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Changing Commonwealth Caribbean Constitutions to Conform with Human Rights Norms

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The background

In the face of widespread economic deprivation, social inequalities and political marginalization, the peoples of the Commonwealth Caribbean experienced during the 1930s a ferment of egalitarian philosophies, libertarian ideas and nationalistic aspirations. Subsequently, post-war revulsion against racism, imperialism and inhumanity inspired an international and unprecedented commitment to the principles of self-determination and human rights. In the Caribbean the immediate demand was for the democratization of the franchise and increased popular participation in the processes of government, since these were seen as indispensable to the paramount need for far-reaching social reconstruction.[1]

Constitutional reform concentrated on the introduction of universal adult suffrage and the transfer of executive power from the colonial administration to local political representatives. In the final analysis, protection against any possible local abuse of governmental power was seen to be secured by gubernatorial legislative veto and residual imperial legislative and prerogative powers.[2]

It was not until independence became imminent that a demand developed for the incorporation of human rights guarantees in Caribbean constitutional instruments. By then the Universal Declaration of Human Rights had acquired international prestige. The United Kingdom had herself adopted the European Convention on Human Rights. The Indian Constitution had included extensive human rights provisions and, most significantly, the Nigerian Constitution incorporated a Bill of Rights which was patterned on the European Convention on Human Rights.[3]

Apart from Trinidad and Tobago, which utilized the more generic expression of human rights to be found in the Constitution of the United States of America, the Commonwealth Caribbean constitutions have followed the Nigerian example and adopted the detailed statement of fundamental rights and freedoms of the European Convention with its express

1 *Report of the West India Royal Commission*, Cmd 6607 (1945), pp 57-8.

2 Lloyd G. Barnett, *The Constitutional Law of Jamaica* (Oxford: Oxford University Press, 1977), pp 376-7.

3 S.A. de Smith, *The New Commonwealth and its Constitutions* (London: Stevens, 1964), pp 162-83; A. Gledhill, "Fundamental Rights" in J.N.D. Anderson (ed), *Changing Law in Developing Countries* (London: Allen & Unwin, 1963), p 81.

prescription of qualifications.

The Balliol Statement of 1992 which emanated from the fifth Judicial Colloquium declared that:

> "The general principles enunciated in the colloquia reflect the universality of human rights - inherent in humankind - and the vital duty of an independent and impartial judiciary in interpreting and applying national constitutions, ordinary legislation, and the common law in the light of those principles. These general principles are applicable in all countries but the means by which they become applicable may differ.
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> The international human rights instruments and their developing jurisprudence enshrine values and principles long recognized by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth. They should be interpreted with the generosity appropriate to charters of freedom. They reflect international law and principle and are of particular importance as aids to interpretation and in helping courts to make choices between competing interests."[4]

The present position

Despite the historic and idealistic antecedents of these constitutional human rights provisions, there are at least four main sources of potential conflict between their application and the norms established by international conventions. These are as follows:

- traditionalism in the approach to judicial interpretation of constitutional provisions;
- the presence of savings clauses in the bills of rights which preserve pre-independence laws;
- the existence of variation between the constitutional and conventional expressions of human rights standards; and
- the continuing development of conventional human rights norms.

Judicial interpretation

The application of a traditional judicial approach to statutory interpretation in the construction of the constitutional instruments was encouraged by the fact that invariably the constitutional Preamble to the Bill of Rights commenced with the following words:[5]

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4 *The Balliol Statement of 1992*, paras 4-5.

5 For example, Jamaica, Section 13; Bahamas, Article 15; Guyana, Article 40.

> "Whereas every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest ..."

This ambiguous expression, which failed to acknowledge expressly that international human rights principles provided a primary source of the constitutional provisions, contributed to an initial view that the Bill of Rights conferred no new rights.

In the *Nasralla*[6] case, which gave Caribbean judges one of the earliest opportunities to construe one of these constitutional instruments, both the Supreme Court and Court of Appeal of Jamaica treated the fundamental rights provisions in question as merely declaratory of the common law. In the Court of Appeal, Mr Justice Lewis stated that the Bill of Rights chapter of the Jamaican Constitution "seeks in some measure to codify those 'golden' principles of freedom, generally referred to as the rule of law, which form part of the great heritage of Jamaica and are to be found both in statutes and in great judgments delivered over the centuries".[7] In the same case, Lord Devlin on the appeal to the Privy Council in giving the opinion of the Board referred to the Preamble as demonstrating that this chapter of the Constitution proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. His Lordship stated:

