

# HUMAN RIGHTS LAW IN THE COMMONWEALTH CARIBBEAN

## Outline of Lecture

### **1. Context:**

- (a) Identification of Commonwealth Caribbean countries
- (b) Socio-economic environment
- (c) Identification of the main sources of human rights law

### **2. Agenda**

- (a) Significance of Human Rights Law in Caribbean societies
- (b) Overview of the International Law commitments of various Caribbean States
- (c) Relationship between International Law and Municipal Law in the Caribbean
- (d) Institutions that help to determine human rights protections in the Caribbean
- (e) Domestic human rights law (sources and content)
- (f) Application of some particular human rights in the Caribbean context

### **3. Guiding questions:**

To what extent are international human rights norms recognized in the Commonwealth Caribbean? Caribbean Governments maintain that they are in the mainstream of human rights protection in the world: is this a fair reflection of reality?

### **4. Specific Treaties:**

In support of the proposition that Caribbean States are in the mainstream of human rights protection, these States sometimes emphasize that they are parties, in significant number, to the following multilateral human rights treaties:

- (a) The International Covenant on Civil and Political Rights (the ICCPR) (8 States out of 12 possibilities),
- (b) The International Covenant on Economic, Social and Cultural Rights (the ICESCR) (7 States out of 12 possibilities),
- (c) The Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW) (11 States),
- (d) The Convention on the Elimination of All Forms of Racial Discrimination (the CERD) (10 States),
- (e) The International Convention on the Rights of the Child (11 States)

5. With respect to some treaties, however, the rate of ratification is relatively low. This applies, for instance, to:

- (a) The American Convention on Human Rights (4 States),
- (b) The First Optional Protocol to the ICCPR (2 States),
- (c) The Second Optional Protocol to the ICCPR (0 States),
- (d) The Optional Protocol to the ICESCR (0 States),
- (e) The Optional Protocol to the CEDAW (3 States).

## 6. The Dualist Tradition

Commonwealth Caribbean systems, based on the English common law, adopt a dualist approach to the relationship between International Law and municipal law. Thus, with respect to treaties, the State normally needs to pass domestic legislation to give effect on the municipal plane to rules of law accepted in treaties. This applies to the human rights treaties to which the Caribbean States are party. This dualist approach is confirmed in a variety of cases including, for instance, **Chung Chi Cheung v. R** (1939) AC 160 and **J.H. Rayner (Mincing Lane) Ltd v. The Department of Trade and Industry** (1990) 2 AC 418, at p. 476. The full rigour of this approach has been softened in recent years by the concept of legitimate expectations: thus, in the decision of the Caribbean Court of Justice in **The Attorney General of Barbados et al v. Jeffrey Joseph and Lennox Boyce** (CCJ Appeal No. CV2 of 2005), it was held that in some circumstances ratification of a treaty could give rise to the legitimate expectation that the treaty will apply in some respects on the domestic plane, even if legislation has not brought the treaty into force locally.

7. With respect to customary international law, there is some authority that rules of custom are automatically a part of the English common law: see, e.g., **R v. Keyn** (1876) 2 Ex. D. 63, **Trendtex v. The Central Bank of Nigeria** (1977) Q.B. 529. But there is no clear support for this conclusion in decisions of the courts in the Caribbean.

8. Consequently, in assessing whether Commonwealth Caribbean States are in the human rights mainstream, we need to consider not only the level of ratification of treaties, but also whether the rules in particular treaties have been incorporated into domestic law. In some instances, treaties are ratified, but the treaty rules are not incorporated into domestic law.

