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THE LEGAL STATUS OF BRITISH DEPENDENT TERRITORIES

THE WEST INDIES AND NORTH ATLANTIC REGION

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PREFACE

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In London

To Tom Russell (former Governor of the Cayman Islands, presently the Cayman Islands' government representative in the United

Table 4. *The distribution of executive power*

Governors – Executive Councils – Cabinet – Governor's Council

	Bermuda	Montserrat	BVI	Anguilla	TCI	CI
Scope of Her Majesty's instructions which complement Constitution	None	Narrow	None	Wider	Wider	Wider
Discretionary powers vested in Governor	Narrow	Narrow	Medium	Medium	Wider	Wider
Scope of terms which allow the Governor to depart from advice	Very narrow	Narrow	Medium	Wider	Wider	Wider
Composition of Exco/Cabinet	Not less than 6 members plus Premier	6 members	4 or 5 members	not more than 6 members	9 members (including the Governor)	8 members
Governor presides at meetings of Exco/Cabinet	No	Yes	Yes	Yes	Yes	Yes
Number of official members included in Exco/Cabinet	***None***	2	1	2	3 (including the Governor)	3
Number appointed from elected members of legislature	All except for 1 or 2	2 to 4 out of 6	3 or 4 out of 4 or 5	4 out of 6	6 out of 9	5 out of 8
Premier/Chief Minister appointed	Yes	Yes	Yes	Yes	Yes	No
Premier/Chief Minister with power to dismiss	Yes	Yes	Yes	Yes	Yes	No
Governor's Council established	Yes	No	No	No	No	No

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APPENDIX I

Key dates of relevance to the history of law and constitutions in British dependent territories in the West Indies and North Atlantic Region

For the sake of clarity this overview focuses upon selected, decisive matters, such as the start and end of British sovereignty, significant legislative and judicial developments and major events regarding the position of the Crown in relation to the dependencies. Part 1 presents a considerable simplification of a period described by Sir William Dale[1] as one in which 'most of the . . . islands in the Caribbean underwent numerous changes in governmental authority through a series of treaties and cessions between colonial powers [during the seventeenth, eighteenth and nineteenth centuries]'.

PART ONE: *1600–1950*

Seventeenth century

1609 British occupation of Bermuda commences
1611 Case of Proclamations (resolved issue regarding areas of responsibility between Crown in person and Crown in Parliament)
1627 First British settlement of Barbados established
1629 Grant of Bahama islands by Royal Charter from the King of England (Charles I) to Sir Robert Heath
1632 First settlement of Montserrat by the British – temporary

[1] Dale, pp. 207–8.

interruptions of this initial settlement occurred but the original title survives
1632 Colonisation of Antigua by English settlers from St Kitts
1647 Systematic colonisation of Bahama Islands by English settlers
Mid-century
British acquisition of Anguilla by settlement
Britons settle in Honduras, now known as Belize
1655 Oliver Cromwell captures Jamaica for Britain from the Spanish
1658 Early settlers (absconders from Cromwell's army) arrive in the Cayman Islands
1670 Treaty of Madrid (formal recognition, by Spanish, of British sovereignty over those colonies that Britain does 'at present hold and possess' in the West Indies and America)
1672 Annexation of Tortola (largest of Virgin Islands) by British Governor of Leeward Islands
1693 *Blankard v Galdy* (English settlers take with them the law of England, so far as it is suitable)
Late century
Seasonal occupation of Turks and Caicos Islands by Bermudians

Eighteenth century

1717 First in a continuous line of British Governors of the Bahama Islands assumes office
1734 Authorised settlement of the Cayman Islands pursuant to British land grant
1774 *Campbell v Hall* (conquered colony – Jamaica – Crown, on granting representative legislature, can lose power to legislate, unless reserved)
1799 Turks and Caicos Islands formally placed under the government of the Bahamas

Nineteenth century

1842 *Penly v Beacon Assurance* (post-settlement UK statutes apply to colonies only if expressed to do so)
1848 Link between the Turks and Caicos Islands and the Bahama Islands determined – grant of separate Charter to TCI with own President and Legislative Council
1859 Convention between Guatemala and Great Britain fixes the boundary between Guatemala and 'the British settlement and

possessions in the Bay of Honduras' – territory now known as Belize – British settlers having first arrived there in the mid-seventeenth century

1863 Cayman Islands Act made the Cayman Islands formally a dependency of Jamaica

1865 Colonial Laws Validity Act
s. 1 definitions and applications
s. 2 rule re. repugnant colonial legislation: applicable Orders in Council and Westminster legislation prevail.

1865 Riots in Jamaica – period of implementation of Crown colony government commences

1871 Leeward Islands Act (establishment of the federal colony, comprising six presidencies – Antigua, Montserrat, St Kitts, Nevis, Dominica (with their respective dependencies) and the Virgin Islands)

1873 Annexation of the Turks and Caicos Islands to Jamaica – to become a dependency of Jamaica

Twentieth century

1920 *AG v de Keyser's Royal Hotel* (re. abeyance of prerogative)

1931 Statute of Westminster (six self-governing colonies become 'dominions' – Australia, Canada, New Zealand, Newfoundland and Canada, South Africa and the Irish Free State – latter two since excluded)

1938 *Sammut v Strickland* (recognises the possibility for revival of Crown legislative authority if grant reserves to the Crown a power of revocation)

PART TWO: *1950 to date*

1950–9

1956 Leeward Islands Act (abolition of the Federation of the Leeward Islands)

1956 British Caribbean Federation Act (confers power upon the Crown to establish a Federation of most of the British colonies in the West Indies – all except British Guiana, British Honduras and the Virgin Islands)

1957 West Indies (Federation) Order in Council (establishes the Federation of the West Indies, from 1 January 1959)

1958 The Cayman Islands and Turks and Caicos Islands Act (confers upon the Crown the power to make separate constitutions for these islands which were formerly administered as dependencies of Jamaica, under the Jamaican Constitution Order 1944. Separate constitutions for each promulgated in 1959)

1960–9

1960 United Nations Declaration on Decolonisation (adopted by resolution of the General Assembly – UK and eight other members abstained)

1962 West Indies Act c. 19 (confers power upon the Crown to dissolve the Federation of the West Indies)
West Indies (Dissolution and Interim Commissioner Order S.I. 1962 No. 1084 (effects the dissolution of the WI Federation – following independence of Jamaica and Trinidad and Tobago)

1962 Jamaica Independence Act c. 40 (neither the Cayman Islands nor the Turks and Caicos Islands were part of Jamaica, under the terms of this Act)

1962 Trinidad and Tobago Independence Act c. 54

1965 Governor of the Bahamas becomes also the governor of the Turks and Caicos Islands

1966 Guyana Independence Act
Barbados Independence Act

1967 Bermuda Constitution Act

1967 West Indies Act (establishes a new status of 'associated statehood' – for six former colonies: Grenada, Dominica, St Kitts–Nevis–Anguilla, Antigua, St Lucia, St Vincent)

1967 Unilateral declaration of independence by Anguilla (July) – not recognised by Great Britain, nor by the central government of St Kitts–Nevis–Anguilla
Interim settlement between Anguilla and Britain (December, 1967–January 1968) temporary administrative separation of Anguilla from St Kitts–Nevis

1969 'Calypso' – British military forces' pre-dawn 'invasion' of Anguilla, followed by addition of British police officers and Royal Marines to those forces – independent Anguillan republic aborted – administrative separation from St Kitts–continued

1970–9

1970 Guyana Republic Act

1971 Anguilla Act

1971	Anguilla (Administration) Order
1973	Bahamas Independence Act (on independence of Bahamas, powers of Governor of Bahamas in TCI transferred to a Governor of the TCI)
1974–83	Under a series of Termination of Association Orders, each of the associated states (established in 1967), apart from Anguilla component of St Kitts–Nevis–Anguilla, attains independence from Britain
1974	Grenada Termination of Association Order
1976	Trinidad and Tobago Republic Act
1978	Dominica Termination of Association Order
1979	St Lucia Termination of Association Order
1979	St Vincent Termination of Association Order

1980–9

1980	Anguilla Act
1980	Anguilla (Appointed Day) Order 1980 (Anguilla established as a separate dependent territory)
1981	Antigua Termination of Association Order
1981	Belize Act (granting independence to Belize)
1983	St Christopher and Nevis Termination of Association Order
1985	Holder of the office of Chief Minister of the Turks and Caicos Islands convicted in the US on drugs charge
1986	Suspension of the ministerial system of government in the TCI – following British Commission of Inquiry
1986	Statute Law (Repeals) Act (application of this Act is limited to the UK except where it has been extended to the dependencies by Order in Council)
1988	Order (S.I. No. 247) issued under West Indies Act 1962 (makes fresh provision for the constitution of TCI)
1989	Order (S.I. No. 2401) issued under West Indies Act 1962 (makes fresh provision for the constitution of Montserrat)

1990 onwards

1990	Order (S.I. No. 587) issued under Anguilla Act 1980 amends Anguilla constitution
1991	Report of the Constitutional Commissioners for the CI, Cm 1547

APPENDIX II

Territories in the English-speaking Caribbean and North Atlantic – size and population[1]

By the end of 1983, the territories in Table 5 had attained independence, while those in Table 6 remained as dependent territories. More recent population figures for the remaining dependent territories appear in Table 1.

Table 5. *Data on former BDTs in the West Indies*

Territory	Area	Population (1983)
Antigua and Barbuda	441 km^2	75,000
Bahamas	13,930 km^2	241,000
Barbados	430 km^2	249,000
Belize	22,965 km^2	145,000
Dominica	751 km^2	83,000
Grenada	344 km^2	110,000
Guyana	210,000 km^2	793,000
Jamaica	10,991 km^2	2,188,000
St Kitts and Nevis	269 km^2	44,000
St Lucia	616 km^2	124,000
St Vincent and the Grenadines	389 km^2	67,000
Trinidad and Tobago	5,128 km^2	1,168,000
Total	266,254 km^2	5,287,000

[1] Figures extracted from Dale.

8

THE PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN THE REGION'S BRITISH DEPENDENT TERRITORIES

Introduction

An understanding of some of the reasons for the continued dependency of this group of BDTs and the significance of this for Britain and the BDT citizens has been developed in the foregoing chapters. Economic dependence, insecurity in international defence terms and an appreciation, in some cases, of a status quo in which their community has thrived, against a backdrop of other small Caribbean territories that have faced difficulties, are seen as significant factors which have influenced local decisions for continued dependent-territory status. Although extreme difficulties have been experienced in some of these territories, on balance of interests the present decision of many citizens within this group of territories and their governments has been for continued dependence.

When considering what effect this status has upon the citizens of these territories, an interesting issue to examine is the extent to which fundamental rights and freedoms are safeguarded under the legal systems established. The power distribution between the Crown and the local authorities of these territories has been considered, but does the use that has been made of those powers adequately safeguard these interests? An investigation of this question shows that different approaches have been taken to the matter in respect of different territories. The reasons for these differences (in constitutional content and the extent to which international agreements are made applicable) are not always apparent from the Constitutional Commissioners' reports and other sources.

In the BVI and the CI, where no specific constitutional protection

is provided[1] and there is no present right to petition the European Commission, nor any current declaration of recognition of the jurisdiction of the European Court on Human Rights, questions concerning the protection of fundamental rights are left to be determined in accordance with the principles of English common law and equity, which may have been modified by local legislation, in the light of various UN measures which have, to varying degrees, been extended to these territories. (Recent constitutional commissions have made recommendations that each of these territories should have a 'Bill of Rights' included in its con- stitution.)[2]

In Anguilla, Bermuda, Montserrat and the TCI there is specific constitutional protection of fundamental rights and freedoms so that the ambit of legislative authority in these territories is prescribed by these constitutional limitations. Furthermore, there is recognition of the right of individual petition to the European Commission, and of the jurisdiction of the European Court on Human Rights. In respect of these territories, additional questions relating to the effect of such constitutional provisions will be considered.

The position of each of these groups of territories will be examined with a view to showing how effectively the British dependent-territory legal systems in operation safeguard fundamental rights. In so doing, the impact of BDT status upon the level of protection afforded in this field is demonstrated.

1. BACKGROUND

As the legal systems that operate in this region's BDTs are based upon the English legal system, the basis for fundamental rights and freedoms is the presumption that members of society are free to do what they wish to, unless there is an authorised limitation against it.[3] The rule of law; principles of natural justice; the fair

[1] At least until any implementation of the recommendations of the 1991 CI Constitutional Commissioners for the inclusion of a bill of rights in the constitution: see Cm 1547 (1991), p. 10; similarly, re. BVI, Cm 2527 (1994).

[2] *Ibid.*

[3] 'The so-called liberties of the subject are really implications drawn from the two principles that the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute. Where public authorities are not authorised to interfere with the subject, he has liberties:' *Halsbury*, vol. VIII, para. 828.

exercise of judicial power; a degree of separation of powers, in particular the full independence of the judiciary, and the expression of the will of the people through Parliament operate under this system to preserve these basic rights.

Within the domestic law of England there is no separate 'Bill of Rights', or any other analogous comprehensive document designed to provide, recognise, preserve or confer fundamental rights or freedoms upon the people within the country, although some statutes relating to basic rights and liberties have been enacted, *ad hoc*, to deal with particular problems relating to liberty as and when they have been recognised.[4] This is in contrast to the position in many other European countries and Commonwealth territories, including more than half of this region's BDTs.[5] Although the European Convention on Human Rights (ECHR) is not so incorporated, Britain is a party to that convention and some of its provisions have had an impact upon English common law.[6]

Some of the early English statutes relating to fundamental rights may apply in the BDTs by virtue of the principle that English settlers took with them the law of England (including that embodied in statute) so far as it was suitable to the needs of the infant colony.[7] By virtue of this principle, the Magna Carta of 1297, the Statute of Westminster of 1331 (providing for due process of law), the Petition of Right of 1627 and the Habeas Corpus Act 1640 could apply in any of these BDTs, if held to have been enacted prior to the date of settlement of a colony and considered to be suitable to the needs of such colony. Also, depending on the precise date of settlement of any particular territory, some later enactments such as the Bill of Rights 1689 and the Act of Settlement 1700 could be held to extend to a BDT.[8] None of these would be a 'superior' Act of Parliament, which by virtue of s. 2 of the Colonial Laws Validity Act 1865 could not be altered by a dependent-territory legislature.

[4] There is legislation of this type dating back to the Magna Carta of 1297.

[5] 'In 14 of the 21 Member States of the Council of Europe [in 1987] the substantive provisions of the Convention have the force of law and are self-executing (directly applicable) in domestic law:' A. Drzemczewski, 'The Growing Impact of the European Court of Human Rights upon National Caselaw' (1987), *Law Society Gazette*, pp. 84, 8, 561. Regarding this region's BDTs, see p. 263 below; re. the Commonwealth generally, see Blaustein.

[6] See e.g. *Attorney-General v Guardian Newspapers* [1987] 3 All ER 316, discussed below, p. 262.

[7] *Blankard v Galdy* (1693) 4 Mod Rep 215 and Blackstone, pp. 106–7.

[8] The dates of settlement of each of this region's DTs are shown in Table 1.

