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## Evaluating the Cayman Islands Bill of Rights, Freedoms and Responsibilities: More Evolution than Revolution

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# ARTICLE

## EVALUATING THE CAYMAN ISLANDS BILL OF RIGHTS, FREEDOMS AND RESPONSIBILITIES: MORE EVOLUTION THAN REVOLUTION

*by Vaughan Carter\**

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I. THE EMERGENCE AND ENACTMENT OF THE FIRST BILL OF RIGHTS IN THE CAYMAN ISLANDS	
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With much fanfare, albeit tinged with a sense of trepidation, the first-ever Bill of Rights, Freedoms and Responsibilities (“Bill of Rights”) for the Cayman Islands came into effect on November 6, 2012.<sup>1</sup> The lengthy modernisation process that resulted in a significantly updated and, in some key respects, novel constitution for the Cayman Islands and the Bill of Rights therein<sup>2</sup> can be traced back to

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1. The Bill of Rights is contained in Part I of Schedule 2 of a statutory instrument entitled The Cayman Islands Constitution Order and was enacted in 2009 in accordance with powers conferred on Her Majesty The Queen under sections 5 and 7 of the West Indies Act of 1962 as to the United Kingdom’s Caribbean and North Atlantic territories—of which the Cayman Islands is one of the remaining six. Cayman Islands Constitution Order 2009, SI 2009/1379 (U.K.). The vast majority of the Bill of Rights then came into effect on November 6, 2012, with certain provisions relating to the treatment of prisoners scheduled to follow a year later so as to provide the Cayman Islands Government sufficient time to put in place all necessary transitional arrangements. Press Release, Cayman Is. Gov’t, Coming into Effect of Bill of Rights, <http://www.gov.ky/portal/page/portal/cighome/pressroom/archive/201211/COMINGINTOEFFECTOFBILLOFRIGHTS> [<https://perma.cc/YL5C-GP7C>]; see *id.* § 4(2).

2. The 2009 Constitution replaced the previous Constitution, the main body of which was enacted in the Cayman Islands (Constitution) Order 1972 and which was subsequently the subject of eight amendment orders in the interim. See Cayman Islands Constitution Order 2009, SI 2009/1379 sch. 1 (U.K.).

1999, when the then-new Labour Government in the United Kingdom published a white paper entitled *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (“White Paper”).<sup>3</sup> Recognising that the United Kingdom’s overseas territories already had “a well-deserved reputation for their respect for and observance of human rights,”<sup>4</sup> the White Paper nonetheless signaled that some advances would be expected and the basis upon which they would be required:

We regard the establishment and maintenance of high standards of observance of human rights as an important aspect of our partnership with the Overseas Territories. Our objective is that those territories which choose to remain British should abide by the same basic standards of human rights, openness and good government that British people expect of their Government. This means that Overseas Territory legislation should comply with the same international obligations to which Britain is subject, such as the European Convention on Human Rights [“ECHR”] and the UN International Covenant on Civil and Political Rights.<sup>5</sup>

In spite of the absence of a bill of rights in its constitution at the time, these important human-rights treaties and many others<sup>6</sup> had long been extended to the Cayman Islands, and like the other overseas territories, the Cayman Islands was accustomed to contributing to the United Kingdom’s periodic human-rights reporting.<sup>7</sup> The Cayman

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3. See SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, *PARTNERSHIP FOR PROGRESS AND PROSPERITY: BRITAIN AND THE OVERSEAS TERRITORIES*, 1999, Cm. 4264 (UK) [hereinafter *PARTNERSHIP FOR PROGRESS AND PROSPERITY*].

4. *Id.* ¶ 4.1.

5. *Id.*

6. For the purpose of evaluating the extent to which its overseas territories were compliant with international human-rights norms at this time, the United Kingdom considered, in addition to the European Convention on Human Rights, what it termed the six core United Nations human-rights conventions: the International Covenant on Civil and Political Rights (“ICCPR”); the International Covenant on Economic, Social and Cultural Rights (“ICESCR”); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”); the Convention on the Rights of the Child (“CRC”); the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”); and the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”). FOREIGN AND COMMONWEALTH OFFICE, *HUMAN RIGHTS ANNUAL REPORT 2007, 2008*, Cm. 7340, at 81 (UK). Of these six core international human-rights treaties, all but CEDAW had been extended to the Cayman Islands. *Id.* at 81–83. Notwithstanding this sole omission, it is notable that there were already moves afoot in the Cayman Islands to remedy this deficit. See *id.* at 81. CEDAW was finally extended to the Cayman Islands by the United Kingdom in March 2016, notwithstanding that the enabling Cayman legislation, the Gender Equality Law of 2011, came into force on January 31, 2012. Governor’s Office Grand Cayman, *UK Extends UN Gender Equality Convention to the Cayman Islands*, GOV.UK (Mar. 10, 2016), <https://www.gov.uk/government/world-location-news/uk-extends-un-gender-equality-convention-to-the-cayman-islands> [https://perma.cc/ZB9D-FTVE].

7. HOUSE OF COMMONS FOREIGN AFFAIRS COMMITTEE, *OVERSEAS TERRITORIES: SEVENTH REPORT OF SESSION 2007–08, 2008*, HC 147-II, at Ev 155 (UK) [hereinafter *SEVENTH REPORT*].

Islands courts were also already aware of the relevance of international human-rights obligations and referred to them where possible, which included as an aid to interpretation where statutory provisions were unclear and as necessary on a case-by-case basis for the development of the common law.<sup>8</sup> Those international human-rights treaties that had been extended to the Cayman Islands were, thus, of persuasive utility; however, until such time as they were incorporated, they would not be directly enforceable.

While there were areas of concern with the status and protection of human rights, it is misguided to simply assume that human rights were some sort of alien concept to overseas territories. However, the absence of bills of rights in the constitutions of territories like the Cayman Islands was clearly something that would need to be addressed,<sup>9</sup> particularly in order to provide a clear basis upon which individuals could initiate cases before local courts where they felt human rights were being violated. With this in mind, the United Kingdom Foreign and Commonwealth Office developed a model human-rights chapter for consideration and potential adoption by overseas territories looking to introduce fundamental-rights provisions into their constitutions or to upgrade existing ones.<sup>10</sup>

While the United Kingdom coaxed and cajoled for further advances in human rights across its overseas territories, it did accept that “the promotion of human rights in the Overseas Territories is principally a matter of domestic policy, and ‘local ownership.’”<sup>11</sup> Accordingly, the Governor of the Cayman Islands responded to the United Kingdom’s modernisation initiative by establishing a constitutional-review com-

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8. See, e.g., *Grant ex rel. Grant v. Principal of John A. Cumber Primary Sch.*, [1999] C.I.L.R. 307, 332–34 (Cayman Is. Grand Ct.) (referencing United Nations Convention Against Discrimination in Education, Dec. 14, 1960, 429 U.N.T.S. 93; United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; and Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222); see also Vaughan Carter & Derek O’Brien, *Education and the Three R’s: Rastafarianism, Religion and Review*, 9 CARIBBEAN L. REV. 184 (1999) (discussing the case at length); Derek O’Brien & Vaughan Carter, *Chant Down Babylon: Freedom of Religion and the Rastafarian Challenge to Majoritarianism*, 18 J.L. & RELIGION 219 (2002) (discussing the case along with the decision on appeal).

9. The Virgin Islands Constitution Order of 2007 introduced a chapter titled Fundamental Rights and Freedoms of the Individual and came into force on June 15, 2007. Virgin Islands Constitution Order 2007, SI 2007/1678 (U.K.). This left the Cayman Islands isolated as the last of the U.K.’s overseas territories in the Caribbean and North Atlantic without a fundamental-rights chapter in its constitution. See generally FOREIGN AND COMMONWEALTH OFFICE, *supra* note 6, at 82 (explaining, in 2008, that the United Kingdom Foreign and Commonwealth Office was “press[ing] for the inclusion of a fundamental human rights chapter when [overseas territories were] considering constitutional review,” and noting that the British Virgin Islands recently adopted such a chapter and that the Cayman Islands specifically would propose “inclusion in any new constitution”).

10. See SEVENTH REPORT, *supra* note 7, at Ev 154.

11. *Id.*

mission.<sup>12</sup> Following an extended period of public consultation, the Constitutional Review Commission produced a report containing a draft constitution in 2002.<sup>13</sup> Insofar as a bill of rights was concerned, this draft constitution incorporated the Foreign and Commonwealth Office's model human-rights chapter wholesale, with little exception or supplement.<sup>14</sup> However, it did not attract the requisite support from Caymanian politicians or the broader populace, and the impetus for modernising the Cayman Islands Constitution on this premise waned sufficiently to result in discussions with the United Kingdom being put on hold in 2004 pending anticipated elections in the Cayman Islands later that year.<sup>15</sup>

The reasons for the lack of interest in the draft constitution were undoubtedly multi-faceted, although two points of particular note arise. The first is that this draft constitution failed to advance the Cayman Islands Constitution much further in terms of the development of local governance beyond the arrangements that were first promulgated more than thirty years earlier in the 1972 Constitution. It was felt that the Governor of the Cayman Islands, the Crown's representative who is appointed by the United Kingdom Government, would still wield more power than was appropriate *vis-à-vis* elected politicians in the Cayman Islands and that having waited so long for a new constitutional framework, this opportunity needed to be maximised so as to obtain the greatest possible advances in local autonomy.<sup>16</sup>

The second point of particular note follows in part from the first, in that while the power struggle between the United Kingdom and the Cayman Islands preoccupied the debate and was at the forefront of the objections to the draft constitution, the inclusion of a fundamental-rights chapter consequently appeared to attract little objection. This endorsement of the inclusion of a bill of rights in the new constitutional arrangements of the Cayman Islands was clearly recorded by the Cayman Islands Chamber of Commerce in its submissions to the United Nations Special Committee on Decolonisation: "Although

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12. *Id.* at Ev 160.

13. BENSON O. EBANKS ET AL., REPORT OF THE CONSTITUTIONAL MODERNISATION REVIEW COMMISSIONERS (2002) (Cayman Is.).

14. *See generally* 626 Parl Deb HL (5th ser.) (2001) col. 1871 (UK) (noting in the statement of Baroness Valerie Amos that the United Kingdom Foreign and Commonwealth Office sent the model human-rights chapter "to the territories to feed into their constitutional review processes"); SEVENTH REPORT, *supra* note 7, at Ev 154 (noting the same and that "[i]t is [the] UK Government's policy to encourage the inclusion in [territory constitutions] of comprehensive fundamental (human) rights provisions").

15. *See* SEVENTH REPORT, *supra* note 7, at Ev 160.

16. *E.g.*, Sophia Ann Harris, President-Elect, Cayman Is. Chamber of Commerce, Presentation at the United Nations in New York, New York: Self-Government in the Cayman Islands and The Perspective of Non-Governmental Organisations (June 12, 2003), <http://www.constitution.gov.ky/portal/pls/portal/docs/1/2971371.PDF> [<https://perma.cc/GV86-UNYP>] (delivered previously in Anguilla in May 2003).

