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ORIGINAL ARTICLE

# Human Rights at the Edges of Late Imperial Britain: The *Tyrer* Case and Judicial Corporal Punishment from the Isle of Man to Montserrat, 1972–1990

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## Abstract

In *Tyrer v. United Kingdom* (1978), the European Court of Human of Human Rights ruled that judicial corporal punishment contravened Article 3 of the European Convention on Human Rights, which proscribed "degrading treatment or punishment." The case unfolded at a formative moment in British legal activism, as left-wing civil-liberties lawyers who had been wary of human rights discourse began taking cases to Strasbourg. The case also involved tactical challenges for British politicians and government lawyers. The case originated on the Isle of Man, which is close to the British mainland but constitutionally not part of the United Kingdom: it is a "crown dependency" with its own executive, legislature, and judiciary, and it persisted with judicial corporal punishment long after the practice had been abolished in Great Britain. By convention, the British government respected the island's laws and criminal-justice policies, but Britain was responsible for the island's compliance with international agreements—including the European Convention on Human Rights. How the British government dealt with the Isle of Man during and after the litigation had direct implications for a host of other small territories in what remained of the British empire—in particular, Britain's remaining Caribbean territories. The Tyrer case's protracted endgame was an object lesson in how much Britain's "unwritten" constitution depends on negotiation, manipulation, and avoiding the overt exercise of powers that might crumble upon use.

Britain's involvement in European institutions is often taken to entail a concession of sovereignty—a national betrayal, from one point of view, or a strategic pooling of sovereign power in a world faced with challenges too complex for

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nation states. Arguments of both kinds were made before the United Kingdom's 1975 referendum on European Community membership as well as the 2016 Brexit referendum.[1] "Euroskeptics" have long denounced adherence to the European Court of Human Rights in Strasbourg as an unacceptable limitation on British sovereignty.[2] Yet, as the case of *Tyrer v. United Kingdom* showed in the 1970s, enforcing international human rights obligations called for state power that the British constitution could not consistently deliver.[3] Supranational human rights guarantees, far from eroding the authority of the state, depended on the exercise of central state power over regions and dependencies. At issue in *Tyrer* was whether the whipping, or "birching," of juvenile offenders on the Isle of Man constituted "degrading treatment or punishment" under the European Convention on Human Rights. When the court found that it did, the British government had to secure compliance from the island authorities. Although the Isle of Man is just off the coast of Great Britain, it had some of the constitutional features, and expectations, of a former colony.[4] How the government dealt with the Isle of Man had direct implications for a host of other small territories in the Commonwealth, as the British empire had come to be called, particularly in the Caribbean. The judgment's protracted endgame was an object lesson in how much Britain's "unwritten" constitution depended on negotiation, manipulation, and avoiding the overt exercise of powers that might crumble upon use.

Britain had played a key part in drafting the European Convention on Human Rights and ratified it in 1951, but until 1966 individuals could not sue the government to enforce the Convention.[5] The Labour government of

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[1] Robert Saunders, *Yes to Europe! The 1975 Referendum and Seventies Britain* (Cambridge: Cambridge University Press, 2018), ch. 8; Anand Menon and Alan Wager, "Taking Back Control: Sovereignty as Strategy in Brexit Politics," *Territory, Politics, Governance* 8, no. 2 (2020): 279–84.

[2] Conor Gearty, *On Fantasy Island: Britain, Europe, and Human Rights* (Oxford: Oxford University Press, 2016), 97–112; Roger Masterman, "The United Kingdom: From Strasbourg Surrogacy towards a British Bill of Rights?" in *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-dynamics at the National and EU Level*, eds. Patricia Popelier, Sarah Lambrecht and Koen Lemmens (Antwerp: Intersentia, 2016), 449–78.

[3] *Tyrer v. United Kingdom*, App. No. 5856/72, A/26, European Court of Human Rights, April 25, 1978, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57587%22]}; *Tyrer v. United Kingdom*, App. No. 5856/72, European Commission of Human Rights decision of December 14, 1976, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-73487%22]}. Subsequent references to are "*Tyrer* (commission)" for the decision of the European Commission of Human Rights and to "*Tyrer* (court)," for the decision of the European Court of Human Rights.

[4] Augur Pearce, "When Is a Colony Not a Colony? England and the Isle of Man," *Common Law World Review* 32, no. 4 (2003): 368–98.

[5] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010), 185–88. On Britain and the origins of the Convention, see A. W. Brian Simpson, *Human Rights at the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), chs 12–16; Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (New York: Oxford University Press, 2017), ch. 8; Mikael Rask Madsen, *La genèse de l'Europe des droits de l'homme: Enjeux juridiques et stratégies d'État (France, Grande-Bretagne et pays scandinaves, 1945–1970)* (Strasbourg: Presses universitaires de Strasbourg, 2010), 129–211.

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1964–1970 signed on to the optional clause in the Convention allowing individuals access to the European Commission of Human Rights (which heard cases at first instance) and the European Court of Human Rights (which heard cases referred to it by the commission) for three years. The government renewed it for another three years in 1969. When the decision to renew the right of individual petition came around again, cases before the commission were putting considerable pressure on the British government. The Conservative Party, led by Edward Heath, was now in power, and Cabinet seriously considered letting the right of individual petition lapse. At the end of 1973, the home secretary, Robert Carr, noted that Britain's denial of the right to enter and remain to British passport-holders from East Africa had been ruled a violation of the Convention; a hundred prisoners in Britain were petitioning the commission each year over their treatment; and in Northern Ireland, "[t]he introduction of internment, combined with allegations of torture, could well lead to an increase in the number of … [applications to Strasbourg] used as a political weapon with the deliberate intention of fomenting prejudice and suspicion."[6] Cabinet resolved to renew individual petition for another two years only (though the next government renewed access again, and as has every government since). People in the United Kingdom and its dependencies thus had the right to petition the European Commission on Human Rights when Anthony Tyrer and Andrew Hays were birched in Castletown on the Isle of Man and took steps to challenge the institution of corporal punishment in 1972.

The *Tyrer* case unfolded at a formative moment in British legal activism, as left-wing civil-liberties lawyers who had been wary of human rights discourse began taking cases to Strasbourg. The early and mid-1970s were also a pivotal moment in the history of the European human rights bodies. The Strasbourg institutions became increasingly assertive and began to have a pronounced impact on the legal systems of the contracting states—especially Britain's.[7] Mikael Rask Madsen has observed that "the United Kingdom was the first member state in which the Court had a real, immediate, and continuous domestic importance as well as a broader audience."[8] In many cases of this time, the court and commission explored relatively uncharted territory—including, in *Tyrer*, the meaning of "degrading treatment or punishment" in Article 3 of the European Convention on Human Rights. What amounted to "degrading treatment or punishment" could change over time. *Tyrer* is best known today as the case in which the European Court of Human Rights expressly endorsed the principle of dynamic and evolutive interpretation.[9] The Convention was "a living instrument which … must be interpreted in light of present-day conditions."[10]

[6] The National Archives, London, FCO 41/1112, "Cabinet: European Convention on Human Rights: Memorandum by the Secretary of State for the Home Department," n.d. (December 1973).

[7] Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79, no. 1 (2016): 141–78, 151–55.

[8] Ibid., 158. See also Carol Harlow and Richard Rawlings, *Pressure through Law* (London: Routledge, 1992), ch. 6.

[9] Bates, *Evolution of the European Convention*, 328–30.

[10] *Tyrer* (court), para. 31.