In general, post-settlement Westminster enactments relating to liberty[9] do not extend to the BDTs.[10] The United Nations Act 1946[11] is an example of a post-settlement Westminster enactment relating to human rights which does extend to the BDTs. Section 1 of this empowered His Majesty in Council to make such provision as appears to him necessary or expedient for enabling measures[12] that the Security Council of the United Nations (UN) call upon him to make and, subject to limited specified exceptions, any such order may extend to any part of His Majesty's dominions.[13]

Where limitations upon any freedom arise from legislation, it is arguable that this may be justified on the basis that legislation expresses the will of the people in a democratic society, but, for the purposes of BDT legislation, the inclusion of official and appointed members in the legislative process, identified in chapter 6, reduces the conviction of that argument. Also, there is the risk that the majority vote might unfairly dominate minority groups. Where limitations arise out of administrative or judicial decisions, no claim to legitimacy based upon democracy is available. The jurisdiction of the European Court of Human Rights (ECtHR)[14] (available to aggrieved persons from the UK, Anguilla, Bermuda, Montserrat and the TCI, once all domestic remedies have been exhausted)[15] provides an additional monitor. Where there is no domestic bill of

[9] Such as the Public Order Act 1936; the Suicide Act 1961; the Race Relations Acts 1965, 1968 and 1976; the Murder (Abolition of Death Penalty) Act 1965; the Abortion Act 1967; the Sex Discrimination Acts 1975 and 1986; the Equal Pay Act 1970; the Industrial Relations Act 1971; the Trade Unions and Labour Relations Act 1974; and the Employment Protection (Consolidation) Act 1978.

[10] Such legislation does not extend to any BDTs unless it is so expressed, or the statute shows a necessary intendment that it should so extend: see *Penley v Beacon Assurance* (1842) 4 Moo PCC 63 at 84 and the Colonial Laws Validity Act 1865.

[11] This was enacted to enable effect to be given to certain provisions of the Charter of the United Nations.

[12] Not involving the use of armed force.

[13] Section 1 (2). Examples of recent Orders which extend to this region's dependent territories include: the Iraq and Kuwait (UN Sanctions) (Dependent Territories) Order 1990, S.I. 1990 No. 1652; the Iraq and Kuwait (UN Sanctions) (Dependent Territories) (No. 2) Order 1990, S.I. 1990 No. 1988; the Libya (UN Prohibition of Flights) (Dependent Territories) Order 1992; the Libya (UN Sanctions) (Dependent Territories) Order 1992; and the Serbia and Montenegro (UN Sanctions) (Dependent Territories) Order 1992, S.I. 1992 No. 1303.

[14] This court sits in judgment of those countries that are party to the European Convention on Human Rights (ECHR), in relation to their obligations under that convention. The UK ratified the treaty in 1951, and has since issued declarations (pursuant to arts. 25 and 46) in respect of the UK, and specified DTs, recognising the jurisdiction of the ECtHR and the competence of the European Commission (EC) to receive petitions from individuals. See pp. 252 and 260–1 below.

[15] Article 26 of the ECHR.

rights, or any separate constitutional court, it is perhaps in respect of the determination of questions of fairness of administrative and judicial decisions that this court might be of the greatest importance; also, this court endeavours to protect minority interests.

Recognition by Commonwealth heads of government at their meeting in 1981 of the importance of the promotion of human rights within member countries resulted in the Human Rights Unit of the Commonwealth Secretariat being established. This unit has been in operation since 1985 and has a mandate 'to promote human rights in the Commonwealth and ensure that human rights considerations are taken into consideration in the work of all the Divisions of the Secretariat'. The unit does not have any investigative or adjudicative functions – its role appears to be, primarily, to inform, to educate and, for some purposes, to provide assistance. In February 1987, the head of the unit said that they were in a position to provide assistance to governments on matters relating to the ratification and implementation of Human Rights Instruments.[16] A representative from the Legal Division of the Commonwealth Secretariat explained further, in December 1991, that while their services could be called upon to give assistance in respect of the drafting of constitutions for the BDTs, to date they had not. Their involvement is primarily with former British territories that have attained independence.

2. THE EXTENT TO WHICH FUNDAMENTAL RIGHTS MIGHT BE PROTECTED IN THE BVI AND THE CI

The constitutions of the BVI and the CI are the only remaining DT constitutions in this region that do not include provision for the protection of fundamental rights and freedoms. By way of comparison, each of the twelve independent Commonwealth states in the Caribbean has a bill of rights.[17] The proliferation of such provisions for the protection of fundamental rights and freedoms has been a relatively recent occurrence. There were no bill of rights provisions in the Caribbean region at all prior to 1961. Addressing this point Dr Francis Alexis said the following: 'In 1961 the first Commonwealth Caribbean Bill of Rights was promulgated in Guyana (British

[16] Addressing participants at their first seminar (which was held in conjunction with the Commonwealth Legal Education Association (CLEA)).

[17] Report of the CLEA and Commonwealth Secretariat (23–25 February 1987), p. 12. The seminar was held under the auspices of the Commonwealth Legal Education Association and the Human Rights Unit of the Commonwealth Secretariat.

Guiana) . . . Two decades later, today, in 1981, Bills of Rights flourish in the region adorning Independence Monarchical Constitutions, Republican Constitutions, Associated State Constitutions, and even colonial constitutions, if not yet a revolutionary constitution.'[18] It should also be noted that the commencement of this proliferation of human-rights provisions coincides with the commencement of the period during which twelve former British colonies in the Caribbean have attained independence.[19]

In 1970, two reports of the CI Legislative Assembly's Select Constitution Committee (which consisted of all the elected members of the House)[20] recommended that constitutional provision should be made for the protection of fundamental rights and freedoms in the CI. The reports of this committee led to the CI Constitutional Commission of 1971. The committee's reports are included in an appendix to the report of the Constitutional Commission[21] but there was no explanation in the report for the omission of such provision from the 1972 constitution. This shows an impact of DT status on this territory. Despite recommendations from the whole Legislative Assembly that the constitution should include a bill of rights, none was included. In 1991, the CI Constitutional Commissioners recommended that such provision should be included in the CI constitution, stating that:

> There was almost unanimous request for the Fundamental Rights and Freedoms, i.e. a Bill of Rights, to be included in the Constitution. With this request there can be no disagreement and since these fundamental rights and freedoms are to be found in the Constitutions of nearly all other dependent territories, we recommend that they be enshrined in any amended Constitution for these Islands.[22]

The Legislative Assembly of the CI and the Select Committee have agreed with this recommendation but it has not yet[23] been put into place, although other constitutional recommendations have been.

The BVI constitution of 1976 has been amended three times during the period of increased popularity of bills of rights,[24] but none of these amendments has added a bill of rights to that

[18] 'Two Decades of Human Rights Adjudication in the Commonwealth Caribbean' (1981), *WILJ* (March), p. 5.

[19] This was outlined on p. 1, footnote 3 above.

[20] Reports (majority and minority) dated 12 June 1970; two MLAs recommended (in the minority report) a more comprehensive list of rights than the majority report suggested.

[21] *CI: Proposals for Constitutional Advance* (1971).

[22] Cm 1547 (1991); p. 10.

[23] December 1994.

[24] S.I. 1979 No. 1603, S.I. 1982 No. 151 and S.I. 1991 No. 2871.

constitution. The report of the BVI Constitutional Commission 1993 (published in April 1994) recommends that a bill of rights should be included in the constitution.[25]

As the legal systems of these territories are based upon the English legal system, there might be nothing extraordinary in the discovery that the Constitution Order of any particular territory does not include express provision relating to the preservation of fundamental freedoms, but the inclusion of such provision in many other parts of Europe and the Commonwealth may lead to the opposite conclusion. As in the UK, where the constitution is found among a multiplicity of sources (including common law, statute, convention and some works of academic writers) so in these BDTs, the constitution is not wholly embodied in the territory's Constitution Order.

The constitution, in the broad sense, is derived from a multiplicity of sources. In BDTs, as in the UK, the question of the extent to which fundamental rights and freedoms are preserved should be considered both at a domestic level and at an international-law level. The principal instrument for consideration, when seeking to establish what domestic provision is made for any constitutional matter in a BDT, is the appropriate Constitution Order in Council. The fact that a BDT, unlike Britain, has such a written constitution does not mean that the entire constitution for the territory must be provided exclusively in that instrument. Thus, in the BVI and CI, as these constitutions are at present silent on fundamental rights and freedoms, the alternative means of safeguarding these rights will be considered. Many points raised here will also be of relevance to those territories that have express constitutional protection. Where appropriate, references to provisions in those territories will be included below.

The extent and exercise of local legislative authority

The impact of constraints in the constitutions and Royal Instructions

The power conferred upon each BDT legislature to enact laws 'for the peace, order and good government' of the territory[26] has been

[25] Cm 2527 (1994), para. 9.1.

[26] In Bermuda and Montserrat, conferred upon the legislature (i.e. Her Majesty and the Senate and House of Assembly in Bermuda; Her Majesty and the Legislative Council in Montserrat). In the CI and Anguilla, upon the Governor with the advice of the House of Assembly; in the TCI and the BVI, upon the Governor

considered in chapter 6.[27] The absence of any bill of rights provision within the Constitution Orders of the CI and BVI which would limit the extent of legislative competence of the legislature makes a significant difference to the scope for judicial challenge to the validity of legislation in these territories. In order to impose an effective limitation on the power to enact valid legislation, the limitation needs to appear in the constitution itself. If a law is enacted outside the limits imposed by the constitution, the court may declare that such a provision is null and void, but this is not the case when a law is enacted in contravention of a Royal Instruction.[28] It will be recalled that Royal Instructions relate only to the 'exercise' of legislative power, not the 'extent' of power conferred by the constitution. Insofar as the provision of any Royal Instruction relates to the 'Law or subject thereof', non-compliance with an Instruction will not render a law void.

Two limitations imposed on the Governor's power to assent to legislation (by the constitution in the BVI and the Royal Instructions in the CI) are of some relevance here. These relate to:

(a) 'any Bill which appears to him acting in his discretion – to be inconsistent with any obligation of Her Majesty or of Her Majesty's Government in the UK towards any other state or power or any international organisation' (in the BVI)[29] and 'any Bill the provisions of which shall appear to him to be inconsistent with obligations imposed upon us by treaty' (in the CI)[30] and;

(b) 'any Bill whereby persons of any community or religion may either:
   (i) be subjected or made liable to disabilities or restrictions to which persons of other communities or religions are not subject or made liable; or
   (ii) be granted advantages which are not enjoyed by persons of other communities or religions;' (in the CI)[31]

and provide that the Governor shall not, without having previously obtained Instructions through a Secretary of State, assent to such

with the advice of the House of Assembly; in the TCI and the BVI, upon the Governor with the advice of the Legislative Council.

[27] See pp. 150–8.

[28] This difference is stated in s. 4 of the Colonial Laws Validity Act 1865.

[29] BVI – s. 42(2). Comparable provision is made in the constitutions of Bermuda – s. 35(2); and Montserrat – s. 48.

[30] CI – s. 8(f). Comparable provision is made in the Royal Instructions of Anguilla – s. 7 and the TCI – s. 8.

[31] CI – s. 8(h). Comparable provision is made in the Royal Instructions of Anguilla – s. 7(h) and the TCI – s. 8(h).

a bill unless it contains a clause suspending its operation until the signification of HM pleasure.

The first of these limitations shows how the ECHR may influence the exercise of DT legislative authority and consequently protect fundamental rights and freedoms. It is a more potent restriction on the legislature of the BVI (where it is embodied in the constitution) than on that of the CI. Nonetheless, Governors are under a duty to comply with Royal Instructions and might ordinarily be expected to do so. Consequently, the above Royal Instruction to the CI Governor should operate to alert the UK government if the CI legislature, to the knowledge of the Governor, was seeking to enact a law that contravened the requirements of the ECHR.

The following comparison between the position in the CI (where the Roads Law 1974, as it was originally enacted,[32] authorised the Governor, in certain circumstances, to take land without compensation) and the position in Bermuda (where the constitution specifies the right to protection from deprivation of property) serves as a good illustration of the difference in the scope of legislative authority in the BVI and CI, as opposed to the other territories. Bermuda has been chosen for the purpose of this comparison, although the point illustrated is equally applicable to any of the BDTs of the region which include provision relating to the protection of fundamental rights and freedoms in the constitution.

In the CI, s. 6 of the Roads Law 1974 provided, *inter alia*, as follows:

> where the Governor is satisfied that it is in the public interest to lay out, widen or divert a road over the portion of land to which the declaration relates without payment of compensation therefor, then, notwithstanding anything contained in any law, and subject to *section 11* (which relates to the payment of compensation in the case of undue damage or severe hardship) the Governor may, on the expiration of fifteen days . . . cause the said road to be commenced or proceeded with without further notification and without any liability to pay compensation therefor.[33]

Conversely, in Bermuda, s. 13(1) of the constitution declares, *inter alia*, as follows:

[32] Law 18/1974. This comparison aims to illustrate the difference between the territories where constitutions include provision for the preservation of fundamental rights and freedoms and those that do not, although the material parts of the provisions of the Roads Law 1974 have been repealed by the Roads (Amendment) Law (Law 6/1988) which provides for the payment of compensation.

[33] Law 18/1974.

> No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:
>
> (a) the taking of possession or acquisition is necessary or expedient in the interests of . . . town and country planning or the development or utilisation of property in such a manner as to promote the public benefit or the economic well-being of the community; and
>
> (b) there is reasonable justification for the causing of any hardship that may result . . .; and
>
> (c) provision is made by a law applicable to that taking of possession or acquisition – (i) for the prompt payment of adequate compensation.

Although s. 13(1) of the Bermuda constitution is subject to limitations imposed in ss. 13(2) and (3), the terms of those quite extensive provisions do not appear to allow the enactment of any legislative provision of the type referred to above in s. 6 of the Roads Law 1974 of the CI, prior to its amendment in 1988. If the Legislature of a territory which has a constitution that includes provision for the protection of the right of an individual not to be deprived of his property without due compensation[34] purported to enact any legislative provision of the above type, the enactment would be *ultra vires* and void.[35] Upon this issue, the Judicial Committee of the Privy Council, in the case of *Akar v Attorney-General for Sierra Leone*,[36] took it for granted that this would be the case.

Two 1968 cases[37] concerning the impact of the constitutional rights to freedom of speech and freedom of assembly, conferred by ss. 10 and 11 of the St Christopher, Nevis and Anguilla constitution 1967[38] upon s. 3 A(a) of the Public Meetings and Processions Ordinance,[39] (which gave an unfettered discretion to the Chief of Police), highlight the difference that express constitutional protection of rights creates. The court held that the provision in s. 3 A(a)[40] could not be shown to be reasonably justifiable, and therefore it

[34] As e.g. the constitutions of Anguilla, Bermuda, Montserrat and the TCI.

[35] This is because the legislative authority of every BDT legislature is limited to the power to make laws in accordance with the constitution.

[36] [1970] AC 853.

[37] *Chief of Police v Powell* and *Chief of Police v Thomas* (1968) 12 WIR 403.

[38] S.I. 1967 No. 228.

[39] Cap. 302.

[40] This made 'permission of the Chief of Police necessary for all meetings, gatherings or assemblies of persons in every "public place" in the State, except bona fide religious meetings, gatherings or assemblies'.

contravened ss. 11 and 12 of the constitution.[41] However, as the offences in issue were committed on the day before the new constitution was implemented, they were not affected by that contravention and repeal.[42]

Examples of local legislation enacted in the CI relating to fundamental rights

By way of example, legislation enacted by the legislature of the CI provides an indication of the type of legislation which may be enacted in this field. The following three lists include a selection of enactments relating to some basic rights. Some of these confer rights upon the individual, while others impose limitations on the freedom of the individual.

Prohibitive provisions

(i) The Gambling Law Cap. 60;[43]
(ii) The Misuse of Drugs (Second Revision) Law 1985;[44]
(iii) The Obeah Law, Cap. 113, repealed and replaced by provision in Law 12 of 1975 (the Penal Code);[45]
(iv) Obscene Publications (Suppression) Law, Cap. 114, repealed and replaced by provision in Law 12 of 1975 (the Penal Code);
(v) The Marine Conservation Law 1978 (as amended in 1985) and Regulations issued thereunder;[46]
(vi) The Immigration Law 1992[47] (which succeeded the Caymanian Protection Law 1984 (residence, nationality, immigration and work permits)).[48]

Restrictive provisions

(i) The Marine Conservation Law 1978, as amended in 1985, and Regulations issued thereunder;[49]
(ii) Mosquito (Research and Control) Law, Revised 1976;[50]

[41] So that s. 3A(a) had been repealed by implication.
[42] See also *Marsh v Attorney-General* (Bermuda) [1990] LRC (Const.) 615, and at pp. 268–9 below.
[43] 2/935.
[44] G.25/1985.
[45] 3/1963.
[46] 19/1978 and 5/1985.
[47] Law 13/1992.
[48] 24/1984.
[49] 19/1978 and 5/1985.
[50] G.23/1976.