> "This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions."[8]

In Trinidad and Tobago where the "due process clause" predominated and gave scope for less traditionalist sentiments, a similar approach was demonstrated. This was evident even in such a case as *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney-General v Prakash Seereeram* (1975),[9] where the Court of Appeal of Trinidad and Tobago took a liberal approach in holding that a statute imposing compulsory deduction of cess (a levy) on canes supplied by cane farmers to sugar manufacturers for eventual payment to an association was unconstitutional, as infringing the constitutional right to property and freedom of association. Although reference was made to the Universal Declaration of Human Rights and relevant International Labour Organization (ILO) conventions, Phillips JA nevertheless stated:

> "The right of freedom of association, which is recognized by the Constitution as existing before its commencement, has its roots in the common law of England which is deemed to have been in force in Trinidad as from 1st March 1848. (See Section 12 of the Supreme Court of Judicature Act 1962.) In my judgment, counsel's submission that a restricted

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6 *Nasralla v Director of Public Prosecutions*, (1965) 9 WIR 15.

7 Ibid, at 27.

8 *Director of Public Prosecutions v Nasralla*, [1967] 2 AC 238, at 247-8.

9 (1975) 27 WIR 329.

> interpretation must be put upon the expression 'freedom of association and assembly' is untenable."[10,11]

However, in *Maharaj v Attorney-General (No 2)*,[12] Lord Diplock, in delivering the majority opinion in the Privy Council, expressly recognized that prior to the Bill of Rights some of the fundamental rights and freedoms only existed *de facto*, and the common law rules could be in conflict with the constitutional guarantees, as evidenced by the insertion of a savings clause in respect of pre-independence laws both written and unwritten. Lord Diplock stated:

> "In view of the breadth of language used in Section 1 to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far as it had not been superseded by written law) might have revealed provisions which it could plausibly be argued contravened one or other of the rights or freedoms recognized and declared by Section 1."[13]

In more recent years British consciousness of the importance of international human rights norms has been aroused by the application of the European Human Rights Convention and the work of the European Commission and Court. The literal approach to constitutional interpretation which the common law tradition prescribed is now being challenged by the more purposive approach which the international human rights norms suggest. In *Minister of Home Affairs v Fisher* (1979),[14] Lord Wilberforce in a Bermudian appeal gave the historical and philosophical justification for the liberal approach. His Lordship stated:

> "It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms .... That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[15]

The divergent attitudes of the liberal and traditionalist schools have a profound bearing on the significance and efficacy of the constitutional guarantees. Results of actual cases vary

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10 Ibid, at 355.

11 *See also Collymore and Abraham v Attorney-General*, (1967) 12 WIR 5; *Lassalle v Attorney-General*, (1971) 18 WIR 379, at 395.

12 *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, [1979] AC 385.

13 Ibid, at 395-6.

14 *Minister of Home Affairs v Collins Macdonald Fisher*, [1980] AC 319.

15 Ibid, at 328.

with the approach judges take in reasoning their judicial decisions both at the national and international levels. In the *Sunday Times*[16] case, the highest court in the United Kingdom reversed the decision of a liberally constituted Court of Appeal which had discharged an injunction restraining as in contempt of court the publication of certain articles dealing with the subject matter of pending court proceedings. The House of Lords held that the proposed publication was objectionable as it would prejudge the issue of negligence, lead to disrespect of the processes of law and expose the defendants to public and prejudicial discussion of the merits of the case. The European Commission on Human Rights referred the *Sunday Times* application to the European Court of Human Rights,[17] which held that freedom of expression constitutes one of the essential foundations of a democratic society, and in weighing the interests of the parties, took into account that the families of numerous victims who were unaware of the legal difficulties had a vital interest in knowing all the underlying facts and the various possible solutions. The European Court held that the interference on which the House of Lords relied did not constitute a social need sufficiently pressing within the meaning of the European Convention and was unnecessary for the preservation of the authority of the judiciary. The Court thus held that the decision of the House of Lords conflicted with the Convention.

Similar divergence in judicial attitude at the municipal and international level can be seen in the *Antigua Times*[18] case, where the Privy Council reversed the decision of the Eastern Caribbean Court of Appeal which had held that a statute requiring a deposit of a substantial sum of money as a pre-condition for operating a newspaper was invalid as it was not reasonably required for the protection of the reputation of others. In the *New Guyana Co*[19] case, the Court of Appeal of Guyana held that an import licence and/or payment of a fee as a condition precedent to obtaining the newsprint or printing equipment needed to produce a newspaper did not hinder the fundamental right to freedom of expression. The basis of the decision was that the impugned orders in their true nature and character were intended to regulate trade and commerce and not the freedom of expression.

