

Who's afraid of Human Rights? The judges' dilemma

Introductory remarks

.....

Introduction

Those of you who have given talks, will be familiar with the situation of being asked months in advance to provide a title for a talk, no doubt for publicity purposes, and, not having had sufficient time to sit and reflect, you think of a title that is not only eye catching but also general enough not to tie you down at an early stage. Such it was with me. Dilemmas for judges so far as human rights are concerned could be manifold, especially in those jurisdictions where there is a suppression of the individual's rights and freedoms and the dilemma facing the judge is between acting against what they know to be right and fair in order to avoid being removed from office or being bold and fair, applying such interpretations of the law as they can to ensure that the defendant receives a fair trial. It would indeed be interesting to do an analysis of decision-making in certain jurisdictions to see how, if at all, members of the judiciary, against all the odds, are striving to "do the right thing" in the face of pressure from their governments. But it is a difficult exercise, because in those jurisdictions access to law reports and transcripts of judgments is often very problematical. So that is not what I am going to do.

What I am going to do is start with my thesis, because that is what Justice Jamadar drew out from me as I was protesting that I was not a human rights specialist. He asked me as a non-specialist what my approach to human rights was. The thesis is this:

That a judge in carrying out his/her duty of fairness and impartiality, need not fear upholding human rights, even where national legislation does not so provide, and should use all tools properly at his/her disposal to do so. In other words, human rights principles should be part of a judge's DNA and as judges we should be bold in upholding such rights. I say "we" but today, I am not wearing a judicial hat, nor am I wearing a lawyer's hat. I am seeking rather to look at the issues as an "informed observer" and even as devil's advocate. I go further therefore by suggesting this: In the pursuit of "developed nation" status by 2020, Trinidad and Tobago has to forge ahead with a changed outlook, looking forward and giving less deference to tradition and history. For example, in respect of the judiciary, where it seems that judges' hands are tied and you feel that you cannot act in accordance with internationally accepted human rights standards, do you not as judges have a duty to make your views known, not only through judgments, (because one might wait years before the right case comes along), but also by means of legal writings, opportunities at public events and also submissions to Parliament?

The lecture is going to be divided into two parts. Because it is such a broad topic, I will of necessity have to be selective and deal with issues in summary fashion.

In Part One I will start with the UK experience with a brief overview of the history behind the introduction of our 1998 Human Rights Act; I will also look at some areas of law on which the Act has had an impact.

In Part Two. I will focus on some of the International Human Rights Instruments that have been ratified by Trinidad and Tobago, but opt-out provisions/reservations have been entered, and some which have not been ratified by Trinidad and Tobago at all. I will look at four specific areas where

national legislation has not yet changed; where arguably the fundamental rights of certain classes of people are not protected; areas which can create dilemmas for the courts. The content of this part is intended to form the basis of the panel discussion tomorrow – with questions revolving around how judges can best give effect to the letter and the spirit of the international human rights instruments where no specific legislative provisions exist or where the Constitution itself (being the Supreme law) allows for exemptions which may arguably undermine international human rights norms. What can a judge do if s/he thinks that the national legislation, the Constitution and authority are incompatible with fundamental human rights?

PART ONE

I have mentioned Human Rights several times. What do we actually mean by the phrase? Two primary categories of rights have been developed:

- Civil and political rights; and
- Social and economic rights.

The first category includes the right to liberty of the person, the right to form political parties and to participate in elections, rights to freedom of conscience, religion and expression and fair trial rights. These “first-generation rights” can be found globally in all documents purporting to set out human rights.

Accordingly this is the category of rights which is usually being referred to when the term “Human Rights” is being used.

The second category contains rights such as the right to employment, health care, housing and income maintenance during periods of ill health, unemployment or old age. As a result of these rights being significantly more difficult both to define and enforce, fewer countries have made attempts to enshrine these rights in law in the same way that they do the former category.

Furthermore, civil and political rights do not in general call for any additional resources to be provided for people to be able to enjoy them. Economic and social rights, on the other hand, will generally require some allocation or redistribution of resources.

Of necessity I am going to have to be selective in this lecture and the focus will be principally on civil and political rights.

What led to the introduction of the Human Rights Act in the UK?

(i) From Magna Carta to ratification of the ECHR

In 1215 Magna Carta introduced the human rights concepts of habeas corpus and trial by jury. This year marks the 800th Anniversary of the document and because of that I am going to spend a little more time on it than I had originally intended, given that it is credited with being the forerunner to the development of Human Rights in the UK.

Magna Carta Libertatum was sealed on June 15th at Runnymede some 20 miles from London in 1215. It came about because King John of England found himself in a very vulnerable position. He had no money. The Church wanted independence; King John had surrendered his kingdom to the Pope, Pope Innocent III. King Philip Augustus of France was eyeing up the English throne for his son Louis and King John's rebellious barons had formed an association to air their grievances against the king. The barons had captured the City; the King, thinking that he could bribe his way out of the fix, gave the City of London its charter for free, having previously refused to do so unless he received a substantial payment. He thought this would bring the city onside. He was wrong. Thousands of French soldiers landed in England, welcomed by the

barons and eventually received into the City. There was revolt in the air. King John realised that he was in a tight corner.

At Runnymede, on June 15th 1215 King John was presented with a document drawn up by the Barons setting out their demands. The demands were as much about commercial rights as they were about trial by one's peers. There were men bearing arms on both sides who were ready to fight nearby. Outrageous though King John may have found the demands, he was in no position to bargain. However, he had little intention of abiding by the Charter. He sealed it because he had no choice. Once Pope Innocent III got wind of the Magna Carta, and, urged by King John, he annulled it declaring it illegal as having been sealed under duress.