(iii) The Finger Prints Law 1964, repealed and replaced by provision in Law 35 of 1985;
(iv) The Penal Code, sections 22 (the death penalty)[51] and 146 (having no visible means of subsistence, to habitually abstain from working);[52]
(v) The Roads Law 1974 (as amended in 1988) (compulsory acquisition of land, formerly authorised without compensation – the amendment alters this);[53]
(vi) The Immigration Law 1992[54] (which succeeded the Caymanian Protection Law 1984 (residence, nationality, immigration and work permits)).[55]

Provisions that confer rights or the protection of any freedom

(i) The Confidential Relationships (Preservation) Law 1976 (bank secrecy): subject to limitations resulting from the Narcotic Drugs (Evidence) (USA) Law 1984,[56] and subsequently, the Mutual Legal Assistance (USA) Law 1986;[57]
(ii) The Sex Disqualification (Removal) Law 1959, Cap. 157;[58]
(iii) The Labour Law 1987;[59]
(iv) The Immigration Law 1992[60] (which succeeded the Caymanian Protection Law 1984 (residence, nationality, immigration and work permits)).[61]

The laws referred to in the first of these lists each impose an outright prohibition on some type of conduct. Gambling; the unauthorised possession, use or supply of prohibited drugs, or of designated obscene materials; and obeah are all forbidden by local legislation. Access to certain designated areas of the sea surrounding the islands, the taking of specified marine life and certain methods of fishing are also forbidden.

The laws included in the second list impose limitations on various rights and freedoms of the individual. For example, the first of these laws seriously limits the rights and freedom of the individual

[51] See now Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, S.I. 1991 No. 988.
[52] 12/1975.
[53] Law 18/1974, s. 6, as amended by Law 7/1988.
[54] Law 13/1992.
[55] 24/1984.
[56] 16/1977 and 17/1984.
[57] Law 16/1988.
[58] 3/2027.
[59] Law 30/1987.
[60] Law 13/1992.
[61] Law 24/1984.

to enjoy the waters surrounding the islands for fishing, turtling and other purposes. For the purpose of controlling mosquitoes, the Mosquito (Control and Research) Law authorises activity that would otherwise interfere with various rights of the individual, in particular his rights relating to ownership and possession of property, while the third law under Restrictive provisions, authorises activity that would otherwise constitute an assault upon the person, where effective policing and control of the criminal element of society makes this appropriate.

The limits imposed by the Immigration Law 1992[62] (which succeeded the Caymanian Protection Law 1984) on non-Caymanians entering into any form of gainful occupation in these islands mean that some elements of discrimination are present as an integral part of the legislative scheme that operates in relation to labour. The basis of that discrimination, however, is in principle a matter of nationality as opposed to race. The apparent discriminatory impact of these controls may be appreciated by considering the Caymanian Protection Regulations 1985 and the Directives to the Caymanian Protection Board (CPB) 1986 and 1987.[63] These require that before a gainful occupation licence authorising a non-Caymanian person to be engaged in the CI can be issued, the prospective employer must satisfy the CPB that they have made efforts to ascertain that no suitable, capable or able Caymanians are available to fill the post.[64] Government directions issued to the CPB in 1987[65] stated the desirability of gainful occupation licences being allocated among applicants with different backgrounds and from different geographical areas.[66]

These statutory encroachments into the realm of liberty may each be considered to be a justifiable encroachment on one area of freedom in order to preserve another which is considered, by the legislators to be superior, in the public interest. The legislature, expressing the will of the people, has provided for 'the peace, order and good government in the Islands' to be preserved by

62 Law 13/1992.
63 Nos. (4) and (5).
64 This includes newspaper advertisements which commonly state 'Caymanians only should apply'. Note that, upon UK ratification of the International Covenant on Economic, Social and Cultural Rights (extending to all this region's BDTs apart from Anguilla), the UK reserved the right to interpret art. 6 as not precluding restrictions safeguarding local employment opportunities; see pp. 257–8 below.
65 Nos. (4) and (5).
66 Five areas were specified, and a limit of 20 per cent of licences allocated to each. Later, the board was given a discretion to disregard this in appropriate cases: Dir 6/1987.

imposing limitations on certain aspects of the individual's general position of freedom. Provided that this interference can be justified as reasonably necessary when the legislators are striving to achieve an appropriate balance between the conflicting interests of society, the fundamental rights and freedoms of the individual will have been preserved.

The statutory provisions referred to in the third list confer some additional rights or freedoms upon the individual. Section 3 of the Sex Disqualification (Removal) Law 1959[67] aims to remove disqualification based upon sex. It states:

> A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal Charter or otherwise) and a person shall not be exempted by sex or marriage from the liability to serve as a juror or pay tax.

Section 4 limits the extent of s. 3. Section 4(1) confers on a judge or magistrate a discretion to exempt a woman from service on a jury, by reason of the nature of the evidence to be given or the issue to be tried, and s. 4(2) provides:

> The judge [of the Grand Court][68] may make rules – (*inter alia*)
> a) prescribing the proportion of female jurors to be summoned; *and*
> b) exempting from attendance as jurors any women who are for medical reasons unfit to attend.

There is no penal sanction provided by this law for the punishment of transgressors. Despite this, in respect of the provision in s. 3, the law appears to have been quite a forward-thinking piece of legislation for its time. When compared with the position in the UK, where legislation imposing some prohibition against discrimination in this field was not enacted until 1970 and 1975,[69] the 1959 Caymanian provision might be considered to be quite advanced.

There is a major difference in the terminology adopted by these provisions though – the 1959 Caymanian provision does not refer to 'discrimination' at all, but only to 'disqualification'. Consequently the requirement could, on the face of it, have been satisfied by,

67 K. C. St L. Henry and R. C. Laming, *Laws of the Cayman Islands 1963*, Eyre & Spottiswoode, Cap. 157 – a short enactment comprising five sections.
68 See s. 2 of the law (the interpretation section).
69 The Equal Pay Act 1970 and the Sex Discrimination Act 1975.

for example, an employer who accepted that a female candidate was 'eligible' for a position but, on the basis of discriminatory preferences, he selected another for the position. Under the somewhat narrow terms of the 1959 law, the 'eligible' person might not have been chosen to fill the post because of the fact that she was a woman. Strictly, in such a case it may be argued that she was not, in the circumstances, 'disqualified' from holding the post on the basis of sex; rather that she simply was not chosen because, in the exercise of a free choice, the employer chose to appoint a male employee. Such a choice is no longer a free choice, in the CI. Since 1987, the Labour Law, s. 73, provides:

(1) No person (whether an employer or an employee) shall discriminate with respect to any person's hire, promotion, dismissal, tenure, wages, hours or other condition of employment, by reason of race, colour, creed, sex, age or political beliefs.
(2) Subsection (1) shall not be construed as prohibiting the taking of personnel action genuinely related to an employee's ability to discharge the duties of the employment in question.
(3) Any person who contravenes the requirements of subsection (1) is guilty of an offence and is liable on summary conviction to a fine not exceeding one thousand dollars or to imprisonment not exceeding twelve months, or both.

Judicial review and complaints against BDT Governors

While the common-law principles of natural justice and the rule of law may operate to protect the rights of an individual from abuse of power by administrative authorities, there may be limitations on rights of action against BDT Governors and on the available remedies which reduce the adequacy of this as a safeguard.[70]

Ouster of jurisdiction of the court to review administrative action

Statutory provisions relating to administrative action generally

Some enactments establishing administrative bodies state that a statutory right of appeal will lie in specified circumstances to a designated person or body (commonly a minister or the executive council of government in a dependent territory), but that no appeal

[70] Judicial review was adversely commented upon by the ECtHR for having too narrow a scope: see *Weeks v UK* (1987) 10 EHRR 293 and *X v UK* (1981) 4 EHRR 188.

against the decision of the original or appellate tribunals, established by the statute, will lie to the courts. The effect of clauses of this type in England and Wales is governed by the decision of the House of Lords in *Anisminic v the Foreign Compensation Commission.*[71] This important case was applied in the Cayman Islands in Re *Caymanian Protection Board.*[72] The Grand Court thereby exercised jurisdiction to review a decision of the Caymanian Protection Board which had been reached in breach of the principles of natural justice and declared it to be *ultra vires* and void, despite legislative provision which purported to deny the court's jurisdiction.[73]

Constitutional ouster of jurisdiction of courts to enquire whether the Governor has satisfied any consultation obligations[74] imposed by the constitution, and in some cases, by any other law

It would appear that an ouster provision embodied in the constitution itself might be treated differently from the *Anisminic* type of provision and accordingly may provide an effective ouster. This has been considered earlier (in chapter 7 above).[75]

Remedies available in actions against the Governor

The type of remedy available in any action for judicial review of the conduct of a Governor of a DT needs to be examined in the light of the recent House of Lords decision in *M v Home Office.*[76] Formerly there was a widely accepted understanding that where an applicant sought a court order for the purpose of exercising control over a BDT Governor serious restrictions were faced as to the type of remedy that might be available.

Of the alternative private-law remedies, only a declaration or an award of damages could be made, as it was understood that neither an order for specific performance nor an injunction could be granted

[71] [1969] 2 AC 147 / 1 All ER 208.
[72] [1982] WILJ 259.
[73] Section 13 of the Caymanian Protection Law 1971: 'Decisions made under or by virtue of *ss. 6, 19 & 11* shall be deemed to be administrative not judicial . . . no person shall be required to . . . give any reasons for such decision and [it] . . . shall not be questioned in any court of law.' Contrast the position in Nigeria – no appeal to PC, *Anisminic* not applied effectively in *Wang v Chief of Staff* [1986] LRC (Const.) 319.
[74] With the Exco, the Cabinet or other authority, depending upon the territory at issue.
[75] See pp. 223–5.
[76] Sub nom *M*, Re [1993] 3 WLR 433.

against the Crown.[77] As far as public-law remedies were concerned,[78] it had been held in relation to actions against the Governor of a colony that although an order of habeas corpus could be made, none of the other prerogative remedies would lie.[79] (The basic reason for this was that the Governor of a colony constitutes the Crown's representative: accordingly, it would be illogical for the prerogative remedy to lie in the form of a command by the Crown's court to compel the Crown, through the colonial representative, to behave in a specified manner.[80] That reasoning does not sufficiently explain the position though, as it was accepted that the Crown's courts could issue an order of habeas corpus against a Governor.)

M v Home Office[81] concerned the validity of a finding of contempt of court against the Home Secretary for non-compliance with a mandatory injunction issued by Garland J requiring the Home Secretary to return 'M' (a national of Zaire who had been claiming political asylum) to the jurisdiction of the High Court. The House of Lords held that injunctions could be granted against officers of the Crown even when acting in their official capacity and that Garland J's order against the Secretary of State had been properly made; further that, historically, orders of prohibition and mandamus had regularly been granted against the Crown or officers of the Crown acting in their official capacity and although a finding of contempt of court could not be made against the Crown directly, such a finding could be made against a minister of the Crown in his official capacity. It was held, for the first time, that a minister of the Crown had been in contempt of court. Towards the end of the judgment, Lord Woolf said:

> The Court of Appeal were of the opinion that a finding of contempt could not be made against the Crown, a government department or a minister of the Crown in his official capacity. Although it is to be expected that it will be rare indeed that the circumstances will exist in which such a finding would be justified, I do not believe there is

[77] See P. P. Craig, *Administrative Law*, Sweet & Maxwell (1983) (hereafter Craig), p. 633; *Underhill v Ministry of Food* [1950] 1 All ER 591; *International General Electric Co. of NY Ltd v Customs and Excise Commissioners* [1962] Ch 784; *Factortame v S of S for Transport* [1990] 2 AC 85; and H. W. R. Wade, 'Injunctive Relief against the Crown and Ministers' (1991b), *LQR*, 107, at p. 9.

[78] Orders of habeas corpus, mandamus, prohibition and *certiorari*.

[79] Re *Fedele* [1988] LRC (Const.) 879; cf. *R v Commissioners of Customs and Excise*, ex parte *Cook* [1970] 1 WLR 450.

[80] In *M v the Home Office* (1991), *The Times*, 2 December, it was held by the CA that although the Crown and the Home Office may not be proceeded against for contempt, this action does lie against the minister in person. C.f. the decision in the HL, below.

[81] [1993] 3 WLR 433.

> any impediment to a court making such a finding, when it is appropriate to do so, not against the Crown directly, but against a government department or a minister of the Crown in his official capacity.[82]

(The House of Lords varied the decision of the Court of Appeal in *M v Home Office (1992)*[83] (in which it had been held that the Secretary of State in his personal capacity acted in contempt of court but that neither the Crown nor the Home Office had sufficient legal personality to be amenable to contempt jurisdiction) and reconsidered the earlier House of Lords decision in *R v Secretary of State for Transport*, ex parte *Factortame Ltd.*[84])

Prior to the House of Lords decision in *M v Home Office* two relatively recent decisions of the Grand Court of the Cayman Islands examined the scope for obtaining prerogative remedies against the Governor and stated that this was limited. The first of these cases was *Dilbert v the PSC and the Attorney-General*,[85] which was followed in Re *Fedele*:[86] each will be considered.

In the former, the Chief Justice of the CI, Mr Gerald Collett QC, declined to grant an unopposed application by Dilbert to amend her pleadings which sought orders for *certiorari* and mandamus against the PSC. The amendment would have had the effect of substituting the Governor as defendant to the action. The applicant sought this amendment after it became apparent that the decision she wished to challenge[87] was not a decision of the PSC but that of the Governor. Giving the reasons of the court in refusing this application Gerald Collett CJ said:

> It is by no means clear to me that I ought to make any such amendment despite the generous waiver of any objection to that course by the learned Attorney-General. This is because there is Commonwealth persuasive authority to the effect that certiorari and mandamus will not issue out of any colonial court directed to the Governor of the territory concerned. This was held in Re *Benn*[88] . . . *R v Gov. of the state of South Australia*.[89] Despite a strong criticism of this line of authority from Professor de Smith in his Judicial Review of Administrative Action, 4th. Edition, p. 385, I am not prepared in the absence of any countervailing authority to hold that this Court is empowered to issue prerogative orders of either prohibition,

[82] *Ibid.*, p. 465 B.

[83] [1992] 2 WLR 73.

[84] [1990] 2 AC 85.

[85] Cause no. 1987/157, judgment delivered 7 January 1988.

[86] [1988] LRC (Const.) 879.

[87] A decision to dismiss her from her employment as an air-traffic controller.

[88] (1964) 6 WIR 500.

[89] (1907) CLR 1497.

certiorari or mandamus directed to His Excellency the Governor of the Cayman Islands acting as Her Majesty's representative herein.

In Re *Fedele*,[90] the Chief Justice gave further, more specific consideration to the issue of whether any prerogative orders, and in particular those of *certiorari* and mandamus, may be issued against the Governor. After giving full consideration to the relevant case law and argument put forward on behalf of the applicant, it was held that the principle set out in *Halsbury's Laws*,[91] and the line of Commonwealth decisions followed in the *Dilbert* case, should be followed. Accordingly, the application for *certiorari* failed.