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Yet the present was heterogeneous. The Convention's framers saw the rights it protected by the Convention as specifically European. Whether they extended to contracting states' overseas territories depended on "local requirements," in the words of Article 63(3)—on how far colonial subjects had progressed toward "civilization."[11] Defending this hierarchy of civilization was fraught by the 1970s.[12] When it found whipping to constitute degrading punishment, the European Court of Human Rights declared that the Isle of Man had always been part of "the European family of nations" and subject to their level of "civilization."[13] British officials and government lawyers did not want British territories to fall below the standards of the rest of "western Europe," but, in an age of decolonization and calls for regional autonomy within the United Kingdom itself, most of them were reluctant to tell local politicians on the Isle of Man, let alone the Caribbean, that they had to measure up to civilized standards.

## I

In the Irish Sea between Liverpool and Belfast, the Isle of Man is British territory but not part of the United Kingdom. The Royal Commission on the Constitution, established by the British government at the end of the 1960s in response to independence movements in Scotland and Wales, described its "constitutional position" as unique and its "system … of government" "not capable of description by any of the usual categories of political science."[14] Like the Channel Islands of Jersey and Guernsey, the Isle of Man is a "crown dependency" with its own executive, legislature, and judiciary. Although the crown dependencies make their own domestic laws, they are represented by the British government in their relations with other nations and with international bodies. Tyrer and Hays' petition to the European Commission of Human Rights brought the Isle of Man's penal policy into the sphere of Britain's foreign relations.

Whipping as punishment for a crime was largely abandoned in Britain in the nineteenth century, at least for adult offenders. In the United Kingdom up to the eve of World War II, flogging was still deemed suitable for the young, partly because of the lack of prisons for young offenders. The Attlee Labour

[11] Duranti, *The Conservative Human Rights Revolution*, 323–26.

[12] On "civilization," imperialism, and international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2002); Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004); Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law*, trans. Christopher Sutcliffe (2011; English trans. Cambridge: Cambridge University Press, 2012). A recent sample of historical scholarship on postwar human rights and empire can be found in A. Dirk Moses, Marco Duranti and Roland Burke, eds. *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (New York: Cambridge University Press, 2020).

[13] *Tyrer* (court), para. 38.

[14] *Report of the Royal Commission on the Constitution*, Cmnd. 5460 (London: HMSO, 1973), vol. 1, paras 1360, 1459; O. Hood Phillips and Paul Jackson, *O. Hood Phillips' Constitutional and Administrative Law*, 6th ed. (London: Sweet and Maxwell, 1978), 659–60.

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government abolished judicial corporal punishment in Great Britain (i.e., England, Scotland, and Wales) in 1948.[15] The 1948 legislation did not extend to Northern Ireland.[16] The use of whipping not only continued, but escalated, against indigenous people in British colonies, notably in Kenya.[17] In 1956, the Greek government brought a case against the United Kingdom to the European Commission of Human Rights alleging that corporal punishment regulations in Cyprus, a "crown colony" at the time, contravened the Convention, among other abuses committed by British authorities there. The commission abstained on the matter, determining that the British government had the power to derogate from the Convention due to the existence of a "public emergency" in their colony. The commission suggested more broadly, however, that the judicial corporal punishment of youth "raises legal issues of some seriousness" under the Convention and expressed approval of its abolition in the metropole.[18]

On the Isle of Man, whipping with a bundle of dried birch branches remained a conspicuous part of the penal system, and even a symbol of Manx identity. Civic leaders set great store in the idea of the Isle of Man as a safe, proper place: a peaceful place to retire (a disproportionate number of its residents were retirees) and a more respectable vacation destination than England's seaside resorts. The Manx authorities regarded the threat of the birch as a warning to tourists, though it was meted out to locals as well. The sentence was only available for males aged between 14 and 21, an age bracket that had once consisted almost entirely of wage-earners still living with their parents but which, by the 1970s, included a substantial number of young men still at school (being hit with a cane was a standard punishment in schools on the Isle of Man as in England).[19] The symbolic importance of birching was out of proportion to the number of actual sentences. Between 1967 and 1972, the number of birchings each year ranged from zero to seven.[20]

[15] *Corporal Punishment: Report of the Advisory Council on the Treatment of Offenders*, Cmnd. 1213 (London: HSMO, 1960), paras 4–6; Victor Bailey, "The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945–51," *Law and History Review* 18, no. 2 (2000): 305–49, 318–40; Owen George Emmerson, "Childhood and the Emotion of Corporal Punishment in Britain: 1938–1986" (PhD thesis, University of Sussex, 2019), chs 2–3. Attempts to reinstate whipping followed almost immediately: Mark Jarvis, *Conservative Governments, Morality and Social Change in Affluent Britain, 1957–64* (Manchester: Manchester University Press, 2005), 26, 43, 50–54.

[16] Criminal Justice Act (1948 c. 58), s. 82.

[17] David M. Anderson, "Punishment, Race and 'the Raw Native': Settler Society and Kenya's Flogging Scandals, 1895–1930," *Journal of Southern African Studies* 37, no. 3 (2011): 479–97; Paul Ocobock, "Spare the Rod, Spoil the Colony: Corporal Punishment, Colonial Violence, and Generational Authority in Kenya, 1897–1952," *International Journal of African Historical Studies* 45, no. 1 (2012): 29–56; Amanda Nettelbeck, "Flogging as Judicial Violence: The Colonial Rationale of Corporal Punishment," in *Violence, Colonialism and Empire in the Modern World*, eds. Philip Dwyer and Amanda Nettelbeck (Cham: Palgrave, 2017), 111–30.

[18] *Greece v. United Kingdom*, App. No. 176/56, European Commission of Human Rights report of September 26, 1958.

[19] *Tyrer* (court), para. 12; Summary Jurisdiction Act 1960 (Isle of Man), s. 8.

[20] *Tyrer* (court), para. 18.

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Birching enjoyed strong public support on the Isle of Man, but when magistrates acted precipitately or particularly harshly in passing the sentence, there were calls for reform even from establishment figures on the island. Additional provision for appeal was introduced in 1969 after the whipping of a fifteen-year-old boy from Preston in Lancashire.[21] He and his girlfriend, also fifteen, had travelled to the Isle of Man and managed to convince a landlady that they were married. Their landlady realized they had taken money from the electricity meter and called the police, who found the two in the attic, unconscious. They had written a joint suicide note and taken an overdose, but the sedatives they had swallowed turned out not to be life-threatening. Two days later, the young man stood trial for snatching a woman's handbag the week before the couple had tried to end their lives. The magistrates found him guilty and had him birched.[22] In 1972, Raymond Kenison, a Manx probation officer, persuaded the local branch of the probation officers' trade union to campaign against the "barbaric" punishment.[23] The most persistent local activist was the Belgian-born Angela Kneale, the Isle of Man's honorary French consul.[24] The National Council for Civil Liberties (NCCL) kept itself informed of birching cases on the island, but it was more interested in corporal punishment in schools.[25] The NCCL's involvement in the fight against judicial corporal punishment spiked dramatically in 1972 when it took up the case of Anthony Tyrer and Andrew Hays.

Tyrer and Hays and two other boys brought beer into their high school in Castletown, south of the island's capital, Douglas. A prefect—another student—caught them and reported them to the head teacher, who caned them. Later on they found the prefect and beat him up.[26] They knocked him to the ground and kicked him in the head, the legs, and the groin.[27] Hays was on probation for larceny and house-breaking and the head teacher said he had "the makings of a young delinquent."[28] Tyrer had been cautioned twice for unspecified offenses but had no criminal convictions.[29] He had "rarely been in

[21] Criminal Appeal Act 1969 (Isle of Man), s. 1.