The context in which it came into being is important, as it was sealed, not as a document of lofty ideals and aspirations on behalf of the King, or selflessness of the Barons, but as a way to avoid civil war (which in the end, it did not); and, in the case of the Barons, pure self-interest. Despite this, it is said to represent the symbol of our liberties. Lord Denning described the Magna Carta as “the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot”

Magna Carta has influenced other constitutional documents worldwide. The US 1791 Bill of Rights includes several of the ideas; due process of law was elevated into a constitutional right in the Constitution of the US. In 1948 Mrs Eleanor Roosevelt, speaking at the UN General Assembly about the UN Universal Declaration of Human Rights said this “ we stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere”.

Magna Carta has an additional significance. The Bill of Rights, an Act of Parliament passed on 16th December 1689 laid down limits on the powers of the Crown and set out the rights of Parliament including the requirements for regular parliaments, free elections and freedom of speech in Parliament. It also set out rights of individuals including the prohibition of cruel and unusual punishment. It should be noted that this Bill was one of the inspirations for the United States Bill of Rights to which I have already alluded. Our Bill of Rights, taken together with the Magna Carta, the Petition of Right, the Habeas Corpus Act 1679 and the Parliament Acts 1911 and 1949 – forms part of our un-codified British Constitution.

I confess, having read in more detail about the circumstances in which the Magna Carta came about, that I wondered how it came to attract such accolades. I then read an interesting talk by Lord Sumption given to the Friends of the British Library in March of this year. He pointed out that historically, there have been two schools of thought about Magna Carta. The first he called the “lawyer’s view”, which is, as I have already described to you, that the charter is a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the “historian’s view”, which has tended to emphasise the self-interested motives of the barons and which has generally been sceptical about the charter’s constitutional significance.

Lord Sumption observed that there are obvious reasons why lawyers should have taken the lead in extolling Magna Carta, because there have been periods in our history when law has acquired an intensely ideological flavour.

He said this: “English law has a long, distinguished and comparatively unbroken history. Its practitioners have a natural tendency to legitimise their

ideals by asserting their antiquity. But they have, on the whole, been bad historians. This is because, with a few honourable exceptions, they have treated the history of law as a self-contained and self-sufficient discipline based almost exclusively on the study of legal texts. They have been much less interested in the social and cultural context in which law is made. Yet, like any system of customary law, English law has adapted itself to reflect the values of each successive generation. Manifestly, the values of the early thirteenth century were not the same as our own". He then went on to identify the writers of legal texts who he submitted were responsible for inventing the myth of the Magna Carta, citing Sir Edward Coke as the chief exponent of the myth.

Historians, Lord Sumption said, were once content to adopt the myths of the lawyers. It was not until the beginning of the twentieth century he said that historians dared to suggest a more sceptical view with some famous articles and essays on the myth of Magna Carta.

Lord Sumption then went on to put Magna Carta into its historical context to demonstrate why he took this view. He accepted that the Magna Carta stands for the rule of law, but argued that it was not true that Magna Carta was the origin of the principle. He said: "The idea that the King was subject to law had, for a very long time, been part of the orthodoxy of medieval constitutional thought both in England and elsewhere. The barons did not invent it at Runnymede. Their object was to define what the law was. No one doubted that whatever it was, the King was subject to it. So why do we single out Magna Carta as the origin of the rule of law. We might equally have celebrated the 800th anniversary of the coronation charters of Henry I, King Stephen or Henry II, if we had thought of it in time. The answer is that what was special about it, was not the ideas which it embodied, which were perfectly conventional, but the dramatic circumstances in which it came into existence."

Lord Dyson, Master of the Rolls, without naming names, in a lecture at the Law Society on 22nd April said this: There are those who seek to debunk Magna Carta, at least to the extent of insisting that it be examined in its true historical context..... It is remarkable that a treaty extracted from a feudal king by the barons “at the point of the sword” would have such a powerful and enduring influence on constitutional development in England, the United States and the common law world and beyond..... It expresses an idea that retains its vitality and relevance in the 21st century. This idea, as described by Sir Winston Churchill, is the “sovereignty of the law” as protection against attempts by governments “to ride roughshod over the rights or liberties” of the governed”.

The British common law as developed by the courts recognised concepts relating to human rights long before the European Convention of Human Rights: for example, the right to personal security and liberty, private property, freedom of discussion, and assembly. However, the incremental development of the common law to protect rights proved languid and unsatisfactory. This was especially so in a legal landscape where Parliament had been known to pass legislation which seeks to remove fundamental rights, or propagate discriminatory practices. For example, the Commonwealth Immigrants Act 1968 – passed to stop British passport holders in East Africa who were fleeing persecution in their home countries coming to the UK – was found to be motivated by racism by the European Commission of Human Rights in the *African Asians Case*.

The importance of human rights for all was etched into the minds of people across the world with the horrors of World War II and its atrocities. In the war's aftermath, the international community framed new covenants explicitly enshrining universal human rights to try to ensure that such atrocities would

never occur again. Leaders from Western countries called for the creation of a European organisation that would promote and ensure democratic values such as the rule of law and human rights.

The outcome of those international discussions was the creation of the Council of Europe in 1949, the European Convention on Human Rights (ECHR) in 1950 and the European Court of Human Rights in 1959 (ECtHR). The UK government signed the ECHR in 1950 and was the first country to ratify the ECHR in 1951. It recognised the right to bring claims in the European Court of Human Rights in 1966.