Caymanians have indicated concern with some of the provisions in the draft constitution submitted by the Commissioners and the process by which the draft constitution has been implemented, they have indicated that in principle they have no objection to implementing a Bill of Rights.”<sup>17</sup>

These sentiments reflect the findings of previous constitutional commissions in the Cayman Islands, which, in spite of a tangible sense that there was some local opposition to certain human rights on religious grounds,<sup>18</sup> had successively concluded that the people of the Cayman Islands did actually wish to see fundamental rights expressly recognised and protected in their Constitution.<sup>19</sup>

However, while the rejection of this draft constitution had more to do with the failure of this document to embrace broader constitutional aspirations than any mobilised opposition to the inclusion of a fundamental-rights chapter, the ensuing period of reflection provided an opportunity to revisit the contents of the proposed bill of rights and consider whether the Foreign and Commonwealth Office’s model fundamental-rights chapter was appropriate. Consistent with its objective that the overseas territories comply with their international human-rights obligations as extended to them by the United Kingdom Government, the model fundamental-rights chapter was evidently premised on the rights enshrined in the ECHR, although it was notably a far longer document.<sup>20</sup> However, these additions did not denote a departure from the principles of the ECHR. Instead, these additional

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17. Harris, *supra* note 16. The Constitutional Review Commission’s 2002 report went so far as to assert “that the inclusion of a Bill of Rights in the constitution was the issue that attracted the most widespread support in the review process.” SEVENTH REPORT, *supra* note 7, at Ev 201.

18. See William Vlcek, *Crafting Human Rights in a Constitution: Gay Rights in the Cayman Islands and the Limits to Global Norm Diffusion*, 2 GLOBAL CONSTITUTIONALISM 345 (2013). It is fair to say that there were and remain concerns regarding the compatibility of human rights with the Christian heritage across much of the Caribbean. See *id.* These concerns flared up as the constitutional-modernisation process advanced in the Cayman Islands and certainly had an impact on the final composition of the new Cayman Islands Constitution and Bill of Rights. *Id.* at 363. Moreover, this continues to prove contentious, particularly in the context of the ongoing debate surrounding marriage equality. *Id.*

19. See, e.g., SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS, CAYMAN ISLANDS: REPORT OF THE CONSTITUTIONAL COMMISSIONERS 1991, Cm. 1547, at 10 (UK) (concluding that “[t]here was almost a unanimous request for the Fundamental Rights and Freedoms . . . to be included in the Constitution”).

20. See generally CHARLES O.H. PARKINSON, BILLS OF RIGHTS AND DECOLONIZATION: THE EMERGENCE OF DOMESTIC HUMAN RIGHTS INSTRUMENTS IN BRITAIN’S OVERSEAS TERRITORIES 7 (2007). The ECHR had previously been deployed by the United Kingdom as a template for fundamental-rights chapters in the independence constitutions of former colonies. See *id.* (“[T]he British Government inserted bills of rights modelled on the European Convention on Human Rights into the constitutions of all its dependencies . . .”). Colonial considerations even permeated the United Kingdom’s participation in drafting the ECHR. See A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 713 (2001).

provisions appear to have been included to complement the ECHR in accordance with the case law generated by the ECHR and handed down by the European Court of Human Rights.

During this period of reflection, two distinct positions emerged, both of which created doubt as to the viability of the ECHR-inspired Foreign and Commonwealth Office's model fundamental-rights chapter as an acceptable bill of rights for the Cayman Islands. On the one hand, there were those who sought to dilute or dispose of certain rights for various reasons, many of which were religious in nature.<sup>21</sup> In pursuing this objective, the very concept of human rights was drawn into the firing line and criticised as a European construct that was being imposed on the Cayman Islands by a colonial power.<sup>22</sup> In this context, the optics of adopting a bill of rights that was effectively an updated ECHR were not good, particularly as compliance with the ECHR was viewed as the underlying force that prompted the United Kingdom Government to legislate by Order in Council to abolish the death penalty for murder<sup>23</sup> and decriminalise homosexual acts between consenting adults in private<sup>24</sup> across its Caribbean overseas territories.<sup>25</sup>

On the other hand, the Cayman Islands Human Rights Committee, which was first formed by the Cayman Islands Government in 2003 and reconstituted with specified terms of reference in 2006,<sup>26</sup> viewed

21. *E.g.*, Vlcek, *supra* note 18.

22. *Id.*

23. Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, MONTSERAT PENAL CODE ch. 04.02, at 147 (2008).

24. Caribbean Territories (Criminal Law) Order, *id.* at 148.

25. This did not impede efforts to increase and expand the use of the ECHR in Cayman courts. One ingenious attempt sought to apply the United Kingdom Human Rights Act, which had previously incorporated the ECHR into United Kingdom law and thereby made the ECHR directly enforceable in the United Kingdom's courts. *Ebanks v. R.*, [2007] C.I.L.R. 403, 426–27 (Cayman Is. Ct. App.). If successful, this argument could have circumvented the barrier limiting unincorporated international treaties affirmed in *Grant* and subsequently in *Moncrieff*. *Grant ex rel. Grant v. Principal of John A. Cumber Primary Sch.*, [1999] C.I.L.R. 307, 338 (Cayman Is. Grand Ct.); *Moncrieff v. R.*, [2003] C.I.L.R. n.35 (Cayman Is. Ct. App.). However, the Cayman Islands Court of Appeal rejected the extension of the United Kingdom Human Rights Act to the Cayman Islands, finding instead that the Court's duty was to enforce the domestic laws of the Cayman Islands and that the Legislative Assembly was free to enact legislation as it deemed fit (which, in this instance, was the introduction of a mandatory minimum sentence for possession of a firearm) so long as it complied with the Constitution (which, at this point in time, did not contain a bill of rights and, thus, any prohibition of inhuman and degrading treatment or punishment). *Ebanks*, [2007] C.I.L.R. 403.

26. *See* SEVENTH REPORT, *supra* note 7, at Ev 199. Because most human-rights complaints arise from the actions or failures of government entities, it may seem incongruous for the Cayman Islands to establish a human-rights committee and charge that government body with the promotion and protection of human rights, including the investigation of complaints. This anomaly arose from the rapid rate of development in the Cayman Islands over the last thirty to forty years, which resulted in some unusual deficits in civil society and the types of organisations typically seen in a devel-

the ECHR as somewhat dated. Inspired by newer international human-rights treaties and innovations in more contemporary national constitutions, the Committee sought to augment the rights contained in the ECHR with other, more novel rights. For the Human Rights Committee, the process of “Caymanianising” the prospective bill of rights was not concerned with the diminution of rights, but with their further enhancement and extrapolation in accordance with the particular needs of the jurisdiction.

As the Cayman Islands grappled with these conflicting approaches to the development of its bill of rights, the United Kingdom moved to reinforce the relevance of the ECHR to its overseas territories.<sup>27</sup> Following Protocol No. 11 to the ECHR coming into force and the establishment of a single permanent court at Strasbourg, the question of periodic renewal of the right of individual petition became moot<sup>28</sup> and the United Kingdom went out to its overseas territories with a view to extending the right of individual petition to these territories and the persons therein on a permanent basis.<sup>29</sup> The right of individual petition had been extended to the Cayman Islands for a period of five years between 1981 and 1986, although this was not widely publicized, and unsurprisingly, it was never utilised.<sup>30</sup> When it came time to consider whether this right should be renewed, it became apparent that the jurisprudence of the ECHR had advanced in the interim and that

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oped democracy. There was a corresponding response by the Government whereby it often stepped in to fill the void. Another example of this is the absence of labour unions in the Cayman Islands and the *de facto* championing of workers’ rights by the Department of Employment Relations. See *Occupational Hazard! Promoting a Culture of Safety*, CAYMAN IS. CHAMBER OF COM.: CAYMAN IS. NEWS (Jan. 20, 2012), <http://web.caymanchamber.ky/cwt/external/wcpages/wcnews/newsarticledisplay.aspx?articleid=1227> [<https://perma.cc/CS26-PG4K>]. Sensitive to this anomaly, the members of the Cayman Islands Human Rights Committee and the Ministry of Education, Training, Employment, Youth, Sports and Culture, which had constitutional responsibility for the Human Rights Committee, worked to reduce the public-sector membership on the Committee and eliminate direct ministerial oversight of its work and the inherent conflicts that this gave rise to. *New Members for HRC: The Right Way Forward*, CAYMAN IS. HUM. RTS. COMMITTEE, <http://www.gov.ky/portal/page/portal/hrchome/news/pr/2007/newmembers> [<https://perma.cc/NC2C-6Z6P>]. Ultimately, this was taken to its logical conclusion, and at the Committee’s own behest, the Human Rights Committee was replaced by an autonomous human-rights commission, which was enshrined in, and empowered by, the 2009 Constitution. See CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 116; SEVENTH REPORT, *supra* note 7, at Ev 198–201 (summarising the role and work of the Cayman Islands Human Rights Committee).

27. See SEVENTH REPORT, *supra* note 7, at Ev 154.

28. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 5, 1994, E.T.S. 155.

29. See SEVENTH REPORT, *supra* note 7, at Ev 154.

30. Hon. Sam Bulgin QC JP, Attorney Gen., Cayman Is., Presentation at the University College of the Cayman Islands: Magna Carta and Human Rights in the Cayman Islands (Mar. 25, 2015), <https://www.judicial.ky/wp-content/uploads/publications/speeches/2015-04-22-AG-paper-on-Magna-Carta-influence-in-CI-FINAL.pdf> [<https://perma.cc/5H54-V45L>].



this might potentially give rise to problems with the compatibility of laws in various overseas territories with the ECHR. Human-rights lawyer Lord Lester of Herne Hill raised parliamentary questions in the House of Lords in 1995 regarding the right of individual petition in both the Cayman Islands and the British Virgin Islands and, in particular, why it had not been renewed.<sup>31</sup> In response on behalf of the United Kingdom Government, Baroness Chalker of Wallasey, Minister of State in the Foreign and Commonwealth Office, somewhat cagily advised that “[t]he right of individual petition has not been renewed in respect of the territories concerned pending a review of legislation in those territories.”<sup>32</sup>

It is not clear from official records what legislation was of concern, but given the decision in *Dudgeon v. United Kingdom*<sup>33</sup> and the United Kingdom’s preparedness to impose legislation by way of Order in Council in 2000,<sup>34</sup> it is likely that there were concerns with statutory provisions that continued to criminalise homosexual acts between consenting adults in private. It is also possible that there were concerns with the emerging jurisprudence under the ECHR at this time involving corporal punishment in schools.<sup>35</sup>

By the mid 2000s, the United Kingdom Government floated extending the right of individual petition to the overseas territories on a permanent basis,<sup>36</sup> and the Cayman Islands Government had clearly become more attuned to the ECHR and its jurisprudence. In 2006, it even requested that the right to petition the Strasbourg Court regarding its actions or omissions—and whether these violated the ECHR and its protocols that had been extended to the Cayman Islands—be

31. 561 Parl Deb HL (5th ser.) (1995) col. 97-8WA (UK).