Counsel for Fedele had submitted that the passage in *Halsbury*[92] on this matter was 'a bald statement . . . unsupported by any consistent line of authority and wrong in principle', adding that the scope of judicial review of administrative action by the UK courts had expanded over the past thirty years[93] but the Chief Justice ruled that:

> The starting place for this examination is the uncontradicted proposition that the prerogative orders of mandamus, prohibition and certiorari will not issue out of any of Her Majesty's Superior Courts directed to the Sovereign personally. That is all part and parcel of the doctrine that the Sovereign may not, except to the extent that a statutory exception has been made,[94] be impleaded in Her own Courts but no doubt it could also be predicated upon the nature of such orders as being peremptory commands of the Crown directed to the subject which the Crown could not, without absurdity, direct towards itself.[95]

The Chief Justice recognised that the Governor of a colony cannot claim to share the Sovereign's 'general immunity from suit', stating that 'He does not enjoy vice-regal status' and accordingly may be sued personally in the courts in contract and tort. The Chief Justice then examined the nature of the office of Governor[96] and concluded

[90] [1988] LRC (Const.) 879.
[91] *Halsbury*, para. 1009, (p. 1050 in the law report).
[92] 'No order of mandamus will lie to the Governor in respect of acts which he can perform only with the advice of his Executive Council or Cabinet or in any other case in which he is acting as representative or agent of the Crown or otherwise in his capacity as Governor': *ibid*.
[93] To include, e.g., prison governors, ministers of the Crown, the take-over panel and the non-statutory criminal injuries board.
[94] There is a Crown Proceedings Law [Revised], in force in the CI, Ref. G.22/1976. This law is primarily concerned with questions relating to liability of the Crown in tort and in relation to industrial property.
[95] [1988] LRC (Const.) 879 at 881, paras. d to e.
[96] See pp. 201–3 above regarding this office.

that the compendium of powers the constitution vests in him was sufficient to establish that he was the Sovereign's representative in the islands. As such, any immunity from the prerogative jurisdiction of the courts in relation to the sovereign functions which have been delegated to him as the Crown's representative should extend to him. Collett CJ observed:

> It is trite law that none of these orders, any more than the old writs which they replace will go from the courts to any of the superior courts of record or to the legislature. Why then, if the highest judicial and legislative authorities of a territory are immune from the compulsion of these orders, should the highest executive authority in the territory be subjected to it?[97]

In the penultimate paragraph of the judgment, Collett CJ concluded:

> No more in my judgment will *certiorari* go from this court to his excellency the governor of the CI to bring up and quash a determination at which he has arrived after taking advice from the executive council to deem a person not possessing Caymanian status to be an undesirable inhabitant or visitor to these Islands pursuant to *s. 36(g)* of the Caymanian Protection Law. Legal remedies may well be available to a person who feels himself aggrieved by a determination of this kind but *certiorari* is not one of them.[98]

However, the scope for any alternative judicial remedy was seriously curtailed by the terms of this judgment. The extent of immunity from action which the Grand Court of the CI held protects the Governor was considerable – relating to all decisions and functions performed in the capacity of Governor. Should an individual wish to challenge the Governor in respect of the performance of any of a vast array of his executive functions, carried out with or without the advice of his executive council, the immunity from prerogative or injunctive relief would according to those cases lie (the limitation adopted from *Halsbury* was said to extend to 'injunctions and other like remedies').[99]

The House of Lords decision in *M v Home Office* may have removed the underlying reasoning for the decisions in *Dilbert* and *Fedele*. It has been noted that in the former the Chief Justice said: 'I am not prepared in the absence of any countervailing authority to hold that this Court is empowered to issue prerogative orders of either prohibition, certiorari or mandamus directed to His Excel-

[97] [1988] LRC (Const.) p. 879, at 883 – this argument is countered by the judgment of Lord Templeman in *M v Home Office* [1993] 3 WLR 433, at 437.
[98] Re *Fedele* [1988] LRC (Const.) at 884, paras. b to c.
[99] *Halsbury*, p. 1009; Re *Fedele* [1988] LRC (Const.) 879, at 881, para. a.

lency the Governor': insofar as it is suitable to the needs of a BDT, English common law is applicable there.[100] Although decisions of the House of Lords are not binding over the courts of the BDTs, they are highly persuasive authorities. Thus when this question next arises in a dependent-territory court there will be countervailing authority to be considered. The judgment in *M v Home Office* identifies important policy issues: Lord Templeman said, at p. 437:

> The argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.[101]

Furthermore, Lord Woolf said, at p. 445: 'What does appear to me to be clear from the events which occurred on 1 and 2 May, 1991 is that, if there is no power in a court to make an order to prevent the Home Office moving a person in any circumstances, this would be a highly unsatisfactory situation.' It will be a matter for the respective DT courts to consider these policy issues and having regard to any specific legislation they have on the lines of the Crown Proceedings Act 1947 and the Supreme Court Act 1981 and to their rules of court, to decide whether the principles enunciated by the House of Lords in *M v Home Office* should be followed in any particular dependent territory and applied in respect of actions against the Governor. It is particularly notable that in addressing the arguments against the view that the King can do no wrong being an impediment to the availability of injunctive relief against the Crown, Lord Woolf cited the following passage from *Dicey on the Law of the Constitution*:[102]

> When we speak of the 'rule of law' as a characteristic of our country, [we mean] not only that with us no man is above the law but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals . . . With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of

100 *Blankard v Galdy* (1693) 4 Mod Rep 215.
101 [1993] 3 WLR 433, at 437.
102 10th edn (1959), pp. 193–4.

> their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.[103]

In February 1994, in *McDonald v Secretary of State for Scotland*,[104] the Second Division of the Inner House of the Court of Session (Scotland) declined to follow the House of Lords decision in *M v Home Office*. It was held by the Lord Justice Clerk (Lord Ross), Lord Morison and Lord Sutherland that neither an injunction (referred to as interdict) nor an interim injunction could be granted against the Crown in Scotland and that an action against the Secretary of State was an action against the Crown, notwithstanding the decision in Re *M (1993)*: a decision of the House of Lords on the interpretation of a United Kingdom statute in English law was not necessarily binding in Scotland.

If it was held in any of the dependent territories that *M v Home Office* would not be applied, with the result that neither injunctive relief nor any prerogative remedies other than habeas corpus would lie in an action against the Governor, an individual who was aggrieved by a decision of the Governor (made in his capacity as such, either with or without the advice of the executive council), who wished to seek redress through the courts, would need to seek a declaration of his rights or interests and would then need to rely on the Governor or government of the day to honour the judgment of the court. Indeed, it is accepted by Lord Woolf that that would be the usual course to take in England where a decision of a government minister or department is challenged:

> The fact that these issues have only now arisen for decision by the courts is confirmation that in ordinary circumstances ministers of the Crown and government departments invariably scrupulously observe decisions of the courts. Because of this, it is normally unnecessary for the courts to make an executory order against a minister or a government department, since they will comply with any declaratory judgment made by the courts and pending the decision of the courts will not take any precipitous action.[105]

If a DT Governor or government failed to honour such a declaratory judgment (or award of damages) the domestic remedies available to the aggrieved individual would be exhausted. Where the UK government has issued declarations on behalf of a DT which recog-

103 [1993] 3 WLR 433, at 449.
104 (1994) *The Times*, 2 February.
105 [1993] 3 WLR 433, at 439 A–C.

nises the right of individual petition to the European Commission and the competence of the European Court,[106] the complainant may at this stage have recourse to that European jurisdiction, if the alleged infringement of rights or interests constitutes a breach of the European Convention on Human Rights. Currently there are no such declarations relating to the BVI or the CI[107] so, at this stage, their remedies would appear to be exhausted.

Source of administrative authority: statute or prerogative

Formerly this was an additional factor to be considered.[108] Today, each of the dependent-territory constitutions is provided by Order in Council, issued under legislation which appears to have suspended the Crown's prerogative constituent powers[109] and, since the House of Lords decision in the *Council of Civil Service Unions v Minister for the Civil Service*,[110] the source of administrative authority is no longer an issue. It was held that 'a decision making power is amenable to judicial review whether its source is in prerogative or statutory power, although the subject matter of some prerogative powers, such as treaty-making or the defence of the realm is such as to exclude judicial review'.[111]

Control of the judiciary

Where an encroachment upon an individual's rights or freedoms arises out of a judicial decision, there is no separate arm of 'government' that has any authority to review the propriety of the material decision. Conversely, subject to the limitations identified, the exercise of 'authority' by both the legislature and the administration may be subject to the supervision of a separate body, the courts. Inherent features of the judicial system (the legal principles which the courts are bound to apply) provide scope for supervision of lower courts by higher courts. In order for the judiciary to impose any legitimate limitation upon the rights or freedoms of an individual, the imposition must accord with the same principles that the

106 Pursuant to art. 63 of the convention, and arts. 25 and 46.
107 Declarations relating to period from 14 January 1991 to 13 January 1996, Council of Europe, *Information Sheet 28*, Doc. ref.: H/Inf (91)2. (The balance of the region's DTs, among others, are included in those declarations.)
108 *Esther v The Prime Minister and another* [1985] LRC 425.
109 See chap. 5 above.
110 [1985] LRC (Const.) 948.
111 [1985] LRC (Const.) 948 at 952/[1984] 3 All ER 935.

courts apply in order to determine whether any administrative decision or subordinate legislation is valid or void: the rule of law, the rules relating to natural justice and the doctrine of *ultra vires* are particularly significant in this respect. In this way, these rules amount to the British constitution's provision for the preservation of human rights. Professor Brownlie[112] has described this feature as follows: 'Modern approaches to human rights could be regarded as a new label for a much older concept, that of the Rule of Law. Human rights might in other words, be regarded as "further and better particulars" of public law.' If the court of a BDT, exercising jurisdiction at first instance, fails to determine any case in accordance with the appropriate principles, an appeal against that decision may be taken to the territory's Supreme/High/Grand Court or to the local Court of Appeal. If necessary, the case may be taken further, to the Judicial Committee of the Privy Council. In many cases, leave to appeal to the Judicial Committee needs to be obtained from the Judicial Committee. However, as one of the categories under which there is a prerogative right of the Sovereign to grant special leave to appeal is when leave at the discretion of the (lower) court has been refused,[113] ultimately the Judicial Committee of the Privy Council constitutes a superior judicial power of review over decisions of the BDT courts. Although this source is not resorted to in many cases, its presence provides a safeguard against improper encroachment upon fundamental rights or freedoms being supported, condoned or imposed by the local judiciary.

An example of how the Judicial Committee may fulfil this role is the case of the *Minister for Home Affairs v Fisher*,[114] which concerned the government of Bermuda and the Supreme Court, of Bermuda's unjustifiable encroachment on the fundamental rights of four illegitimate children to continue living in Bermuda with their family. The applicant was a Jamaican mother of four illegitimate children who, in 1972, married a Bermudian. Her husband accepted all four of these children as children of his family, but the Bermuda government would not. The applicant and her children had taken up residence[115] in Bermuda in 1974. One year later the government

112 Chichele Professor of public international law, University of Oxford.
113 Roberts-Wray, pp. 436–7, of which he says: 'An application in this category is, in substance, an appeal against the exercise of discretion by the local Court and leave would not be lightly granted.'
114 [1979] 3 All ER 21, although the local CA reversed the decision of the lower court, so the mother and children did not have to rely on the PC to correct a local decision. The PC confirmed the higher local decision. This case is discussed in the following section of this chapter, pp. 263–4.
115 And each of the children had been placed in state schools.

issued an order requiring the children to leave Bermuda. The mother sought a declaration that her children were 'deemed to belong to Bermuda',[116] under s. 11 (5) (d) of the constitution, because they were each a 'child of a person with Bermudian status'. The Supreme Court of Bermuda refused the application on the basis that 'child' in this provision meant 'legitimate child' and, as a result the provision, neither recognised nor afforded any protection of rights for her children. The Privy Council did not need to reverse the local court, because the Court of Appeal of Bermuda did so, finding the Supreme Court of Bermuda had erred in its interpretation of the constitution. As a result, it was held that the interference with the constitutional rights of the mother and her children to live as a family in Bermuda, with her Bermudian husband, was unlawful: a decision which the Privy Council affirmed.

The independence of the judiciary is clearly of considerable importance to the effective operation of this system. As observed in chapter 6, only the constitutions of Bermuda, the CI and the TCI include detailed provision to protect judges from unwarranted removal from office in both the Supreme/Grand Court and the Court of Appeal,[117] while those of the BVI[118] and Anguilla[119] provide for a judicial and legal service commission to be consulted,[120] and the Montserrat constitution, for consultation with the Chief Justice. Until the recent amendment of the CI constitution, the provision found in the TCI provided the strongest constitutional measure to safeguard judicial independence. It might be thought that this was because of the political problems experienced in the 1980s, but that is not the case: that TCI provision was originally introduced by constitutional amendment in 1973.[121]

Control under the UN Charter

Following the Second World War, 'a broadly held belief that, in order to attain international peace, some effective means of protecting Human Rights was needed' resulted in the promulgation of the Charter of Nations. This treaty was ratified on behalf of the UK and its dependent territories in 1946.

[116] And were therefore entitled to reside in Bermuda: s. 11(1).
[117] See pp. 188–90 above.
[118] S.I. 1976 No. 2145, as amended, ss. 54 and 55.
[119] S.I. 1982 No. 334, as amended, ss. 67 and 68.
[120] Except for the Attorney-General in Anguilla – s. 66, Governor's discretion.
[121] S.I. 1973 No. 599.

Commission on Human Rights

The objective declared in art. 1(3) of the UN Charter calls for 'promoting and encouraging respect for Human Rights and fundamental freedoms for all, without distinction as to race, sex, language or religion'. One of the six functional commissions established by the Economic and Social Council[122] of the UN,[123] the Commission on Human Rights, was established to promote respect for and observance of human rights and fundamental freedoms. The principal concern of this commission is with the preparation of draft declarations and conventions. Also, it receives thousands of communications a year from persons and organisations alleging violations of human rights. From 1951 to 1971, 120,000 complaints were received and, between 1972 and 1988, a further 350,000.[124] The Commission on Human Rights has no formally conferred power to take action in respect of complaints from individuals but a procedure for handling lists of complaints and informing member states of complaints made against them has developed.[125] It has no jurisdiction to hear complaints, except in relation to a 'consistent pattern of gross violation'.[126]

The Universal Declaration on Human Rights

This declaration[127] was adopted by the General Assembly of the UN in December 1948. Because it is not a convention, entered into and ratified by contracting member states, it does not, strictly, impose legal obligations, nor does it formally confer any 'rights'. Describing the significance of this declaration, which has formed the basis, together with the ECHR, for later UN covenants,[128] Judge Tanka, in the International Court of Justice,[129] said: 'The Declaration constitutes evidence of the application and the interpretation of the

[122] Comprising fifty-four elected members (three-year office).
[123] One of the six organs of the UN – the others being the ICJ, the General Assembly (over 150 members, one from each country), the Security Council (fifteen members) the Trusteeship Council and the Secretariat, headed by the Secretary-General.
[124] United Nations, *Droits de l'homme, Procedures d'examen des Communications (7)*, United Nations Publications (1989), p. 7.
[125] This was endorsed by resolution of the Economic and Social Council as early as 1959.
[126] Resolution of the Economic and Social Council, 1503 (XCVIII), 48 UN ESCOR (No. 1A) at 8, UN Doc. E/4832/Add. 1 (1970).
[127] Drafted by the Commission on Human Rights.
[128] The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.
[129] In *South West Africa Cases (Second Phase)*, ICJ 1966, 6 at 293.

relevant provisions of the Charter of the United Nations.' Under arts. 1 and 2 of the Universal Declaration on Human Rights, basic rights relating to equality and freedom from discrimination are declared. This is followed by a group of provisions, in arts. 3 to 21, where civil and political rights of all human beings are declared; and a group of provisions, in arts. 22 to 27, where economic, social and cultural rights of all human beings are declared. Finally, arts. 28 to 30 recognise the entitlement of all human beings to social and international order in which the declared rights may be enjoyed. A general qualification on the content of the UDHR relates to the nature of some of the 'rights' declared therein, which may be appreciated by consideration of the following extract from *Halsbury*:

> SOCIAL RIGHTS: Certain rights enunciated in the United Nations Declaration of Human Rights (and the ECHR) are scarcely rights in the strict sense of that term and in their generality are unenforceable. They may however be regarded as a legislative policy which might influence the courts in the interpretation of statute law.