(ii) From ratification to incorporation of the ECHR

Despite the UK government having been the first country to have ratified the ECHR, it was one of the last of the Member States to have incorporated it into their domestic law. For decades it was feared that incorporation of the ECHR would irreparably harm the constitutional doctrines of parliamentary sovereignty and separation of powers between the Executive (the government), legislature (the Parliament) and the Judiciary (the Courts). Over the past fifty years those views on incorporation have gradually changed as it was realised that the common law safeguards for human rights were inadequate.

In 1968 Anthony Lester (now the Liberal Democrat peer Lord Lester QC) published a pamphlet 'Democracy and Individual Rights' which called for incorporation of the ECHR. In 1974 Sir Leslie Scarman (later the cross-bench peer Lord Scarman) wrote of the need for an instrument to challenge the sovereignty of Parliament and to protect basic human rights which could not be adequately protected by the legislature alone. Scarman was in favour of entrenchment. He believed that only by making a Bill of Rights superior to Parliament could such fundamental rights be protected.

The House of Lords set up a select committee in 1978 to inquire whether to introduce a Bill of Rights; There was further consideration of the issue but it was not until the Labour Party Conference in October 1993 that a two-stage policy supporting the incorporation of the European Convention of Human Rights to be followed by the enactment of a domestic Bill of Rights was adopted. Lord Lester of Herne Hill continued his human rights work in the Lords by introducing a bill in November 1994. The bill did not receive support from the Conservative Government. Particular aspects of the proposed bill were criticized by the Law Lords, but significantly they supported incorporation in so far as it allowed UK judges to interpret human rights domestically.

In December 1996, a consultation paper was published entitled, 'Bringing rights home', setting out the Labour Party's plans to incorporate the Convention if it won the election in 1997. When the Labour Party won the election the government introduced the Human Rights Bill into parliament in November 1997. Jack Straw, the then Home Secretary, at the second reading of the Human Rights Bill emphasised the purpose of the HRA, namely a practical one of 'bringing rights home'. It was to enable people in the UK to bring a human rights claim without having to go to the unnecessary expense and delay of bringing proceedings in the European Court of Human Rights. At that point it took approximately five years and cost £30,000 for a claim to reach the European Court of Human Rights after exhausting all domestic remedies. The Human Rights Act was a means by which people could secure access to justice in British courts. The Bill received Royal Assent in November 1998 and it came into force in October 2000.

How is the Human Rights Act enforced?

The British constitutional model is a largely unwritten one in which the concept of parliamentary sovereignty is paramount. This means that parliament can alter any law, there is no legal distinction between constitutional and other laws; moreover no judicial authority has the right to strike down an Act of Parliament or to treat it as void or unconstitutional.

The Human Rights Act adheres to the concept of parliamentary sovereignty; therefore it is not possible for UK courts to declare void any legislation where it breaches Convention rights. However, there are two mechanisms available to the courts. Courts are firstly required to interpret legislation compatibly with Convention rights ‘so far as is possible to do so’; this is known as “strong” interpretation or the “purposive” approach. Secondly, where the senior courts cannot interpret legislation compatibly with Convention rights they can make a declaration of incompatibility. This is considered to be a remedy of last resort. Declarations from the lower courts can be appealed. Once the Supreme Court issues a declaration of incompatibility, it remains for Parliament to decide what action to take. I am not aware of any declarations of incompatibility which have not been followed by amended legislation. The model is said to create a ‘dialogue’ between the courts and parliament.

What rights are incorporated from the ECHR by the HRA?

- Art 2 - right to life
- Art 3 - protection from torture and other inhuman and degrading treatment
- Art 4 - freedom from forced labour
- Art 5 - right to liberty
- Art 6 - right to fair trial

- Art 8 - respect for privacy
- Arts 9&10 - freedom of thought and expression
- Art 11 - freedom of peaceful assembly
- Art 1, Protocol 1 - right to peaceful enjoyment of possessions
- Art 2, protocol 1 - right to education

How did the Human Rights Act affect lawyers and judges and what changed?

Before I look at what changed post HRA, it should be noted that pre HRA the UK's record in the European Court of Human Rights was not one to be particularly proud of – cases in which the UK was held to be in breach of the Convention included cases about conditions of detention and treatment of suspected IRA detainees in Northern Ireland were not uncommon; law of phone tapping; holding that the ban of the employment of gays and lesbians in the armed forces was unlawful and many others.

The most immediate way in which the HRA affected lawyers and judges was that we all had to undergo training on the Act and the European Convention. For those civil rights and public law lawyers and possibly those who did European law, it was nothing really new. For the rest it was a steep learning curve. Who was afraid? –A lot of people. Afraid of what? From the lawyers' perspective, it was how to present human rights arguments. I was one of the lecturers for the Bar training. It consisted of a series of lectures on the Convention and the Act. There was no practical application of what was learnt so the issue of what a human rights argument might look like was not really addressed. That may have had more to do with the kind of training one received in those days. Today it would be very different.

For the judges it was a similar course of lectures. For the magistrates however, there was some practical work to be done. For the first time, magistrates were obliged to give reasons for their decisions as article 6 of the ECHR provided a right to a reasoned judgment. I recall conducting a day's workshop with some magistrates in London on giving reasons. Our lay magistrates had been used to saying after trial – “we find the case proved” - then passing sentence. To have to articulate reasons for their conclusions caused great consternation, fear and anxiety. The dilemmas facing them were more to do with what we would refer to now as “unconscious bias”, there being a tendency to always accept the evidence of the police officers. With time they came to realise that the giving of reasons actually helped them with their decisions. Today, they would not even remember that fear and anxiety as giving reasons is second nature.

