK becomes a party to an international treaty, the international treaty does not automatically become part of domestic law, unless Parliament chooses to incorporate all or part of the treaty into domestic law. A treaty that has not been incorporated into domestic law is called an “unincorporated” treaty. Before a domestic

court, you cannot rely directly on an unincorporated treaty as a source of rights and obligations.[1] Sometimes part but not all of a treaty is incorporated into domestic law.

Many important human rights treaties are still mostly unincorporated today. This includes the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.

This does not mean that unincorporated treaties are irrelevant in domestic law. It is a long-established principle that there is a presumption that Parliament intends to legislate in conformity with its international obligations. So, when the courts are construing a provision of domestic law, and the domestic law is ambiguous, they can use an international treaty to help them decide what the domestic law should be construed to mean. This is what lawyers call an "aid to construction". Therefore, before the incorporation of the European Convention, it was possible to rely on the Convention as an aid to construction.

But the limits of this doctrine were underlined by the House of Lords in the 1991 case of *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696. That case drew a careful distinction. It reaffirmed the traditional doctrine that an international treaty could be used to resolve an ambiguity or uncertainty in a statutory provision. However, where a statutory provision was not ambiguous or uncertain, there was no rule that a public authority had to exercise its discretionary powers consistently with an international treaty.

So, for example, when it is unclear whether a statutory provision means that a Minister must do X or must do Y, an international treaty can be relied on to help the court decide what the provision means. But where a statutory provision is perfectly clear but gives the Minister a discretion to decide whether to do X or not, there is no obligation for the Minister to exercise that discretion in accordance with an international treaty.

So, before 2000, if the UK had breached your rights under the European Convention, you might, depending on the circumstances, find yourself without any remedy before a domestic court. If that was the case, you could, of course, take your case to the European Court of Human Rights, which could find the UK to be in breach of the Convention and could award you monetary damages. But depending on the breach you were complaining about, that remedy might not be much use to you. If the UK refused to change the law or practice that had been found to be in breach of the Convention, there might not be much you could do about it.

This changed, to a significant extent, when the Human Rights Act 1998 came into force in October 2000. The 1998 Act incorporated some, but not all, provisions of the European Convention on Human Rights directly into UK law. And it created a complex and multi-layered mechanism for enforcing those rights before UK courts.

Let's take a look at how the Human Rights Act works.

First of all, the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. This is the central guiding principle of the Act. It means that in general, if a public authority breaches your Convention rights, you have judicial remedies in UK courts under the Human Rights Act. For example, you can challenge the public authority's decision by judicial review and have that decision quashed. Or you can bring a civil claim against the public authority and, in some cases, can be awarded damages for the breach. You can also rely on human rights as a defence in civil or criminal proceedings brought against you by a public authority.

However, the Human Rights Act stops short of being a constitutionally entrenched Bill of Rights, because it affirms the traditional principle of parliamentary sovereignty.

The Act does not allow the courts to strike down primary legislation which conflicts with the European Convention. The courts are required to interpret legislation, so far as possible, as being in conformity with the Convention. They can "read down" legislation so as to bring it into conformity with the Convention, if they can do so without going against the grain of the legislation. But if they cannot read down the legislation so

[1] As recently reaffirmed in *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26

as to bring it into conformity with the Convention, the only thing they can do is to make a declaration of incompatibility.

A declaration of incompatibility is a signal to Parliament and the public that the relevant legislative provision is incompatible with the Convention and needs to be reformed. But it doesn't actually disapply the legislation. Courts are still obliged to apply what Parliament has enacted unless and until it is changed.

The Act provides a mechanism, called a remedial order, by which Ministers can amend the relevant law so as to bring it into conformity with the Convention. But the decision whether to do this or not is a political decision. The courts cannot force them to do so.