## 9. Institutions

The main institutions that assist in ensuring that Caribbean States respect international human rights norms include:

- (a) The local courts. Usually, there is a hierarchy of courts with the Judicial Committee of the Privy Council being the highest court in a three-tiered appellate system: appeals often go from the High or Supreme Court, to the Court of Appeal, and then to the Judicial Committee of the Privy Council. For two Commonwealth Caribbean countries, the Judicial Committee of the Privy Council has been replaced as the highest court by the Caribbean Court of Justice.
- (b) The United Nations Human Rights Committee (for countries party to the ICCPR and the First Optional Protocol to the ICCPR).
- (c) The Inter-American Commission on Human Rights (for countries party to the American Convention on Human Rights).
- (d) The Inter-American Court for Human Rights (only Barbados is party to the jurisdiction of this court).
- (e) Non-Governmental Organizations. In some countries, there are active non-governmental organizations in the area of human rights. There is no significant interference by governments in the activities of these organizations.

## 10. Sources of Law on the Municipal Plane

- (a) *The Constitution.* Generally, Commonwealth Caribbean States have constitutional provisions that set out the fundamental rights and freedoms of persons in each jurisdiction. These constitutional provisions show a marked similarity from one country to another, with most of them owing their origins to parts of the Universal Declaration on Human Rights and the terms of the European Convention on Human Rights.
- (b) *Legislation.* In some cases, the rules of a particular treaty will be expressly incorporated into local law. So, for example, provisions in the Convention on the Rights of the Child have become part of statutory law pertaining to children in various Caribbean countries.
- (c) *The Common Law.* Various decisions of municipal courts also take into account rules of the common law that protect human rights: see, for example, the writ of *habeas corpus*.

## 11. The Rights in Practice (A Broad Overview)

The typical Commonwealth Caribbean constitution (sometimes referred to as the Westminster Export-Model Constitution) will set out a fairly broad range of civil and political rights in a separate chapter. These civil and political rights will invariably include, among others,

- (a) The Right to Life,
- (b) Freedom from Inhuman or Degrading Punishment or Treatment,
- (c) Freedom of Thought, Conscience and Religion,
- (d) Freedom of Expression,
- (e) The Right to a Fair Trial,
- (f) Freedom of Movement,
- (g) Freedom from Discrimination on certain grounds,
- (h) The Right to Property,
- (i) Freedom from Arbitrary Arrest or Detention, and
- (j) The Due Process of Law (including the Right to a Fair Trial).

## 12. Restrictions to be Noted

Although the typical Commonwealth Caribbean country thus offers persons within its jurisdiction a significant base of human rights protection, in some instances these rights are restricted. Generally, restrictions that may be noted include the following:

- (a) *The absence of economic, social and cultural rights.* In most Commonwealth Caribbean countries, there is limited constitutional protection for the rights listed in the ICESCR. In practice, in some of the countries, the right to education is assured up to secondary level, and in a small number, the State provides full financial support to students at the tertiary level. On the positive side, labour rights are generally safeguarded in practice, although these rights are sometimes not constitutionally protected; there is, for example, no right to employment. The general approach concerning economic and social rights appears to be that the society should work progressively towards the introduction of entitlements such as universal access to health care and full employment, but these entitlements presently do not amount to “rights properly so-called”.
- (b) *Not absolute rights.* The rights recognized in individual Commonwealth Caribbean constitutions are not absolute. Most of them (e.g. freedom of movement, freedom of expression, freedom of thought, conscience and religion) are qualified by the need for the individual to respect the rights of other persons. Therefore, most of the constitutional rights are to be exercised with “reasonable regard” to considerations such as public order, public safety, public health

and public morality. Reference to “public morality” should alert us to the fact that there will be a subjective assessment inherent in whether or not certain rights are to be recognized in practice.

(c) *The Savings Clause Issue.* Some constitutions (e.g. Jamaica, Barbados, Trinidad and Tobago) contain a savings clause to the effect that colonial laws are to be preserved unless and until they are amended by legislation. Thus, if a law existed prior to the date of independence, then that law remains valid even if it is in breach of constitutional safeguards. This is exemplified by the case of flogging and whipping, forms of punishment that are evidently contrary to the injunction against inhuman or degrading punishment or treatment. To the extent that flogging and whipping was valid in the pre-independence period, they remain valid as punishments in those countries that have the savings clause in their constitutions. Even if social values change against flogging and whipping, the judiciary cannot strike down this form of punishment as unconstitutional in countries which have the savings clause. The United Nations Human Rights Committee has been critical of some Commonwealth Caribbean States for retaining this form of punishment in their law: see, e.g., ***Errol Pryce v. Jamaica*** (United Nations Human Rights Committee, Eightieth Session, 15 March – 2 April 2004, Communication No. 793/1998).