In the criminal sphere in which I practised, the reality is that not that much changed certainly so far as the law was concerned. The enthusiastic amongst us would produce European court judgements during our legal arguments, knowing deep down that, with some exceptions, it would make little different to the expected outcome of the argument. The dilemma of the judges was how much weight to give to European Court judgments; however the dilemma did not last long. Mostly, judges would repeat the mantra – “I have taken into account the Convention authorities” with no analysis and then would carry on as normal.

I remember doing a case shortly after the Act came into force. I was defending a man accused of serial rape of about six different women. It was a hopeless case. I was in front of a senior judge who had the reputation of being very pro prosecution and a judge who pulled faces, made comments and made his view of the case perfectly clear to the jury. I had never been before this judge before but his reputation was legendary. He acted true to form in my case. I tolerated

him repeating every word the victims said when they were giving their evidence, but when my client went into the witness box I decided it was time to stand up to the judge. Why? Because he had put his pen down, turned away from the defendant and was looking at the jury pulling faces at them as my client gave his evidence. I stood up and availed myself of the HRA and the ECHR and the fair trial provisions. In short I pointed out that these instruments guaranteed the defendant a fair trial and that he was not receiving one. Because the Court of Appeal had criticised counsel on appeal for failing to spell out their complaints at the court below – I did precisely that and set out everything the judge had been doing. You could have heard a pin drop. The judge went ashen. The prosecuting lawyers could not believe their ears and the court staff were highly amused. However, it backfired on me because the judge then got hold of a transcript of the defendants evidence and did a summing up which was the fairest he had ever done. The client (surprisingly) was acquitted of some of the charges so the chances of a successful appeal were very slim. The reality of the matter was that I did not need to allude to the Act. I could have just deal with it on the simple grounds of fairness and the judge's duty of impartiality. However, the newness of the Act in that case definitely had its effect!

I have said that little changed in the criminal law, the impact being felt more in other areas. However one example in criminal law was the setting of the life tariff by the Home Secretary. This was found to be incompatible with the Convention. The tariff is now set by the sentencing judge. Let me give some examples of other areas of law. One is prison law, where disciplinary hearings within prisons have to be adjudicated by impartial judges rather than the prison authorities, given the right to an independent and impartial tribunal. Prisoners were for the first time entitled to be represented at the adjudication of their disciplinary proceedings due to fair trial provisions.

Other examples include changing the Rent Act to give equality to same sex couples regarding statutory tenancies; certain provisions of the Mental Health Act 1983 were found to be incompatible with Article 5 as they did not require a mental health review tribunal to discharge a patient where it could not be shown that the patient was suffering from a mental disorder. Under Anti-terrorism law detention without trial of foreign nationals was found to be discriminatory. The safeguarding of service personnel – the Supreme Court held that soldiers operating overseas enjoy the protection of the Human Rights Act since they are within UK jurisdiction, being subject to UK authority and control; the age for consenting heterosexuals and homosexuals was made the same (Sexual Offences Amendment Act 2000).

Whilst much of our legislation was human rights compliant, there is no doubt that the Human Rights Act had the effect of “upping our game”. All public authorities have to act compatibly with the Convention; it is a civil wrong not to do so. The courts are expressly included in the definition of “public authority” and this includes what happens both in court and behind the scenes. Any new Act has to have a certification that it is Convention compliant, meaning that the legislature had to think about it. Having said that, in practice, this seems to be no deterrent to Parliament passing inadequately considered legislation such as the 2001 Anti-Terrorism Crime and Security Act.

Adverse findings by Strasbourg against the UK also dropped significantly. In 2014 the UK lost only four out of 2,997 cases brought against it and lodged at Strasbourg. Perhaps the biggest change was one of culture within public authorities and policy makers who had to think more deeply about such issues to ensure that proper transparent and accountable policies and procedures were in place.

PART TWO

What has Trinidad and Tobago done in respect of implementing its international human rights obligations and espousing international human rights norms? In this part I am going to concentrate on a number of international human rights instruments which Trinidad and Tobago has either ratified, but with reservations or has not ratified at all in relation to four areas: **capital punishment, corporal punishment, imprisonment of young people and sexual orientation.**

The International Covenant on Civil and Political Rights 1996. (Plus two optional protocols) is relevant to all the four topics to be considered. It commits its parties to respect the civil and political rights of individuals, including the right to life, the right not to be subjected to torture inhuman and degrading treatment or punishment, freedom of religion, speech, assembly, electoral rights, rights to due process and a fair trial and the prohibition against discrimination. The Convention came into force on 23 March 1976. Trinidad and Tobago deposited its instrument of accession on 21st December 1978. Reservations were entered. I touch on only one of them:

- (i) Where at any time there is a lack of suitable prison facilities, the Government of the Republic of Trinidad and Tobago reserves the right not to apply article 10 (2) (b) and 10 (3) so far as those provisions require juveniles who are detained to be accommodated separately from adults;

The two optional protocols are relevant to the issue of capital punishment.

First Optional Protocol to the International Covenant on Civil and Political Rights (Human Rights)

This established an individual complaint mechanism for the International Covenant on Civil and Political Rights. Trinidad and Tobago deposited its instrument of accession on 14th November, 1980 but entered a reservation to Article 1 to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith. The UN Committee on Human Rights decided that the reservation was destructive of the main thrust of the protection and ruled that it had no effect. (Rawle Kennedy, UNHRC 2.11.99). This Optional Protocol was denounced by Trinidad and Tobago in June 2000.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

This Protocol says that a State Party will not execute anyone in its jurisdiction and will aim to abolish the death penalty. The Protocol was adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989. Trinidad and Tobago has not signed, ratified or acceded to it.