[22] "Parents of Birched Boy Want Probe," *Daily Mirror*, November 16, 1969; "Birch for Boy Angers Islanders," *Guardian*, November 18, 1969; "Birching Bringing Isle of Man into Dispute, Says MP," *Daily Telegraph*, November 26, 1969; "Manx Birching Appeal Rules Approved," *The Times*, January 21, 1970.

[23] "Campaign against Birching," *Liverpool Echo*, June 17, 1972.

[24] "The Birch," *Liverpool Echo*, February 1, 1974; "Crusader in an Emotional Minefield," *Liverpool Daily Post*, February 1, 1974.

[25] Hull History Centre, Liberty Archive, U DCL/600/2. On the campaign against corporal punishment in schools, see Andrew Burchell, "*In Loco Parentis*, Corporal Punishment and the Moral Economy of Discipline in English Schools, 1945–1986," *Cultural and Social History* 15, no. 4 (2018): 551–70.

[26] National Archives, HO 284/16, European Commission of Human Rights, decision on the admissibility of applications by Andrew Hays and Anthony M. Tyrer (sitting of July 19, 1974).

[27] HO 284/16, minutes of proceedings at Juvenile Court, Castletown, March 7, 1972.

[28] Ibid.; HO 284/16, R. Kennison, probation officer's social enquiry report on Hays, March 7, 1972; J. R. Smith, head teacher's report on Hays, March 2, 1972.

[29] HO 284/16, minutes of proceedings at Juvenile Court, Castletown, March 7, 1972.

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trouble" at school.[30] The four youths were charged with assault occasioning actual bodily harm. They were convicted and sentenced to birching by the Castletown magistrates. Hays was sentenced to five strokes, though after examining him the doctor recommended he be given no more than three.[31] Tyrer was to be given three strokes because of his good conduct at school.[32] Tyrer appealed to the island's High Court, to no avail.[33] When he went with his mother for the medical examination required before the sentence could be carried out, he was "in a distressed state," which the doctor blamed on his mother: "It's all your fault, you should have let him be birched in the first place," rather than appealing.[34] The doctor certified that he was fit to be birched, and he went, this time with his father, to the court building. Police officers led them upstairs to what Tyrer thought was the jury room. Police officers "told me to take my trousers and underpants down and bend over a table in the room. I was held by my head in a sort of ninety degree position so that I could not see what was happening. I was also held by a policeman by each arm."[35] This was the standard procedure.[36] Tyrer continued: "On the first stroke the birch broke. I remember pieces being shattered all over the room." After the third stroke, his father could not contain himself and "went for" one of the police officers. The other officers restrained his father and the birching stopped. "I pulled up my trousers and went downstairs to my mother, leaving my father with the police."[37]

Tyrer and Hays then petitioned the European Commission of Human Rights with the help of a lawyer from the NCCL. The NCCL sponsored more petitions to Strasbourg involving the United Kingdom in the 1970s than any other pressure group, even though its legal department consisted of a single lawyer.[38] Before the 1970s, the NCCL had kept its distance from human rights discourse. As Tom Buchanan has observed, the "concept of civil liberties was steeped in the 'English' tradition of individual freedoms," and the NCCL "was strongly associated with the political left," whereas Britain's human rights activists were "more at home in religious and non-political associational cultures."[39] As Chris Moores writes, some in the NCCL worried that a focus on human rights "had a capacity to depoliticize." Others were suspicious of the European Court of Human Rights on account of the way the National

[30] HO 284/16, Smith, head teacher's report on Tyrer, March 2, 1972.

[31] HO 284/16, J. H. Ferguson, medical certificate for Andrew Hays, March 10, 1972.

[32] HO 284/16, Anthony Tyrer, statement taken by Lawrence Grant, n.d. (c. September 1972).

[33] HO 284/16, *Anthony Michael Tyrer v. James Bramwell Callin*, High Court of Justice of the Isle of Man, judgment of deemster G. E. Moore, April 28, 1972.

[34] HO 284/16, Tyrer, statement taken by Grant, n.d. (c. September 1972).

[35] Ibid.

[36] David Callister, interview with Henry Corlett and Jack Corrin, February 3, 2005, Manx Heritage Foundation, https://culturevannin.im/media/Oral%20History/Transcripts/Corlett_Henry%20Mr%20and%20Corrin_Jack%20Deemster.pdf (accessed January 12, 2023).

[37] HO 284/16, Tyrer, statement taken by Grant, n.d. (c. September 1972); *Tyrer* (court), para 10.

[38] Harlow and Rawlings, *Pressure through Law*, 257–59.

[39] Tom Buchanan, *Amnesty International and Human Rights Activism in Postwar Britain, 1945–1977* (Cambridge: Cambridge University Press, 2020), 26–27.

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Association for Freedom (which became involved in the birching dispute) was using it to challenge the power of trade unions. Nevertheless, as the NCCL's general secretary Patricia Hewitt recognized, the European Court of Human Rights was "valuable for creating publicity and legitimating the NCCL's efforts to challenge British law and government policy."[40]

The architect of Tyrer and Hays' case was Lawrence Grant, legal officer for the NCCL and a veteran of the council's work on Northern Ireland.[41] Tyrer and Hays authorized Grant to act for them, and both sets of parents gave their consent.[42] In the application to Strasbourg, Grant argued that the punishment violated Articles 1, 3, 7, 8, 13, and 14 of the European Convention on Human Rights. The most important violations were of Articles 3 and 14. Article 3 stated that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." This was the crux of the case, of course. At different times, Grant provided different justifications for the claim that the Isle of Man's penal practice violated Article 14's stipulation that the rights and freedoms guaranteed under the Convention be secured "without discrimination." Grant argued variously that birching was discriminatory because it was only applied to males between the ages of 14 and 21, and, more ambitiously, "that the punishment is primarily pronounced on persons from financially and socially deprived homes."[43] A judge on the island vehemently disputed the latter claim.[44] In the case of Tyrer and Hays, the Isle of Man government sought reports from the boys' probation officers about the homes, which were well-kept, and their family life, which seemed good: this, the official responsible said, was "[t]he only available information to show whether or not the two petitioners come from homes that can fairly be described as 'financially and socially deprived.'"[45]

## II

With the petition lodged, the British government had to decide how—and whether—to defend the case. The government's response had to be negotiated between the Attorney General's Department, the Home Office, and the Foreign and Commonwealth Office. The Home Office, Britain's powerful interior

[40] Chris Moores, *Civil Liberties and Human Rights in Twentieth-Century Britain* (Cambridge: Cambridge University Press, 2017), 241.

[41] Ibid., 162, 169.

[42] HO 284/16, commission decision on admissibility, July 19, 1974.

[43] Grant initially claimed violations of Article 8, but later abandoned them. Article 8 guarantees everyone's "right to respect for his private and family life." Grant suggested that judicial corporal punishment was "destructive of family well-being." In a later submission, he put it this way: "Birching also is inhuman and degrading to the family of those birched. The Commission's attention is drawn to the adverse effect the punishment had on the Applicant's father." HO 284/16, Lawrence A. Grant, "European Commission of Human Rights: Application of Andrew [*sic*] Michael Tyrer," September 21, 1972; HO 284/16, "Observations of the Applicant on the Merits of Application No. 5856/72 Anthony M. Tyrer," n.d.

[44] HO 284/16, Thomas Kelly to N. F. Carrington, May 2, 1974.

[45] HO 284/16, Kelly to undersecretary of state, Home Office, April 23, 1974.