32. *Id.*

33. *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. (ser. A) 149 (1981). *Dudgeon* was the first case concerning the criminalisation of homosexual acts to be successfully argued before the European Court of Human Rights and resulted in changes to legislation in Northern Ireland, which brought the law into line with those of the other component parts of the United Kingdom. *See id.* at 168; *see also* PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* 15, 100 (2013) (noting that “*Dudgeon* was the first successful complaint relating to homosexuality in the Court” and explaining its importance and that it led to changes in the law).

34. *E.g.*, Caribbean Territories (Criminal Law) Order, MONTSERRAT PENAL CODE ch. 04.02, at 148 (2008).

35. *See Campbell v. United Kingdom*, 1982 Y.B. Eur. Conv. on H.R. 3 (Eur. Ct. H.R.) (holding that the United Kingdom was in breach of Article 2 of Protocol 1 to the ECHR for not respecting parents’ objections to corporal punishment in schools and for suspending one student from school when he refused to accept such punishment).

36. *See generally, e.g.*, Letter from the Permanent Representative of the U.K. (Jan. 14, 2006) (registered at the Secretariat General of the Council of Europe) (noting that the United Kingdom Government accepted the permanent extension of the right of petition in certain territories); Letter from the Permanent Representative of the U.K. (Feb. 23, 2006) (registered at the Secretariat General of the Council of Europe) (noting the same with respect to additional territories, including the Cayman Islands).

permanently restored.<sup>37</sup> This right was subsequently reinstated on a permanent basis in February 2006,<sup>38</sup> thereby providing persons in the Cayman Islands with an additional remedial avenue for the resolution of human-rights concerns.<sup>39</sup> While this external scrutiny was undoubtedly a significant step,<sup>40</sup> if anything, it brought into even sharper focus the anomaly of local judges not being able to directly enforce any chapter or charter of fundamental rights in the absence of either a domestic bill of rights or the direct incorporation of the ECHR as the United Kingdom had opted to do in its own human-rights act in 1998.<sup>41</sup>

As the broader constitutional modernisation process in the Cayman Islands gathered pace, it became evident that the ECHR, or at least a modern version of the ECHR with rights articulated in greater detail, would be the minimum standard for any bill of rights that the United Kingdom would agree to in an updated constitution. Reflecting on the effect of the ECHR on the development of a fundamental-rights chapter for the Cayman Islands, the Attorney General of the Cayman Islands has noted that “[t]he incremental extension of [this] human rights framework laid the ground work for the Cayman Islands to embrace the full gamut of fundamental rights and freedoms when The Cayman Islands (Constitution) Order, 2009 was adopted as the Territory’s fourth constitution.”<sup>42</sup>

If a minimum threshold had been established in the ECHR, the only remaining question regarding the scope of Cayman’s first bill of rights was whether it would encompass any other rights over and above that; or, put another way, would the approach to “Caymanianising” the prospective bill of rights advocated by the Human Rights Committee find favour and, if so, in what ways?

In addition to the rights that mirror those contained in the ECHR, the fundamental-rights chapter in the 2009 Cayman Islands Constitution ultimately embraced four novel rights.<sup>43</sup> The inclusion of these,

37. See Bulgin, *supra* note 30. As the signatory to the ECHR, it was the United Kingdom who would defend cases before the European Court of Human Rights. See, e.g., *Ebanks v. United Kingdom*, App. No. 36822/06 (Jan. 26, 2010), <http://hudoc.echr.coe.int/eng?i=001-96925> [<https://perma.cc/W43Y-JUB3>].

38. *European Court of Human Rights*, CAYMAN IS. HUM. RTS. COMMITTEE, <http://www.gov.ky/portal/page/portal/hrchome/yourrights/european> [<https://perma.cc/E63J-24C9>] (last updated Jan. 11, 2007). Notwithstanding that the Committee has now been replaced by the Human Rights Commission, the Committee’s explanatory release presently remains available “for archive/historical purposes only.” *Id.*

39. Shortly thereafter, one such application was lodged, which ultimately made its way to the European Court of Human Rights. *Ebanks*, App. No. 36822/06.

40. See Bulgin, *supra* note 30 (“[E]ven without a justiciable Bill of Rights in our local courts, there was access to justice all the way to the ECHR.”).

41. See *Introduction to Human Rights*, UK HUM. RTS. BLOG, <https://ukhumanrightsblog.com/introduction/> [<https://perma.cc/NT8Q-CH6C>].

42. Bulgin, *supra* note 30.

43. Some sections of the Cayman Islands Bill of Rights are identical, word for word, to their counterparts in the ECHR. *Compare, e.g.,* CAYMAN ISLANDS CONSTI-

however, was not entirely smooth. A preliminary draft of the fundamental-rights chapter also contained a stand-alone right to equality, but this was removed following an eleventh-hour deal struck between several key participants in constitutional talks convened by the United Kingdom with the Cayman Islands Government and various representatives of civil society in the Cayman Islands, including the Cayman Ministers' Association<sup>44</sup> and the Cayman Islands Conference of Seventh-Day Adventists,<sup>45</sup> and a more limited right was inserted in its place.<sup>46</sup> Unsurprisingly, this replacement closely resembled Article 14 of the ECHR in that the right was similarly parasitic and would only be enforceable in conjunction with one of the other substantive rights enshrined elsewhere in the Bill of Rights.<sup>47</sup>

The Human Rights Committee, which was also participating in the constitutional talks, objected to this compromise.<sup>48</sup> The Government

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TUTION June 10, 2009, § 3 (prohibiting “torture or inhuman or degrading treatment or punishment”), with Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, 213 U.N.T.S. (using the exact same language). Other sections are largely the same as the corresponding rights in the ECHR, with only minor variations. *Compare, e.g.*, CAYMAN ISLANDS CONSTITUTION June 10, 2009, §§ 2, 4 (providing for the right to life and the prohibition of forced labour), with Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*, arts. 2, 4 (providing similar protections). In most cases the differences between the Cayman Islands Bill of Rights and the ECHR can be explained by jurisprudential developments promulgated by the European Court of Human Rights, the evolution of other human rights as international legal norms, or even just simple textual clarification; only rarely, in isolated examples, do the differences embody a particular local perspective.

44. See Pastor Al Ebanks, Cert. Hon., JP, Presentation: Cayman Ministers' Association Draft Position Paper on Cayman Islands Constitutional Modernisation – Round Two (Jan. 13, 2009), <http://www.constitution.gov.ky/portal/pls/portal/docs/1/6377853.PDF> [<https://perma.cc/NN6R-STK3>].

45. *Government's Proposal for Constitutional Reform*, CAYMAN IS. CONF. SEVENTH-DAY ADVENTIST, <http://www.caymanadventist.org/caymanconference/cicresponsetocmi.php> [<https://perma.cc/6G7W-HCDG>].

46. See CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 16; see also Boris O. Dittrich, *Letter to the Governor of the Cayman Islands*, HUM. RTS. WATCH (Mar. 11, 2009, 11:03 AM), <https://www.hrw.org/news/2009/03/11/letter-governor-cayman-islands> [<https://perma.cc/5EPZ-ZFFH>] (“The present draft of the proposed constitution contains severely restricted protections against discrimination, at the apparent urging of civil-society groups anxious that it not prevent discrimination based on sexual orientation and gender identity in many crucial walks of life.”).

47. See Rory O'Connell, *Cinderella Comes to the Ball: Article 14 and the Right to Non-Discrimination in the ECHR*, 29 LEGAL STUD. 211 (2009) (analyzing the “second-class” status of Article 14 and its consequently unfavourable comparison with section 15 of the Canadian Charter of Rights and Freedoms and Article 26 of the ICCPR, but noting that this provision may nevertheless provide increasing protection to disadvantaged and vulnerable groups; see also Janneke Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Rights*, 13 HUM. RTS. L. REV. 99 (2013) (offering further discussion on case law emanating from Article 14 of the ECHR).

48. Press Release, Cayman Is. Human Rights Comm., Statement on the Constitution: Statement of Sara Collins on Behalf of the Human Rights Committee (Feb. 16, 2009), <http://www.gov.ky/portal/page/portal/hrhome/news/pr/2009/constitutionstate->

of the Cayman Islands, however, was focused on presenting a united front to the United Kingdom in an effort to ensure that the Cayman Islands Constitution was finally modernised<sup>49</sup> and was concerned about losing support for a new draft from the religious lobby groups.<sup>50</sup> In response, the Cayman Islands Government asserted that the new

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ment [<https://perma.cc/PQ66-F3QU>] (“History has shown that our collective conscience doesn’t always spur us on to do the right thing. For that reason, we pass laws to regulate our behaviour. The Constitution is the supreme law in any land. All other laws and the behaviour of the government and the citizens will be guided and shaped by it. It is important to get it right and not just to make a half hearted attempt. I am not sure that I can think of any other constitutional process where the people drafting the document stepped away from it at some point and said, ‘Well, there it is. It’s not ideal but it’s the best we can do for now so let’s just leave it half finished and come back to it later’. I believe the Caymanian people want us to aim for perfection, to achieve the ideal.”)

And so we come to the story of section 16. Many people in the country are asking what happened here. Because of the convoluted language in the document and the lawyer like way in which it says everything a lot of people don’t understand what the issue is. This is what happened. The draft we had been working with in the negotiations all along said the government could not discriminate against anyone at any time. Full stop. The Hon. Minister McLaughlin told us that the churches could not accept such a wide ranging right applying to gays and lesbians. On the other hand, the UK and the HRC could not condone gays and lesbians being left out altogether. So the plan was formed and this question was put to us: what if we reduce the right or cut the right in half so it is limited only to the basic things like the right not to be tortured and doesn’t go so far as to include everything? That way we can put everyone in but they are not getting as much as the original version of the right gave them.

It is important to understand this because we are not saying that any one group is left out of rights that other people are enjoying. The list of the groups did not change, except to include gays and lesbians. Women and the disabled and the elderly and everyone else will still be included in the right, but the right itself was changed so that the Government could discriminate against all of those people in certain areas.

This is why the Hon Leader is asking the country to accept half a loaf on this; because the other half was chopped off and may now be thrown away. But, let’s be clear. Everyone gets only the half loaf. It is not like some of us have to settle for half and the others get the whole loaf if they are hungry for it. The other half is being taken away from the other vulnerable groups too, who will lose the protection against discrimination that is being taken out of the right. That is why the HRC were duty bound to explain to the public what this means for them. The government will be able to discriminate against anyone in the areas of healthcare, housing, employment, provision of social services, access to public spaces and many others because these are no longer covered. The UK said, as I believe did the Hon Minister McLaughlin, that what the HRC wants (which is the original s.16 that said the government could not discriminate against anyone at any time) is the ideal solution, but the country is not ready to do more than take baby steps towards that ideal on some distant horizon. If it is the ideal solution why can’t we have it now? Why stop at the first step if you can complete the whole journey? How do we know that our people don’t want to walk together now down that road?”).

49. Honourable D. Kurt Tibbetts, JP., MLA, Remarks at the Cabinet Press Briefing (Aug. 7, 2008), <http://www.gov.ky/portal/page/portal/cighome/pressroom/archive/200808/thewayforward> [<https://perma.cc/9WWH-JJWX>].