The Convention against Torture, and other cruel, inhuman or degrading treatment 1984

This Convention is relevant to the issue of corporal punishment. It aims to 'make more effective the struggle against torture and other cruel, inhuman or

degrading treatment or punishment throughout the world'. The Convention came into force on 26 June 1987. Trinidad and Tobago has not signed, ratified or acceded to it.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The objective is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. This Protocol came into force on 22 June 2006 and Trinidad and Tobago has not signed, ratified or acceded to it.

On a regional level, the relevant human rights instrument is:

The American Convention on Human Rights 1969 (Protocols 1988 and 1990).

Trinidad and Tobago denounced this treaty on May 26, 1998, re-ratified it with the proviso that it did not apply to death penalty cases. The underlying reasoning for the denunciation was based on the decision of the Judicial Committee of the Privy Council in *Pratt and Morgan v. Attorney General for Jamaica* (2.A.C.1, 1994). The Judicial Committee decided that strict guidelines must be observed by States in the hearing and determination of appeals from convicted murderers who have been condemned to death. In any case in which execution was to take place more than five years after the sentence of death there would be strong grounds for believing that the delay was such as to constitute "inhuman or degrading punishment or other treatment". A State that

wished to retain capital punishment must accept the responsibility of ensuring that execution followed as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. Capital appeals must be expedited. The aim should be to hear capital appeals within twelve months of conviction. It should be possible to complete the entire domestic appeal process (including an appeal to the Privy Council) within approximately two years. It should be possible for the International Human Rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, to dispose of complaints to them in death penalty cases at most within eighteen months.

The Government of Trinidad and Tobago's justification for denouncing the Treaty ran as follows: the effect of the decision of the Judicial Committee of the Privy Council in the case of Pratt and Morgan is that, notwithstanding the fact that the death penalty is the punishment for the crime of murder in Trinidad and Tobago, inordinate delay in carrying out the death penalty constitutes cruel and unusual punishment and is accordingly a contravention of section 5(2)(b) of the Constitution of Trinidad and Tobago. The Government had to ensure that the appellate process is expedited by the elimination of delays within the system in order that capital sentences imposed in accordance with the laws of Trinidad and Tobago can be enforced. The Attorney General and Minister of Foreign Affairs, as representatives of the Government of Trinidad and Tobago, met with the Assistant Secretary-General of the Organization of American States and with the Inter-American Commission on Human Rights to present the problems facing Trinidad and Tobago in complying with the timeframes laid down by the Judicial Committee of the Privy Council for the consideration of petitions by the International Human Rights Bodies in capital cases. The Attorney General

sought the cooperation of the Commission in implementing the relevant timeframes for completion of the consideration of petitions to the Commission in capital cases so that the mandatory sentence of death for convicted murderers could be carried out within the time limits. The Commission indicated that whilst it was sympathetic to the problem facing Trinidad and Tobago, it had its own established procedures and was unable to give any assurances that capital cases would be completed within the timeframe sought. “The Government of Trinidad and Tobago is unable to allow the inability of the Commission to deal with applications in respect of capital cases expeditiously to frustrate the implementation of the lawful penalty for the crime of murder in Trinidad and Tobago. Persons convicted and sentenced to death after due process of law can have the constitutionality of their death sentence determined before the Courts of Trinidad and Tobago. Sufficient safeguards therefore exist for the protection of the human and fundamental rights of condemned prisoners.”

The Inter –American Court of Human Rights declared that the denunciation had no effect on the Court’s jurisdiction over events which took place before the denunciation took place. (Hilaire v T and T IACHR 21.6.02)

Turning to the issue of **imprisonment of young persons**, there are a number of provisions that are relevant. Firstly there are the specific provisions concerning children and young persons and then the rules and principles for the treatment of prisoners generally.

The Convention on the Rights of the Child 1989 (two protocols 2002, third protocol 2014)

The United Nations Convention on the Rights of the Child is a human rights treaty which sets out the civil, political, economic, social, health and cultural

rights of children. It came into force on 2 September 1990. Trinidad and Tobago signed the convention on 30th September 1990 and later deposited the instrument of ratification on 5th December 1991.

The UN Rules for the Protection of Juveniles deprived of their liberty 1990

These rules relate to young people under the age of eighteen. They address their treatment from arrest to detention, noting that deprivation of freedom should be a last resort. The rules seek to serve as a minimum standard for the protection of juveniles without discrimination while trying to counteract the detrimental effects of detention and fostering integration in society. They were adopted by General Assembly Resolution A/RES/45/113 on 14 December 1990. The resolution invites member states to adapt national legislation to the spirit of the rules.

The Basic Principles for the Treatment of Prisoners 1990

These basic principles address the treatment of prisoners with respect for their human dignity, and exposure to activities for the full development of their human personality. The principles were adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

The Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment 1988

These principles seek to set out and protect the rights of all persons under any form of detention or imprisonment. Such persons are to be treated in a humane manner with respect for the inherent dignity of the human person. The

principles were approved by General Assembly Resolution A/RES/43/173 on 9 December 1988.

THE FOUR AREAS

That is the background. Let us now look at some specific examples where legislation has lagged behind international human rights standards and, in some cases, created anomalies. As noted earlier, the headings are: capital punishment; corporal punishment; imprisonment of young people and sexual orientation (homosexuality). This is not an exclusive list; there are other examples; but time does not allow us to go through them all.