International Covenants on Human Rights

International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR)

Adopted by the General Assembly of the UN in 1966, these covenants did not enter into force until 1976.[130] Unlike the UDHR, these provisions are 'covenants' and (except for an optional protocol to the latter), having been entered into and ratified by the UK on behalf of most of the dependent territories,[131] they give rise to legally binding obligations on the UK in international law. Each covenant establishes a scheme for the supervision of compliance with their provisions. Member states are obliged to submit reports of measures taken to the appropriate UN body.[132] Following sub-

[130] By then each covenant had been ratified by the requisite thirty-five member states.

[131] The territorial application of the UK's 1976 ratification includes all of the region's BDTs, apart from Anguilla. At that time Anguilla was formally part of the Associated State of St Kitts, Nevis and Anguilla. Since becoming a separate BDT in 1980 no extension to the territorial application appears to have been made. See United Nations, *Status of International Instruments*, United Nations Publications (1987), pp. 3, 19, 27 and 85, and update chart, 31 March 1991. The lack of reports submitted from Anguilla supports this conclusion.

[132] Reports submitted pursuant to the former covenant are presented to the Economic and Social Council; those for the latter, to the Human Rights Committee.

mission of the second such report by the UK, in relation to the ICCPR and the dependent territories, in 1988, the Assistant Under-Secretary to the FCO, Mr Fearn, addressed the Human Rights Committee on the constitutional and legal framework within which the covenant is implemented. He said:

> As the Committee was aware, the Covenant did not itself form part of the domestic law of the dependent territories. Although there were no examples of judicial decisions directly relating to the Covenant, if a conflict were alleged, the courts would be entitled, in accordance with common law rules of statutory interpretation to look at the Covenant to resolve any ambiguity in domestic legislation relating to rights and freedoms guaranteed by the Covenant.[133]

Mr Fearn also drew attention to the constitutional constraints on local Governors from giving their assent to legislation where this appears to conflict with treaty obligations on the UK.[134]

Upon ratification of the ICCPR, the UK reserved 'the right not to apply or not to apply in full the guarantee of free legal assistance . . .[135] in so far as the shortage of legal practitioners renders the application of this guarantee impossible in the BVI [and] the CI'.[136] In view of current (and 1976) levels of development, it appears strange that these reservations relate to the CI but not to the TCI. Upon ratification of the ICESCR, the UK declared that the BVI, the CI and the TCI[137] are developing countries. Bermuda and Montserrat were not so declared but the UK reserved the right to postpone the application of art. 7(a)(i) (regarding equal pay for equal work) in the private sector in Bermuda.[138] The UK reservation of the right to postpone implementation of the right to social security[139] related only to the CI (and the Falkland Islands). Broadly, the UK reserved 'the right to interpret *Article 6* as not precluding the imposition of restrictions, based on place of birth or residence qualifications, on the taking of employment in any particular region or territory for

[133] CCPR/C/SR.855, para. 21.

[134] Regarding these constraints, see pp. 152–5 above.

[135] Article 14(3)(d).

[136] The Falkland Islands, the Gilbert Islands, the Pitcairn Islands Group, St Helena and dependencies and Tuvalu.

[137] Together with the Pitcairn Islands Group, St Helena and the dependencies and Tuvalu.

[138] Together with Jersey, Guernsey, the Isle of Man, Hong Kong and the Solomon Islands. The right to postpone the application of art. 10(1) re. maternity leave in Bermuda (and the Falkland Islands) was also reserved: United Nations (1987), p. 17.

[139] Article 9.

the safeguarding the employment opportunities of workers'.[140] (The examples given earlier, of provisions in the CI Immigration Law 1992[141] (which succeeded the Caymanian Protection Law 1984)[142] and related regulations and directives, illustrates the type of legislation that might have been contemplated by this reservation.)

The Human Rights Committee

The Human Rights Committee (HRC), established by the ICCPR, monitors the implementation of that covenant's provisions. Reports submitted by party states are examined in public but the full extent of the committee's power of recourse is to comment. Since the 1976 ratification of the ICCPR, the UK has submitted three reports relating to the UK and three relating to the BDTs.[143] Public examination of reports (which might result in adverse comment from respected responsible sources) aims to provide encouragement to governments sensitive to adverse publicity to comply with their treaty obligations. The timing of an announcement in the House of Commons[144] (28 March 1991) of the then forthcoming Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991[145] (promulgated in May 1991) illustrates the impact that public examination before the HRC may have. The announcement of the proposed Order in the House of Commons was made three days before the public examination of the Third Periodic Report of the UK was scheduled to take place in New York, on 1 April 1991. At this examination, the UK delegate informed the HRC of the announcement made in the House of Commons three days earlier, and the forthcoming Order in Council.[146] These events appear to be related.

The HRC has adopted a number of 'General Comments' which 'seek to summarise its understanding of the meaning of various articles of the Covenant'.[147] Also, there is a complaints procedure

[140] United Nations (1987), p. 16.
[141] Law 13/1992.
[142] Law 24/1984.
[143] Re. UK: 1977 – CCCPR/C/1/Add.17; 1984 – CCCPR/C/32/Add.5; 1991 – CCCPR/C/58/Add.6 and 11. Re. BDTs: 1978 – CCCPR/C/1/Add.37; 1988 – CCCPR/C/31/Add.14; 1991 – CCCPR/C/SR.1045 to 1050.
[144] HC Deb. vol. CLXXXVIII col. 502 w (28 March 1991).
[145] S.I. 1991 No. 988.
[146] CCPR/C/SR.1045, para. 6. This Order is examined in a case study in chap. 9 (pp. 325–34), where the British response to pressures arising from ICCPR and ECHR commitments on the UK in respect of the death penalty and the BDTs is considered.
[147] A. Byrnes and M. M. J. Chan, *Bill of Rights Bulletin* (HK) (1992), 1, 3 (19, as of April 1992).

which allows individuals to present complaints to the HRC. This procedure, established by the Optional Protocol to the ICCPR, was not adopted by the UK.[148] In countries where this right is recognised, problems may be encountered where the jurisdiction of the Privy Council, as final court of appeal, has been retained. The need to exhaust local remedies before resorting to international remedies could place a serious hurdle before prospective petitioners but recent decisions of the HRC, such as *Reid*,[149] show that it is not necessary 'to exhaust a constitutional motion to the Privy Council where an ordinary appeal ha[s] . . . failed due to the ineffectiveness and "unavailability" of the remedy'.[150]

International Convention on the Elimination of all Forms of Racial Discrimination

The UK is party to this convention and thereby undertakes, *inter alia*, to pursue a policy of eliminating racial discrimination and promoting understanding among races.[151] All the region's BDTs fall under this, as UK ratification[152] was 'with respect to the Associated States and Territories under the Sovereignty of the UK'.[153]

Convention on the Elimination of all Forms of Discrimination against Women

The UK ratification of this convention[154] of August 1985 specifies only two of this region's BDTs within the territorial ambit: the TCI

[148] The UK has however issued a declaration recognising the competence of the HRC, under art. 41 of the ICCPR: see United Nations (1987; update, 31 March 1991).
[149] Comm. 250/1987, decided 20 July 1990.
[150] R. M. B. Antoine, 'The Judicial Committee of the Privy Council' (1991), *ICLQ*, 41 p. 189. Antoine concludes: 'The application to the Privy Council does little to further the cause of due process . . . [it] does little more than prolong the tortuous, winding and unjust route that a prisoner on death row already has to undergo': p. 190.
[151] This was adopted by the UN General Council in 1965; the convention came into force in 1969. By 1987, 122 states had ratified it: United Nations (1987), pp. 94–8.
[152] In March 1969.
[153] United Nations (1987), pp. 98 and 127. Note the UK reservation regarding art. 15 as discriminatory: see p. 117. Article 15 makes provision pending the achievement of the objectives of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples. It recognises the rights of petition of these people and directs the Committee on the Elimination of Racial Discrimination to receive such petitions and make recommendations upon them.
[154] It was adopted by the General Assembly of the UN on 18 December 1979; entry into force, 3 September 1981.

and the BVI.[155] This ratification was issued subject to a declaration of understanding as to the validity of existing [illegible]s, regulations, customs and practice and quite extensive reservations, extending to the UK and the relevant dependent territories.[156]

Impact of the European Convention on Human Rights

The ECHR and the first protocol thereto extend to the BVI and the CI, although the citizens of these territories do not currently have the benefit of access to the European Commission (EC) or recognition of the jurisdiction of the European Court of Human Rights (ECtHR). Explaining the position before the HRC in 1991, Mr Beamish for the UK said:

> Of those [BDTs to which the ECHR extends], all but the BVI, the CI and the Isle of Man accepted the right of petition under article 25 of the European Convention and the jurisdiction of the European Court under article 46. The acceptance of the right of petition had recently been renewed for a further five-year period in respect of the UK itself and also the Territories concerned. Those territories which were not so far included did not wish the right of petition to apply to them and the UK respected their position.[157]

In accordance with the terms of the UN Declaration on the Granting of Independence to Colonial Countries 1960,[158] the people of a BDT ought[159] to be able to choose whether or not the UK recognition of the jurisdiction of this court and of the competence of an individual to petition the EC should be extended to their territory. The above reply to the HRC shows that, for these DTs, this approach has been taken by Britain. The current lack of declarations for individual petition to the EC, and recognition of the jurisdiction of the ECtHR in respect of the BVI and CI, has not always been the position. The 1974 declarations for this purpose[160] included both the BVI and the CI in a list of sixteen dependent territories to which that declaration related. Each of these territories were again

155 United Nations (1987), pp. 142 and 173.
156 *Ibid.*, pp. 160–6.
157 Consideration of the Third Periodic Report of the UK under the ICCPR: CCPR/C/SR.1046, para. 45.
158 See pp. 278–80.
159 In view of the undertakings in the UN Charter and the Declaration on Granting of Independence to Colonial Countries and Peoples, although this may be contentious.
160 Treaty Series No. 26, Cmnd 5605 (1974).

included in the 1982 declarations (for the period 1982–6).[161] Since 1986, however, neither of these territories has been included within the ambit of these declarations.[162]

It may be thought that such recognition would be more important to the citizens of those DTs that do not have bills of rights included in their constitutions than to those who do. However, in practice, in this region it is those territories lacking constitutional protection that also lack the ECtHR jurisdiction. When the 1986 declaration omitted the BVI, the CI and Montserrat from its ambit,[163] these were the only three DTs in this region that did not have constitutional bills of rights. Anguilla, Bermuda and the TCI were each included within the ambit of that declaration, and they each had, and continue to have, a constitutional bill of rights. Since Montserrat has had a new constitution, which includes a bill of rights, it has been included in the (subsequent) UK declaration relating to the ECHR (1991).

Although the 1991 CI Constitutional Commissioners' recommendation for the inclusion of a bill of rights within the CI constitution was not adopted in the 1993 amendments to that constitution, there is local support for that recommendation. Similarly, the BVI Constitutional Commission Report of 1993 recommends constitutional provision for a bill of rights. The current declaration of the UK relating to itself and the region's DTs and the ECHR is not due to expire until 1996. If in the meantime, a constitutional 'Bill of Rights' is provided for the BVI and/or the CI then, unlike the other territories with rights provision in their constitutions, these territories would be in the position of having a domestic bill of rights, but none that is international.

Even where there is no domestic implementation of the ECHR there is scope for judicial importation of this treaty's provisions into English common law and, consequently, into the law of these territories. Thus, in the BVI and CI where there is neither domestic implementation nor acceptance of individual petition or recognition of the jurisdiction of the ECHR, principles embodied in that convention may influence domestic case law. Addressing the growing impact of the ECHR upon national case law, Andrew Drzemczew-

161 Treaty Series No. 11, Cmnd 8488 (1982).
162 1986–91, Treaty Series No. 64, Cmnd 23 (1986); and 1991–6, Council of Europe, *Information Sheet 28*, Doc. Ref.: H/Inf (91)2. These decisions taken by the Executive Council are subject to strict confidentiality relating to the meetings of Council, and the specific reasons for the decisions are not known.
163 Treaty Series No. 64, Cmnd 23 (1986).

ski[164] says: 'In the remaining seven member states [where there is no domestic bill of rights] – including the UK – its provisions can be, and often are, successfully cited as persuasive authority of which even judges not well versed in "Convention law" are prepared to take cognisance.'[165] The *Attorney General v Guardian Newspapers and others*[166] shows British judicial recognition of the ECHR, but the House of Lords nevertheless upheld (3:2) an interim injunction limiting the rights of freedom of expression and freedom of the press. After asserting recognition of the importance of the ECHR on their decision, Lord Templeman (in the majority) concluded: 'The imposition of restraints on the press in the exercise of a judicial discretion in conformity with the convention was an expression and not negation of democracy in action.' Conversely, Lord Bridge, delivering a dissenting judgment, stated: 'If the Government were determined to fight to maintain the ban to the end, they would face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg.' Lord Bridge was right. The European Court held that the interim injunction, or its continuation after the book (*Spycatcher*) was on sale in the US, violated art. 10 of the ECHR.[167] In due course, at the British trial of the action, Scott J dismissed the Attorney-General's claim, and the Court of Appeal and the House of Lords (differently composed from that which determined the interim application)[168] upheld that decision.

Thus, apart from the international law level of control under the ECHR (which is currently not available to the citizens of the BVI and the CI), control may result from the impact of decisions of the ECtHR on domestic case law. Some of the provisions of the convention may thereby extend indirectly into the law of these territories. The common law is, so far as it is suitable to the needs of the British colonial territory, applicable as law therein.[169] Although the decisions of the House of Lords do not amount to binding precedents over the courts of the BDTs, they are persuasive authorities. In this way the ECHR may have an impact within a territory even at a time when there is no declaration of recognition extending the jurisdiction of the ECtHR to the territory.

[164] Of the Directorate of Human Rights, Council of Europe, Strasbourg.

[165] Drzemczewski (1987), p. 561: *Attorney-General v BBC* [1980] 3 WLR 109 at 128, 130 and 137 (*obiter dicta* by Lords Fraser and Scarman) and *UKAPE v ACAS* [1980] 2 WLR 254 at 266, (*per* Lord Scarman).

[166] [1987] 3 All ER 316 (HL): cf. *R v Secretary of State for the Home Department*, ex parte *Brind and others* [1991] 1 AC 696.

[167] *Guardian Newspapers v the UK* (1992) 14 EHRR 153; and *Sunday Times v the UK (No. 2)* (1992) 14 EHRR 229.

[168] *Attorney-General v Guardian Newspapers Ltd (No. 2)* [1988] 3 All ER 545. See Rt Hon. Lord Oliver [dissenting judge in interim application], 'Spycatcher Case: Confidence, Copyright and Contempt', in S. Shetreet (ed.), *Free Speech and National Security* (1991), pp. 23–40.

[169] *Blankard v Galdy* (1693) 4 Mod Rep 215.

3. PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS IN ANGUILLA, BERMUDA, MONTSERRAT AND THE TCI – WHERE A 'BILL OF RIGHTS' IS INCLUDED IN THE CONSTITUTION ORDER

The means available for the protection of fundamental rights and freedoms in the BVI and CI considered in the foregoing discussion are relevant to the protection of fundamental rights in these territories too, but these territories have additional measures available. Each has a chapter or part of its constitution devoted to the protection of fundamental rights and freedoms[170] and the current UK declarations under the ECHR extend to each of these territories. Also, in Bermuda, in 1981 the Human Rights Act was enacted. This repealed and replaced earlier race relations legislation: 'While preserving those features of the earlier acts, [it] is wider in that it refers to the applicability of the European Convention on Human Rights to Bermuda, and reinforces the fundamental rights and freedoms of every person of whatever race, place of origin, political opinion, colour, creed or sex.'[171]

Construction of constitutional provisions

When giving consideration to the effect of any particular provision, the following principles of construction should be applied:

(a) the *sui generis* nature of the instrument;
(b) the desirability of uniformity of meaning of constitutional provisions in the constitutions of different countries;
(c) the presumption of constitutionality of legislation.