In practice, most of the time, when a court makes a declaration of incompatibility, the incompatibility is subsequently remedied, either by a remedial order made by Ministers or by an amending Act of Parliament. However, there have been some exceptions to this, of which the starkest is the issue of prisoner voting. The Strasbourg Court held in *Hirst v United Kingdom* (2006) 42 EHRR 41 that the UK's blanket ban on prisoners voting was incompatible with the Convention. Soon afterwards, the Scottish Registration Appeal Court in *Smith v Scott* [2007] CSIH 9 made a declaration of incompatibility. But the UK Government, which disagreed with the *Hirst* decision, made a decision not to amend UK law to allow prisoners to vote. And there is nothing the courts have been able to do about this. Years later, in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, the Supreme Court declined to make another declaration of incompatibility, even though the blanket ban on prisoner voting was admittedly incompatible with the Convention. In short, in this case the Government has decided to just ignore the Convention because it doesn't like the result. And there is nothing that lawyers or courts can do about it.

Another closely related constraint under the Convention is that, whereas it is ordinarily unlawful for a public authority to act incompatibly with a Convention right, this does not apply if the authority could not have acted differently because of one or more provisions of primary legislation. So, if your Convention rights were breached, but this happened because it was required by primary legislation, you have no effective remedy before the courts.

And if Parliament wanted to rewrite the Human Rights Act, or repeal it altogether, or exempt a whole sphere of government activity from its scope, it could do so. For example, Parliament legislated in 2021, very controversially, to impose a new limitation period for Human Rights Act proceedings against the Ministry of Defence in respect of overseas armed forces operations. And the Government is currently carrying out a consultation on wide-ranging proposed reforms of the Human Rights Act, which may well result in legislation. In short, under our system, our human rights are given by Parliament, and what Parliament can give, Parliament can take away.

So what do we think of the structure of the Human Rights Act? Is it a good thing that the courts can't strike down primary legislation, and that Parliament can consciously legislate contrary to Convention rights if it chooses to do so? Well, it all depends on your perspective.

Some people argue that it is indeed a good thing. They argue that in a democratic political system, it should be our elected representatives in Parliament, not unelected judges, who should make the final decision about how human rights should be understood and applied. After all, they argue, human rights are inherently political. When the European Court or a domestic court decides that terror suspects can't be detained indefinitely, or that a migrant can't be deported without procedural safeguards, or that prisoners should be able to vote, they're not just "applying the law" – they're making a value-judgment about how individual rights should be weighed against the perceived collective good, which is an inherently political exercise. Some people argue that judges are not democratically elected, are not representative of the popular will, and don't have the institutional competence to make decisions that are fundamentally political in character.

The people making this argument are of course correct that human rights are political, and that judges don't merely apply the law but also make it. They are also correct that judges aren't democratically accountable. Indeed, throughout this lecture series I have sought to point out that judges are disproportionately drawn from privileged groups and are not representative of the people whose lives their decisions affect.

On the other hand, a fundamental problem with this argument is that many of the people who need to rely on human rights litigation to defend themselves are the very people who are disenfranchised by our political system. For example, much human rights litigation is brought on behalf of asylum-seekers and irregular migrants – who can't vote, and therefore have no democratic say in what Parliament decides to do to them. And the litigation in respect of prisoners' voting rights was, by definition, brought by people who could not vote and had no say in the law.

As an analogy, imagine a political system in which only men could vote. This isn't far-fetched – such political systems have existed in many countries, including the UK until the early twentieth century. Liechtenstein did not allow women to vote until the 1980s, having held a series of referenda on the question – in which only men could vote. In such a political system, do you think legislation imposing restrictions on women would have any democratic legitimacy? Of course not, because the very people affected by the law are systematically disenfranchised.