CAPITAL PUNISHMENT

It is right to point out that Article 6(2) the International Convention on Civil and Political Rights does recognise that some States have not abolished the death penalty but states that such a penalty can only be imposed for the most serious of offences. Your Constitution is consistent with that position therefore.

However in light of the Optional Protocol, even though it has been denounced by Trinidad and Tobago, this should not be a source of complacency. Apart from the obvious question of why the death penalty is still extant, given that there have been no executions since 1999 there are a number of issues on the present law which bear discussion.

The definition of murder is the same as in the UK - namely that there has to be an intention either to kill or cause serious bodily harm. The lesser intention is sufficient to justify a death sentence. The court has no discretion; it has to pass the mandatory death sentence, so much is clear from the case of Roodal. For the purposes of sentence in the UK an intention to kill is considered to aggravate

the offence. One question is: Can it be right that a person should be sentenced to death when their intention was not to kill? Is it fair that a person who commits a heinous murder is sentenced to the same punishment as someone who has committed a less serious one? Depending on the facts, does the punishment fit the crime?

The Privy Council in the case of *Daniel v State of Trinidad and Tobago* (2014 2AER 461) re-iterated that the mandatory death penalty constitutes cruel and unusual punishment and is inconsistent with Sections 4(a) and 5(2)(b) of the Constitution. (See also *Matthew* 2002 UKPC 33a) The validity of the mandatory death penalty is preserved by Section 6 of the Constitution because the law of murder was an existing law. *Daniel* was a case of felony murder in which the Privy Council held that, because the relevant section was not existing law at the time of the Constitution coming into force, the mandatory death penalty did not apply. One only has to pause to think about it - depending on the facts and the circumstances, a felony murder could be far more serious (as for example the facts of the case of *Daniel*) than a straightforward murder and even though judges have a discretion in the former to pass a sentence of life imprisonment or the death penalty, there is still the potential for anomalies.

When I was reading the law and the cases I was surprised. Has nobody done something about this I asked myself? A little more research showed that in fact there had been some attempts to mitigate – not eliminate – the circumstances in which the death penalty could be passed. That was the Offences against the Person (Amendment) Act 2000 where only certain types of murder known as Murder One (aggravated murders such as murder of police officers, judicial officer in furtherance of another crime etc. would attract the death penalty. Murder 2 would be where there was a previous conviction for murder. As far as I know it was never implemented.

In 2011 The Constitution (Amendment) (Capital Offences) Bill was tabled in Parliament to categorise murder. This required an amendment to the Constitution which needed a $\frac{3}{4}$ majority in the House of Representatives and two thirds majority in the Senate. The necessary majority was not achieved so the bill failed. Is it not time that the judiciary help galvanise the necessary majority needed to repeal the death penalty by making a case for its abolition, given the anomalies, the fact that nothing has happened since 1999 and given that the Privy Council has declared the death penalty to be cruel and unusual punishment?

The effect presently of the death penalty is that those convicted of murder are sentenced to death, yet the death penalty is not being carried out. They sit in prison with this sentence over their head, their time in prison exceeding the period that the case of Pratt and Morgan found amounts to inhuman and degrading treatment; moreover, there is no certainty. That cannot surely be right?

Another issue arises from the denouncement of the First Optional Protocol, the effect of which is that a person sentenced to death in Trinidad and Tobago is, unlike many other jurisdictions, deprived of the opportunity to present his case to the Human Rights Committee. Does this not compound the unfairness? Is this not a case where the judiciary should be calling for the Protocol to be adopted?

CORPORAL PUNISHMENT

The Corporal Punishment (Offenders over Eighteen) Act 1953 makes provision for a sentence of corporal punishment of up to twenty lashes to be imposed in addition to any other punishment to which the offender is liable for certain

serious offences – mainly offences of violence where injury was caused as well as cases of rape and incest. It pre-dates the Constitution.

Rule 272 of the Prison Rules makes provision for a punishment of corporal punishment in certain cases where the male prisoner is under sentence of hard labour. The maximum number of lashes is 24.

The European Court of Human Rights had no hesitation in concluding that judicial corporal punishment which was being carried out on the Isle of Man was degrading punishment under the ECHR (*Tyrer v UK* 1979-80) 2 EHRR 25.)

Corporal punishment as a judicial sentence was abolished in England and Wales by the Criminal Justice Act 1948 and corporal punishment in prisons by the Criminal Justice Act 1967. We are not alone.

The Namibian Supreme Court has declared that sentences of corporal punishment by a judicial or quasi-judicial authority or corporal punishment in state schools is unlawful, confirming that such treatment is inhumane and degrading punishment for the compelling reasons which it set out. (*Ex A-G of Namibia: In re Corporal Punishment by Organs of state* 1992 LRC (Const) 515) A similar approach has been taken in South Africa.

The European Court found that corporal punishment in state schools could amount to degrading treatment or punishment and the Education Act of 1986 led to the statutory abolition of corporal punishment in state schools. (*Campbell and Cosans v UK* 1982 4 EHRR 293). A case involving a private school was brought a decade later with the same result (*Costello-Roberts v UK* 1993 19 EHRR 112) The Education Act of 1996 abolished corporal punishment in both state and private schools.

In *Winston Caesar* the Inter-American Court of Human Rights declared flogging with a cat-o-nine tails was cruel and inhuman and amounted to torture if the prisoner was made to witness its effect on other prisoners before being flogged himself. Trinidad has ignored the decision.