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ministry, dealt with criminal justice, and it was also the department responsible for the Isle of Man. Because the jurisdiction of the commission and court in Strasbourg arose from an international agreement, the Foreign and Commonwealth Office asked to lead the government conduct of the case.[46] And the attorney general, as the government's first law officer, was responsible for determining the government's legal position. Samuel Silkin, the attorney general at the time of the Isle of Man case, professed the orthodox view that his first responsibility was to the law rather than the government he served in.[47] Ministers and civil service lawyers in the Home Office and Foreign Office worried that Silkin's opinion on whether birching was degrading under the European Convention on Human Rights would create a "constitutional storm" or at best a time-consuming administrative and diplomatic mess that they would have to clean up.[48]

Silkin saw two main possibilities. If the government took the view that birching was not a violation of the Convention, "whatever other views one may have about it," then the British government should "defend itself before the Human Rights Commission on the basis that it is not a violation." The British government's "view of the merits of the island's penal policy as such" was irrelevant to the legal issue of whether birching violated Article 3 of the Convention. But if the government decided that birching was "'degrading' within the meaning of Article 3," then the proper course of action was not to defend the case but "to secure a change in the law of the Isle of Man."[49] Ministers and civil servants thought there was a strong chance that Strasbourg would find that birching was degrading. Their preference was to fight the case and lose it rather than have the attorney general decide at the outset that birching violated the Convention. Fearing that Silkin would recommend that the government fold, they held off lodging a formal request for the attorney general's advice.

John Harris, an experienced Labour Party strategist brought into government in 1974 as a Home Office minister, was concerned that Tynwald, the Manx parliament, would react badly if the British government decided that birching violated the Convention without seeing the matter through the European Commission of Human Rights. But if Britain defended the case and lost, "the Isle of Man could be brought to act upon that judgment, with whatever ill-grace." The other two crown dependencies, Jersey and Guernsey, which also had birching laws but had let the practice lapse, would accept the commission's decision "with very little demur." However, Harris went on, "we should provoke the most bitter reactions there if we were to instruct Tynwald, on an opinion unsupported by any decision at Strasbourg, to legislate to abolish this

[46] HO 284/16, M. G. de Winton to E. A Grant, July 11, 1974.

[47] On the role of attorney general and the inconvenience incumbents often caused for their government colleagues, see J. Ll. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (London: Sweet and Maxwell, 1964).

[48] HO 284/16, K. P. Witney to Sir Arthur Peterson, August 7, 1974 ("constitutional storm"); Lord Harris to Roy Jenkins, March 29, 1974.

[49] HO 284/16, Silkin to Jenkins, July 25, 1974.

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punishment, with the implied threat that if they failed to do so we would pass overriding legislation at Westminster. This would be represented as a gross interference with the domestic affairs of the Island unwarranted by any authoritatively established international obligation."[50] The Home Office lawyer K. P. Witney expressed similar concerns at the beginning of 1974 and, as the government worked out its position over the course of that year, he drafted Harris's communications on the subject. "Purely on an expedient view," Witney remarked, "… we would prefer to see the proceedings through at Strasbourg." "If … we have to drop the proceedings and go to the Islands with an opinion unsupported by any ruling at Strasbourg, I believe that we shall be in serious trouble. This is just the sort of issue that many of those in the Isle of Man would delight to seize upon and to magnify."[51] Significantly, both Witney and Harris thought that the Manx authorities would be more willing to bend to Strasbourg than to Westminster.

The island's lieutenant-governor, Sir John Paul, agreed it would not go down well on the island if the British government decided to "anticipate or, it might be argued, to arrogate to herself the responsibility of the European Court in this matter." The lieutenant-governor was the Queen's official representative on the island.[52] The post was never filled by a Manx native—the job usually went to high-ranking military officers or veterans of the colonial service. Paul had previously served as governor of Gambia, the Bahamas, and British Honduras (before it became Belize). Paul told Witney at the Home Office that if the British government pre-empted the European Court of Human Rights and told Tynwald what to do, it "could lead to a serious constitutional crisis."[53]

"Serious constitutional crisis" was an exaggeration, but the Isle of Man's constitutional and geographical position often caused friction with the British efforts to regulate commerce on the mainland, especially when those efforts involved international institutions. One example was the long-running dispute over the Isle of Man's commercial radio station. The British authorities granted Manx Radio a license but restricted its transmission power so that its broadcasts would not carry to the mainland and compete with radio stations subject to Britain's regulations. Citing its obligations to the International Telecommunications Union, the United Kingdom insisted on remaining the sole "authority to control the use of scarce frequencies in the United Kingdom and the Islands."[54] Another example was the debate, just before the birching case began, about the future of the island's Usury Act. This was a legislative relic that capped interest rates and so prevented the Isle of Man, inside the Sterling Area but with a lot of regulatory independence from the United

[50] HO 284/16, Harris to David Ennals, August 30, 1974.

[51] HO 284/16, Witney to Harris, August 12, 1974.

[52] The island's status as a crown dependency meant that the Queen's representative held the rank of lieutenant-governor rather than governor.

[53] HO 284/16, John Paul to Witney, August 15, 1974.

[54] *Report of the Royal Commission on the Constitution*, vol. 1, paras 1422–1429. The BBC retained its monopoly on radio broadcasting in the United Kingdom until 1973. On the Isle of Man and pirate radio, see Adrian Johns, *Death of a Pirate: British Radio and the Making of the Information Age* (New York: W. W. Norton, 2011), 143.

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Kingdom, from realizing its potential as a tax haven.[55] At this time, Britain's Labour government was trying to crack down on tax avoidance; the Prime Minister, Harold Wilson, was lobbying Commonwealth leaders about tax havens.[56] Harris worried that if the British government did not defend the birching case, or gave the Isle of Man license to defend the case by itself, the United Kingdom would look to be shirking its responsibilities to the island and so encourage Tynwald to assert itself in other international fora. He worried that Jersey and Guernsey would draw the same conclusion: "Both the Isle of Man and the Channel Islands have been seeking to negotiate directly with the Commission of the EEC on several matters, including financial questions, and the Isle of Man with other international bodies on the broadcasting issue, on which we do not wish them to have direct access."[57]

Failure to defend birching before the European Commission of Human Rights would lead to other diplomatic challenges besides relations with international bodies. The Foreign and Commonwealth Office lawyer David Gordon-Smith reminded the Home Office that it was not just the Isle of Man and the Channel Islands that retained judicial corporal punishment. A dozen other British territories scattered around the world had laws providing for whipping as punishment for crimes: Belize, Bermuda, the Falkland Islands, Gibraltar, the Gilbert and Ellice Islands, Monserrat, St Helena, the Seychelles, the Turks and Caicos Islands, the British Virgin Islands, and perhaps Brunei and the West Indies Associated States (Antigua, Dominica, Grenada, St Kitts-Nevis, St Lucia, St Vincent). Most of these territories had small populations. Some, like Belize, Bermuda, Brunei, and the West Indies Associated States, were largely self-governing former colonies. Others fell into a different category of dependency from the three islands close to Great Britain. Differences in constitutional status aside, they were all subject to the European Convention on Human Rights. Gordon-Smith thought that "they might well take exception to being obliged to abolish it as a result of failure of HMG [Her Majesty's Government] to defend the Tyrer case." The dependencies' governments would at least expect to be consulted "before a decision having implications for them was taken." Consulting a dozen other dependencies before deciding how to proceed with the Isle of Man case was surely not feasible. "If we defend the Tyrer case but lose, that would, of course, be different matter." Gordon-Smith assumed that no one in the British government would want to "draw any distinction between its use in the Isle of Man and other territories," that is, to say that what was unacceptable in the Isle of Man was permissible in the Seychelles. British officials were embarrassed about not conforming to the standards of Western Europe, and they were

[55] Vaughan Robinson, "Extractive and Manufacturing Industries," in *The Isle of Man: Celebrating a Sense of Place*, eds. Vaughan Robinson and Danny McCarroll (Liverpool: Liverpool University Press, 1990), 219–37, 240–41.