By the same token, therefore, we might ask whether the vast body of legislation enacted by our Parliament inflicting suffering on asylum-seekers, for instance, has any real democratic legitimacy, given that asylum-seekers cannot vote and have no say in our political system. And even where people are not disenfranchised, the course of history gives numerous examples of a majority voting to oppress a poor and powerless minority. In this context, leaving the final say up to Parliament means giving *carte blanche* to the tyranny of the majority. And when I say "the majority" in this particular context, I don't even mean the majority of the people, but rather the majority of the MPs in the House of Commons. As we all know, our first-past-the-post electoral system does not always produce proportionate results.

That brings me on to my next question. How effective is the European Convention on Human Rights, as applied in the UK, at protecting the rights of the oppressed? We're going to take a whistle-stop tour through some of the most important rights in the Convention, what they do, and what they don't do.

The Convention Rights

On the whole, the European Convention on Human Rights only protects civil and political rights, like the right to life, freedom from torture, the right to liberty, the right to freedom of expression, and so on. It doesn't protect social and economic rights. It doesn't give us a right to free health care, to free education, to an adequate standard of living, or to decent employment. Social and economic rights are protected in some other human rights treaties, such as the International Covenant of Economic, Social and Cultural Rights, and other national constitutions, such as the Constitution of South Africa. They're also protected to an extent by the EU's Charter of Fundamental Rights. But the European Convention doesn't protect those rights. We will return to the significance of this.

In terms of how they are drafted, many of the rights in the European Convention at first blush look like negative rights, rather than positive rights. That is, they're about what the state must not do to you, rather than what the state must do for you. However, in practice, it's more complicated than that, because the European Court of Human Rights has construed many of the Convention rights as imposing a range of positive obligations on the state.

Due to constraints of time, we aren't going to look at all the rights in the European Convention but will simply pick out a few particularly important ones.

One right I've talked about in many previous lectures is Article 2, the right to life. As interpreted by the European Court of Human Rights, Article 2 isn't a purely negative right that only restricts the power of the state to kill you. It also imposes positive obligations on the state. There are three main positive obligations. First, the systems duty, to have an adequate legal framework for the protection of life. Second, the operational duty: where the state knows or ought to know that there is a real and immediate risk to a person's life, it has a duty to take reasonable steps to protect them.[2] This duty often comes up in the context of people who are

[2] See for example *Osman v United Kingdom* (2000) 29 EHRR 245 and *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2

institutionalised, such as prisoners, immigration detainees and people detained under the Mental Health Act. And third, the investigative duty: the duty to carry out an adequate investigation into killings in which the state is involved.[3] As I've described in detail in my previous lectures, this jurisprudence has had a huge positive impact across numerous areas of our law, especially the law of inquests and public inquiries. The bereaved families of the victims of state killings have far stronger rights today than they did a couple of decades ago.

Similarly, Article 3 – the prohibition of torture and inhuman or degrading treatment or punishment – has evolved significantly over the decades. The paradigm case of an Article 3 violation is when the state itself inflicts the treatment, such as by torturing you or by imprisoning you in inhumane conditions. But the scope of Article 3 has evolved well beyond that. The panoply of positive obligations under Article 2 – the systems duty, the operational duty and the investigative duty – also have their counterparts in respect of Article 3. So the state isn't just obliged to refrain from torturing or ill-treating you, but also to provide protection against torture and ill-treatment from private actors.[4]

And the landmark cases of *Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* (1997) 23 EHRR 413 established that a state wasn't just prohibited from torturing or ill-treating a person itself. It was also prohibited from forcibly returning them to a country where they would be tortured or ill-treated, even if that country was not itself a party to the European Convention. This is a hugely significant protection, which is much wider in scope than the protection available under the Refugee Convention. In particular, it's an absolute right – so it applies even where a person has committed serious crimes or poses a threat to national security. Whatever the context, a person has an absolute right not to be tortured or subjected to inhuman or degrading treatment.