50. See, e.g., Ebanks, *supra* note 44; Position Statement, Cayman Minister’s Ass’n, Position Statement on New Draft Constitution (Mar. 12, 2009) (noting that Human Rights Commission press releases indicated that it was “not determined to campaign against the Bill of Rights . . . and agree[d] that the alternative [was] worse if the alternative [was] nothing” (emphasis omitted)).

section 16 was the norm and positioned the freestanding right to non-discrimination as something that one ought to be concerned about.<sup>51</sup> Referencing the freestanding right to non-discrimination in Protocol 12 to the ECHR, which the United Kingdom itself had not signed onto,<sup>52</sup> the broader approach to equality and non-discrimination was met with subtly belittling comments.<sup>53</sup> While it was “recognised that free standing non discrimination as expressed in Protocol 12 has many obvious benefits, the jury is still out as to the extent to which the concerns by conservative countries are unfounded.”<sup>54</sup>

In response, Human Rights Watch, an international non-governmental organisation, wrote to the Governor of the Cayman Islands protesting the “severely restricted protections against discrimination” in what was now a third draft of a new constitution.<sup>55</sup> It also urged that “language restoring full protections for equality and against discrimination be submitted to the voters, rather than the present restrictive text”—it being “unacceptable that animus against [persons based on sexual orientation and gender identity] lead to a rollback of rights protections for all”—at the forthcoming referendum on the new constitution.<sup>56</sup> The stakes were, however, too high for the Cayman Islands Government to accede to such a request and the revised section 16 modelled on Article 14 of the ECHR was retained and presented to the electorate in the referendum.

In fact, this was one of several concessions largely driven by the “non-negotiable positions” laid out by the religious lobby groups participating in the constitutional-modernisation negotiations with the

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51. See generally Cayman Minister’s Ass’n, *supra* note 50 (“The careful research and deliberations of the constitutional negotiating team from Cayman, from the government’s legal advisor Professor Jeffery Jowell, and from the team of experts from the Foreign and Commonwealth Office (FCO) led by the UK Minister Gillian Merron have all made it abundantly clear that they will not accept any draft document that would unjustifiably exclude the rights of any category of persons . . .”).

52. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, E.T.S. 177. See generally Urfan Khaliq, *Protocol 12 to the ECHR: A Step Forward or a Step Too Far?*, 2001 PUB. L. 457 (discussing Protocol 12 and noting that as of that writing, “the United Kingdom, France, Sweden and Spain” and others had not signed onto it); Nicholas Grief, *Non-Discrimination Under the European Convention on Human Rights: A Critique of the United Kingdom Government’s Refusal to Sign and Ratify Protocol 12*, 27 EUR. L. REV. 3 (2002).

53. These comments included that the approach was “new,” “optional for member states of the European Convention on Human Rights,” lacking in “case law that can help countries to understand the extent to which protocol 12 could affect their national laws,” “too wide,” “unclear,” and not necessary given apparent “Danish scepticism” and its absence from the United Kingdom Human Rights Act, and that it contained “unacceptable uncertainties.” CONSTITUTIONAL MODERNIZATION INITIATIVE, UNDERSTANDING SECTION 16 OF THE BILL OF RIGHTS, <http://www.constitution.gov.ky/portal/pls/portal/docs/1/6931927.PDF> [<https://perma.cc/4QCB-EBGJ>] (Cayman Is.).

54. See *id.*

55. Dittrich, *supra* note 46.

56. *Id.*

United Kingdom that found its way into the final draft.<sup>57</sup> Further examples where the broader rights perspective was compromised in order to win over the religious lobby include the limitation of the Bill of Rights to vertical application and the absence of any horizontal application;<sup>58</sup> the curtailment of the powers of the new Human Rights Commission, such that if the inclusion of a human-rights commission was unavoidable, its role would be restricted to “the education and promotion of human rights without the ability to assume quasi judicial functions”;<sup>59</sup> and the attempt to curb marriage equality by defining marriage as being a right applicable to “every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex.”<sup>60</sup>

Offsetting these compromises are the new rights in the Cayman Islands Bill of Rights—the extra-ECHR rights that do not appear in the ECHR at all. The first such example is section 17, which specifically provides for the rights of children and, in so doing, is influenced by the overarching principles contained in the Convention on the Rights of the Child, the United Nations convention that deals specifically with the rights of children.<sup>61</sup> Section 18 then augments the ECHR rights by providing for protection for the environment.<sup>62</sup> While European Court of Human Rights jurisprudence has recognised environmental issues—such as in decision-making and access to justice in environmental matters and where the right to life, privacy, or property may be seriously affected by environmental nuisances—the ECHR does not expressly require states to protect the environment.<sup>63</sup> Inspired by the South African Constitution, section 19 follows by adding a right to lawful administrative action.<sup>64</sup> And to cap off the supplementary pro-

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57. See, e.g., Ebanks, *supra* note 44.

58. *FAQs*, CAYMAN IS. HUM. RTS. COMM’N, <http://www.humanrightscommission.ky/faqs> [<https://perma.cc/8ZL6-H4B5>]. Allowing only the vertical application of human “rights means rights will apply vertically so that they can be enforced by a citizen against the Government only – but not against other private individuals or companies,” while allowing horizontal application “means a person can also enforce rights against other private individuals or companies.” *Id.*

59. *Government’s Proposal for Constitutional Reform*, *supra* note 45.

60. CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 14.

61. *Compare id.* § 17 (providing for the rights of children), with United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (also setting out the rights of children).

62. CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 18.

63. *Environment and the European Convention on Human Rights*, EUR. CT. HUM. RTS. (2016), [http://www.echr.coe.int/Documents/FS\\_Environment\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Environment_ENG.pdf) [<https://perma.cc/5JN4-7NAP>]. In this regard the European Court of Human Rights has relied upon the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Elena Falletti, *The Aarhus Convention and the Democratic Involvement in Environmental Issues: The Italian Case 1* (Mar. 19, 2014) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2411318](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411318).

64. *Compare* CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 19, with CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 Dec. 16, 1996, § 33 (both requiring

visions, section 20 provides for enhanced rights to education—including the progressive realisation of not just free primary education, but also free secondary education—over and above the limited reference to education contained in Article 2 of Protocol 1 to the ECHR.<sup>65</sup>

While there may not have been unanimous delight at the prospect of the final draft of the new constitution containing Cayman's first-ever chapter of fundamental rights, there was sufficient support from the various groups participating in the constitutional-modernisation talks for the Cayman Islands Government to press for this iteration and for the United Kingdom to assent to it.<sup>66</sup> It was this final draft that went to the people of the Cayman Islands in a referendum on May 20, 2009, together with the general-election vote.<sup>67</sup> Although the incumbent Government, which had reinitiated the modernisation process upon taking office and devoted significant time and resources to the realisation of a modern constitution during its term, lost the general election, there was a clear majority in favour of the new Constitution.<sup>68</sup> With the domestic manoeuvrings successfully navigated, the United Kingdom approved the new Constitution and it was duly extended to the Cayman Islands a full decade after the United Kingdom published its White Paper and set the modernisation process in motion.<sup>69</sup>

## II. THE INTERPRETATION AND APPLICATION OF THE CAYMAN ISLANDS BILL OF RIGHTS, FREEDOMS AND RESPONSIBILITIES

It is against the backdrop of this long and complex process that the first-ever chapter of fundamental rights finally came to be included in

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administrative actions to be lawful and “procedurally fair” and providing a right to written reasons for decisions).

65. Compare CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 20, with Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 20, 1952, E.T.S. 9 (stating only that “[n]o person shall be denied the right to education” and that “[i]n the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”).

66. See Dittrich, *supra* note 46.

67. See CONSTITUTIONAL REVIEW SECRETARIAT, 2009 DRAFT CONSTITUTION EXPLANATORY GUIDE 1 (2009) (Cayman Is.) (“Do you approve the Draft Constitution which was agreed by the Cayman Islands Constitution Delegation and the Government of the United Kingdom on 5th February, 2009 and tabled in the Legislative Assembly of the Cayman Islands on 11th February, 2009?”).

68. See *Cayman Islands, May 20, 2009: Constitution*, DATABASE & SEARCH ENGINE FOR DIRECT DEMOCRACY, <http://www.sudd.ch/event.php?lang=en&id=ky012009> [https://perma.cc/4JM8-JT5E]. Of the 11,244 votes cast in the referendum, 7,045 (62.66%) voted in favour of the new Constitution, thereby exceeding the simple majority required to ratify the new Constitution. *Id.*

69. See PARTNERSHIP FOR PROGRESS AND PROSPERITY, *supra* note 3; Cayman Islands Constitution Order 2009, SI 2009/1379 (U.K.).

the Cayman Islands Constitution. Notwithstanding the common-law pronouncements in which rights were protected, the legislative advances by which certain rights were granted, the increasing cognizance of international human-rights treaties that had been extended to the Cayman Islands, and the historical support for the inclusion of a bill of rights in the Constitution, the final hurdle was not overcome without incident and some difficulty. However, with the terms of the Bill of Rights settled, the focus shifted away from the negotiation table to ascertain whether this new constitutional provision—over which there had been so much debate and discussion—would transform the legal system of the Cayman Islands or it had been sufficiently muted to render it sterile.

Following a three-year grace period, during which the Cayman Islands Government was effectively given an opportunity to put its house in order and address any identifiable deficiencies, the majority of the Bill of Rights came into effect on November 6, 2012.<sup>70</sup> Having now entered its fifth year of operation, the time is ripe to evaluate the impact of this landmark constitutional change. First, one is quickly drawn towards the courts as the most obvious arena for the next episode of this saga to play out. Although this is not the only way in which the impact of the Bill of Rights is measurable, the interpretation of key provisions in the Bill of Rights by the Cayman Islands courts is an appropriate place to begin this evaluation.

Speaking at the opening of the Grand Court of the Cayman Islands for the 2013 Session, Attorney General Samuel Bulgin noted:

For the first time in the legal history of these Islands claimants are now entitled to file a claim in these courts where they are alleging that there is a breach of [their] human rights, and the courts are now empowered to adjudicate on such claims and to grant direct relief where a claim is made out.

My Lord this is not an insignificant development in our legal history. It will not be too long before the benefit of such a facility will start to manifest itself.<sup>71</sup>

At the same event, Chief Justice Anthony Smellie indicated that preparations were under way to deal with the forthcoming cases when they would inevitably arrive:

The advent of the Constitutional Bill of Rights since November is rightly regarded as having commenced a new era for the observation and enforcement of fundamental rights.

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70. Cayman Islands Constitution Order 2009, SI 2009/1379, §4(2) (U.K.).

71. Samuel Bulgin, Cayman Is. Attorney Gen., Remarks by the Hon. Attorney General on the Opening of the Grand Court of the Cayman Islands for the 2013 Session (Jan. 16, 2013), <https://www.judicial.ky/wp-content/uploads/publications/speeches/Speech-GrandCourtOpening2013-AG.pdf> [<https://perma.cc/WHX8-NZ22>].



Already I am advised that cases involving constitutional aspects have been filed and the special issues that they raise must be carefully and effectively resolved.