[56] Vanessa Ogle, "Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s," *American Historical Review* 122, no. 5 (2017): 1431–58, 1444.

[57] HO 284/16, Harris to Jenkins, March 29, 1974; Witney to Peterson, March 15, 1974.

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not about to reinstate a sliding scale of "civilization" in what remained of the empire.[58]

Thus, the Foreign Office and the Home Office agreed that politically the best course of action was for the British government to defend birching before the European Commission of Human Rights, and then direct Tynwald to abolish birching if the United Kingdom lost the case.[59] The two departments wanted to fight the case solely on the grounds of Article 3, whether birching constituted degrading punishment. The Home Office resolved to try to get the complaint under Article 14, that birching was discriminatory, dismissed. "If we concede admissibility on the ground that corporal punishment is discriminatory, because it is pronounced primarily on the poor and socially deprived, the same argument could very easily brought forward in relation to imprisonment, and indeed in relation to almost the whole of the penal system and the criminal process (road traffic offences apart)."[60] (The idea of speeding fines as a zone of equality is a sign of how far Britain had come from the days when only the wealthy owned cars and dangerous driving was scarcely criminalized.)[61] As we have seen, interference with Britain's treatment of prisoners was one of the main reasons the Heath government considered withdrawing from the jurisdiction of the European Commission of Human Rights in 1972. As it turned out, both Hays and Tyrer withdrew their Article 14 complaints in the middle of 1974.[62] The case at Strasbourg would now turn entirely on whether birching was degrading.

In the end, Silkin decided that it was an arguable question whether birching violated Article 3, and as such the United Kingdom should take it to the commission. Jenkins, Harris, and Roy Hattersley—the minister of state at the Foreign and Commonwealth Office, so deputy to the foreign secretary—wanted the British government's legal team to appear alongside the attorney general for the Isle of Man, and leave the substance of the argument to him. This way, they reasoned, the British government would avoid the embarrassment of arguing in favor of a punishment that was banned on the mainland.[63] There were, Jenkins told Silkin, "strong presentational reasons" for getting the island's own attorney general to take the lead.[64] Silkin did not accept this argument, which, as Gordon-Smith at the Foreign Office noted, "suggests some continuing confusion between arguing that birching is sound penal policy and arguing that it is not inhuman or degrading within the meaning of the

[58] HO 284/16, David Gordon-Smith to Sir William Dale, August 2, 1974; also FCO 41/1627, C. C. C. Tickell, "European Commission of Human Rights: Corporal Punishment in the Isle of Man," January 8, 1975. See also Simpson, *Human Rights at the End of Empire*, 844.

[59] HO 284/16, Sir Kenneth Jones to Witney, July 31, 1974.

[60] HO 284/16, Francis Graham-Harrison, untitled, unaddressed memo, January 29, 1974, with annotations by A. W. Peterson, January 30, 1974, stating agreement.

[61] Joe Moran, "Crossing the Road in Britain, 1931–1976," *Historical Journal* 49, no. 2 (2006): 477–96, 480; Adam Sisman, *Hugh Trevor-Roper: The Biography* (London: Weidenfeld and Nicolson, 2010), 59.

[62] HO 284/16, E. A. Grant to M. G. de Winton, July 9, 1974.

[63] FCO 41/1627, Hattersley to Harris, January 15, 1975; HO 284/16, Harris to David Ennals, August 30, 1974.

[64] FCO 41/1627, Jenkins to Silkin, February 17, 1975.

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Convention."[65] Silkin continued to object to Jenkins' and the others' demand to put political and "presentational" considerations before what Silkin regarded as strictly legal issues, but he lost. The attorney general for the Isle of Man would present the case in tandem with a barrister from outside the civil service representing the United Kingdom.

## III

These strategic deliberations took place in 1974–1975. It would be another two years before the European Commission of Human Rights heard the matter, and in that time opponents and defenders of birching mobilized. Angela Kneale, the island's leading anti-birching campaigner, does not seem to have been involved in the legal proceedings, though the NCCL published her tract, *Against Birching* (supposedly with money from an anonymous benefactor on the island), to coincide with the Tyrer and Hays' petition to Strasbourg, and Grant cited it in submissions.[66] Peggy Irving emerged as the most prominent defender of birching outside Manx government circles. Irving was the Isle of Man branch organizer for the National Association for Freedom, a hub of the new right-wing activism in 1970s Britain. The association's leaders launched litigation and direct-action campaigns to thwart strikes and tried to block British membership of the European Economic Community.[67] Speaking to Independent Television's *Tonight* in 1978, Irving described birching as a short, sharp lesson, more effective than a prison sentence that was a drain on the taxpayer.[68] Irving contacted the NAFF's head office, which advised her that it would be useful to gather evidence that a majority on the island wanted to keep the birch.[69] A petition in support of birching had attracted the signatures of a third of the island's population; Irving started a new petition that ended up getting 30,000 signatories out of the island's 45,000 voters.[70] The island's attorney general would take it with him to Strasbourg.

Hays withdrew before the oral hearing before the European Commission of Human Rights in October 1975. Tyrer was represented by Nigel Rodley, legal officer at Amnesty International (although acting in a private capacity), and Bill Nash of the NCCL.[71] (Nash replaced Lawrence Grant as NCCL legal officer when Grant moved to the Law Clinic at the new University of Kent at

[65] FCO 41/1627, Gordon-Smith to Mr McCarthy (Western Organisations), February 20, 1975.

[66] HO 284/16, untitled clipping from *Isle of Man Courier*, February 1, 1974; HO 284/16, "Observations of the Applicant on the Merits of Application No. 5856/72 Anthony M. Tyrer," n.d.

[67] Neill Nugent, "The Freedom Association," in *Respectable Rebels: Middle Class Campaigns in Britain in the 1970s*, eds. Roger King and Neill Nugent (London: Hodder and Stoughton, 1979), 76–100; Andy Beckett, *When the Lights Went Out: What Really Happened to Britain in the Seventies* (London: Faber and Faber, 2009), ch. 15; *McWhirter v Attorney General* [1972] CMLR 882.

[68] The video is available at https://www.corpun.com/manx.htm (accessed January 10, 2023).

[69] "Birching Advice by NAFF," *Guardian*, November 25, 1977.

[70] "Island Steps up to Fight to Keep Birch," *The People*, November 27, 1977; "Folly to Ban Birching, European Court Told," *Birmingham Post*, January 18, 1978.

[71] Bates, *Evolution of the European Convention*, 327 n. 44.

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Canterbury.)[72] Completing the legal team was Cedric Thornberry, who, as a member of the Society of Labour Lawyers, worked on antidiscrimination law and the conditions of political prisoners in Northern Ireland. Thornberry represented many complainants in Britain's early human rights cases in Strasbourg.[73] The British government was represented by Gordon-Smith of the Foreign Office, lawyers from the Home Office and the Treasury Solicitor's Department, and the attorney general of the Isle of Man, J. W. Corrin.