But the real challenge in the Article 3 case law has been how far it protects a person from inhuman and degrading treatment that is inflicted on them not by violence, but by poverty. After all, the experience of a homeless person who is freezing and starving on the street could be called inhuman and degrading. So too could dying of a preventable disease due to being unable to afford medical care. We can see here the frontier between civil and political rights on the one hand, and social and economic rights on the other. Does Article 3 give people a right to dignified living conditions, food, or medical care?

The answer, as elucidated in the case-law, could best be described as "no, except in certain circumstances". In general, Article 3 doesn't impose any obligation on the state to provide a person with the necessities of life. However, this changes when there is an additional element of state responsibility involved. The courts have accepted, for example, that where an asylum-seeker – who the state specifically prevents from working or claiming benefits because of their immigration status – is left to become destitute and street-homeless by the state, this can breach Article 3.[5]

Similarly, in some very narrow circumstances, the courts have accepted that forcibly returning a person to a country where they will face an early and painful death due to lack of medical care, and/or due to a condition of total destitution, may breach Article 3. For a decade this was almost impossible to establish, following the decisions of our House of Lords and the Strasbourg Court in the *N* case,[6] which limited the doctrine so severely that almost no one could meet it. But it's now somewhat easier to meet, following the changes made by the Strasbourg Court in *Paposhvili v Belgium* [2017] Imm AR 867 and ultimately accepted by our Supreme Court.[7] David Neale and I covered these cases in detail in our previous lecture on the history of immigration control.

In short, Article 3 has expanded beyond its literal wording, but this expansion has not been unlimited. It is still essentially a civil and political right, not a social and economic right. It does not confer a right to decent and dignified living conditions, food, shelter, or health care. And that is a very serious lacuna in the European Convention.

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[3] See *Middleton v HM Coroner for Western Somerset* [2004] UKHL 10
[4] See for example *DSD v Commissioner of Police for the Metropolis* [2019] UKSC 11
[5] See *R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 and *MSS v Belgium and Greece* (2011) 53 EHRR 2
[6] *N v Secretary of State for the Home Department* [2005] UKHL 31; *N v United Kingdom* (2008) 47 EHRR 39
[7] In *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 7

Finally, Articles 8, 9, 10 and 11 of the Convention have all had a huge impact on our jurisprudence. These respectively protect the right to private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression, and the right to freedom of assembly and association. Unlike Articles 2 and 3, these rights are not absolute rights, but qualified rights. This has led to the adoption of the concept of proportionality in our law. Where a law or government decision interferes with one of the qualified rights, it has to pursue one of the legitimate aims set out in the Convention – such as the prevention of crime and disorder, the economic wellbeing of the country, or the protection of the rights and freedoms of others – and has to be proportionate to that goal. Our courts have held that in dealing with an alleged breach of a qualified Convention right by a public authority, the role of the court isn't limited to deciding whether the public authority's decision was reasonable – the court has to decide for itself whether the Convention right has been breached, which means that the court itself has to decide whether the decision was proportionate.[8]

Article 8 is a particularly wide-ranging right. Since the landmark case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11*,* Article 8 has had a huge and controversial impact in immigration law, providing many people with a route to come to or stay in the UK outside the terms of the Immigration Rules, which led to a vicious backlash from the Government in the form of the Immigration Act 2014. Article 8 also embraces many other aspects of human life, including a person's name, their gender identity, their ethnic identity, their mental and physical health, and their right not to be evicted from their home, among other things. Some of the most important and progressive changes in our society in recent decades have been driven by litigation under Article 8, ranging from the recognition of transgender people's identities to the protection of children's rights in immigration law.[9]

But again, these rights are essentially civil and political, not social or economic. Article 8 may regulate the state's interference with a person's home or with their mental and physical health, for example, but it doesn't confer a freestanding right to be provided with a home or with adequate health care. This is a real limit of our human rights regime.