The sui generis *nature of the instrument*

The Minister of Home Affairs v Fisher,[172] a Privy Council case concerning the meaning of the word 'child' in s. 11(5) (d) of the constitution

[170] Chapter 1 of the constitutions of Anguilla (1982) and Bermuda (1968), part IV of the Montserrat constitution of 1989 and part VIII of the Turks and Caicos Islands constitution of 1988.

[171] Second Periodic Report by the UK under ICCPR, Appendix A: Report by Bermuda, ACCPR/C/32/Add.14, p. 3.

[172] [1979] 3 All ER 21, applied in *The Law Society of Lesotho v The Prime Minister of Lesotho and another* [1986] LRC (Const.) 481.

of Bermuda, illustrates this. The material facts of this case appear earlier in this chapter.[173] The Court of Appeal's reversal of the Supreme Court's decision was confirmed by the Judicial Committee of the Privy Council which stressed the following points:

1 A constitutional instrument is a document *sui generis*, to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation.
2 Provisions in a constitutional instrument dealing with rights were therefore to be interpreted according to the language used and the traditions and usages that had influenced that language.

The Judicial Committee referred to the broad and ample style of chapter 1 of the Bermudian constitution and the fact that the constitution had been influenced by both the United Nations' UDHR and the ECHR. In view of this, the provisions should be broadly interpreted to give full recognition and effect to the fundamental rights and freedoms referred to. The matter was to be approached with an open mind unfettered by the presumptions as to legitimacy arising in ordinary legislation dealing with property, succession and citizenship. The context of the provision in issue showed clear recognition of the family as a group and that children should not be separated from a group which, as a whole, belonged to Bermuda. As a result the Judicial Committee concluded that 'child' in this provision included each illegitimate child of the applicant so that they were protected by s. 11 of the constitution and entitled to remain in Bermuda.

Uniformity of meaning of similar constitutional provisions used in the constitutions of different parts of the world

When construing a constitutional instrument of one territory, is it legitimate to take into consideration the meaning other courts have held to be appropriate, when construing a similar provision in the constitution of another territory? The balance of authority on this issue appears to favour the application of similar criteria to all constitutions.[174] This approach was favoured in *The Minister of Home Affairs v Fisher* (Bermuda);[175] *Bell v DPP and another* (Jamaica);[176]

[173] See pp. 253–4 above.
[174] See A. K. Fiadjoe, 'Judicial Attitudes to Commonwealth Caribbean Constitutions' (1991), *Anglo-American Law Review*, 20, pp. 116–30.
[175] [1979] 3 All ER 21, discussed above.
[176] [1986] LRC (Const.) 392 at 399–401.

Arthur v Chief of Police (St Kitts, Nevis and Anguilla)[177] and the *Attorney-General and Minister of Home Affairs v Antigua Times*[178] (the *Antigua* case).

One cogent reason for this approach is that much of the material included in these constitutional provisions is derived from a common source. Commonly, provision included in Commonwealth Caribbean constitutions compares closely with, and 'evidently owe[s] much to the ECHR, which was itself based on the Universal Declaration of Human Rights'. This observation, made by the Judicial Committee of the Privy Council in the *Antigua* case, is one that has frequently been made.[179]

In the *Antigua* case,[180] it was concluded that the word 'persons', in the provision of the Antigua constitution relating to the preservation of property, includes 'artificial persons'. In arriving at this conclusion, the Judicial Committee took into consideration the fact that in some articles, the ECHR applies to artificial persons. Reference was also made to some Australian and American decisions which the Judicial Committee, while recognising that they were not 'decisive', said were nonetheless an indication of the approach taken on similar questions in recent times.

Conversely, the Judicial Committee of the Privy Council held in *Ong Ah Chuan v DPP*[181] that decisions of the US Supreme Court, on the US bill of rights, were of little help in construing the provisions of modern commonwealth constitutions that follow the Westminster model.[182] In a more recent decision of the Judicial Committee, however, *Bell v DPP*,[183] Lord Templeman referred to a decision of the Supreme Court of the USA and the lucid identification of relevant factors made by Powell J.[184] Those factors had been adopted by the Queen's Bench Court of Alberta, in *R v Camaron*[185] and Lord Templeman said that they also provided guid-

[177] (1973) 20 WIR 550.
[178] (1975) 21 WIR 560.
[179] See also *Minister of Home Affairs v Fisher* [1979] 3 All ER 21.
[180] (1975) 21 WIR 560.
[181] [1981] AC 648 at 669.
[182] Of this, Fiadjoe (1991) said: 'Despite the peculiar slip by the Privy Council in *Ong Ah Chuan's* case that US decisions were not appropriate models for construing fundamental rights in Westminster Constitutions, Caribbean and, indeed, Commonwealth Courts have relied on principles formulated by the US Supreme Court': p. 120.
[183] [1986] LRC (Const.) 392 at 399–401: declaration that the applicant's right to a fair hearing in a reasonable time, conferred by s. 20 of the constitution of Jamaica, had been infringed.
[184] *Barker v Wingo* (1952) US 511.
[185] [1982] 6 WWR 270.

ance for the instant case: 'Similar criteria should be applied to the application of similar provisions, protecting accused persons against oppression by delay, in any other constitutions. The weight to be attached to each factor would vary according to jurisdiction and case.' Similarly, in *Francis v Chief of Police,*[186] which concerned the constitution of St Kitts, Nevis and Anguilla, the Judicial Committee referred to relevant cases decided in the US, Canada, India, Pakistan and the West Indies. The differences between the material provision of the local constitution and the First and Fourth Amendments of the constitution of the US, in relation to limitations on fundamental rights and freedoms of the individual, however, were pointed out. Also, in *Runyowa v R,*[187] a case concerning the death penalty in Rhodesia, the Judicial Committee, while respecting the importance of decisions of the Supreme Court, stressed the conceptual differences between the relevant amendment of the US constitution and the constitutional provision, in issue.

A degree of reticence has been expressed by the Court of Appeal of Trinidad and Tobago concerning the propriety of using judicial precedents and commentaries from other jurisdictions as an aid to the interpretation of the constitution of Trinidad and Tobago. The case of the *Attorney-General v Morgan*[188] concerned an appeal to the Court of Appeal of Trinidad and Tobago brought by the Attorney-General against the lower court's ruling that the Rent Restriction (Dwelling Houses) Act 1981 was void. This Act was initially held to be void because it was found to derogate from the constitutionally guaranteed rights to property and equality before the law. The applicant had satisfied the court that this was 'not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual'. The Act was therefore initially held to be unconstitutional. Allowing the appeal, it was held by the Court of Appeal, *inter alia*, that 'the High Court had erred in equating the Constitution of Trinidad and Tobago, *sections 4, 5* and *13*, with the Constitution of India, *articles 19(1)(f)* and (5); great care must be taken before applying Indian precedents and commentaries thereon to the interpretation of the Constitution of Trinidad and Tobago'.[189] Braithwaite J, explaining the reasons for this finding, highlighted the differences between the two constitutions in question. He referred in particular to the inappropriate use of any Indian commentaries for assistance in

[186] (1973) 20 WIR 550.
[187] [1966] 1 All ER 633.
[188] [1985] LRC (Const.) 770 at 796–7.
[189] Note that the basis of the Trinidad and Tobago bill of rights (1962 and 1976) was the Canadian bill of rights: A. P. Blaustein and G. H. Flanz, *Constitutions of the Countries of the World*, vol. XVIII; Oceana Publications (1971), pp. 6 – 10.

interpreting s. 13 of the local constitution because there was no similar provision in the constitution of India.

The position appears to be that the Privy Council encourages a uniformity of approach to interpretation of truly comparable provisions of constitutions from different countries. Caution must be exercised when putting this proposition into operation, in order to ensure that any comparisons that are drawn, and analogies that are made, are fair and apposite in all the circumstances of the case. The Indian cases and commentaries were considered to be inappropriate by the Court of Appeal of Trinidad and Tobago, because the court found there to be 'plain differences' between the provisions of the two constitutions. A significant point which should be noted about this decision is that the differences the Court of Appeal found to be 'plain' were nonetheless not such obvious differences as to have been recognised by the High Court in that case. The High Court had drawn what at that stage had been considered to be legitimate, helpful comparisons with the Indian provisions. It seems that a careful comparison of the overall provision of any constitution should be made before any assistance is taken from a case or commentary that relates to an apparently comparable provision in the constitution of a different country. Only if there is genuine comparability is it legitimate to make use of decisions and commentaries relating to other territories when construing any constitutional provision. When genuine comparability is found, use of such materials is not only a legitimate aid to construction, but their use is positively encouraged by the Privy Council.

The presumption of constitutionality

The effect of this rebuttable presumption is that in the construction of legislation, it is presumed that the provision does not conflict with the requirements of the constitution. Where the person challenging an enactment shows that it clearly transgresses constitutional principles, however, as occurred in the *Attorney-General v Lawrence,*[190] the court may declare the legislation void.[191] Reliance in this case was placed upon a constitutional protection of the

[190] [1985] LRC (Const.) 921 – the law in issue contravened the constitutional protection of property.
[191] A. K. Fiadjoe, 'Fundamental Freedoms and Rights of Property: The Case of the *Attorney-General and the State of St Kitts and Nevis v Edmund W. Lawrence,* Judicial Activism beyond Recall?' (1984), WILJ, 8, 2, p. 212, case commentary re. limited ratio. See also *Attorney-General v Morgan,* [1985] LRC (Const.) 770 – CA (Trinidad and Tobago); the *Attorney-General v Lawrence* [1985] LRC (Const.) 921 – CA (St Kitts and Nevis); and the *Minister of Home Affairs v Bickle and others* [1985] LRC (Const.) 755 (Supreme Court of Zimbabwe).

right to property[192] which effectively limited the general legislative authority conferred, and the St Kitts/Nevis/Anguilla National Bank Ltd (Special Provisions) Act 1982 was declared void.

The nature of constitutional provision made for the protection of rights and freedoms in Anguilla, Bermuda, Montserrat and the TCI[193]

The rights and freedoms declared in each of these constitutions may be enforced by way of court proceedings. The constitutions declare that the High/Supreme Court shall have jurisdiction to determine such applications and to make such orders, issue such writs and directions as are considered necessary.[194] The court may decline to exercise this jurisdiction if satisfied that adequate means of redress are, or have been, available under any law. Further, it is provided that if, in any proceedings before a court, other than the High/Supreme Court, Court of Appeal or Court Martial, any question arises concerning any alleged contravention of these provisions of the constitution, the person presiding over the court may, and if requested by a party to the action shall, refer the matter to the High/Supreme Court, unless he is of the opinion that the question is frivolous.

This function of the courts is the feature that fundamentally distinguishes these constitutions from those that do not include provision relating to the protection of fundamental rights. Where legislation has an impact upon these rights, a transfer of the ultimate responsibility for the determination of the legitimacy of legislation occurs. In the non-fundamental rights constitutions this is purely a matter for the legislature, subject to the control reserved by the Crown.[195] The original version of the CI Roads Law 1974[196] illustrates this. In the express constitutional provision territories, this is a matter for the courts, ultimately the Privy Council.[197] Recently, the Supreme Court of Bermuda, in *Marsh v Attorney-General*,[198] rejected the Crown's argument that the application of the rules of natural

[192] Constitution of St Kitts, Nevis and Anguilla of 1967, ss. 6 and 16.
[193] Chapter 1 of the constitutions of Anguilla (1982) and Bermuda (1968), part IV of the Montserrat constitution of 1989 and part VIII of the Turks and Caicos Islands constitution of 1988.
[194] Anguilla – s. 16; Bermuda – s. 15; Montserrat – s. 66 and s. 81; TCI – s. 81.
[195] To disallow and to assent to certain bills.
[196] Law 18/1974.
[197] See *Minister of Home Affairs v Fisher* [1979] 3 All ER 21.
[198] [1990] LRC (Const.) 615.

justice can be excluded expressly or by implication by legislation. Hull J said: 'In Bermuda, however, where a rule of natural justice is incorporated in the Constitution, the application of that rule as expressed in the Constitution cannot be modified by an Act of the Parliament of Bermuda except to the extent that the Constitution itself might specify or authorise such a modification.'[199] The provision made in each of these constitutions is of a common type. Chapter I of the Bermuda constitution of 1968 (revised), which comprises sixteen sections, is almost identical to part VIII of the Turks and Caicos Island constitution of 1986[200] and part IV of the Montserrat constitution of 1989. In general, the first chapter of the Anguilla constitution of 1982 (comprising eighteen sections) does not differ greatly from these.[201] The obvious influence that the United Nations' UDHR and the Council of Europe's ECHR have had upon chapter I of the Bermuda constitution was recognised by the Privy Council in the *Minister of Home Affairs v Fisher*.[202] Addressing this, Lord Wilberforce said:

> It can be seen that this instrument [the Bermuda constitution] has certain special characteristics.
> (1) It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of great width and generality.
> (2) Chapter 1 is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. 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 ECHR. That convention was signed and ratified by the UK and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations UDHR 1948.[203]

The influence to which Lord Wilberforce refers is indeed conspicuous. Each of the basic rights and freedoms that the constitutions recognise may be found, declared in a concise manner, in the part

[199] [1990] LRC (Const.) p. 620.
[200] The 1976 constitution, S.I. 1976 No. 1156 also included such provision, in part VIII.
[201] The difference is found in the sequence of provision made; to a marginal extent, there are other differences, but these largely relate to the form rather than the substance of the provision. Note also the 1990 amendment adding 'sex' to definition of discriminatory: see p. 271 below.
[202] [1979] 3 All ER 21, discussed earlier in this chapter: pp. 253–4 and 263–4 above.
[203] [1979] 3 All ER 21 at 25, para. f. Note the application of *Fisher* to the construction of the Hong Kong letters patent: *David Chiu and Deacon Chiu v AG* (1991) CA Civ App 63/91.

of the United Nations UDHR relating to civil and political rights. The first section of each of the relevant parts of these constitutions declares the 'Fundamental Rights and Freedoms of the Individual'. In this section, many of the basic rights declared in the UDHR are grouped together in a declaration of recognition of these rights at the outset. The rights and freedoms declared in art. 1 to 3, 16 and 18 to 21 of the UDHR are all embodied in that preliminary section of these constitutions' provisions.[204] The provision in these constitutions bears a closer similarity, in style and detailed content, to the ECHR than the UDHR in that they are expressed in the more detailed manner of the ECHR, as opposed to the style of the UDHR which is couched as a rather dogmatic, concise, unqualified assertion of rights and freedoms.

The preamble to part IV of the Montserrat constitution differs from the others in that the following declaration precedes a broad statement of the fundamental rights and freedoms of the individual: 'Whereas the realisation of the right to self-determination must be promoted and respected in conformity with the provisions of the Charter of the United Nations . . .'[205] The broad statement that follows appears in each of these constitutions:

> Whereas every person in . . . is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the rights and freedoms of others and for the public interest, to each and all of the following, namely:
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection of the privacy of his home and other property from deprivation without compensation.[206]

In each of these constitutions a series of detailed provisions, which state the extent of protection provided for each of those declared basic rights and freedoms, follows. Sections 2 to 13 of the Anguilla constitution, for example, make provision for the following:

[204] These relate to the equality of rights (art. 1); freedom from discrimination (art. 2); the right to life (art. 3); freedom of conscience (art. 18), of expression (art. 19), of peaceful assembly (art. 20) and of association (art. 21); and respect for private and family life (art. 16).