## IV

As Gordon-Smith had observed earlier, there was a dearth of case law on the meaning of "degrading" in Article 3 of the European Convention on Human Rights.[74] The distinction between "torture," "inhuman," and "degrading" in that article had been considered by the commission in a series of cases against the Greek junta brought by Denmark, Sweden, Norway, and the Netherlands in 1967. The commission established a hierarchy in which "degrading treatment" was the least restrictive and the least severe. "Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience," the commission had declared.[75] The commission had considered the scope of "degrading" treatment in another case involving the United Kingdom. The *East African Asians* case concerned the government's restriction of the right of South Asians expelled from Kenya and Uganda to enter and remain in Britain despite bring British passport-holders.[76] The applicants in the *East African Asians* case "submit[ed] that the British authorities, by refusing to admit them to the United Kingdom or to allow them to stay there permanently, reduced them to the status of second-class citizens. This degradation, which was based on their colour or race, amounted to 'degrading treatment' in the sense of Article 3."[77] The majority on the commission agreed, finding that degrading treatment was not confined to physical acts.[78] In the *East African Asians* case, the commission placed special weight on considerations of racial discrimination and citizenship, neither of which were factors in *Tyrer*. Despite the thinness of the case law, a majority of the commission hearing the Isle of Man case seems to have found the question of degrading treatment straightforward.

[72] On Rodley, see Buchanan, *Amnesty International*, 3. On Nash, see Moores, *Civil Liberties and Human Rights*, 114.

[73] Turlough O'Riordan, "Thornberry, Cedric Henry Reid," *Dictionary of Irish Biography* (2021), https://doi.org/10.3318/dib.010202.v1.

[74] HO 284/16, Gordon-Smith to Sir William Dale, August 2, 1974.

[75] *Ireland v. United Kingdom*, App. No. 5310/71, European Commission of Human Rights report of January 25, 1976.

[76] *East African Asians v. United Kingdom*, App. Nos. 4403/70–4419/70 et al., European Commission of Human Rights report of December 14, 1973. On the legal and policy aspects of this episode, see Ian Sanjay Patel, *We're Here Because You Were There: Immigration and the End of Empire* (London: Verso, 2021), ch. 8; Randall Hansen, *Citizenship and Immigration in Post-war Britain: The Institutional Origins of a Multicultural Nation* (Oxford: Oxford University Press, 2000), ch. 7.

[77] *East African Asians*, para. 182.

[78] Ibid., paras 191, 203–206, 208.

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"Judicial birching humiliates and disgraces the offender," wrote the majority, "and can therefore be said to be degrading treatment or punishment. This is particularly evident in the procedure used for birching in the present case, including the pact that persons aged between 14 and 21 years of age have to strip off their trousers when being birched." The Manx authorities' contention that birching acted as a deterrent was the only justification offered. The commission thought that the deterrent value of corporal punishment was disproved by reports commissioned by the British government itself in the past, including the Cadogan Report of 1938 and the Barry Report of 1960, both of which Tyrer's NCCL lawyer quoted at length in his written submission.[79] The commission declined to consider the Article 14 claim that sentences were passed in a discriminatory way, and sent the Article 3 complaint on to the European Court of Human Rights for a definitive ruling.

One commissioner dissented. Kevin Mangan, the commissioner from the Republic of Ireland, said he had been strapped at school and slapped by his parents and he did not consider these punishments degrading. Mangan had a substantive argument as well. "The earlier terms with which 'degrading' is associated in Article 3 … ('torture' or 'inhumanity') reflect the concern which moved the framers of the Convention in the post World-War-Two era." Birching did not have the gravity contemplated by the framers of Article 3, Mangan thought. Mangan also read the Cadogan and Barry reports as finding that the deterrent value of corporal punishment was "not proven"—not that they concluded it did not actually work. Mangan also disagreed with the majority that the local traditions of the Isle of Man were sufficiently different from those of the UK as to warrant allowances under Article 63(3) of the Convention.[80]

Three months after the commission hearing, Tyrer too decided to withdraw. The commission "decided it could not accede to the applicant's demand since the case raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved."[81] The commission itself was the only party to put the case against the United Kingdom in the European Court of Human Rights. "Although the NCCL offered to present Tyrer's original argument in any way acceptable to the Court it was refused permission."[82] The commission's principal delegate in the court hearing was Love Kellberg, who as head of the legal department of Sweden's foreign ministry had been instrumental in cases against the Colonels' Greece a decade before.[83] While the British government had relied on civil service lawyers for the commission hearing, it instructed outside counsel for the court hearing. Remarkably, the Foreign Office selected Louis Blom-Cooper, who was used to

[79] *Tyrer* (commission), 14–15; *Report of the Departmental Committee on Corporal Punishment*, Cmnd. 5684 (London: HMSO, 1938) (the Cadogan Report); *Corporal Punishment: Report of the Advisory Council* (the Barry report).

[80] *Tyrer* (commission), 18–21.

[81] *Tyrer* (commission), 2.

[82] Harlow and Rawlings, *Pressure through Law*, 260.

[83] *Tyrer* (court), para. 7; Hanne Hagtvedt Vik and Skage Alexander Østberg, "Sweden, Amnesty International and Legal Entrepreneurs in Global Anti-Torture Politics, 1967–1977," *International History Review* 44, no. 3 (2022): 633–52, 637. The commission's other delegate was Kevin Mangan.

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challenging the government in human rights cases rather than defending it. Blom-Cooper had made his name suing prison authorities to force them recognize prisoners' rights, and challenging death sentences imposed by colonies and dependencies that had not joined the United Kingdom in abolishing the death penalty for murder.[84] As had been decided, against Silkin's wishes, most of the work in court fell to Corrin, the Manx attorney general.[85]

The six judges in the majority emphasized the importance of context in determining whether a punishment was "degrading." They argued that birching was an "assault" on "a person's dignity and personal integrity." In the same passage, they emphasized the "institutionalised character of this violence" and "the fact that those inflicting it were total strangers to the offender."[86] Here the judges drew an implicit but clear distinction between punishment administered by the state and parents hitting their children, legal restrictions on which were still decades away.[87] The judges were mindful of a larger context as well: the Convention was "a living instrument" and the Court "cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field." The judges considered and dismissed Corrin's arguments about procedural safeguards and found birching to be degrading within the meaning of Article 3.[88]

Corrin submitted further that public opinion on the Isle of Man, as indicated by the petition in support of birching and a debate in the House of Keys, the lower house of the Manx parliament, warranted making an exception for the island under Article 63 of the Convention. This article provided that states that ratified the Convention could extend it "to all or any of the territories for whose international relations it is responsible"—with the rider that it "shall be applied in such territories with due regard, however, to local requirements." Kellberg, representing the commission, responded that "no specific local conditions" had been pointed to, just public opinion.[89] Agreeing with Kellberg, the majority "note[d] … that the Attorney-General for the Isle of Man spoke more of circumstances and conditions than of requirements in the Island," and only requirements could justify an exception to the rights guaranteed by the Convention. Again invoking the broader European context, the court noted that "the great majority of the member States of the Council of Europe" did not use judicial corporal punishment, which "casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country." The reference to Europe was significant: the court stated that the proviso allowing for exception according to "local requirements" was "primarily designed to meet the fact that, when

[84] The final appeals in these cases were heard by the judicial committee of the Privy Council in London.

[85] Callister, interview with Corlett and Corrin.

[86] *Tyrer* (court), para. 33.

[87] P. R. Ghandhi and J. A. James, "Parental Rights to Reasonable Chastisement and the European Court of Human Rights," *International Journal of Human Rights* 3, no. 3 (1999): 97–119.

[88] *Tyrer* (court), paras 28–35, quotations from paras 31, 33. Compare para. 9 of the dissent by Sir Gerald Fitzmaurice.