The Constitutions of the Commonwealth Caribbean

Now I want to turn away from the UK and take a broad-brush look at the constitutions of the Commonwealth Caribbean. Although I speak from the perspective of an English lawyer, I'm also a citizen of Antigua and Barbuda and of Dominica, and I'm called to the Bars of several Caribbean islands. I've been involved in litigation in Antigua and Barbuda, Dominica, Grenada, and St Kitts and Nevis. It's been interesting to compare the constitutions of the Commonwealth Caribbean to what we have in the UK.

The Commonwealth Caribbean is a diverse place. Some jurisdictions, such as Anguilla, the British Virgin Islands, the Cayman Islands and Montserrat, are still British Overseas Territories. But many others are independent countries within the Commonwealth.

Most of these constitutions follow a broadly similar template, although there are also important differences between them. At the start, they contain a Bill of Rights that protects fundamental rights and freedoms. The rights are usually modelled broadly on the European Convention, although there are usually important differences in wording from the European Convention. There are also important differences in the rights included in different constitutions. Some follow the wording of the European Convention much more closely from others. But again, for the most part, the rights tend to be civil and political, not social and economic.

Most Commonwealth Caribbean constitutions provide for a Westminster parliamentary system similar to that of the UK. In some independent Commonwealth Caribbean countries, the head of state is the Queen represented by a Governor-General, while others are republics that have an elected President. These roles are for the most part ceremonial. Guyana, which has a more powerful presidency, is an exception to this general rule. Those jurisdictions that are still British Overseas Territories have a Governor rather than a

[8] See *R (Begum) v Denbigh High School Governors* [2006] UKHL 15 and *Belfast City Council v Miss Behavin'* [2007] UKHL 19

[9] See *Goodwin v United Kingdom* (2002) 35 EHRR 18 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4

Governor-General. In these territories important powers are reserved to the Governor, particularly over foreign affairs and defence.

In independent Commonwealth Caribbean countries, the actual executive power is usually vested in a Prime Minister and Cabinet, who are drawn from the majority party in the legislature, just as in the UK. Similarly, the Commonwealth Caribbean overseas territories have a Premier and Cabinet, albeit those important powers are reserved to the Governor.

The constitutions also provide for the judiciary. There are variations in what the courts are called and how they are organised, but most Commonwealth jurisdictions follow a similar pattern. Each state and territory has a court of unlimited original jurisdiction, similar to the High Court in England. This may be called the Supreme Court, the High Court, or in the Cayman Islands the Grand Court. Appeals from that court are heard by a Court of Appeal. And above the Court of Appeal, at the apex of the judicial system, you have either the Judicial Committee of the Privy Council in London, or the Caribbean Court of Justice. We're going to be discussing these two courts in more detail in a future lecture.

Most jurisdictions have a Judicial Service Commission which is responsible for advising on the appointment and discipline of judges. And judges of the higher courts have constitutionally protected tenure of office and can only be removed for misconduct or inability to perform the functions of their office. This normally requires an elaborate process that includes the appointment of an ad hoc tribunal to investigate the allegations.

In several islands of the Eastern Caribbean, including my home islands of Antigua and Dominica, there is a shared court called the Eastern Caribbean Supreme Court. The Eastern Caribbean Supreme Court is split into two courts, a High Court and a Court of Appeal. The High Court is the court of unlimited original jurisdiction, and the Court of Appeal hears appeals from the High Court.

Each jurisdiction also has lower courts, usually called Magistrates' Courts, which are usually provided for in an Act of Parliament rather than the Constitution itself. Generally, magistrates and other lower judicial officers don't have the same robust security of tenure as higher court judges.

Human Rights Protection in the Commonwealth Caribbean

A few key features of these Commonwealth Caribbean constitutions set them apart from the UK's system.

First of all, the Constitution is the supreme law, and any other law inconsistent with the Constitution is invalid to the extent of the inconsistencies. This means that, unlike in the UK, the courts can – and indeed must – disapply an Act of Parliament that breaches constitutional rights.