It is said that corporal punishment is rarely used as a sentence or as a punishment today. But why is the Act still on the Statute books? We know from your local press that there have been reports of violent beatings in prisons and one of your judges referring to the conditions in prison referred to them as cruel and inhuman. Taking these clearly inappropriate punishments from the statute books is one step in the direction of sending out the message that corporal punishment in any form will not be tolerated.

So far as corporal punishment of children at school is concerned, the position is little better. The Children Amendment Act No 68 of 2000 has provisions to abolish corporal punishment in schools. It is not in force. This provision is also contained in Section 4(7) of the Children Act 2012 which is awaiting proclamation. So it too is not in force. Section 22 of the Children Act is the current law. This allows any parent, teacher or other person having the lawful control or charge of a child or young person to administer reasonable punishment to that child or young person. That the 2000 Act has been assented to shows that there has been recognition that Trinidad and Tobago needs to move to be in line with its international obligations. So how can the courts help achieve implementation of the Act?

IMPRISONMENT FOR YOUNG PERSONS

Section 43 of the Children Act currently in force provides that where a young offender is charge with an offence punishable in the case of an adult offender with imprisonment, such offender if aged between 10-16 may if the court is satisfied may be sent to a certified industrial school. One infers from this provision that if the court is not so satisfied and there seem to be no criteria spelled out, then the offender will be sent to prison – this applies to both male and female offenders.

Between 2009 and 2010, juvenile offending increased in Trinidad and Tobago (Newsday, January 16th, 2011) and this increase had the effect of bolstering calls for tougher action including imprisonment of juveniles. Despite a recent drop in the number of children incarcerated for criminal offences in Trinidad and Tobago, the country still has one of the highest rates of child imprisonment in the Caribbean and one of the lowest ages of criminal responsibility which is seven years.

Concerns have been expressed in the past including by the Convention for the Rights of Children (CRC) Committee (2006) about juvenile incarceration in Trinidad and Tobago and in particular for our purposes the lack of facilities for female juvenile offenders, which result in girls being detained with adult female offenders; persons below 18 who are placed in adult detention facilities due to “unruly character” or “depraved character”, as stipulated in sections 74 (2) and 78 (3) of the Children Act.

The concerns of the CRC committee are unsurprising given that international standards dictate that Criminal Justice Systems should always distinguish in the manner in which they treat adults and juveniles. Further, Article 10(1) (b) of the

International Covenant on Civil and Political Rights states that all juveniles shall be separated from adult prisoners and should be treated in a way appropriate to their age and legal status.

The reality is that this is still a huge problem on the island. In his address at the launch of the Juvenile Court project on 24th November 2014, the Chief Justice said this:

“In Trinidad and Tobago most juveniles below eighteen years old who are in conflict with the law are sent to designated children’s homes and industrial schools or to the Youth Training Centre. We have a particularly acute situation with the young ladies which has caused concern and distress to everyone in the justice system including judicial officers and prison officers who, contrary to opinion in some quarters, have demonstrated a very progressive and compassionate approach to young offenders in particular. None of us believes that the use of incarceration therefore has been very effective in reducing the incidence of juvenile offending. On the contrary, early preventive measures provide a more efficient means of reducing juvenile delinquency and steering juveniles away from adult prison.

We must also be mindful of our obligations as a matter of basic human rights and International Law. There are several international conventions that deal with juvenile offending and the suggested approach to the problem. The common thread which runs through the fabric of the conventions is that incarceration should be used as a ‘last resort’ for juveniles.

For example, the Beijing Rules, which were adopted by the United Nations in 1985 to define a set of principles for the proper administration of juvenile justice, speak directly to these concerns. These rules specifically outline that “no minors should be held in a facility where they are vulnerable to the negative influences of adult detainees” and that “the danger to juveniles of ‘criminal contamination’ while in detention pending trial must not be underestimated. It is therefore important to stress the need for alternative measures. . . . to avoid such detention in the interest of the well-being of the juvenile.” The degree to which we observe, or rather fail to observe these principles is of concern as the provisions for juveniles are deficient. We need proper alternatives to detention prior to trial, we do not have adequate facilities established to support juveniles while they are kept in detention. Juveniles, both males and females, have been housed with adults in detention facilities. This increases the risk of all sorts of abuse, including sexual abuse.”

Nothing could be clearer in those words of the Chief Justice. The project is intended to embed the provisions of the Children's Act 2012. Section 60 of the Act states that a court shall not order a child to be detained in an adult prison. However, the Act is not in force. Three years have elapsed. Why is this new legislation including the relevant part of the Children Authority Act not in force? What can be done to get this legislation into force before you have new elections? So far as imprisonment is concerned - what can the court do to ensure that the child does not end up detained in an adult prison in order for the international obligations to be complied with?

SEXUAL ORIENTATION – HOMOSEXUALITY

Section 8 of Trinidad and Tobago's Immigration Act prohibits entry of, inter alia, homosexuals. This provision is currently subject to challenge in the Caribbean Court of Justice in the case of Tomlinson and Belize and Trinidad and Tobago (judgment is awaited- heard March 2015). At the application stage both States specifically accepted that they were bound by the decision of the Caribbean Court of Justice in *Shanique Myrie v The State of Barbados* and that they intended to apply it fully and that in practice the provision was not carried out. It was explained to the Court that in a number of CARICOM countries there are outdated laws with anachronistic references still on the statute books but never invoked in practice. Is that a satisfactory answer? Is it suggested that the non- enforcement of the law amounts to implementation of human rights norms?