[89] *Tyrer* (court), para. 37.

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the Convention was drafted, there were still certain colonial territories whose state of civilisation, it was thought, did not permit the full application of the Convention." The Isle of Man was no such colonial territory: "Historically, geographically and culturally, the Island has always been included in the European family of nations and must be regarded as sharing fully that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble to the Convention refers."[90]

Again there was one dissenting judge. The Strasbourg bench had to include a judge from the state being challenged, and the dissenter in the birching case was the British appointee, the distinguished international lawyer Sir Gerald Fitzmaurice (who had been a legal advisor at the Foreign Office when the Universal Declaration on Human Rights and the European Convention were drafted).[91] Fitzmaurice argued that juveniles had always been punished differently from adults. While "[m]odern opinion" had moved against corporal punishment, as the majority said, "it has not been generally regarded as degrading when applied to juveniles and young offenders, in the same way as it is considered so to be in the case of adults." Fitzmaurice suggested that the difference was "an extension of the attitude that does not consider young persons as susceptible of offence in the same manner or degree as adults, so that a measure of freedom of speech or action is felt to be permissible in the one case that would not be in the other."[92] Like Mangan, Fitzmaurice pointed to his own benign experience of corporal punishment. He ostentatiously evoked the atmosphere of the boys' boarding schools that were so important in the socialization of Britain's elite: "it was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart." The beatings Fitzmaurice experienced and witnessed at Malvern College "were carried out without any of the safeguards attendant on Mr. Tyrer's: no parents, nurses or doctors were ever present. They also not infrequently took place under conditions of far greater intrinsic humiliation than in his case. Yet I cannot remember that any boy felt degraded or debased."[93] Fitzmaurice notwithstanding, the court had found birching to be a violation of the European Convention on Human Rights.

## V

The British government took the view that the minimum it needed to do to comply with the court's ruling was to ensure that no further birchings took place: it would be acceptable if the law remained on the books but was not

[90] *Tyrer* (court), para. 38.

[91] Ian Brownlie, "Fitzmaurice, Sir Gerald Gray (1901–1982)," *Oxford Dictionary of National Biography*, September 23, 2004, https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-31111, accessed October 9, 2023; Simpson, *Human Rights at the End of Empire*, 310–17.

[92] *Tyrer* (court), dissent, para. 11.

[93] *Tyrer* (court), dissent, para. 12.

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enforced.[94] Angela Kneale told the press she would be happy with that outcome.[95] So, rather than inviting a confrontation by asking the Manx government to rescind the directive on birching, the British government relied on the island's judge of appeal to overturn any birching sentence passed by a local magistrate.[96] (The judge of appeal was appointed by the Crown and had to be a member of the English bar; the position was often combined with part-time judgeships in the north-east of England.) There was defiant talk in Tynwald, and pro-birching women marched on the building and packed the public gallery, but the legislature backed down from a confrontation with the British government and deferred the question of birching to a select committee.[97] Seven months later, in June of 1979, the select committee reported in favor of keeping the birch. Legislators spoke of asking the British government to secure a carve-out from the Convention for the Isle of Man, or, failing that, introducing a Manx bill of rights that would allow birching (the new Conservative government led by Margaret Thatcher was promoting a United Kingdom bill of rights at the time).[98] The Manx government had already ensured that there would be no further human rights cases initiated by residents of the Isle of Man. When the British government renewed the right of individual petition to the European Commission of Human Rights for another five years beginning in January 1976, the island's executive council asked the Home Office not to include the island, and the right of individual petition from the Isle of Man lapsed.[99] At least in theory, however, the island's laws and practices remained subject to the European Convention on Human Rights.[100]

The Manx government followed through and sent the Home Office a draft Fundamental Liberties Bill at the beginning of 1980. In fact, the Fundamental Liberties Bill was not a human rights instrument, for it neither codified the wider array of freedoms found in international treaties nor guaranteed "fundamental liberties" to all persons on its territory. The bill pointedly did not include any prohibition of torture or other provision found in Article 3 of the European Convention; it also permitted discrimination against those who were not of "Manx status."[101] When officials at the Home Office pointed this

[94] S. Ghandhi, "Birching in the Isle of Man," *Modern Law Review* 46, no. 4 (1984): 493–517, 516–17; College of Europe Committee of Ministers, "Resolution," October 13, 1978, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-55404%22]}.

[95] "Isle of Man Told to Abolish the Birch," *Guardian*, August 2, 1978.

[96] Ibid.; "Last-minute Moves to Keep the Birch," *Guardian*, November 16, 1978.

[97] "Women Stage a Demo in Support of Birching," *Birmingham Daily Post*, November 22, 1978; "Isle of Man Draws Back in Birch Fight," *Guardian*, November 22, 1978.

[98] "Tynwald Fights on for the Birch," *Guardian*, June 20, 1979.

[99] "Isle of Man Stops 'Human Rights' Pleas," *Guardian*, July 11, 1976.

[100] The island's laws relating to sexual acts between men remained in place despite European Court of Human Rights rulings against comparable provisions in Northern Ireland and the United Kingdom as a whole in *Dudgeon v. United Kingdom*, App. No. 7525/76, October 22, 1981, 4 EHRR 149 and *Smith and Grady v. United Kingdom*, App. Nos 33985/96 and 33986/96, September 27, 1999, 29 EHRR 493. Paul Johnson, "Homosexual Offenses and Human Rights in Isle of Man," *Jurist*, December 8, 2012, https://www.jurist.org/commentary/2012/12/paul-johnson-manx-homosexuality/.

[101] HO 342/274, N. M. Johnson to B. Latimer, February 1, 1980.

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out, the Manx government inserted the language of Article 3 into the bill with an accompanying clause that rendered this provision all but meaningless.[102] The Home Office resolved to delay the bill and head off any suggestion that its adoption would be accompanied by a denunciation of the European Convention.[103] In subsequent drafts, the Manx government continued to try to incorporate the European Convention into Manx law in a way that justified limiting Strasbourg's jurisdiction over the island. As one Home Office lawyer wrote in a March 1981 memorandum, "It is clear to me what the Manx are up to, although they do not say so and I suspect we cannot press them to say so, is that their Bill should be amended in Tynwald so as to disapply the proscription of judicial corporal punishment. They would then ask us to denounce the Convention. It clear to me that we must refuse to denounce the Convention."[104] Accordingly, the Manx proposals went nowhere.

Two years later, most members of the House of Keys continued to support birching, but "the Manx government is believed to consider its resumption untenable."[105] The issue flared up again in the summer of 1981 when a magistrate sentenced a sixteen-year-old visitor from Glasgow to four strokes of the birch for slashing another youth with a broken beer glass. The (English) judge of appeal, Benet Hytner, quashed the sentence and recommended a custodial sentence instead. He stressed that carrying out a sentence of birching "would render the United Kingdom and the Isle of Man in breach of international treaty obligation." Hytner rebuked the British and Manx governments more than the magistrates. While the birching law remained valid, "either the United Kingdom and Manx governments are unconcerned about the possibility of their respective countries being in breach of their international treaty obligations, or they are depending on the courts of the Isle of Man always so to exercise their discretion not to pass (or to vary) perfectly lawful and valid sentences as to extricate them from the consequences of inaction."[106] There were no more birchings after Hytner's decision. The power to order birching was formally curtailed in 1993 and eventually abolished completely as late as 2001.[107]

## VI

The senior politicians involved, like the civil servants, tended not to discuss the issue in moral terms, but rather in terms of legal and international obligations. For some, this low-affect approach was temperamental. It may also have reflected a recognition that there was some level of public support for birching in Great Britain as well as on the Isle of Man. The Conservative backbencher

[102] HO 342/274, Latimer to Johnson, September 24, 1980.