Secondly, there is a specific, constitutionally mandated procedure for bringing a claim in the High Court in respect of an alleged breach of the Constitution. This is typically dealt with by two separate sections of the Constitution – one dealing with breaches of fundamental rights and freedoms, and the other dealing with other breaches of the Constitution. This procedure operates similarly to a claim for judicial review. When this procedure can or should be used has been a matter of controversy in Caribbean jurisprudence.[10]

Thirdly, although the rights are usually modelled broadly on the European Convention, there are a lot of variations in wording. For instance, many constitutions contain a clause at the start of their Bill of Rights that sets out broad statements of principle, with wording such as "life, liberty, security of the person and the protection of the law". Whether the prefatory clause is actually enforceable in court has been held to vary between different Commonwealth constitutions according to the exact wording used.[11] Nothing like this is found in the European Convention.

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[10] See *Ramanoop v Attorney-General of Trinidad and Tobago* [2005] UKPC 15, [2006] 1 AC 328; *Jaroo v Attorney-General of Trinidad and Tobago* [2002] 1 AC 871; *Belfonte v Attorney-General of Trinidad and Tobago* (2005) 68 WIR 413

[11] See *Oliver v Buttigieg* [1967] 1 AC 115; *Societe United Docks v Mauritius* [1985] AC 585; *Blomquist v Attorney-General of Dominica* [1987] AC 489; *Grape Bay Ltd v Attorney General of Bermuda* [2000] 1 WLR 574

So, with this in mind, let's turn to how human rights protection in the Caribbean functions in practice. This is a vast subject, and we only have time for a few headline points, rather than a detailed treatment.

Most Commonwealth Caribbean constitutions have a provision in similar or identical terms to Article 3 of the European Convention, prohibiting torture and inhuman or degrading treatment or punishment. This has been extensively litigated.

An important issue in these cases, however, has been the savings clauses. This is a feature of Commonwealth Caribbean constitutions that has no counterpart in the European Convention. Some Commonwealth Caribbean constitutions have a savings clause which protects forms of punishment that were lawful immediately before a specified date, even if those forms of punishment would otherwise constitute unconstitutional inhuman and degrading treatment or punishment. The ambit of the savings clauses has been central in many cases involving criminal justice.

Commonwealth Caribbean countries inherited capital and corporal punishment from the UK, and this has given rise to a great deal of litigation.

For instance, in the landmark case of *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1 the Privy Council held that a 14-year delay in the carrying out of the death penalty constituted inhuman and degrading treatment.[12] It held that the savings clause did not apply, because it was confined to authorising descriptions of punishment. It did not prevent a person from arguing that the circumstances in which a sentence was to be carried out constituted inhuman and degrading treatment. The effect of this decision was that a sentence of death has to be carried out within five years if it is to be carried out at all – so the "death row" practices of the US are unconstitutional in the Commonwealth Caribbean.

Another important example came in the early 2000s. Many Commonwealths Caribbean jurisdictions inherited from the UK the mandatory death penalty for murder. If a person was convicted of murder, the sentencing judge had no discretion and was obliged to impose the death penalty. It was not suggested that the death penalty itself was torture or inhuman or degrading treatment or punishment, because the various constitutions specifically allowed it, as an exception to the right to life. But the mandatory death penalty was challenged on constitutional grounds. In a 2002 trio of cases from Belize, St Lucia and St Kitts and Nevis, the Privy Council held that the mandatory death penalty constituted inhuman or degrading treatment, because it prevented any judicial consideration of the humanity of sentencing a person to death in an individual case.[13] This did not mean that no one could be sentenced to death. But it meant that whether they were sentenced to death had to be considered on the individual facts of their case, rather than being automatic upon conviction.

The savings clauses were in issue in two of these three cases. The Privy Council held that the savings clause prevented the court from holding that the relevant statute was unconstitutional insofar as it authorised the infliction of the death penalty on all murderers. But to the extent that the statute went beyond this and required the imposition of the death penalty on all murderers, the savings clause did not apply. Therefore, the savings clause did not prevent the Board from protecting people's rights in this instance.