By contrast, the advisory opinion of the Inter-American Court,[20] which had been requested by the Costa Rican Government following the *Stephen Schmidt*[21] case, took the more liberal approach. The question was whether compulsory membership in an association prescribed by law for the practice of journalism offended Articles 13 and 29 of the American Convention. The Court held that the desire to regulate professional standards and ethics would not justify the restriction, and that the Costa Rican provisions conflicted with the Convention. The Inter-American Court stated:

> "The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions....

16 *Attorney-General v Times Newspapers Ltd*, [1974] AC 273.

17 *Sunday Times v UK*, Judgment of 26 April 1979, Series A No 30; (1979-80) 2 EHRR 245.

18 *Attorney-General of Antigua and Minister of Home Affairs v Antigua Times Ltd*, (1973) 20 WIR 573 (CAWIAS); [1976] AC 16 (PC).

19 *Hope and Attorney-General v New Guyana Co Ltd and Vincent Teekah*, (1979) 26 WIR 233.

20 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights) Advisory Opinion, OC-5/85 (13 November 1985), Series A No 5; 7 HRLJ 74 (1986).

21 Resolution 17/84, Case 9178 (OEA/Ser L/V/II 63 doc 15), 2 October 1984.

> In fact it is possible, within the framework of the Convention, to understand the meaning of public order as a reference to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles."[22]

It is noteworthy that in a subsequent case, the Costa Rican Constitutional Court held the impugned legislation to be unconstitutional as offending the implied incorporation in the Costa Rica Constitution of the international human rights standards.[23]

Capital punishment cases have provided the most dramatic demonstration of the divergence in judicial attitudes. Because the constitutional and conventional instruments permit the retention of the death penalty where it hitherto existed, the real issue with which the Caribbean courts have had to grapple is the delayed execution of such sentences. The *Pratt and Morgan*[24] case provides the high-water mark in this development. The Privy Council, in reversing its own decision in the *Riley*[25] case, placed considerable reliance on the conclusions which had been reached by the Inter-American Commission on Human Rights and the UN Human Rights Committee to the effect that the American Convention on Human Rights and the International Covenant on Civil and Political Rights (ICCPR) and its first Optional Protocol placed on State Parties an imperative duty in capital cases to observe vigorously all guarantees for a fair trial set out in the international instruments, and that the punishment should not be inflicted if the State Party had violated those guarantees. The Privy Council expressed the view that it was proper for the state authorities to afford weight and respect to the views of the international bodies although they were not legally binding. The Privy Council also relied on the judgment of the European Court of Human Rights in the case of *Soering v United Kingdom*[26] which had held that extradition to the United States of a German national would violate the guarantee of the European Convention against "inhuman or degrading treatment or punishment", in that in the State of Virginia, where the applicant would be extradited to, he would be subject to the "death row phenomenon".

The Privy Council expressed itself as preferring the interpretation of the Constitution of Jamaica that "accepts civilized standards of behaviour which will outlaw acts of inhumanity, albeit they fall short of the barbarity of genocide".[27] This approach to the construction of Caribbean constitutions with respect to the carrying out of death sentences has been applied by the Privy Council also to the Bahamas,[28] although, unlike Jamaica, that country had not ratified the International Covenant and its Optional Protocol and the American Convention.[29] The *Pratt and Morgan* case therefore demonstrates that the constitutional guarantees may and should be interpreted so as to conform with international human rights norms irrespective of the absence of conventional legal obligations.

The traditionalist approach has not died easily, however.

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22 *Supra*, n 20, paras 44 and 64.

23 Accion de Incost No 421-S-90, *Roger Ajun Blanco*, Art 22, Ley Orig de Periodistas (12 May 1995).

24 *Earl Pratt and Another v Attorney-General for Jamaica*, [1994] 2 AC 1.

25 *Noel Riley v Attorney-General of Jamaica*, [1983] 1 AC 719.

26 Judgment of 7 July 1989, Series A No 161; (1989) 11 EHRR 439.

27 *Supra*, n 24, at 33G.

28 *Reckley v Minister of Public Safety and Immigration*, (1995) 46 WIR 27; [1995] 3 WLR 390.