### 13. **The Death Penalty**

All Commonwealth Caribbean countries retain the death penalty for some types of murder. In the case of Trinidad and Tobago and Barbados, the death penalty is mandatory, so that where a person is convicted of murder, the judiciary has no option but to impose the death sentence: ***Charles Matthew v. The State*** (2004) UKPC 33, ***Boyce and Joseph v. The Queen*** (2004) UKPC 32. In the case of Jamaica, Belize, St. Lucia, and St. Kitts-Nevis the mandatory death penalty has been struck down by the Judicial Committee of the Privy Council: see ***Lambert Watson*** (2005) 1 A.C. 472; ***Reyes v. The Queen*** (2002) UKPC 11; ***R v. Hughes*** (2002) UKPC 12; ***Fox v. The Queen*** (2002) UKPC 13. In Commonwealth Caribbean countries that no longer have the mandatory sentence, capital punishment may be carried out only in the “worst of the worst” cases: ***Daniel Dick Trimmingham*** (2009) UKPC 25.

14. In addition to striking down the mandatory death penalty where this possibility was available to the court, the Judicial Committee of the Privy Council has restricted the circumstances in which the death penalty may be carried out. Thus, in ***Pratt and Morgan v. The Attorney General of Jamaica*** (1993) UKPC 1, the Privy Council held

that where the time between the imposition of the death sentence and its execution exceeded five years, there was a presumption that execution would then be inhuman or degrading punishment or treatment. In the case of ***Neville Lewis v. The Attorney General of Jamaica*** (2000) UKPC 35, the Privy Council appears to have converted this presumption to a rule of law, and added other restrictions to the circumstances in which the death penalty may be carried out.

15. In the context of the United Nations, questions concerning the lawfulness of the death penalty continue to be controversial. In the debate, Commonwealth Caribbean countries have sought to defend their legislative provisions largely by reference to State sovereignty; these countries have also argued, with others, that Article 6 of the ICCPR on the right to life does not prohibit the death penalty. This position has not convinced a significant number of abolitionist States and organizations.

16. **Some Other Issues (Briefly Noted)**

(a) *Freedom of Expression.* The approach in the Commonwealth Caribbean favours the English common law perspective. So, for example, with respect to libel law, there is as yet no clear acceptance of the ***New York Times v. Sullivan*** ((1964) 376 U.S. 254) approach to public figures. This matter was considered by the Inter-American Commission on Human Rights in ***Dudley Stokes v. Jamaica***. The Commission concluded that Jamaica's libel laws, as applied in that case, were consistent with the safeguards on freedom of expression in the American Convention.

(b) *Police Killings.* The high level of police killings in Jamaica, and the ratio of civilians to police officers killed have given rise to considerable concern. United Nations Special Rapporteurs on the subject have expressed criticisms on this subject, as have the United Nations Human Rights Committee and the Inter-American Commission on Human Rights.

(c) *Prison Conditions.* In various countries, prison conditions leave much to be desired, and have sometimes been subject to United Nations criticism. In these instances, the States concerned seek to rely on their resource limitations to explain the situation.

## **17. Final Comment**

Generally, Commonwealth Caribbean States have active communities of lawyers that work to preserve human rights, whether derived from treaty commitments or otherwise. The countries seek to respect the rule of law, and generally, have upheld the traditions of plural democracies. However, they face significant problems with very high crime rates and resource insufficiency presenting special difficulties. In light of this, Commonwealth Caribbean countries all aim to remain in the mainstream of human rights protection, but sometimes fail to meet this objective.