[205] See p. 43 above.

[206] Extract from text of TCI constitution, s. 67; Montserrat constitution, preamble to part IV; Bermuda constitution, s. 1. Anguilla's provision in s. 1 differs in that para. (a) includes 'the enjoyment of property'; para. (b) limits assembly with 'peaceful' and para. (c) refers only to 'respect for his private and family life'.

- *protection of the right to*:
  Life, personal liberty,[207] secure protection of law (fair hearing within a reasonable time);
- *protection of freedom of*:
  conscience, movement, expression, assembly and association; and
- *protection from*:
  slavery and forced labour, inhuman treatment, deprivation of property, arbitrary search or entry,[208] discrimination.

While comparable provisions follow in each of these constitutions,[209] the definition of 'discriminatory' in the Anguilla constitution has recently been amended.[210] This amendment removes a discrepancy that remains in each of the other constitutions. Although the preamble/introductory provision in each refers to every person's entitlement to fundamental rights and freedoms, 'whatever his race, place of origin, political opinions, colour or creed or sex', the provision declaring the right to freedom from discrimination[211] omits the word 'sex' from the definition of 'discriminatory'.

The amendment to the Anguilla constitution (s. 13) adds 'or sex' to the above phrase. In recommending that the fundamental rights and freedoms should be 'enshrined in any amended Constitution for these Islands' the Constitutional Commissioners for the CI (in May 1991) drew attention to this omission from the TCI constitution:

> It should be noted that in the Turks and Caicos Islands Constitution Order the Preamble (in Part VIII of that Constitution) dealing with the fundamental rights and freedoms of the individual – and where these rights are set out – the word 'sex' is included after the word 'creed' in the Preamble whereas in Section 78(3) the definition of 'Discriminatory' makes no reference to sex. Unless there is some good reason of which we are unaware the word 'sex' should be inserted after the word 'creed' in the definition of 'discriminatory'.[212]

The broad statement in the preamble creates an expectation that sex will be a factor within the definition of discrimination. Consequently, the unamended provisions remaining in Bermuda, the TCI and Montserrat may be misleading. Also, the UK has international obligations arising from ratification (subject to reservations) of the

[207] Expressed as a freedom from arbitrary arrest or detention in the other constitutions: Bermuda – s. 5; Montserrat – s. 56; TCI – s.71.

[208] Expressed as 'Protection of privacy of home and other property' in the other constitutions: Bermuda – s. 7; Montserrat – s. 58; and TCI – s. 73.

[209] Bermuda – ss. 1–13; Montserrat – ss. 52–64; TCI – ss. 57–79.

[210] S.I. No. 587 1990 – s. 3.

[211] Anguilla – s. 13; Bermuda – s. 12; Montserrat – s. 63; TCI – s. 78.

[212] Cm 1547 (1991), p. 10.

Convention on the Elimination of all Forms of Discrimination against Women, by the UK in relation to the BVI and the TCI.[213]

Generally, each right or freedom declared in these constitutions is expressed to be subject to detailed qualifications,[214] whereby limitations upon, or deprivation of, the declared interests is permitted. For example, although the right to protection from slavery and forced labour might be thought to be an absolute right, it is necessary to include provision limiting the meaning of 'forced labour'. Otherwise, persons who are convicted and sentenced by the courts to terms of imprisonment could not be ordered to perform tasks and disciplined without the authorities breaching a declared right.[215]

In cases where it would be unjust to give priority to a public interest without affording to the individual whose personal right or freedom has been interfered with some measure of compensation, provision for this may be included in the constitution. In this way, the requisite balance between various conflicting interests can be maintained. This occurs, for example, in respect of the right to protection from deprivation of property. Compulsory acquisition of property is permitted if certain prescribed conditions are met.[216]

A summary of reported cases relating to provisions in past and present constitutions of this group of BDTs shows adjudication on:

- protection of freedom of movement – s. 11 of the Bermuda constitution of 1968;[217]
- secure protection of the law – s. 6 of the Bermuda constitution of 1968;[218]

[213] See pp. 259–60 above.
[214] The scope of which determine the extent of the rights.
[215] See e.g. Prison Rules 1964, S.I. 1964 No. 388, ss. 28(1) and 29(1).
[216] These conditions include the requirement that such compulsory acquisition is necessary or expedient in relation to certain (generally public) interests; that it can reasonably be justified and that provision is made for the prompt payment of adequate compensation.
[217] *Minister of Home Affairs v Fisher* [1979] 3 All ER 21.
[218] *Marsh v Attorney-General* [1990] LRC (Const.) 615 (a provision in s. 35(3) of the Road Traffic Act 1947 violates right to a fair hearing); *Chapman v Attorney-General* (1985) 31 WIR 133 (right to a fair trial within a reasonable time – no undue delay on facts – charged 28 April 1982, application under s. 15 of the constitution 28 June 1982. Arrest was the previous year, 6 September 1981 – even had he been charged then – no undue delay).

- freedom of expression – s. 10 of the St Kitts, Nevis and Anguilla constitution of 1967;[219]
- protection of right to personal liberty – s. 3 of the St Kitts, Nevis and Anguilla constitution of 1967;[220]
- requirement that election candidates names on ballot paper be in alphabetical order – s. 60 (2) of the [Montserrat] Constitution and Election Ordinance.[221]

Relatively few cases relating to the exercise of this jurisdiction in respect of these BDT constitutions are reported in the West Indian Reports, Law Reports of the Commonwealth and All England Reports. Many more cases are reported from the former British territories, such as Jamaica, Guyana, Trinidad and Tobago, St Kitts and Nevis,[222] than from the remaining DTs. The generally smaller populations of the remaining DTs will have an impact on this. Replies received from the Attorney-Generals' chambers of these territories, to the question of the extent to which points relating to constitutional rights have been raised in court, and whether legislative or common law principles have been held invalid as a result, showed that relatively few, and in some territories, no cases involving these rights have been before these courts.

The Montserrat Attorney-General's Office was not aware of any such cases, and attributes the lack of cases to 'the fact that Montser-

[219] S.I. No. 228, 1967 *Chief of Police v Powell, Chief of Police v Thomas* (1968) 12 WIR 403 (s. 3 A (a) of the Public Meetings and Processions Ordinance, Cap. 302 giving unfettered discretion to Chief of Police which could not be shown to be reasonably justifiable – contravenes ss. 11 and 12 of the constitution – offences committed before implementation of constitution not affected by that contravention); *Arthur Francis v Chief of Police* (1973) 20 WIR 550 – unfettered discretion of Chief of Police to grant or refuse use of loudspeaker not seriously defective and not in contravention of constitution.
[220] S.I. No. 228 1967 – *Charles v Phillips & Sealy* (1967) 10 WIR 423; *Herbert v Phillips & Sealy* (1967) 10 WIR 435; (Emergency Powers Regulations 1967, reg. 3 – Governor's power to detain person he is satisfied has recently been concerned in acts prejudicial to public safety and is in need of control – 'dictatorial' and offends against the constitution); *Attorney-General v Reynolds* (1977) 24 WIR 552 – similar.
[221] Laws of Montserrat, Cap. 153; *Arthurton v Fergus* [1988] LRC (Const.) provision directory only – no scrutiny by court and no court count.
[222] A rather pessimistic analysis of the role of the Privy Council as the final constitutional court for many Commonwealth countries is given by K. D. Ewing, 'A Bill of Rights: Lessons from the Privy Council', in Finnie W. et al. (eds.) *Edinburgh Essays in Public Law* (1991) 'The adjudication of the Privy Council in this field is characterised by caution and deference to political authority' (p. 236); 'The practical result of all this, of course, is that the constitutional rights themselves are often puny and insubstantial' (p. 241). Cf. the 'rather more positive and optimistic' view of J. A. Thornton, 'A Review of Privy Council Decisions (1966–86) on Individual Rights and Fundamental Freedoms Entrenched in Commonwealth Constitutions' (1986–7), LLM thesis, University of Cambridge.

rat is basically a tranquil, peace loving and law abiding community'.[223] The Anguillan reply said that such issues were 'not frequently raised . . . no cases . . . within last two years', and the writer was 'not aware of any' common-law or legislative principles being held invalid under the constitution.[224] The TCI reply referred to there being 'no cases'[225] while, in Bermuda, a special edition of the *Bermuda Bar Review*[226] identifies a total of twelve rights-related cases, dating from 1973 to 1989.

The Canadian experience with their Charter of Rights and Freedoms of 1982 has involved the striking-down of a considerable number of substantive common-law principles and statutes.[227] In contrast, in Japan, a period exceeding forty years from the implementation of the new constitution of 1946[228] led to only 'two cases in which the Supreme Court clearly held a current provision of law unconstitutional'.[229] In the BDT of Hong Kong, where the population is about six million, the bill of rights enacted in June 1991 gave rise to a considerable amount of litigation in its first year.[230] This related mostly to criminal law and procedure, and the majority of cases involved the presumption of innocence[231] and/or the right to trial within a reasonable time.

223 Letter dated 14 May 1992.
224 Letter dated 26 May 1992.
225 Letter dated 21 May 1992.
226 Commemorating twenty-one years of the 1968 Bermuda constitution: (1990), 3, 2.
227 Prof. Gerry Ferguson, 'The Impact of a Bill of Rights: The Canadian Experience', Hong Kong University seminar, 19 October 1989; Prof. Cairns Way, 'The Impact of the Canadian Charter on the Administration of Criminal Justice in Canada: Rhetoric or Revolution?', Hong Kong University, Hong Kong Bill of Rights Conference, 1991; Chief Superintendent P. Cummins, 'The Impact of the Canadian Charter . . . on Law Enforcement Responsibilities of the Canadian Police', Hong Kong University, Hong Kong Bill of Rights Conference, 1991; Jack London QC, 'An Anecdotal View of Rights Development in Canada: Private Right or Public Wrong?', Hong Kong University seminar, 23 November 1989; Mr Justice Barry Strayer, Federal Court of Canada, 'Drafting a Bill of Rights for Hong Kong', Hong Kong University seminar, 24 November 1989.
228 Article 81 of this provides: 'The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.'
229 Y. Taniguchi, 'Le Cas du Japon', Le Controle Jurisdictionnel des Lois, Presses Universitaires D'ais-Marseille (1986); paper later presented at Hong Kong University, February 1992. Japan is perhaps a special case owing to many extrajudicial dispute-resolving options.
230 See *Bill of Rights Bulletin* 1991 to 1992, vol. 1, nos. 1 to 3. By July 1992, however, only four of these cases had been reported in Hong Kong Law Reports. Many of the others appear in the *Bulletin* – three CA cases on substantive issues; three CA cases on procedural issues; one case pending before the CA; and two before the Privy Council (1 July 1992).
231 For example, presumptions in the Firearms and Ammunition Ordinance, s. 24 and the Dangerous Drugs Ordinance, s. 47(1)(c) and (d) have been held to be repealed by the District Court and Court of Appeal respectively.

Limitations on the protection provisions

Existing law and protection from inhuman treatment

Special provision is included in each of these constitutions to deal with existing laws which appear to be in breach of the provision for the protection from inhuman treatment. While s. 6 of the Anguilla constitution (set out in the Schedule to the Anguilla Constitution Order) provides that 'no person shall be subjected to torture or to inhuman or degrading punishment or other treatment', s. 7 of the Order limits the scope of s. 6 of the constitution, by providing:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of *section 6* of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Anguilla immediately before the commencement of this Order.

Comparable provision is made, more simply, in each of the other constitutions, in a subsection to the provision that declares the basic protection.[232]

Limitations in times of emergency

Provision is made in each of these constitutions for periods of emergency when derogation from various protected rights and freedoms may occur. The extent to which a state of emergency operates to suspend constitutional protection of rights varies. The greatest similarity is found in the provisions of the constitutions of Montserrat, the TCI and Bermuda. The TCI and Montserrat constitutions have one section[233] relating to 'provisions for periods of public emergency'[234] which renders the basic constitutional rights to protection of freedom of conscience; expression; assembly and association; movement; and protection from discrimination and deprivation of property; of privacy of home and other property; and (subject to exceptions) the provisions to secure protection of

232 Sections 6(2), 69(2) and 54(2) of the Bermuda, TCI and Montserrat constitutions respectively.
233 TCI – s. 80; Montserrat – s. 65.
234 Whereby nothing contained or done under the authority of any regulation made under the Emergency Powers Order in Council 1939 to 1973 (S.I. 1952 No. 2031 as amended) or, re. TCI, the Emergency Powers Ordinance 1962; re. Montserrat, under Leeward Islands (Emergency Powers) Order 1959 (S.I. 1959 No. 2206) shall be inconsistent with or in contravention to, re. TCI, ss. 71 and 72 (1–3), (5) and (7–12) or ss. 73–8 of the TCI constitution; re. Montserrat, ss. 57 and 58 or ss. 59 to 64].

the law[235] inferior to regulations made under the Emergency Powers Order in Council 1939 to 1973;[236] the TCI Emergency Powers Ordinance 1962; and, regarding Montserrat, the Leeward Islands (Emergency Powers) Order 1959.[237] The TCI provision includes protection from arbitrary arrest and detention within the category of 'inferior' provisions in cases of emergency.[238]

In Bermuda, s. 14 makes 'provisions for time of war or emergency'. Section 14(3) empowers the Governor, 'by proclamation published in the Gazette, [to] declare that a state of emergency exists'. Under s. 14(6), unless already revoked, or extended to a maximum of three months by resolution of both Houses, a proclamation of emergency lapses automatically after fourteen days. During a state of emergency s. 14 (generally) applies,[239] whereby nothing done under the authority of any law shall be held to be inconsistent with a list of constitutional provisions comparable to those specified in relation to the TCI, above – except that the right to protection from deprivation of property is omitted from the Bermuda group of 'inferior provisions'.[240]

In Anguilla, three separate sections deal with 'Derogations from fundamental rights and freedoms',[241] 'Protection of Persons detained under emergency laws'[242] and 'Declaration of Emergency'.[243] The

235 The qualification in s. 65 of the Montserrat constitution 'other than subsections (4) and (6) thereof' is expressed in relation to s. 58 (which relates to protection of privacy of home and other property and has only two subsections). Section 57, with twelve subsections, relating to 'secure protection of law', is cited immediately before this. This is the provision of the TCI and Bermuda constitutions which is limited in this way in the emergency powers provision of those constitutions and it appears that a drafting error occurs in s. 65 of the Montserrat constitution. A serious consequence of this is that, on a literal interpretation, as drafted, the whole of the provision relating to 'Provisions to secure protection of law' is rendered inferior to emergency provisions, even though it appears that the intention was for rights preserved in s. 57(4) and (6) (re. the need for the crime to have existed at the time of its commission and limits of punishment; and no criminal trial following pardon for that offence) should stand up against such provisions. Flexibility regarding the use of extrinsic aids in the interpretation of constitutions may, however, avoid such an interpretation.

236 S. I. 1952 No. 2031 (as amended).

237 S. I. 1959 No. 2206.

238 The primary constitutional provision relating to this right in each of the constitutions is, in any event, subject to the qualification 'save as is authorised by law'.

239 It also applies when 'Her Majesty is at war'.

240 Qualifications upon this right allow s. 13(1) acquisition of property in the interests of defence, public safety, public order . . . provided provision for adequate compensation is made; and s. 13(2)(b) full exemption for the taking of enemy property.