29 [***EDITOR'S NOTE:*** *After this paper was written, in October 1997 Jamaica notified the UN of its withdrawal from the Optional Protocol to the ICCPR; in May 1988 Trinidad announced its withdrawal from the Optional Protocol and from the American Convention.*]

Subsequent to the landmark decision in *Pratt and Morgan*, Bingham J in the Supreme Court of Jamaica in the case of *Albert Huntley v The Attorney-General and Director of Public Prosecutions*[30] stated:

> "It has long been judicially recognized that the fundamental rights and freedoms ... are and have always been available to the individual prior to the coming into operation of the Constitution."[31]

Savings clauses

Jamaica was the first of the Commonwealth Caribbean countries to attain independence. The uncertainties of the future and the fear that an unpredictable amount of existing legal rules would fall foul of the new Bill of Rights led to the introduction of a savings clause in the following terms:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."[32]

This example was followed by Barbados, Trinidad and Tobago, Guyana, and Belize. In the case of Guyana the savings provision is expressly confined to "written law", and in the case of Belize to a limited period. In the case of Antigua and Barbuda, St Christopher and Nevis, and Grenada the savings provision is limited to "disciplinary law", namely the law regulating discipline in the armed forces, police and prison services.

It is remarkable that even after a revision of the constitutions in Guyana and in Trinidad and Tobago such savings clauses have been retained. It seems illogical to have a bill of rights solemnly declaring rights and freedoms as fundamental, and nevertheless to preserve indefinitely ordinary legislation or principles of law which were made or developed in a colonial era and which conflict with the bill of rights. Still less is it justifiable to preserve against constitutional challenge the exercise of wide discretionary powers conferred on the executive by such pre-existing laws. In any case, the apprehensions of the constitution-makers do not appear to be justified, as in the many countries which have not resorted to such savings clauses no exceptional difficulties have been experienced.

Variations in formulation

There are areas in which international human rights conventions afford greater protection or include rights which are not provided for in the constitutions. A few examples will suffice: the right to a fair trial under the American Convention on Human Rights posits the

30 Misc Suit No SC M 1/93 (23 April 1993).

31 Ibid, at 4, 5.

32 Constitution of Jamaica, Section 26(8).

"inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel".[33] In the domestic systems while the accused cannot be prevented from engaging counsel of his choice, if one is available, the state has no obligation to provide him with such representation. In many of these jurisdictions very limited legal aid is provided by the state, and persons may be tried on very grave criminal charges without the protection of legal representation. Indeed, persons on the capital charge of murder have been tried and held to be validly convicted although they did not have the assistance of counsel in the conduct of their defence, even where this resulted from the improper withdrawal of counsel from the trial at the last moment.[34]

Under the American Convention a person tried on a criminal charge must have, at the minimum, a right of appeal to a higher court.[35] Although this is the usual position in the administration of criminal justice in the English-speaking Caribbean, the legislature may deny this right, at least where no constitutional question arises. The right to compensation, where a person had been sentenced by a final judgment through a miscarriage of justice, is provided for under the Convention[36] but not in the domestic system. However, if it involves a direct infringement of a fundamental right, this relief may be obtained.[37]

The right to privacy under the Convention also has more positive and fuller expression than in the domestic constitutions. The former proclaims that "Everyone has the right to have his honor respected and his dignity recognized",[38] whereas the latter merely prohibits illegal search and entry on private premises.[39]

Although both the Convention and the constitutions express the protection of freedom of thought and expression in similar language, the Convention goes further and significantly prohibits prior censorship and the indirect restriction of the freedom by means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information.[40]

Development of international human rights norms

Since the pattern of the Caribbean constitutional instruments was established in the early 1960s there have been considerable developments in international human rights law. International conventions have come into being affecting a wide variety of subjects. There have been conventional provisions relating to, *inter alia*:

- discrimination in education;
- statelessness;
- minimum age for marriage and registration of marriages;

33 American Convention on Human Rights, Article 8(2)(e).

34 *R v Pusey*, (1970) 12 JLR 243; *Frank Robinson v The Queen*, [1985] 3 WLR 84.

35 American Convention, Article 8(2)(h).

36 Ibid, Article 10.

37 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*, *supra*, n 12.

38 American Convention, Article 11(1).

39 The exclusionary rule is not applied where evidence is obtained in breach of these rights. *Herman King v The Queen*, [1969] 1 AC 304; *R v Howard*, (1970) 16 WIR 67.

