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There seems to be a recent unity of purpose in promoting the entrenchment of human rights and basic freedoms around the world. For example, one of the new stated objectives of British foreign aid policy is the promotion of human rights. Rights are now being brought all the way home by the incorporation of the European Convention on Human Rights ("the Convention") into domestic law. A discussion on human rights and comparative constitutions therefore seems appropriate. This article outlines the:

-- constitutional framework protecting fundamental human rights in the Commonwealth Caribbean in comparison to the new proposed model in the UK under the Human Rights Bill, and;

-- immediate differences between the above two systems, particularly the question of standing.

COMMONWEALTH CONSTITUTIONS

The independent Commonwealth states of the Caribbean all have written constitutions which are the "supreme law" of each state. These Constitutions contain a chapter devoted to the protection of fundamental human rights, which are mostly based on the Convention. (As concluded in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328 and referred to by Lord Diplock in *Thornhill v AG* 31 WIR 61 PC.) In the majority (All except Trinidad & Tobago and Guyana.) of the Caribbean Commonwealth states this chapter commences with an introductory statement of the rights protected in very general terms, followed by more detailed statements of each of the rights protected, along with an elaboration of their qualifications and exceptions.

HUMAN RIGHTS BILL

On October 23, 1997, the Human Rights Bill was introduced into the House of Lords. This marked a recognition by the Labour government that the traditional freedom of the individual under an unwritten constitution to do that which is not prohibited by law gives inadequate protection from misuse of

power/acts/omissions by the state/public bodies in a manner which is incompatible with human rights under the Convention. Clause 1 specifies those articles of the Convention and the Protocol, as set out in sch 1 (art 2 to 12 of the Convention and art 1 to 3 of the Protocol) which are given effect by the Bill, subject to any designated derogation or reservation. (To which clauses 14 and 15 refer.) Remedies will now be available in national courts and tribunals for rights already recognised under the Convention. In determining a question in connection with a Convention right the court or tribunal is obliged to take into account relevant judgments, decisions, declarations and opinions made or given by the European Commission and Court of Human Rights and the Committee of Ministers of the Council of Europe. (Clause 2 of the Bill.)

The differences

The fact that the substantive protection of human rights derives from the Constitutions of the Commonwealth Caribbean states gives rise to immediate advantages. Firstly, the Constitution is the supreme law of the land so that any law inconsistent with it may be declared void to the extent of the inconsistency. Courts are therefore able to sever those sections of the Act it has declared void. For example, in *Commissioner of Police v Davis* (1993) 43 WIR 1 PC their Lordships stated that certain sections of the Dangerous Drugs Act in the Bahamas failed to offer accused persons the opportunity to be tried by a jury. Their Lordships therefore concluded that the said sections were unconstitutional and void.

The Bill on the other hand walks a tightrope between parliamentary supremacy and the recognition of Convention rights. Primary and secondary legislation must be read and given effect to in a way compatible with Convention rights. However, this does not affect the validity, continuing operation or enforcement of any incompatible primary legislation, or any incompatible subordinate legislation if primary legislation prevents the removal of the incompatibility. (Clause 3 of the Bill.) The UK courts, unlike their Caribbean counterparts, are unable to declare legislation void, but may make a "declaration of incompatibility", provided that they are satisfied that a provision of primary legislation is incompatible with a Convention right, or that a provision of subordinate legislation is incompatible and the primary legislation under which it was made prevents the removal of that incompatibility. (Clause 4 of the Bill.) Once such a declaration is made it will be for Parliament to decide whether to legislate. (There is a fast track route for Ministers to take remedial action by order.) Further, before the Second Reading of any Bill, the respective Minister will make a statement on whether or not the Bill is compatible with Convention rights. (Clause 19 of the Bill.) The Lord Chancellor has said that these provisions will maximise: "the protection of human rights without trespassing on Parliamentary Sovereignty, which has been the foundation of our unwritten constitution since the Glorious Revolution of 1688". (Speaking in Port of Spain, Trinidad on January 5, 1997.)

Secondly, in order to amend human rights provisions in the Commonwealth, the governments have included entrenched principles which mark the extent to which they are prepared to limit themselves and future parliaments. The entrenchment provisions in Trinidad and Tobago provide that for constitutional amendment and/or repeal three-fifths majority is necessary, (Section 13 of the Trinidad and Tobago Constitution.) and in St Lucia a three-quarters majority and referendum are necessary. (Section 41 and Schedule 1 Part 1 of the St Lucia

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Constitution.) There is nothing to prevent future governments from repealing parts or the whole of the Human Rights Bill, except perhaps the vagaries of public opinion.