Also in anticipation of the Bill of Rights, new Rules of Court, in the form of Order 77A of the Grand Court Rules, were promulgated by the GCR [Grand Court Rules] Committee in October [2012]. Order 77A is designed specifically to allow for the bringing of applications under the Constitution.<sup>72</sup>

Soon thereafter, in *In the Matter of Nairne*, the Grand Court was called upon to consider the compatibility of the Police Law of 2010—particularly section 65 and the provisions therein pertaining to how long an arrested person could be held in custody before being brought before a court—with the right to liberty provided in section 5 of the Bill of Rights.<sup>73</sup> The appellant had been arrested on suspicion of being involved in the supply of cocaine,<sup>74</sup> an offence for which a person may be arrested without a warrant under the Misuse of Drugs Law.<sup>75</sup> After an initial period, the appellant’s detention was extended on the basis of an authorisation signed by a Chief Inspector in the Royal Cayman Islands Police Service (“RCIPS”).<sup>76</sup> Subsequently, the appellant was further detained upon application by an RCIPS Detective Inspector before the Chief Magistrate.<sup>77</sup> The appellant “sought and obtained a writ of habeas corpus *ad subjiciendum*” and was bailed (with conditions), pending a hearing of the writ and the associated application that his detention should be declared incompatible with the Bill of Rights.<sup>78</sup>

Section 5 of the Bill of Rights provides, *inter alia*, that a person who is arrested or detained on reasonable suspicion of having committed, or being about to commit, a criminal offence and who is not released shall be brought promptly before a court.<sup>79</sup> Section 65(4) of the Police Law of 2010 on its face, however, permitted a person to be detained for up to four days without being brought before a court.<sup>80</sup> While section 65(5)–(6) required an application to be brought before a magis-

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72. Hon. Anthony Smellie, Cayman Is. Chief Justice, Chief Justice’s Address to the Opening of the Grand Court (Jan. 16, 2013), <https://www.judicial.ky/wp-content/uploads/publications/speeches/CHIEFJUSTICESPEECH2013-Final.pdf> [<https://perma.cc/5XWN-62M2>].

73. *In re Nairne*, [2013] 1 C.I.L.R. 345 (Cayman Is. Grand Ct.).

74. *Id.* at 348.

75. Misuse of Drugs Law (2010 Revision) § 5(1) (Cayman Is.).

76. *Nairne*, [2013] 1 C.I.L.R. at 348.

77. *Id.* The court notes that “[i]n short, Mr. Nairne was held in police custody without being charged with an offence or produced to a court for a period of 6 days and 5½ hours.” *Id.* at 349.

78. *Id.*

79. CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 5.

80. Police Law, 2010 § 65(4) (Cayman Is.).

trate for a further extension,<sup>81</sup> the fact that these provisions did not mandate that the detainee be physically brought to the court at that time was asserted to be a breach of the right to liberty as outlined in section 5 of the Bill of Rights.<sup>82</sup>

Critically, in considering these issues, the court would have to interpret and apply the enforcement mechanisms built into the Bill of Rights. Therefore, the interpretive obligations of the court contained in section 25 and the declaration of incompatibility established under section 23 had to be considered.<sup>83</sup> Section 25 provides that “[i]n any case where the compatibility of primary or subordinate legislation with the Bill of Rights is unclear or ambiguous, such legislation must, so far as it is possible to do so, be read and given effect in a way which is compatible with the rights set out in” the Bill of Rights.<sup>84</sup>

However, where it was not possible to interpret any primary legislation at issue in accordance with the fundamental rights outlined in the Constitution, the court would then have no option but to issue a declaration of incompatibility.<sup>85</sup> The principles to be applied in this scenario are laid out in section 23(1): “If in any legal proceedings primary legislation is found to be incompatible with [the Bill of Rights], the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.”<sup>86</sup>

If the court issues a declaration of incompatibility, it then falls to the legislature to decide how to remedy it.<sup>87</sup> This method of enforcement is similar, although not identical, to that in the United Kingdom Human Rights Act; it reflects the United Kingdom Constitution’s fundamental principle of parliamentary sovereignty, and accordingly it does not permit the court to declare primary legislation unconstitutional.<sup>88</sup> Instead, in the Cayman Islands, as in the United Kingdom,

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81. *Id.* § 65(5)–(6).

82. *Nairne*, [2013] 1 C.I.L.R. at 345.

83. *See* CAYMAN ISLANDS CONSTITUTION June 10, 2009, §§ 23, 25.

84. *Id.* § 25.

85. *See id.* § 23.

86. *Id.* § 23(1). Where a court makes a declaration of incompatibility, however, this “shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.” *Id.* § 23(2).

87. *Id.* § 23(3).

88. Human Rights Act 1998, c. 42, § 4 (U.K.); *see How the Human Rights Act Works*, LIBERTY, <https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/how-human-rights-act-works> [https://perma.cc/JNU3-QFLR] (describing a process where courts cannot rule laws invalid and it is up to Parliament to ultimately decide whether legislation should be amended); *Parliamentary Sovereignty*, UK PARLIAMENT, <https://www.parliament.uk/about/how/role/sovereignty> [https://perma.cc/HMH4-TY4X]. Parliamentary systems of government often distinguish between primary and secondary legislation. Primary legislation usually refers to Acts of Parliament, although it also encompasses Orders in Council made under the Royal Prerogative, whereas secondary legislation (sometimes also referred

the matter is effectively redirected to the legislature as the democratically elected body for ultimate resolution.<sup>89</sup>

Several important considerations flow from this arrangement. First, if the court's role in providing solutions and remedying situations where statutory provisions conflict with fundamental rights is limited to interpretation, how broadly will the courts interpret and exercise these powers? And secondly, where the court has no recourse but to issue a declaration of incompatibility, will the Cayman Islands Legislative Assembly move swiftly to amend the offending legislation?

Addressing the first of these questions in *Nairne*, Justice Alexander Henderson began by outlining the general approach to the Constitution and its bill of rights that courts ought to take.<sup>90</sup> In so doing, he emphasised that constitutional provisions “must be approached in a flexible manner so that they can be adapted to changing conditions”; “should be given a ‘large and liberal interpretation’ and not one which is truncated by a ‘narrow and technical construction’”; and adopting the words of the Privy Council, should be given a “generous interpretation” so that individuals are accorded “a ‘full measure of the fundamental rights and freedoms’ enshrined in the [Constitution].”<sup>91</sup>

Applying these principles to the Cayman Islands Bill of Rights and the interpretive obligation provided in section 25, Justice Henderson held that “[t]his section ensures that the court will strive to align an impugned legislative provision with what the legislature may reasonably be taken to have intended and, by this process of ‘reading down,’ will seek to avoid a formal declaration of incompatibility.”<sup>92</sup> However, he proceeded to stress that there was a limit to this interpretive obligation and that it only arises where the statute in question is “unclear or ambiguous” and that “[c]lear cases of incompatibility are to be left to the legislature for correction.”<sup>93</sup>

Citing with approval the approach of the Privy Council in *de Freitas v. Secretary of Ministry of Agriculture*, the Grand Court held “that ‘an enactment construed by severing, reading down or making implications into what the legislature has actually said’” would still have to “take a form which it could reasonably be supposed that Parliament intended to enact.”<sup>94</sup> Where a “wholesale reading down” results in a

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to a delegated legislation or subordinate legislation) is made by an executive authority under powers delegated to it by an enactment of primary legislation.

89. See CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 23.

90. See *In re Nairne*, [2013] 1 C.I.L.R. 345, 353–56 (Cayman Is. Grand Ct.).

91. *Id.* at 354–55 (first quoting 1 RICHARD CLAYTON & HUGH TOMLINSON, *THE LAW OF HUMAN RIGHTS* ch. 3, ¶ 3.81 (2d ed. 2009); then quoting *Edwards v. AG* [1930] 5 AC 124 (PC) 136 (appeal taken from Can.) (U.K.); and then quoting *Minister of Home Affairs v. Fisher* [1979] 44 WIR 107 (PC) 112 (appeal taken from Berm.) (U.K.)).

92. *Id.* at 355.

93. *Id.*

94. *Id.* (quoting *de Freitas v. Ministry of Agric.* [1990] 1 AC 69 (PC) 79 (appeal taken from Ant. & Barb.) (U.K.)).

law bearing “little resemblance to the law that Parliament passed,” the extent of the interpretive obligation will likely have been exceeded and there must be a “strong inference” that it is simply incompatible.<sup>95</sup> Further limiting the application of section 25 of the Cayman Islands Bill of Rights, Justice Henderson drew a distinction with section 3(1) of the United Kingdom Human Rights Act, highlighting that the latter created an obligation to interpret “‘as far as it is possible to do so’ which is not limited to ‘unclear or ambiguous’” situations, as is the case in the former.<sup>96</sup> As a result, the interpretive obligation would be triggered less often in the Cayman Islands.<sup>97</sup>

This approach to analyzing section 25 of the Bill of Rights was confirmed by Chief Justice Smellie in *In the Matter of the Petition of Borden*.<sup>98</sup> In that case, the petitioner sought a declaration that section 17(2) of the Bail Law was incompatible with the rights to liberty and the presumption of innocence in a fair trial provided in sections 5 and 7 of the Bill of Rights.<sup>99</sup> The petitioner asserted that section 17(2) removed the presumption of bail, impermissibly shifting the burden of proof onto the defendant.<sup>100</sup> In pre-Bill of Rights case law, courts had already gone to great lengths to preserve this presumption, rejecting a literal interpretation of the statutory provision and affirming that section 17(2) “could not properly be construed as implying a complete prohibition on bail in cases involving those offences listed.”<sup>101</sup> Therefore, the important questions that arose in *Borden* were whether the pre-Bill of Rights case law, which had relied on ECHR jurisprudence,<sup>102</sup> continued to be relevant now that there was a domestic bill of rights to be interpreted and applied, and whether there was a more demanding standard in the Cayman Bill of Rights—such that it was no longer possible to simply read down the statute and it now had to be declared incompatible, forcing the legislature to revisit it.<sup>103</sup>

The Grand Court was persuaded by the Solicitor General’s argument (on behalf of the Attorney General), which accentuated “the common legal heritage shared by the ECHR and the Bill of Rights.”<sup>104</sup> Consequently, the case law, which had been followed and applied prior to the Bill of Rights in *R. v. Whorms*, remained relevant.<sup>105</sup> On this basis, the Chief Justice concluded:

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95. *Id.* (quoting *de Freitas*, [1990] 1 AC at 79–80).

96. *Id.* at 356 (parentheses omitted).

97. *Id.*

98. *See In re Borden*, [2013] 2 C.I.L.R. 444 (Cayman Is. Grand Ct.).

99. *Id.* at 449.

100. *Id.* at 448–49.

101. *Id.* at 459 (citing *R. v. Whorms*, [2008] C.I.L.R. 188 (Cayman Is. Grand Ct.)).

102. *See, e.g., Caballero v. United Kingdom*, 2000 Y.B. Eur. Conv. on H.R. 133 (Eur. Ct. H.R.).

103. *Borden*, [2013] 2 C.I.L.R. at 459–60.

104. *Id.*

105. *Id.* (citing *Whorms*, [2008] C.I.L.R. 188).