40 American Convention, Article 13.

- elimination of racial discrimination;
- economic, social and cultural rights;
- civil and political rights;
- elimination of discrimination against women;
- apartheid in sports;
- rights of the child;
- the environment; and
- protection of intellectual property.

Some Commonwealth Caribbean states have acceded to various of these international treaties. Many of them widen the scope of existing rights and impose higher duties on states. If conflicts between constitutional provisions and international obligations are to be avoided, it is submitted that not only is a liberal interpretation of the constitutions and the removal of restrictive savings clauses essential, but a new and more flexible formulation of the constitutional guarantees is demanded.

A scheme of amendment

So far Caribbean leaders have shown a reluctance to make any significant changes to the bills of rights. We have commented on the incorporation of savings clauses in these bills of rights. The Report of the Constitution Commission of Trinidad and Tobago stated:[41]

> "We have not included in the draft any clause preserving existing legislation. Where an existing law abridges or infringes a fundamental right, its validity will depend on its falling within one or other of the permitted exceptions and also on its satisfying the test of what is reasonably justif. .ble in a society with a proper respect for the rights and freedoms of the individual. It will not, if enacted before Independence, have had to be passed by a three-fifth majority; that requirement will only apply thereafter.
>
> We are satisfied that the specific categories set out will accommodate all areas of existing desirable legislation. The broad exception of public interest leaves room for dealing with any unusual situation which may develop. We are confident that the capacity of any government to act has not been unduly circumscribed.
>
> Further, because the formulation we have used has been so widely adopted, there will be a growing body of decided cases on its interpretation in various parts of the world which should be of help to our courts when dealing with their own problems. Cases dealing with the European Convention on Human Rights will also be useful since there are many points of similarity between the Convention and the proposed Declaration of Rights - the name we have suggested for the new chapter in our draft.

41 Report of the Constitution Commission of Trinidad and Tobago (22 January 1974).

> It will also be possible to challenge existing laws which may be thought to abridge or infringe the fundamental rights and freedoms as they have now been defined since there has been no wholesale adoption of the pre-Independence body of law. It seems only proper that citizens should be able to test such laws against the standards which the society has elected to adopt."

A momentous effort is being made in Jamaica to reform the constitutional guarantees so as to bring them in closer harmony with international human rights norms. In its first report,[42] the Constitutional Commission of Jamaica stated that it was agreed that "the declaratory provisions of the Fundamental Rights and Freedoms should be expressed in positive terms...". In that regard, the Commission noted the communication through the Ministry of Foreign Affairs and Foreign Trade from the Organization of American States (OAS) requesting that Jamaica "bring [its] fundamental rights and freedoms in line with that of the United Nations".[43] The final report[44] of the Constitutional Commission recommended considerable changes to the formulation of the Bill of Rights and prepared a draft which has been accepted by Parliament for implementation.

Some important features of the draft may now be mentioned. First, it seeks to make clear that the genesis of fundamental rights and freedoms is not confined to English common law but encompasses universally accepted human rights norms. Reminiscent of the Universal Declaration of Human Rights it states in the following words that the rights and freedoms are the entitlement of the people by virtue of their inherent dignity as individuals:

> "We resolve as a people to preserve for ourselves and future generations the fundamental rights and freedoms to which we are entitled by virtue of our inherent dignity as individuals and as citizens of a free and democratic society."

Second, to ensure that the constitutional provisions synchronize with Jamaica's undertakings under international conventions, it is provided that "in determining the meaning and effect of the provisions of the Bill of Rights" judicial notice should be taken of the international instruments to which Jamaica is a party.

Third, the presumption of constitutionality which favoured legislative and executive encroachment of fundamental rights is reversed, and the onus placed on the state or other responsible party to justify any legislative or executive act which has a direct impact on the rights.

Fourth, the standard of proof required of the person or official who trespasses on the fundamental rights and freedoms is heightened as the encroachment will be unconstitutional unless it is "demonstrably justified in a free and democratic society".

Fifth, the draft contains a declaration of several rights not previously specified in the existing instruments, such as "equality before the law", "respect for private and family life and privacy of communication", "the right of every child to such measures of protection as

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42 Report of the Constitutional Commission - Jamaica (August 1993).

43 Ibid, para 12(1).

44 Final Report of the Constitutional Commission - Jamaica (February 1994), Appendix A.

are required by the status of a minor or as part of the family, society and the state", and "the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage".

Until the Caribbean bills of rights are modernized to such a significant extent as the Jamaican draft envisages, the primary onus will fall on the judiciary to secure harmony between our constitutional guarantees and international human rights norms.