



'The protection of the law': Constitutional law, human rights and social justice in the UK and the Commonwealth Caribbean

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The UK and international human rights treaties

- The UK has been a party to the European Convention on Human Rights since 1951.
- But the Convention was not incorporated into domestic law until the Human Rights Act 1998 came into force in October 2000.
- Other important human rights treaties are still unincorporated, including the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities.
- Unincorporated treaties do not directly create rights or obligations in domestic law (see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26).
- Unincorporated treaties can be an aid to construction, but do not govern public authorities' exercise of discretion (*R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696).

The Human Rights Act 1998

- Incorporates most (but not all) rights under the European Convention on Human Rights into domestic law.
- Makes it unlawful for a public authority to act in a way incompatible with a Convention right.
- Human rights can be relied on in judicial review claims, civil claims for damages, and as a defence to criminal prosecutions and civil claims.
- But not constitutionally entrenched.

The HRA and primary legislation

- The HRA does not allow the courts to strike down or disapply primary legislation.
- The courts can “read down” legislation to bring it into conformity with the Convention – but only if the interpretation does not go against the grain of the legislation.
- If primary legislation is incompatible with the Convention, the courts can make a declaration of incompatibility.
- But Parliament is not obliged to act on a declaration of incompatibility and can ignore it.
- For example, Parliament refused to act on the cases of *Hirst v United Kingdom* (2006) 42 EHRR 41 and *Smith v Scott* [2007] CSIH 9 which said that the UK’s blanket ban on prisoner voting was incompatible with the Convention.

The HRA and parliamentary sovereignty

- The HRA is not constitutionally entrenched.
- If Parliament wanted to rewrite the HRA, or repeal it altogether, or exempt a whole sphere of government activity from its scope, it could do so.
- For instance, Parliament legislated to amend the HRA in 2021 to impose a new limitation period for HRA proceedings in respect of overseas armed forces operations.
- And a Government consultation on wide-ranging reforms to the HRA is currently ongoing.

The Convention rights

- The Convention mostly protects civil and political rights – the right to life, freedom from torture, right to liberty, freedom of expression, etc.
- Doesn't protect social and economic rights – right to health care, right to education, right to an adequate standard of living, right to decent employment, etc.
- Most Convention rights look like negative rights, not positive rights.
- But the Strasbourg Court has interpreted them to impose significant positive obligations on the State.

Article 2 – the right to life

- Not just a negative right – doesn't just stop the state from killing you.
- Imposes positive duties:
 - The systems duty – to have an adequate legal framework for the protection of life.
 - 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 (*Osman v United Kingdom* (2000) 29 EHRR 245 and *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2).
 - The investigative duty: the duty to carry out an adequate investigation into killings in which the state is involved (*Middleton v HM Coroner for Western Somerset* [2004] UKHL 10).

Article 3 – the prohibition of torture and inhuman and degrading treatment or punishment

- Like Article 2, it imposes systems, operational and investigative duties (see for example *DSD v Commissioner of Police for the Metropolis* [2019] UKSC 11).
- Prevents the State from expelling you to another state where you will be ill-treated (*Soering v United Kingdom* (1989) 11 EHRR 439 and *Chahal v United Kingdom* (1997) 23 EHRR 413).
- Doesn't impose a general duty to provide the necessities of life – but in particular circumstances homelessness/destitution may breach Article 3, e.g. for asylum-seekers (*R (Limbuela) v Secretary of State for the Home Department* [2005] UKHL 66 and *MSS v Belgium and Greece* (2011) 53 EHRR 2).
- May now prevent the State from expelling you to another state where you will die or experience acute suffering from lack of medical care (*Paposhvili v Belgium* [2017] Imm AR 867).

Articles 8, 9, 10 and 11

- Right to private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association.
- Not absolute rights, but qualified rights.
- Introduction of the concept of proportionality – is the interference with the protected right proportionate to the legitimate aim?
- 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 (*R (Begum) v Denbigh High School Governors* [2006] UKHL 15 and *Belfast City Council v Miss Behavin'* [2007] UKHL 19).