[T]he principles accepted and applied in *R. v. Whorms* from the earlier case law [i.e., ECHR case law] . . . remain as authoritative and persuasive now as before the advent of the Bill of Rights and lead, entirely properly, to the same result of reading down s.17(2) so as to bring it into conformity with the Bill of Rights.<sup>106</sup>

Therefore, this was not a situation in which a “wholesale reading down” was required.<sup>107</sup> In accordance with *Nairne*, had this been the case, resulting in the law “bearing little resemblance to the law that Parliament passed,”<sup>108</sup> this would indicate the unsuitability of reading down and “give rise to the inference that the law is simply incompatible and should be so declared, leaving it to the legislative branch of government to bring it into line with the constitutional guarantees of the Bill of Rights.”<sup>109</sup>

Returning to the facts of the *Nairne* case, Justice Henderson found that the appellant’s detention was unlawful and contrary to section 5 of the Bill of Rights and, in particular, the right to be brought promptly before a court after arrest.<sup>110</sup> According to Justice Henderson, this aspect of the right “imposes an affirmative obligation upon those who have custody of an arrested or detained person to convey the person into the presence of a judicial officer,” and consequently “[t]he right is not merely a right to make an application for release to a court; the state must take the initiative to provide judicial oversight of the justification for detention.”<sup>111</sup> Henderson concluded:

[S].65(5) applications must be made in the presence of the person who has been arrested and detained and that any further detention “authorized” by an order obtained *ex parte* is unlawful. Section 65(6) should be read as including the words “in the presence of the person in detention” after the phrase “in chambers.”<sup>112</sup>

As to whether section 65 of the Police Law of 2010 conflicted with the Bill of Rights, Justice Henderson struggled to reconcile a situation where the first time a detained person appeared in court was four days after arrest with the requirement that such appearance be made “promptly” under section 5(5) of the Bill of Rights.<sup>113</sup> However, he was not able to substitute “‘a magistrate’ for the phrase ‘a police officer of the rank of Chief Inspector or above’” in section 65(4) of the Police Law in order to establish the requisite judicial approval of any detention beyond seventy-two hours.<sup>114</sup> Explaining this decision, Jus-

106. *Borden*, [2013] 2 C.I.L.R. at 460.

107. *Id.* at 449.

108. *Id.* (alteration in original) (quoting *In re Nairne*, [2013] 1 C.I.L.R. 345, 355 (Cayman Is. Grand Ct.)).

109. *Id.* (citing *Nairne*, [2013] 1 C.I.L.R. 345).

110. *Nairne*, [2013] 1 C.I.L.R. at 363.

111. *Id.* at 356.

112. *Id.* at 357.

113. *See id.* at 362.

114. *Id.* at 363.

tice Henderson stated that “[t]he difficulty is that this change eviscerates the section; the original intent of the legislature is not modified or expanded by it, but obliterated” and “[a] change of this magnitude is beyond the scope of the process of reading down.”<sup>115</sup>

Absent any room for interpretation, the only other option was, under section 23 of the Bill of Rights, to declare section 65(4) of the Police Law incompatible with section 5(5) of the Bill of Rights and, as noted above, rely on the Legislative Assembly to remedy the incompatibility.<sup>116</sup> This was duly ordered by Justice Henderson, and all eyes turned to the elected politicians in the Legislative Assembly to see how they would respond.<sup>117</sup> Their response can be found in The Police (Amendment) Law of 2014, passed on January 31, 2014, assented to by the Governor on February 21, 2014,<sup>118</sup> and now contained in the 2014 revision to the Police Law.<sup>119</sup> If one was looking for a poster child for how the process ought to operate, then this is probably as good as it gets insofar as a legislative response is concerned—with a quick turnaround and an appropriate remedy.

This, combined with the other early cases in which there were unsuccessful attempts to utilise the Bill of Rights to defeat existing statutory provisions, especially in the field of criminal procedure,<sup>120</sup> led the Attorney General to report in March 2015:

Since the coming into force of the Bill of Rights, already the Cayman Islands courts have addressed several Constitutional matters, including human rights issues, and have generally been persuaded that the laws of the Cayman Islands are compatible with international principles of rights and freedoms for all. Indeed even in the one case where a declaration of incompatibility was made, the incompatibility point was quickly rectified by the legislature, thereby demonstrating the determination to adhere to those principles and uphold the Rule of Law.<sup>121</sup>

It is not clear, however, whether the Legislative Assembly would respond so expeditiously and responsibly in situations where the matters at issue were more contentious and where a significant portion of the populace was averse to the requisite remedial action. The furore surrounding section 16 in the negotiations that gave rise to the Bill of

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115. *Id.*

116. *See id.* at 354–55.

117. *See id.* at 363.

118. *See* Police (Amendment) Law, 2014 (Cayman Is.) (entitled “A Law to Amend the Police Law, 2010 . . . to Make the Procedure Following on the Detention of Persons in Section 65 Consistent with Section 5(5) of the Cayman Islands Constitution . . .”).

119. *See* Police Law (2014 Revision) § 65 (Cayman Is.).

120. *E.g.*, *R. v. Rickfield*, [2015] 1 C.I.L.R. n.1 (Cayman Is. Grand Ct.) (allowing a criminal trial to continue in spite of a two-year delay in prosecution, holding that the delay did not violate her right to a fair trial under the Bill of Rights absent “exceptional circumstances” and “serious detriment” to the defendant).

121. Bulgin, *supra* note 30, at 15 (footnote omitted).

Rights illustrates that there are powerful lobby groups that are very much opposed to, for example, the recognition of LGBT rights in the Cayman Islands.<sup>122</sup> Hypothetically, were the courts to issue a declaration of incompatibility in respect to a statute where some aspect of LGBT rights was in question,<sup>123</sup> there is a very real possibility that members of the Legislative Assembly would rail against the prospect of amending the offending legislation so as to enhance LGBT rights.<sup>124</sup>

While no such case has reached the Cayman courts to date, the Immigration Appeals Tribunal has ruled in favour of a same-sex couple and acceded to a gay man's application to be added as a dependent to his spouse's work permit.<sup>125</sup> Notwithstanding that the Government continues to refuse to recognise gay marriage or amend the Marriage Law<sup>126</sup> or the Constitution<sup>127</sup> to allow it, the Immigration Appeals Tribunal accepted that the Bill of Rights requires that married homosexual couples be treated the same as other married couples under the Immigration Law.<sup>128</sup>

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122. See generally *supra* notes 43–60 and accompanying text.

123. See, e.g., Press Release, Cayman Is. Human Rights Comm'n, HRC's Statement on European Law, Human Rights and Same Sex Unions (June 23, 2016), [http://www.humanrightscommission.ky/upimages/commonfiles/HRCsStatementonEuropeanLawHumanRightsandSameSexUnions\\_1470789444.pdf](http://www.humanrightscommission.ky/upimages/commonfiles/HRCsStatementonEuropeanLawHumanRightsandSameSexUnions_1470789444.pdf) [<https://perma.cc/VR7G-YXWR>] (responding to recent European Court of Human Rights decisions and stating that “[a]ny suggestion that Cayman’s current legal framework is sufficient to survive a legal challenge in the Court on same-sex unions is wrong as a matter of law”).

124. In fairness to the Legislative Assembly, it should also be noted that legislation has been passed subsequent to the Bill of Rights coming into effect, which further enhances fundamental rights. See, for example, The Disabilities (Solomon Webster) Bill, 2016 (Cayman Is.), which sets out, *inter alia*, “to promote, protect and ensure the full enjoyment of human rights and fundamental freedoms, by persons with disabilities, on an equal basis with other persons.”

125. *IAT Finds in Gay Couple's Favour*, CAYMAN NEWS SERV. (July 22, 2016), <https://caymannewsservice.com/2016/07/iat-finds-in-gay-couples-favour> [<https://perma.cc/VUC2-Z7MK>].

126. See Marriage Law (2010 Revision) § 2 (Cayman Is.) (“‘[M]arriage’ means the union between a man and a woman as husband and wife.”).

127. See CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 14, pt. I (“Government shall respect the right of every unmarried man and woman of marriageable age . . . freely to marry a person of the opposite sex . . .” (emphasis added)).

128. The unreported decision of the Immigration Appeals Tribunal was handed down on July 20, 2016. See *IAT Finds in Gay Couple's Favour*, *supra* note 125. The appellant, Leonardo Raznovich, was an Argentinian national who had not had his contract of employment renewed and was consequently advised by the Immigration Department that he would be required to leave the Cayman Islands. See *Same-Sex Couple Plan Immigration Challenge*, CAYMAN NEWS SERV. (Sept. 2, 2015), <https://caymannewsservice.com/2015/09/same-sex-couple-plan-immigration-challenge> [<https://perma.cc/82NR-Q3RH>]. His spouse, a British citizen who was also employed as a lawyer in the Cayman Islands (Raznovich and his husband were legally married in both their home countries), applied for Mr. Raznovich to be added as a dependent on his work permit. See *id.* Although spouses were normally accommodated in this way, the Immigration Board declined to apply the law in a similar fashion to Mr. Raznovich and his husband. See *id.* Mr. Raznovich and his husband appealed to the Immigration Appeals Tribunal on the basis that the Immigration Board's decision was

However, only one member of the Legislative Assembly has indicated any semblance of positive support for the rights of the LGBT community.<sup>129</sup> Therefore, it is highly unlikely that sufficient support could be mustered for legislative reform advancing LGBT rights for the time being. This would likely be the case even in the face of a declaration of incompatibility or, as is perhaps more likely, a successful challenge under the ECHR. The inability of the courts to prefer rights over existing statutory provisions is, of course, by design. Ultimately, the politicians preferred to retain the final decision and were not prepared to cede this to an unelected judiciary. Some may say that in a democracy the legislature is precisely where the final say should be, but this does not account for the needs of minorities—those often most in need of the protection generally afforded by a bill of rights.

This predicament is compounded by the small size of the Cayman Islands electorate and the recent establishment of a system of single-member constituencies in which the electorate in each individual constituency could be as small as 650 persons.<sup>130</sup> Even where the size of the constituency is twice this, it remains that only a very small number of electors has to swing in order to change the outcome of an election in a particular constituency. In these circumstances, the likelihood of a politician doing something that might alienate even a small percentage of the electorate is significantly diminished. This is not a unique or new situation, as evidenced by the reluctance of various overseas territories to attend to certain controversial matters in the past, resulting in the United Kingdom moving to address these through the enactment of Orders in Council.<sup>131</sup> With these factors in play, the suitability of using sections 23 and 25 of the Bill of Rights as a mechanism for the

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discriminatory and contrary to the Bill of Rights. *See IAT Finds in Gay Couple's Favour*, *supra* note 125.