But this does not mean that the savings clauses are a dead letter. In *Pinder v The Queen* [2003] 1 AC 620 the Privy Council upheld the legality of a statute reintroducing flogging in the Bahamas. Even though flogging was inhuman and degrading punishment, it was saved by the savings clause because it had been lawful immediately before the specified date. So, the savings clause is a significant limitation on the constitutional prohibition of inhuman and degrading treatment or punishment. It means that some people can be lawfully subjected to treatment that is admittedly inhuman and degrading.

Another important area of constitutional litigation has been about prison conditions. In Europe, the European Court of Human Rights has been quite prescriptive as to what prison conditions are acceptable in Article 3 terms – for example, there is a presumption of an Article 3 breach if a prisoner has less than three square metres of personal space.[14]

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[12] Reversing its own decision in *Riley v Attorney-General of Jamaica* [1983] 1 AC 719.
[13] *Reyes v The Queen* [2002] UKPC 11, *R v Hughes* [2002] UKPC 12 and Fox v The Queen [2002] UKPC 13
[14] *Mursic v Croatia* (2017) 65 EHRR 165

But in the Caribbean, prison conditions are generally appalling by European standards, and fall far short of measuring up to the standards set out by the Strasbourg Court. Given that the prohibition of inhuman and degrading treatment or punishment is an absolute right, both in the ECHR and in Commonwealth Caribbean constitutions, does this mean that Caribbean prison conditions systematically breach it?

The case of *Thomas v Baptiste* [2000] 2 AC 1 squarely confronted this question. The case was decided under the Trinidad Constitution, which unlike most Caribbean constitutions refers to "cruel and unusual" rather than "inhuman or degrading" punishment, but there was no suggestion that this difference in wording was material.[15] In that case, the applicants, who were under sentence of death, argued that to execute them would be cruel and unusual punishment because, inter alia, of the poor conditions in which they were being held. The majority made a stark finding:

> *"The applicants were detained in cramped and foul-smelling cells and were deprived of exercise or access to the open air for long periods of time. When they were allowed to exercise in the fresh air they were handcuffed. The conditions in which they were kept were in breach of the Prison Rules and thus unlawful. It does not follow that they amounted to cruel and unusual treatment. (It is rightly accepted that they did not amount to additional punishment.) In a careful judgment de la Bastide C.J. found that they did not. The expression is a compendious one which does not gain by being broken up into its component parts. In their Lordships view, the question for consideration is whether the conditions in which the applicants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual. Prison conditions in third world countries often fall lamentably short of the minimum which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were commonplace. Whether or not the conditions in which the applicants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison. Their Lordships do not wish to seem to minimise the appalling conditions which the applicants endured. As the Court of Appeal emphasised, they were and are completely unacceptable in a civilised society. But their Lordships would be slow to depart from the careful assessment of the Court of Appeal that they did not amount to cruel and unusual treatment."*

This passage appears to suggest that the constitutional standard varies according to the affluence of the country concerned. That stands in stark contrast to the European Court of Human Rights' approach, which applies the same Article 3 standards to every country in Europe, whether rich or poor.

Another interesting area of constitutional litigation in the Caribbean has been in the area of communal land rights. In a series of progressive judgments, the Belizean courts and the Caribbean Court of Justice recognised the traditional communal land rights of Mayan communities as being protected by the constitutional right to property.[16] Unfortunately, the Eastern Caribbean Court of Appeal recently took a markedly less progressive approach in its judgment on the communal land rights of Barbudan islanders, which is currently under appeal to the Privy Council.[17] We will be looking at the plight of communities fighting for their land rights in more detail in a future lecture.