Article 8 – right to private and family life

- A wide-ranging right.
- It has had a huge impact on immigration law since the landmark case of *Huang v Secretary of State for the Home Department* [2007] UKHL 11.
- It embraces many 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.
- It has led to many important changes, ranging from recognition of transgender people's identities (*Goodwin v United Kingdom* (2002) 35 EHRR 18) to protection of children's rights in immigration law (*ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4).

The constitutions of the Commonwealth Caribbean

- Includes independent Commonwealth realms (e.g. Jamaica, Antigua and Barbuda), British overseas territories (e.g. Anguilla, British Virgin Islands, Montserrat), and independent republics (e.g. Dominica, Guyana).
- Constitutions contain Bills of Rights modelled broadly on the European Convention, but with important differences.
- Westminster parliamentary system similar to that of UK (except Guyana). Commonwealth realms have a Governor-General, overseas territories have a Governor, republics have a President. Executive power vested in a Prime Minister/Premier and Cabinet.
- Courts based on English model – Magistrates' Courts, High/Supreme/Grand Court, Court of Appeal, and either the Judicial Committee of the Privy Council or the Caribbean Court of Justice.
- Several countries/territories share the Eastern Caribbean Supreme Court, divided into a High Court and a Court of Appeal.

Human rights in Commonwealth Caribbean constitutions

- Constitutionally entrenched – the Constitution is the supreme law and laws that conflict with it are invalid to the extent of the inconsistency.
- Specific procedure for bringing a constitutional claim in the High/Supreme Court. Controversy about when this procedure should be used (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).

Human rights in Commonwealth Caribbean constitutions (continued)

- Usually modelled broadly on the European Convention, but with important differences in wording.
- Many constitutions have a clause containing broad statements of principle (e.g. protecting "life, liberty, security of the person and the protection of the law"). Whether this clause is enforceable in court varies between different constitutions according to the exact wording used (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).

Capital and corporal punishment

- "Savings clauses" protect forms of punishment that were lawful on a specified date in the past.
- Lots of litigation around capital and corporal punishment.
- *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1 held that more than 5 years' delay in carrying out the death penalty constituted inhuman and degrading treatment.
- Mandatory death penalty for murder also unconstitutional (see *Reyes v The Queen* [2002] UKPC 11, *R v Hughes* [2002] UKPC 12 and *Fox v The Queen* [2002] UKPC 13). Not saved by savings clauses.
- But flogging in the Bahamas saved by savings clause, even though it was inhuman and degrading (*Pinder v The Queen* [2003] 1 AC 620).

Prison conditions

- In Europe, Article 3 imposes prescriptive standards for prison conditions – for example, there is a presumption of Article 3 breach if a prisoner has less than 3 square metres of personal space (*Mursic v Croatia* (2017) 65 EHRR 165).
- Caribbean prison conditions are usually appalling by European standards.
- *Thomas v Baptiste* [2000] 2 AC 1 applied a more lenient standard to Caribbean prison conditions than that which applies in Europe. Is this consistent with the absolute nature of the right?

Further issues

- Some important innovations in Caribbean jurisprudence, e.g. recognition of communal land rights (*Cal v Attorney General of Belize* (2007) 71 WIR 110 and *Maya Leaders' Alliance v Attorney General of Belize* [2016] 2 LRC 414).
- But the European jurisprudence on the Article 2 and 3 positive duties has not (yet) been imported into the Caribbean (the point was not decided in *Commissioner of the Independent Commission of Investigations v Police Federation* [2020] UKPC 11).
- Some jurisdictions more influenced by European jurisprudence than others – e.g. Cayman Islands case of *Day and Bush v Registrar of the Cayman Islands* [2019] CICA J1107-1 heavily influenced by European jurisprudence.

Conclusion

- What would an ideal system of human rights protection look like?
 - It would be constitutionally entrenched, and courts would have the duty to strike down legislation that breached constitutional rights.
 - It would go beyond civil and political rights, and would also include social and economic rights such as the right to free health care, free education and an adequate standard of living.
 - The judiciary would look at the spirit, not the letter, of human rights guarantees and would look at case law from other jurisdictions and international courts.