241 Section 14.

242 Section 15.

243 Section 17.

combined operation of these is that a state of emergency has less of an impact on the extent of rights preserved by the constitution, although the duration of a state of emergency declared by the Governor[244] will only automatically lapse after ninety days.[245] The provision relating to derogation from fundamental rights in the Anguilla constitution states only that 'nothing . . . done under the authority of any law shall be held inconsistent with or in contravention of *s. 3* or *s. 13* of this constitution'.[246]

Control resulting from the European Convention on Human Rights

The jurisdiction of the European Court on Human Rights (ECtHR) may be recognised by any covenanting party on behalf of its dependencies. This is a matter on which contracting parties may, from time to time, issue an express declaration. The declarations issued by the UK to date are of limited duration, so that periodically the relevant territory and the Crown reconsider the position, and changes may occur. The 1991 to 1996 declaration for the purpose of extending UK recognition of the jurisdiction of the ECtHR to any territories for whose internal relations it is responsible, together with the recognition of the competence of an individual to petition the EC,[247] includes Anguilla, Bermuda, Montserrat and the TCI.[248] Thus, the citizens of these territories have two additional judicial means of assessing the lawfulness of any interference with fundamental rights and freedoms, over those of the other BDTs. They have a domestic bill of rights, which can be administered by their local courts, and an international convention on human rights, under which issues may be raised at an international level.

In some ways this may be looked on as a 'belt and braces approach'. The constitutional provision might be expected to afford a more constantly available protection than the ECHR, in view of the changes witnessed in recent years, as to which territories UK declarations under this convention relate to. On the other hand, recognition of the jurisdiction of the ECHR confers an additional,

244 Section 17.

245 There is no safeguard provision of the type found in s. 4(2) of the Bermuda constitution of laying the proclamation before the House, and summoning the House.

246 These sections relate to the protection of the right to personal liberty and the protection from discrimination.

247 Issued pursuant to art. 63, 46 and 25 of the convention.

248 Council of Europe, *Information Sheet 28*, Doc. Ref.: H/Inf (91)2.

international, monitor, which affords the citizens of these BDTs a further level of protection from abuse in this field.[249]

4. THE RIGHT TO SELF-DETERMINATION

Beyond the question of how the fundamental rights and freedoms of an individual are protected within dependent-territory legal systems, a broader question lies; this concerns the subordinate nature of such a system of government. In view of various constraints which thereby arise, are such systems acceptable?

As noted earlier, art. 1(3) of the UN Charter requires, as a primary objective, 'promoting and encouraging respect for Human Rights and fundamental freedoms for all, without distinction as to race, sex, language or religion'. Among the human rights of inhabitants of DTs, one right that has been formally recognised by the United Nations, which goes to the very root of the systems currently in operation, is the right of inhabitants to self-determination. Article 73 makes the following declaration in respect of non-self-governing territories:

> Members of the UN . . . recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present charter, the well-being of the inhabitants of these territories, and to this end:
>
> a) to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses.

In 1960, the General Assembly of the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples. There were no votes against this (although there were nine abstentions, which included the UK and the USA).[250] Under the UN Charter and the above declaration, adopted by resolution, the 'right to self-determination' is evinced as a legal principle. Although General Assembly resolutions are not legislative in effect, they show that these principles are emerging in international law.

[249] Note also that the Bermuda Human Rights Act 1981 preserved features of the earlier race relations legislation, and refers to the applicability of the ECHR to Bermuda.

[250] The vote was 89–0–9.

The 1960 declaration opens in these terms: 'The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the UN and is an impediment to the promotion of World peace and co-operation.' An express right to self-determination follows: 'All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' The UK government policy on this matter, given in the Introduction to this volume was repeated as the FCO position in December 1991.[251] At the November 1988 Human Rights Committee consideration of the Second Periodic Report of the UK, under the UN ICCPR,[252] Mr Fearn, Assistant Under-Secretary to the FCO, replying to questions from members of the Committee, 'stressed that, contrary to the impression which might have been given by one of Mr Zielinski's questions, self-determination did not inevitably lead to independence; that would be a contradiction in terms'. Mr Fearn summarised the 1988 position in the remaining DTs as follows:

> In point of fact, Bermuda was the only UK dependent territory where a lively debate on independence was now under way . . . there was no clear-cut majority in favour of independence. At the forthcoming elections, any party could propose that option. If it so wished, the Government of Bermuda could also organize a referendum on the question.

He concluded: 'The various situations which had just been listed clearly showed that self-determination did not necessarily mean independence. In any event, there could be no doubt about the UK Government's attitude towards self-determination.' The British government's rejection, in June 1988, of the Premier[253] of Bermuda's proposal for partial but not total independence[254] imposes some rigidity on the terms of the 1960 declaration. In effect, the UK government thereby asserted that Bermuda had been permitted to

[251] 'We would not urge them to consider moving to independence, but we remain ready to respond positively when this is the clearly and constitutionally expressed will of the people' (HC Deb. (1987–1988), p. 574, cols. 161, 124. See also the UK's statement before UN Human Rights Committee in examining the UK Second and Third Periodic Reports on DTs: UN Doc. CCPR/C/SR.855, paras. 13–15 (1988) and SR.1045, para. 6 (1991).

[252] CCPR/C/SR.856, paras. 32–43.

[253] Regarding the nature of the office of Premier, see pp. 174–7 above.

[254] The proposal was that the UK should retain full responsibility for the defence and diplomacy of Bermuda, but otherwise the territory would become independent from the UK see p. 15 above.

'freely pursue its economic, social and cultural development' to a level where it enjoys a high degree of self-government: but that if it requires any higher degree of independence, this must be in the form of total independence. This approach may be contrasted with that taken in 1967 when the WIA 1967 made provision for a group of Caribbean territories to assume a 'status of association' with the UK government[255] (a comparable status to that proposed by Premier Swan).

By way of comparison, the arrangements made by New Zealand with the Cook Islands and with Niue might be considered. Each of these territories is self-governing in free association with New Zealand.[256] Under these free associations the Cook Islands have exclusive legislative competence but, so long as the Cook Islands agree, New Zealand retains a responsibility for the conduct of external relations.[257] While Niue is completely self-governing 'in matters internal and external', without limiting this competence New Zealand has certain responsibilities in matters of external affairs and defence.[258] New Zealand law can only apply to Niue if expressly requested and assented to by the Niue Assembly.[259]

5. OTHER INTERNATIONAL MEANS FOR THE PROTECTION OF FUNDAMENTAL RIGHTS OF SIGNIFICANCE IN THE CARIBBEAN

The American Convention on Human Rights 1969

In 1960 the Organization of American States (OAS)[260] established the original Inter-American Commission on Human Rights[261] to investigate allegations of human rights violations.[262] This commission hears complaints against member states[263] and prepared the American Convention on Human Rights, adopted by the OAS Council in 1969.[264] While only independent states participate in the OAS, it has relevance to any of the region's DTs that may be considering independence. Each of the former British Caribbean colonies have joined the OAS since becoming independent,[265] although of these only Barbados, Jamaica and Grenada have ratified the American Convention on Human Rights.

An Inter-American Court of Human Rights was established in Costa Rica under this convention.[266] The contentious jurisdiction of this court is limited to those states that 'by declaration or special agreement' have recognised the jurisdiction of the court as binding. By 1981, Costa Rica was the only state to have done this. By 1987, nine states recognised this jurisdiction and by 1991,[267] this had increased to thirteen, none of which was a former British colony.[268]

A Caribbean human rights instrument

In February 1987, a Commonwealth Secretariat/Commonwealth Legal Education Association (CLEA) seminar on the promotion of human rights within the Commonwealth was informed of consideration being given to the development of a Caribbean human rights instrument.[269] The main impetus for this was said to be coming from the churches as well as the states of Barbados, St Lucia and Trinidad and Tobago: 'It was felt at the moment that a regional instrument would not necessarily give more protection of human

[255] All those former associated states have now attained full independence, and the Statute Law (Repeals) Act 1986 repealed the WIA 1967.
[256] See Dale, pp. 264–5.
[257] Schedule to the Cook Islands Constitution Act 1964, the constitution of the Cook Islands.
[258] Dale, p. 265.
[259] The Niue Constitution Act 1974; the constitution is in the second schedule to this Act.
[260] This was established in 1948; see p. 68 above for full list of member states.
[261] Statute of the Inter-American Commission on Human Rights, approved by the council of the organisation at a meeting held on 25 May 1960, amended June 1960, in IACHR, basic documents (OEA/Ser. L/V/1.4, 1 December 1960).
[262] In 1970 the OAS charter included this commission as an organ of the OAS.

[263] 'By ratifying the Convention State Parties accept *ipso facto* the jurisdiction of the Commission to receive complaints': Commonwealth Human Rights Initiative, *Put our World to Rights* (1991), p. 214.
[264] M. Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations in the Inter-American System*, Martinus Nijhoff (1988), p. 97; this came into force in September 1978 when the required number of eleven states had ratified the provision.
[265] After stating that nineteen American states are now parties to the convention, Medina Quiroga (1988) at p. 109, lists the states that have not ratified this – Chile, Paraguay, Brazil, the US, Antigua and Barbuda, the Bahamas, Dominica, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Surinam, and Trinidad and Tobago.
[266] *Ibid.*, pp. 109 and 161
[267] *Ibid.*, p. 168.
[268] Press release from the Inter-American Court of Human Rights, 17 April 1991: Ref. CDH–CP/3–91.
[269] By the Commonwealth Legal Officer at Interights.

rights, but would serve an important promotional role.'[270] The following year it was announced that, following a regional meeting concerning this, it had been agreed that no additional human rights preservation body for the region would be established at this time. It was resolved that the use of existing avenues for redress should be encouraged, rather than any new supplementary body being created for that purpose.[271]

'Caribbean Rights' – A Barbados-based human rights network

This coalition of human rights groups from eight national affiliates across the Caribbean monitors human rights issues in the region and publicises those of concern with a view to bringing pressure to bear from other territories where abuse is apparent.[272]

Limits to the effectiveness of international agreements in this field

A fundamental limitation on all the above types of provision arises from the fact that true protection and respect of human rights depends on adequate recognition of the relevant interests at a national level. International bodies may endeavour to encourage various nations to comply with standards that are acceptable, but effective protection depends ultimately on a fair system of government operating within the territory.

Conclusion

The following observation on the issues relating to the enactment of a formal bill of rights for the UK was made by Lord McCluskey:

[270] Report of CS/CLEA seminar on the promotion of human rights within the Commonwealth (February 1987).
[271] Note also CLEA Newsletter 59 (October 1989), p. 1 and annex one, Commonwealth Human Rights Initiative advisory group established, comprising the following Commonwealth Associations: the Commonwealth Lawyers Association; Medical Association; Trade Union Council; Journalist Association; and Legal Education Association.
[272] See e.g. press release from George Town, Guyana, regarding the October 1992 presidential, parliamentary and regional elections. This identified a 'grave error' re. 'wrongly printed ballot forms' an 'ominous threat of post-election petitions to the court' and 'serious procedural problems . . . when the army, police and other disciplined services voted': *Caymanian Compass*, 1 October 1992, p. 6.

> To enact a Bill of Rights in noble language and to set judges to apply it to cases would, I suspect, be the modern equivalent of writing and producing a morality play. It would be entertaining, even instructive, and would allow us to applaud the occasional triumph of those values that the scriptwriter favoured. But it would have little effect on how people behave in the real world.[273]

Some of the region's BDTs have the equivalent of a bill of rights expressly incorporated into their constitutions, while others do not. Developments over recent years indicate that inclusion of provision in all the remaining DT constitutions is likely in the future.[274] Do inhabitants of the territories with bills of rights in their constitutions possess any more rights, or any greater freedom or any better entitlement to protection from abuse? Or does the formal enumeration and expression of that which, in general terms, is supposed to be included as an integral part of the legal system do little more than provide Lord McCluskey's 'morality play'?

In those constitutions that include declarations of the various rights and freedoms, these declarations are generally expressed in a qualified manner, so that 'justifiable' limitations upon declared rights and freedoms are permitted. These limitations would not however legitimise a provision such as that included in s. 6 of the Roads Law 1974 (CI) (before amendment).[275] Similarly, the Bermuda Supreme Court decision of *Marsh v Attorney-General*[276] illustrates how express constitutional protection may limit the powers of the legislature. Thus, in light of examples of material cases and legislation examined, it appears to be unduly restrictive to consider that any benefits that may result from the inclusion of express provision for the protection of human rights within the Constitution Order are no greater than those which might arise from a morality play.[277] The rights protection provisions included in these constitutions are superior to provision made by way of local legislation. The latter is not entrenched and may be removed or reduced by local legislation. In addition

[273] BBC Reith Lecture (1986), published as *Law, Justice and Democracy*, BBC Publications (1987), p. 30.
[274] The Montserrat constitution of 1989, S.I. 1989 No. 2401 added provision; the Constitutional Commissioners for the reports for the CI (1991) and the BVI (1993) recommend inclusion of such provision in those constitutions (although as of May 1994 neither has such provision yet; and a Bill of Rights Ordinance was enacted in the BDT of Hong Kong, in 1991.
[275] See pp. 238–9 above.
[276] [1990] LRC (Const.) 615.
[277] Although perhaps these are the 'occasional triumph of those values . . . favoured' to be applauded.

there is the benefit that constitutional inclusion may confer, by creating or increasing certainty in the minds of those who do not understand the way in which the legal system operates, in particular the requirements of the rule of law and the principles of natural justice. They may be reassured as to the existence of such basic rights and freedoms, by the fact that they are expressly enumerated in the constitution of their country.

The main difference between the position of the inhabitants of territories where the constitutions include express provision for the preservation of rights (EPTs) and those where the constitution is silent (STs) may be highlighted by comparing the limits of local legislative authority in each. The difference in the level of protection afforded in EPTs was shown by the comparison between s. 6 of the Roads Law 1974 (CI) (as originally enacted) and the constitutional right to protection from the deprivation of property conferred upon inhabitants of the EPTs; and in *Marsh v Attorney-General*,[278] by the effect of ss. 1 and 6 of the Bermuda constitution upon s. 2 of the Road Traffic Act 1947. When this comparison is made, the inhabitants of EPTs are shown to have the potential for an increased measure of protection of rights, entrusted to the judiciary. Provided that s. 6 of the Roads Law 1974 (CI) as originally enacted was 'for the peace, order or good government of the Islands', despite the encroachment it made upon the rights of the individual, local courts and, ultimately, the Judicial Committee of the Privy Council, could uphold this as valid legislation. In the EPTs, legislative authority to authorise such encroachment is not conferred.

Recent experience in the BDT of Hong Kong where a Bill of Rights Ordinance was enacted in June 1991 shows this difference clearly. In the first year, the courts undertook this measuring of authority exercise in more than a hundred cases with a significant number of provisions, such as presumptions in criminal cases, failing to measure up to the limits imposed by the bill of rights.[279]

In a territory with a constitution that does not include any express provision relating to the protection of rights and freedom, provided that any manner and form requirements have been satisfied in the enactment of any law for the peace, order or good government of that territory, the law will be valid. Conversely, in a territory where the constitution also includes detailed provision relating to the protection of rights and freedoms, mere satisfaction of the manner

[278] [1990] LRC (Const.) 615.
[279] See *Bill of Rights Bulletin* (HK) (1991–2), 1, 1–3.

and form, and peace, order or good government of the territory requirements is insufficient. In order to be valid, it is necessary to show that a law satisfies all of the requirements of the constitution, including any particular terms of the constitution regarding the protection of rights and freedoms.

The scope for laws to be drafted in a manner that satisfies the general precondition for legislative authority, but does not satisfy the constitution's express terms regarding the protection of rights and freedoms, allows certain laws to be constitutional and valid in an ST, which might be void in an EPT. As a result, the significant difference between these two classes of constitution is the role played by the judiciary. In EPTs, judicial interpretation of the extent of permissible limitation of the protection afforded by the constitution will determine the validity or otherwise of legislative provisions. In STs, decisions regarding the extent of limitation which might properly be imposed upon any rights and freedoms are made by the legislature. It is debatable whether the judiciary is the right body to decide on these issues which formerly were a matter for the elected legislature.[280]

[280] Subject to the control of the Crown reserved by the DT constitutions.