Despite the fact that the Commonwealth Caribbean has seen a lot of constitutional litigation, there are some areas of constitutional jurisprudence that remain underdeveloped compared to the UK and European jurisprudence. For example, I referred earlier to the panoply of positive obligations that the Strasbourg Court has derived from the rights guaranteed by Articles 2 and 3 of the Convention: the systems duty, the operational duty and the investigative duty. It remains unclear whether similar positive obligations will be held to exist in the Commonwealth Caribbean. The issue was recently brought up in a Jamaican case, *Commissioner of the Independent Commission of Investigations v Police Federation* [2020] UKPC 11 but was not decided.

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[15] It was applied, for instance, in *Campos v Attorney-General* AG 2010 HC 21 to hold that prison conditions in Antigua were not "inhuman and degrading" within the meaning of the Antigua and Barbuda Constitution.
[16] See *Cal v Attorney General of Belize* (2007) 71 WIR 110 and *Maya Leaders' Alliance v Attorney General of Belize* [2016] 2 LRC 414
[17] *Attorney-General v Frank and Walker* AG 2020 CA 5

Some jurisdictions have been more influenced by European jurisprudence than others. For example, in the Cayman Islands, which is a British overseas territory, the recent case of *Day and Bush v Registrar of the Cayman Islands* [2019] CICA J1107-1 (which is under appeal to the Privy Council at present) drew extensively on European Convention jurisprudence in holding that same-sex couples, while not having the right to marry, had to be given a legal status functionally equivalent to marriage. But that is in the context of a territory which is under UK sovereignty and to which the European Convention has expressly been extended, and where the text of the Constitution tracks that of the European Convention more closely than do those of many other Commonwealth Caribbean constitutions. So, it is not surprising that we don't see so much European influence in other Caribbean jurisdictions.

Conclusion

This lecture could have been an entire book. There's a great deal we could have talked about and didn't have time for. For instance, we didn't have time to get into the impact of Article 14, the prohibition of discrimination, or Article 6, the right to a fair trial, and their cognate rights in Caribbean constitutions. Nor have we had a chance to look at important comparators from elsewhere in the Commonwealth, such as the progressive constitutional jurisprudence in South Africa and India.

But now that we've taken a whistle-stop tour through the strengths and weaknesses of the UK and Commonwealth Caribbean human rights protection systems, let's stop to think about what an ideal system of human rights protection would look like.

First, it would be constitutionally entrenched. A strength of the Commonwealth Caribbean system is its constitutional entrenchment, and the concomitant duty of the courts to disapply primary legislation that breaches the Constitution. Politicians can't take away human rights on a whim. By contrast, in the UK, it's very easy for Parliament to simply refuse to honour a declaration of incompatibility, or even to amend the Human Rights Act to weaken the protection of human rights.

Second, it would go wider than either the European Convention or the Caribbean constitutions do. It would of course need to include the core civil and political rights protected by the Convention. But it would also include social and economic rights such as the right to free health care, the right to free education, and the right to an adequate standard of living. The South African Constitution and the International Covenant of Economic, Social and Cultural Rights could be good templates to use.

Third, the judiciary would take an approach that looks beyond the literal wording of the text and enforces the spirit, not just the letter, of human rights guarantees. In this regard, the judiciary would look to case law from other jurisdictions and international courts when developing the law. For instance, the European Court of Human Rights jurisprudence on the Article 2 and 3 positive duties should be an important influence. We would also want our hypothetical system to look to case law from other international courts such as the Inter-American Court of Human Rights, which has often been a progressive and innovative court, and whose judgments have had an influence on Commonwealth Caribbean jurisprudence.

A system of human rights protection with these features would have an important role to play in moving society forward and achieving social justice.

Let me finish with this.

> "*Where, after all, do universal human rights begin? In small places, close to home -- so close and so small that they cannot be seen on any maps of the world. [...] Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world*."
> - Eleanor Roosevelt

References and Further Reading

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