STANDING

Under the Commonwealth Constitutions any person who has alleged that a fundamental human rights provision has been, is being or is likely to be contravened, in relation to him may apply to the High Court for relief. (Section 14(1) of the Trinidad and Tobago Constitution.) Caribbean courts have in general remained committed to the doctrine which states that an individual has no right to bring an action in court to litigate a matter of general public interest. S/he must have sufficient relevant interest in order to be given *locus standi*. In *R v Sir Loius Mbanefo, ex parte Pierre* (1966) 10 WIR 368 (See also the St Lucia case of *Gordon v Minister of Finance* (1968) 12 WIR 416 an MP claimed that the Appropriation Act was in violation of the Constitution. He argued that membership of Parliament and his status as a taxpayer was enough to give him relevant interest, which was rejected by the court.) a Commission of Enquiry was appointed to enquire into subversive activity in Trinidad and Tobago. The applicant was called to give evidence, but refused and eventually sought an order of *certiorari* to quash the Commission's report. The application was dismissed for want of standing on the basis that,

". . . the applicant has to show that he is a person aggrieved. In other words, he has to show he is one who is wrongly deprived of or refused something to which he is legally entitled or upon whom a legal burden is cast, and not merely one who is dissatisfied with an act or decision".

There have been more liberal trends in the case-law since the above decision such as: the wife of a deceased person who had been killed unlawfully by the police could complain of a breach of her fundamental rights as a result of an unlawful act or omission in respect of another; (*Patrice Kareem v AG CA/Civ No 71 of 1987* (unreported).) a merchant company acting as shipping agents was held to be a person who could obtain redress under s 14 of the Constitution for a violation by the Chief Immigration Officer to grant equality before the law; (*Smith v LJ Williams* (1981) 32 WIR 395.) and a citizen and tax-payer of St Lucia was held to have *locus standi* in seeking to prevent a Commission of Enquiry to look into alleged misappropriation of UN funds. (*Lionel v AG of St Lucia* (357 of 1995) (unreported).)

The Bill provides that only "victims" may bring proceedings or rely on Convention rights in legal proceedings, (Clause 7 of the Bill.) which is the test of standing that applies to a claim under the Convention in Strasbourg. If the proceedings are brought by judicial review, the applicant is only taken to have a sufficient interest, in relation to the unlawful act if he is, or would be, a victim of the Act. (Clause 7(3) of the Bill.) By contrast, in judicial review proceedings, complaints may be brought by any person with a "sufficient interest", (RSC Order 53, r 3(7); *R v Inland Revenue Commissioners, ex p National Federation of Self Employed and Small Businesses Ltd* [1980] 2 All ER 378.) which allows bodies such as the Equal Opportunities Commission and the Joint Council for the Welfare of Immigrants to bring proceedings. The importance of this is realised when one considers the burden of being the complainant and the number of cases of public importance which settle outside court, or after leave has been granted "on the papers". This narrow definition of "sufficient

interest" under the Bill may lead to the peculiarly unjust situation where unlawful action by public bodies is acquiesced, for the reason that the illegality is brought to the court's attention by a person/body considered to have an insufficient stake in the relevant subject matter.

As it stands the Bill is likely to lead to unnecessary and costly preliminary litigation on whether applicants have standing, since there will be different tests of standing according to the issues raised by the applicant in the judicial review proceedings. David Pannick QC has recently argued (The Times, April 21, 1998.) that the victim criterion applicable to the Convention international procedure is not the appropriate test where rights are conferred in domestic law and the Bill should apply the existing procedural regime of domestic law ie, "sufficient interest".

Indeed, there has been a recognition in many Commonwealth states (See Dr Sonia Hura in her book "Public Interest Litigation -- in Quest for Justice" Mishra & Co (1993) in which she states "the greatest service done by the Indian Supreme Court to the poor of the country is the development of Public Interest Litigation". See also *Banhhua Mukti Morcha v Union of India* (1984) 3 SCC 161 in which it was stated that a member of the public acting bona fide can move the court for relief where fundamental rights are allegedly infringed, on behalf of a person unable to do so because of poverty, disability or social position.) that a breach of fundamental human rights should facilitate an even broader interpretation of standing than "sufficient interest" since individuals and organisations have a responsibility to see and ensure that the fundamental human rights are guarded. "A Working Paper on Public Interest Litigation -- A Question of Locus Standi" was recently (September 15, 1997.) published in Trinidad and Tobago which recommended that legislation should be introduced to give the court the discretion to allow any person -- whether in his own right, as a representative or a surrogate -- to commence proceedings in both constitutional and judicial review matters where it is justifiable in the public interest. (Dr Fladjoe has consistently argued that the courts should readjust their focus by concentrating more on discouraging the meddlesome busybody and less on ensuring the directness of the applicant's interest, if a matter is of public importance.) Barbados has also taken a bold step in creating open access to the court for "any other person" to apply for judicial review if the Court is satisfied that the person's application is justifiable in the public interest and the circumstances of the case. (Section 6 1980 Administrative Justice Act. This provision reflects some of the thinking of the UK Law Commission in its 1994 Report "Administrative Law: Judicial Review and Statutory Appeals, (Report No 226) which referred to a two track system of standing. The first track would cover those personally affected by the decision and the second track would be discretionary to cover public interest litigation. The Commission however chose not to this.) The court will therefore be obliged to focus upon the justifiability of the application in the public interest rather than the individual's standing or interest.

NOTES: Melanie Plimmer is a barrister at the Chambers of Ian Macdonald QC, Manchester. She has recently returned from a sabbatical in Trinidad where she completed a conversion course in order to be called to the Trinidad and Tobago Bar.