129. *See* Press Release, Cayman Is. Human Rights Comm'n, Statement on the Motion to Retain the Definition of Marriage (Aug. 20, 2015), [http://www.humanrightscommission.ky/upimages/commonfiles/StatementontheMotiontoRetaintheDefinitionofMarriage\\_1470788639.pdf](http://www.humanrightscommission.ky/upimages/commonfiles/StatementontheMotiontoRetaintheDefinitionofMarriage_1470788639.pdf) [<https://perma.cc/6GCX-4MSB>]; *Panton Offers Backing to LGBT Community*, CAYMAN NEWS SERV. (Aug. 19, 2015), <https://caymannewservice.com/2015/08/panton-offers-backing-to-lgbt-community> [<https://perma.cc/SNF8-NQAB>]. The vehemence with which the opposition to LGBT rights was expressed in the course of the debate on a private members' motion asking the Government to preserve "traditional marriage" prompted the Human Rights Commission to issue a press release condemning what it described as "poisonous hate speech" and noting its regret that "the overwhelming majority of Members present at that 'debate' did not see fit to challenge these statements in any way." Cayman Is. Human Rights Comm'n, *supra*.

130. *See The Official Register of Electors*, ELECTIONS OFF. CAYMAN IS. GOV'T, <https://portal.elections.ky/index.php/home/official-register> [<https://perma.cc/B3XD-85SD>]. Under the previous arrangements, the North Side constituency had the fewest electors with 651. *Id.* Under the new arrangement with nineteen single-member constituencies that will be applicable in the May 2017 general election, the Cayman Brac East constituency may have even fewer electors. *Id.*

131. *See, e.g., supra* notes 23–24 and accompanying text.



advancement of fundamental rights may—notwithstanding that it has held up well to date—be called into question in due course.

The *Raznovich* decision of the Immigration Appeals Tribunal is also an example of another potential issue, which is that many claims involving the Bill of Rights are not making it to the courts. In *Raznovich*, the Government opted not to pursue its right of appeal, presumably because it had determined that the prospects for a successful appeal were not good.<sup>132</sup> Other challenges to administrative decisions by way of judicial review are now subject to a pre-action protocol, which requires persons to send a standard letter to the Attorney General before taking legal action to determine whether litigation can be avoided.<sup>133</sup> While this is undoubtedly prudent, particularly given the increasing use of judicial review,<sup>134</sup> the more cynical might also suggest that this affords the Attorney General an opportunity to settle cases that might potentially give rise to broader, potentially troubling precedents. Although on one hand, the settlements indicate that the Bill of Rights is having an effect and individuals are obtaining practical solutions to their problems, on the other it could prove to be concerning if this serves to limit the development of jurisprudence under the Bill of Rights by the local courts.

This process may well explain why the anticipated rush of cases in areas such as immigration has not materialised before the courts. However, in the main immigration case to reach the courts, the Chief Justice in *In re Hutchinson-Green* provided some pointers as to how section 19—one of the extra-ECHR rights incorporated into the Bill of Rights—will be applied.<sup>135</sup>

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132. See *IAT Finds in Gay Couple's Favour*, CAYMAN NEWS SERV. (July 22, 2016), <https://caymannewsservice.com/2016/07/iat-finds-in-gay-couples-favour> [<https://perma.cc/VUC2-Z7MK>].

133. PRACTICE DIRECTION NO. 4 OF 2013, GRAND CT. R. O. 1, R. 12, <https://judicial.ky/wp-content/uploads/practice-directions/PracticeDirection4of2013-Pre-action-ProtocolforJudicialReview.pdf> [<https://perma.cc/A3F7-KBMM>].

134. See Vaughan Carter, *Friend or Foe: Judicial Review Development*, CAYMAN FIN. REV. (Aug. 8, 2014), <http://www.caymanfinancialreview.com/2014/08/08/friend-or-foe-judicial-review-developement> [<https://perma.cc/TEY6-CZHZ>].

135. See *In re Hutchinson-Green*, Nos. G0386, G0387 of 2013 (Cayman Is. Grand Ct. Aug. 28, 2015), <https://caymannewsservice.com/wp-content/uploads/2015/08/Chief-Justice-ruling-Hutchinson-and-Racz-v-IAT.pdf> [<https://perma.cc/492Q-4RN6>]. The decision in *Hutchinson-Green and Racz* is particularly significant in the context of the Cayman Islands and the importance of its Immigration Law as a mechanism for regulating population growth, as it has called into question the entire regime employed for the grant of permanent residency in the Cayman Islands. See *id.* Following this decision, all applications for permanent residency have been put in a holding pattern and a review instigated. Brent Fuller, *Women at Center of Landmark Immigration Case Granted PR*, CAYMAN COMPASS (July 17, 2016), <https://www.caymancompass.com/2016/07/17/women-at-center-of-landmark-immigration-case-granted-pr> [<https://perma.cc/WX68-H7ZQ>]. The Government now has the result of the review that it commissioned, but it is presently approaching eighteen months since the judgment and it remains unclear as to how the Government proposes to fix this problem. See *id.*

Section 19 provides that “[a]ll decisions and acts of public officials must be lawful, rational, proportionate and procedurally fair” and “[e]very person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.”<sup>136</sup> However, unlike most of the other rights in the fundamental-rights chapter, “there is little guidance to be drawn from the ECHR, or indeed from other Commonwealth Caribbean Constitutions,” as to how these concepts should be interpreted now that they have been elevated to the status of fundamental right and enshrined in the Constitution.<sup>137</sup> The principles of administrative justice have a long common-law heritage, although the extent to which the judiciary could exercise supervisory jurisdiction over the executive in common-law countries was limited by the landmark decision of the England and Wales Court of Appeal in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*<sup>138</sup> *Wednesbury* established that in order to successfully challenge an administrative decision for unreasonableness (or irrationality as it has been termed more recently<sup>139</sup>), the decision not only had to be unreasonable, but had to be so unreasonable that no reasonable authority could have made it.<sup>140</sup>

There was some promise that the effects of *Wednesbury* could be mitigated by the introduction of section 19(1), which provided for a more measured ground of proportionality.<sup>141</sup> The notion was that it would be easier to establish that an administrative decision was disproportionate than to establish that it was unreasonable under the stricter *Wednesbury* test. Similarly, the general right to request and be given reasons for decisions or acts of public officials appears to be broader than the common-law position at present, although it is expressly limited to persons who have been adversely affected by such decisions or acts.<sup>142</sup>

The reference to section 19 in *Hutchinson-Green*, however, was more concerned with validating a line of common-law authorities that have served as a basis for subjecting administrative action to “height-

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136. CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 19.

137. Vaughan Carter, *The Right to Lawful Administrative Action in the Cayman Islands: Maybe Novel, but Not Dangerous*, CAYMAN FIN. REV. (Oct. 31, 2014), <http://www.caymanfinancialreview.com/2014/10/31/the-right-to-lawful-administrative-action-in-the-cayman-islands> [https://perma.cc/79RC-TZ4S] (noting that the right to lawful administrative action was not drawn from the ECHR and suggesting that looking to other countries with similar constitutional provisions could provide helpful guidance).

138. *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.* [1948] 1 KB 223 (appeal taken from Eng.) (UK).

139. *Council of Civil Service Unions v. Minister for the Civil Service* [1985] 1 AC 374 (HL) 410 (UK) (Lord Diplock).

140. *Wednesbury*, [1948] 1 KB at 230, 234.

141. See CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 19(1).

142. See *id.* § 19(2); Mark Elliott, *Has the Common Law Duty to Give Reasons Come of Age Yet?*, 2011 PUB. L. 56, 58–59.

ened scrutiny” where the decision at issue involved some aspect of human rights than the latent potential for the development of a new branch of administrative law that lurks in section 19.<sup>143</sup> In *Axis International Ltd. v. Civil Aviation Authority*, the court took its duty to apply heightened scrutiny as one that arose depending upon the context of the case at hand, and only when it arose would the decision maker be subject to more “anxious” examination.<sup>144</sup> Following this decision, the Chief Justice determined that “in such cases – which will more readily arise in the human rights context – the Court should not necessarily be looking for an extreme degree of unreasonableness, capriciousness or absurdity on the part of the decision-maker before intervening, something less will do.”<sup>145</sup>

The Grand Court also considered section 19 in *Coe v. Governor*, a case concerning protracted objections to the closure of a portion of West Bay Road in the main tourism district on Grand Cayman and the associated deal struck between a major developer and the Government.<sup>146</sup> Much of the argument in this case became mired in the question of whether the action, which had been initiated by writ but challenged the decision to close the road on the basis that it was unconstitutional, was procedurally permissible.<sup>147</sup> Relaxing the traditional approach to procedural exclusivity and accepting that a challenge brought in this fashion would not necessarily amount to an abuse of process where personal rights and freedoms enshrined in the Constitution were at stake, Justice Henderson nevertheless held that the time limit for the claim under the Constitution had lapsed and a declaration of incompatibility was only available as part of a claim under section 26(1) of the Constitution.<sup>148</sup>

On appeal, the Court of Appeal confirmed that the two different procedures could co-exist, albeit that it was important to differentiate between the spheres in which each could properly be used, and that the established procedure for the judicial review of administrative action had not been abolished by the new Constitution.<sup>149</sup> Expanding on

143. See *In re Hutchinson-Green*, Nos. G0386, G0387 of 2013, at 12–14 (Cayman Is. Grand Ct. Aug. 28, 2015), <https://caymannewsservice.com/wp-content/uploads/2015/08/Chief-Justice-ruling-Hutchinson-and-Racz-v-IAT.pdf> [<https://perma.cc/492Q-4RN6>] (quoting *R v. Ministry of Defence* [1996] QB 517 (UK)) (citing *Axis Int'l Ltd. v. Civil Aviation Auth.*, [2014] 1 C.I.L.R. 12 (Cayman Is. Grand Ct.)).

144. See *Axis*, [2014] 1 C.I.L.R. at 66. As the decision at issue in this case predated the implementation of the Bill of Rights, the applicant did not plead a free-standing case and was limited to asserting that “the court, being itself bound to give effect to the principles enshrined in the Bill of Rights, should have regard to relevant constitutionally protected rights when determining the intensity of judicial review appropriate to this case . . . .” *Id.* at 67.

145. *Hutchinson-Green*, at 13.

146. See *Coe v. Governor*, [2014] 1 C.I.L.R. 251, 254–55 (Cayman Is. Grand Ct.).

147. See *id.* at 258–61.

148. *Id.* at 260–63.

149. See *Coe v. Governor*, [2014] 2 C.I.L.R. 465, 499–501 (Cayman Is. Ct. App.).

these different spheres, the Court of Appeal made some potentially damning statements concerning section 19 and the other extra-ECHR rights, the inclusion of which in the Bill of Rights had done much to offset the disappointment felt by some at section 16's curtailment in the final throws of the constitutional talks.<sup>150</sup>

In this case, particularly before the Grand Court, the Crown had asserted a distinction between the rights provided in the Cayman Constitution that mirror their counterparts in the ECHR and the additional rights that were added in sections 17–20 of the Bill of Rights.<sup>151</sup> The Crown argued that the fact that the full title of the human-rights chapter in the Constitution is “Bill of Rights, Freedoms *and Responsibilities*” meant that these additional rights ought to be characterised as “responsibilities” and not rights at all.<sup>152</sup> Buried at the end of the Court of Appeal's judgment is some acceptance of this distinction, where Justice of Appeal Sir Bernard Rix states:

[I]t seems to be possible to distinguish between on the one hand the fundamental personal human rights and freedoms which are set out in the Bill of Rights and which are familiarly found in constitutional documents such as the ECHR and, on the other hand, the responsibilities of government which are concerned with lawful administration and the furtherance of constitutionally important objectives such as the environment and education.<sup>153</sup>

However, this distinction is not entirely persuasive. While there are certainly aspects of the extra-ECHR rights included in the Cayman Islands Bill of Rights that are aspirational,<sup>154</sup> it is well-established in international human-rights law that even vaguely worded economic, social, and cultural rights are justiciable. The United Nations Office of the High Commissioner for Human Rights has summarised three propositions as to why these concepts are rights and ought to be enforceable as such.<sup>155</sup> In so doing, courts should approach determining what

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150. *See id.*

151. *See id.* at 500.