One only has to note a case which was reported prominently in the local papers where the police for their own amusement arrested a gay man, stripped humiliated and abused him and then let him go. You will be aware of another

recent case of abuse by the police, where they arrested a young man some weeks ago, stripped him and poured boiling water on his thighs and genitals causing serious injury. Whilst such laws exist, it gives those members of the police who are wont to abuse their authority, the pretext and opportunity to do so. What should the judiciary be doing to rid the statute book of these archaic laws?

Let us turn to **discrimination law**. So far as your Constitution is concerned there is no explicit provision covering non- discrimination on grounds of sexual orientation; there is no explicit protection therefore. The equality legislation of Trinidad and Tobago is more focussed on equality of opportunity and does not outlaw discrimination on grounds of sexual orientation. The Sexual Offences Act criminalises buggery (section 13). It is to be noted that this covers both buggery on men and women. The Act also criminalises acts of serious indecency. However there is an exception for married persons conducting the activity in private and heterosexual couples over the age of 16 engaging in consensual activity in private. There is no such exception for two adult men engaging in consensual activity in private.

Civil partnerships or marriages between consenting males are not recognised in Trinidad and Tobago. Elsewhere in the world, there is a gradual acceptance of the rights of such persons to respect for family life and also the right not to be discriminated on grounds of their sexual orientation.

There have been two cases recently on almost identical facts one in the UK and one in South Africa where a gay couple booked accommodation at a bed and breakfast establishment, but were then refused accommodation when the owners realised that it was a gay couple. Both claimants won their discrimination

claims. How would you deal with a case of this nature given the absence of specific legislation or provision in the Constitution?

CONCLUSION

Whilst the focus of the second part of the talk is to highlight the remnants of old laws which are arguably not human rights compliant and for this to form the basis of the panel discussions tomorrow, I do not want to end the talk by giving the impression that I am seeking to be wholly negative about your legislation. Trini can do good legislation – one only has to look at the provisions in relation to Human Trafficking which should be an example to other jurisdictions. Also to be noted is that Trinidad and Tobago was the first state to ratify the Rome Statute for the International Criminal Court. What does this indicate? That Trinidad recognises the rule of law – but is reluctant to apply it to its own citizens consistently? Because it does seem anomalous that some of the antiquated non-human rights compliant legislation still exists. I have recently been to Zimbabwe which has a fairly new constitution (2013). I met with the Attorney-General who explained that he was busy with the exercise of going through all the current legislation to identify where it is not compliant with the constitution and making proposed amendments. Is it not time that Section 6 of the Constitution or better still legislation was amended to make Trinidad and Tobago truly human rights compliant? In the meantime, I invite you as judges for whom fairness is part of your DNA to apply a critical eye to consider how you can ensure that what you do gives effect to international human rights norms, even in the face of difficulties posed by the legislation and the Constitution; and, more than that, what you can do to encourage ratification of those instruments which have not yet been ratified and the enactment of appropriate legislation. You may say to me, “You don’t understand our legislation, our Constitution and the weight of authority – our hands are tied. No

can do”. I am aware of the obstacles; but in inviting you to take a “can do” attitude, therein lays the challenge or dilemma. I hope you will rise to it fearlessly and engage in some judicial activism.

QUESTIONS FOR THE PANEL

PRINCIPLE

To what extent should the judiciary seek to influence legislative reform where it identifies lacunae or deficiencies in the law and what form should this take?

How far can judges go to achieve a fair and just result that is human rights compliant in the face of legislation and provisions of the Constitution which may be non-compliant from an international human rights perspective?

CAPITAL PUNISHMENT

Is it just and fair that there should be no distinction in sentence for a person convicted of murder on the grounds of the lesser intent?

Is it right that the discretion of judges to distinguish between the wide range of facts that constitute murder when sentencing be removed?

How could judges when faced with a defendant convicted of murder give effect to the dictum in the case of Daniel, that capital punishment is inhuman and unusual punishment and that the inevitable delay (given that there have been no executions since 1999) in execution of the sentence is inhuman and degrading treatment? What would be the line of reasoning?

Can it be fair and just to prevent a condemned person from exercising the option of having his case considered by a supra national body?

CORPORAL PUNISHMENT

How can the courts protect children from the provisions on corporal punishment given that T and T has not entered any reservations in relation to the Convention on the Rights of the Child in order to comply with Article 19. (States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.) and in light of the provisions of the as not yet proclaimed Children's Amendment Act No 68 of 2000?

IMPRISONMENT OF YOUNG PEOPLE

The Children Act 2012 which has measures to ensure that children are not imprisoned with adults is not in force. What should judges do in the meantime to ensure that children are not imprisoned with adults in line with international human rights law and the intention of the 2012 Act?

SEXUAL ORIENTATION/HOMOSEXUALITY

- 1) A Defendant is charged with serious acts of indecency said to have taken place at his home witnessed by the defendant's maid and gardener and captured on a mobile phone. The defence submit that the prosecution should not go ahead for two reasons: 1) that the law is discriminatory in that were the defendant heterosexual he would not be prosecuted for the matters given the exception; 2) that there has been a breach of his privacy and right to respect for family life and 3) the prosecution should therefore be stayed as an abuse of the process, condoning as it does breaches of human rights. How would a judge go about upholding the submission?

2) The two Claimants, a gay couple bring a claim for damages against a hotel which refused them accommodation on the basis that it did not accept gay couples in one room, on the grounds of discrimination based on their sexual orientation and breach of their right to respect for private and family life. What legislation, sections of the constitution or international human rights instruments could they rely on to make good the claim?