152. *See id.* at 475.

153. *Id.* at 500.

154. *See, e.g.,* CAYMAN ISLANDS CONSTITUTION June 10, 2009, § 17(1) (“[T]he Legislature shall enact laws to provide every child and young person under the age of eighteen . . . with such facilities as would aid their growth and development and to ensure that every child has [various other specified rights].”); *id.* § 20(2) (“[The] Government shall seek reasonably to achieve the progressive realisation, within available resources, of providing every child with [free] primary and secondary education. . . .”). Section 19 of the Bill of Rights, however, does not anticipate any future action, and furthermore, section 19(2) seems to provide an unequivocal right when it states: “Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.” *Id.* § 19(2).

155. *See Key Concepts on ESCRs – Can Economic, Social and Cultural Rights Be Litigated at Courts?*, UNITED NATIONS HUM. RTS.: OFF. OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/Issues/ESCR/Pages/CanESCRbelitigatedatcourts.aspx> [https://perma.cc/PYB9-K4HC].

constitutes, for example, “hunger, adequate housing or a fair wage” in the same way as they have previously approached determining what constitutes “torture, a fair trial or arbitrary or unlawful interference with privacy”—by filling in any gaps that may be present.<sup>156</sup> Acknowledging that the “realization of economic, social and cultural rights depends heavily on Government policies,” courts should review “policies in this area, as in any other, to ensure that they are consistent with constitutional principles and obligations under international human rights law.”<sup>157</sup> Furthermore, courts should monitor the progressive realization of such rights, including “by considering whether the steps taken by the Government” to further these rights are reasonable.<sup>158</sup>

These counterpoints were not addressed in Justice of Appeal Rix’s judgment.<sup>159</sup> Therefore, it would be surprising if his pronouncement, which taken to its logical conclusion would amount to a dismembering of the Bill of Rights, was the final word on this matter—notwithstanding that it was handed down in the name of the Court of Appeal.

### III. CONCLUSION: MORE EVOLUTION THAN REVOLUTION

For all the acrimony that surrounded, and the expectation that accompanied, the first-ever Bill of Rights in the Cayman Islands, its introduction has not resulted in the flood of cases that some undoubtedly feared and others perhaps dreamed of. Case law has been generated, although not necessarily in the areas that most commentators would have envisioned. Since the low-hanging fruit had been picked off in *Nairne*,<sup>160</sup> the challenges to criminal procedure in the Cayman Islands have not revealed any glaring deficiencies. Thus, while the Bill of Rights continues to be raised in various criminal cases, it is not as if these are unearthing widespread abuses of power and miscarriages of justice. On the contrary, the effect of the Bill of Rights in this area has been to largely affirm the robustness of the existing system.

At the same time, another area in which much was expected—immigration—has not proven to be fertile ground, at least not with respect to cases reaching the Grand Court. But this does not mean that all is totally well here. In its 2015 annual report, the Human Rights Commission reported that eleven of the thirty-nine complaints that it had received during the course of the year involved immigration and the operation of the Immigration Department or its connected statu-

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156. *Id.* (emphasis omitted).

157. *Id.*

158. *Id.* As an example, “[a] failure to take into account the needs of the most vulnerable in . . . a housing policy would suggest that the policy would not meet the test of reasonableness.” *Id.*

159. *Coe v. Governor*, [2014] 2 C.I.L.R. 465 (Cayman Is. Ct. App.).

160. *See In re Nairne*, [2013] 1 C.I.L.R. 345 (Cayman Is. Grand Ct.).

tory boards.<sup>161</sup> If there are immigration issues, then why are most of these complaints not reaching the courts? The introduction of the Pre-Action Protocol for Judicial Review and the opportunities for settlement that came about as a result are likely part of the explanation.<sup>162</sup> However, the fact that many of these immigration issues disproportionately affect the poorer elements of Caymanian society may also indicate that there are financial barriers to pursuing these types of cases all the way through to the courts.

It is interesting to juxtapose this unexpected shortfall with the number of high-profile commercial cases where litigants are more likely to be well-funded. This includes cases before the Financial Services Division of the Grand Court in which the Bill of Rights has been cited. In addition to in *Axis International Ltd.*,<sup>163</sup> the Bill of Rights has been successfully used to challenge the release of tax information by the Cayman Islands Tax Information Authority to its Australian counterparts in breach of the rights to privacy and a fair and public hearing in sections 9 and 7 of the Bill of Rights.<sup>164</sup> And in the context of the Companies Winding Up Rules and an application for security for costs, discriminatory treatment between different classes of litigants, including based on national origin, was found to violate section 16 in conjunction with section 7.<sup>165</sup> This is perhaps not altogether surprising given the nature of the Cayman economy and the reflection of this in the types of cases that proliferate in the courts. It would, however, be somewhat novel for these cases to dominate entirely and define the jurisprudence of the Bill of Rights. It will be curious to monitor this trend over the next five years to see if it continues or if there is greater diversification in the types of cases in which the Bill of Rights is being utilised effectively.

Other preliminary conclusions can also be drawn from the jurisprudence engendered by the Bill of Rights thus far. These tend to coalesce around two themes: the enforcement mechanism in the Bill of Rights and the interplay between the Bill of Rights and the ECHR. Regarding the first of these themes, it has quickly become apparent that the courts are relatively limited when it comes to actually providing a remedy for statutory provisions that infringe on the Bill of Rights. In both *Nairne* and *Borden*, the Grand Court established strict

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161. See CAYMAN IS. HUMAN RIGHTS COMM'N, ANNUAL REPORT 2015 20 (2015). Of thirty-nine complaints made to the HRC, seven were against the Immigration Department, and two each were against the Immigration Appeals Tribunal and the Caymanian Status and Permanent Residency Board. *Id.*

162. See PRACTICE DIRECTION NO. 4, *supra* note 132.

163. *Axis Int'l Ltd. v. Civil Aviation Auth.*, [2014] 1 C.I.L.R. 12 (Cayman Is. Grand Ct.).

164. See *Cayman Is. Tax Info. Auth. v. M.H. Invs. Ltd.*, [2015] 2 C.I.L.R. 52 (Cayman Is. Ct. App.) (dismissing the Tax Authority's appeal of an unreported judgment).

165. See *Dyxnet Holdings Ltd. v. Current Ventures II Ltd.*, [2015] 1 C.I.L.R. 174, 201-02 (Cayman Is. Ct. App.).

parameters for its interpretive obligation.<sup>166</sup> Moreover, in *Nairne*, Justice Henderson went on to indicate that the way in which the interpretive obligation was drafted in the Cayman Islands Bill of Rights would likely limit the opportunities for the courts to even engage in this exercise, rendering the courts in most instances where there is a conflict between primary legislation and the Bill of Rights with little option but to issue a declaration of incompatibility and shift responsibility for the final resolution of the conflict to the legislature.<sup>167</sup> Ultimately, in *Coe*, the Grand Court limited the availability of a declaration of incompatibility itself to claims brought under section 26(1) of the Constitution.<sup>168</sup>

With respect to the second theme, the court in *Borden* also determined that the Bill of Rights and the ECHR shared a common heritage, and as such, the Bill of Rights did not herald a departure from pre-existing case law.<sup>169</sup> In *Axis International Ltd.*, the Chief Justice had previously accepted that fundamental rights “were not created but only affirmed by the introduction of the Bill of Rights” and, in so doing, a foundation was laid for limiting the impact of section 19 of the Bill of Rights to a crystallization of existing common-law principles.<sup>170</sup> Therefore, the heightened-scrutiny concept was accepted in *Hutchinson-Green* where the decision at issue gave rise to human-rights concerns, and the suggestion that including proportionality in section 19(1) was an advancement on the common law in *Coe* was marginalised.<sup>171</sup> The scope for section 19 to strike out on its own was further stymied by the Court of Appeal in *Coe* with the distinction between the rights in the Bill of Rights that are also featured in the ECHR—these being what might normally be viewed as justiciable fundamental rights—and the extra-ECHR rights that were also included in the Bill of Rights, which perhaps should not be considered rights at all.<sup>172</sup>

Both themes disclose a narrow application of the first-ever Bill of Rights in the Cayman Islands. The former would seem to be by design, borrowing a tried and tested enforcement mechanism from the United Kingdom Human Rights Act,<sup>173</sup> which was itself conceived to complement the United Kingdom’s unwritten constitution.<sup>174</sup> Although not as explicit in terms of intent, the latter reflects the long-

166. See *supra* notes 83–115 and accompanying text.

167. See *supra* notes 90–121 and accompanying text.

168. See *supra* notes 146–148 and accompanying text.

169. *In re Borden*, [2013] 2 C.I.L.R. 444, 460 (Cayman Is. Grand Ct.).

170. *Axis Int’l Ltd. v. Civil Aviation Auth.*, [2014] 1 C.I.L.R. 12, 70 (Cayman Is. Grand Ct.).

171. See *Coe v. Governor*, [2014] 2 CILR 465, 499 (Cayman Is. Ct. App.).

172. See *id.* at 500.

173. See *supra* notes 87–89 and accompanying text.

174. See Robert Blackburn, BRIT. LIBR., <https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution> [<https://perma.cc/6MZ8-4MLT>] (U.K.).

standing connections between the common law, the ECHR, and the rights embodied in the Bill of Rights. Given the delays in enshrining a bill of rights in the Cayman Islands Constitution and the reliance on the common law and the ECHR in the interim, it was always a good bet that these connections would come to the fore. However, these very connections, which originally served as the inspiration for creative and inventive ways to advance fundamental rights in the absence of a directly enforceable bill of rights, now seem to be susceptible to deployment as forces of constraint and as a basis for checking the pace of change resulting from the Bill of Rights's introduction.

According to the Cayman Islands Constitutional Commission, the Constitution is a "living document," which may "grow, expand, adapt [and] . . . evolve."<sup>175</sup> It may well be that in time this growth, expansion, adaptation, and evolution will propel the Cayman Islands Bill of Rights and revolutionise the legal system of the Cayman Islands. However, for the time being, its impact is more a process of gradual evolution than the immediate revolution that some might have anticipated.

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175. *Why is Cayman's Constitution Referred to as a "Living Document"?*, KNOW YOUR CONST., <http://www.knowyourconstitution.ky/why-is-caymans-constitution-referred-to-as-a-living-document> [<https://perma.cc/JMW2-EU77>].