[103] HO 342/274, A. H. Hewins to Johnson, November 27, 1980.

[104] HO 342/274, Johnson to Geoffrey de Deney, March 3, 1981; HO 342/274, Latimer to Johnson, March 25, 1981.

[105] "Youth 'Unlikely to Be Birched,'" *Guardian*, July 24, 1981.

[106] *Teare (Sergeant of Police) v. O'Callaghan* 4 EHRR 232 at 237 (Isle of Man High Court of Justice).

[107] Ghandhi and James, "Parental Rights to Reasonable Chastisement," 103–04; Criminal Justice Act 2001 (Isle of Man), s. 61.

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Graham Page introduced a private member's bill to "bring back the birch" in Britain itself for "vandals, hooligans, and muggers." All three criminal types were usually envisioned as young men. Page argued that birching was analogous to the physical chastisement of children in the home, which was still not subject to serious political or legal challenge. Page claimed to have popular sentiment on his side, pointing out that over a million Britons had signed a petition in support of his bill and that a recent survey of pensioners showed that "old people are particularly frightened" of falling victim to violent crime.[108] Page's bill was easily defeated by the government, as bills initiated by backbench MPs usually were. Significantly, the minister responsible for killing the bill during debate in the House of Commons focused on whether birching was an effective deterrent to juvenile crime rather than on moral and legal considerations.[109]

In contrast, campaigners and the talking heads and ordinary citizens whom the media gave space to in its coverage of the birching controversy discussed the issue in more expansive terms. Opponents routinely described the practice as barbaric and its prohibition a marker of civilized norms.[110] Birching's defenders turned these civilizational tropes on their head. "The most barbarous aspect of society to-day is the growing number of brutal, unprovoked attacks on long-suffering citizens," asserted a reader of the *Liverpool Echo* in defense of the birch.[111] It was criminals, and especially juvenile offenders, who were the forces of barbarism, not the state that punished them. Young black men were central to the "mugging" panic that underwrote a Conservative politics of "law and order" over the course of the 1970s.[112] The *Sunday Telegraph* editor Peregrine Worsthorne, a dependable soldier for the New Right, wrote that the European Court of Human Rights handed down its decision in *Tyrer* on the same day that "a gang of 12-year old monsters … tortured an old woman into handing over her pension." "As life in the cities grows ever more coarse-grained and barbaric, the language of public discourse grows ever more lofty."[113] A letter to *The Times* echoed this sentiment, suggesting that the "liberal conscience" of "Strasbourg judges" had "coincided with the horrifying increase in the rate of juvenile crime and violence." Another "reflect[ed] upon the irony of a process by which a humane and highly sophisticated civilization is reduced by its own peculiar logic to compound with barbarism."[114]

The expectation that an international court's decision would be less provocative than a directive from London proved ill-founded. Critics of European

[108] *House of Commons Debates* (*HC Deb.*), vol. 930, April 29, 1977, cols. 1736–1742.

[109] *HC Deb.*, vol. 930, April 29, 1977, cols. 1745–1747.

[110] Bryan Dende, "Thanks, No," *The People*, March 26, 1972; "Campaign against Birching," *Liverpool Echo*, June 17, 1972; "The Battle of the Birch," *Guardian*, January 18, 1978; Colin Bagnall, letter to editor, *The Times*, April 28, 1978; Grahame Ainge and Anne Ainge, "Condemn All Violence," *Hertford Mercury*, July 24, 1981; "Stop Birching, Whitelaw Urged," *Belfast Telegraph*, August 5, 1981.

[111] J. N. Tierney, "The Birch 'Makes Do-gooders Foam,'" *Liverpool Echo*, February 5, 1973.

[112] Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (Basingstoke: Macmillan Press, 1978).

[113] Peregrine Worsthorne, "H-Bombs Yes, but Birching No," *Sunday Telegraph*, April 30, 1978.

[114] D. G. Galvin and E. J. Kynaston, "Letters to the Editor," *The Times*, May 2, 1978.

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Economic Community membership such as the Scottish Conservative MP Teddy Taylor described the court's decision as interfering with Britain's sovereignty.[115] Enoch Powell, who had been the most prominent right-wing opponent of EEC membership on sovereignty grounds, asked rhetorically in parliament: "Is not the effect of the United Kingdom's adherence to the European Convention on Human Rights to alter the constitutional relationship between the United Kingdom and the Isle of Man in respect of the internal affairs of the Isle of Man?"[116] Pro-birchers threatened to declare independence from "Westminster, Brussels and Strasbourg."[117] Lumping the Economic European Community together with the European Court of Human Rights would become standard in British Euroskepticism; Peggy Irving and her fellow campaigners on the Isle of Man added the UK government at Westminster too.[118]

## VII

The task of persuading the governments of Britain's "dependent territories" dragged on for more than a decade. By the early 1980s, most of the remaining dependent territories were in the Caribbean, but the Falkland Islands, over which Britain fought a war with Argentina in 1982, also fell into this category, and so, between 1981 and 1997, did Hong Kong. Hong Kong, the Falklands, and most of the Caribbean dependencies had flogging laws. For the most part, these laws remained "dormant." Only in the British Virgin Islands did the courts regularly sentence convicted defendants to flogging.[119]

By the late 1980s, Britain's human rights obligations to the United Nations had become more important than its obligations under the European Convention on Human Rights in the ongoing negotiations over corporal punishment in the parts of the Commonwealth for which Westminster still had the authority to legislate. Every five years, the British government had to report to the UN on its progress in meeting its commitments under the International Covenant on Civil and Political Rights. The UN's Human Rights Committee "made clear during their examination of … [Britain's] First and Second Reports that they consider judicial corporal punishment in the DTs to be incompatible with Article 7 of the Covenant." Article 7 proscribed torture and "cruel, inhuman or degrading treatment or punishment"—language that overlapped with the wording of Article 3 of the European Convention on Human Rights. "In Geneva in November 1988 they said that the British Government should use its good offices to have it abolished in the DTs where it was still on the statute books." The Foreign and Commonwealth Office also noted that the new UN Committee against Torture "will regard …

115 "Manx Birch Decision 'Interferes with Sovereignty,'" *Guardian*, April 29, 1978.

116 *HC Deb*., vol 943, February 2, 1978, col. 671. On Powell's sovereignty talk during the 1975 referendum on EEC membership, see Saunders, *Yes to Europe*, 239–41.

117 "Island Bid for Freedom to Birch," *Observer*, September 27, 1981.

118 Zoë Jay, "A Tale of Two Europes: How Conflating the European Court of Human Rights with the European Union Exacerbates Euroscepticism," *British Journal of Politics and International Relations* 24, no. 4 (2022): 563–81.

119 FCO 33/9343, Mark Herdman, telex to Foreign and Commonwealth Office, February 4, 1987.

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[judicial corporal punishment] as incompatible with the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and will devote more time to its consideration than the Human Rights Committee does."[120] As the October 1989 submission date for the United Kingdom's third report loomed, the Foreign Office renewed its efforts to get the dependencies to abolish judicial corporal punishment.

Politicians in the dependencies were not enthusiastic about starting a fight over an issue extraneous to their own political struggles. In the Caribbean, there was a high level of public support for keeping flogging on the statute books even if only as a latent threat.[121] Jamaica, Trinidad, and most of the other independent states in the Caribbean retained corporal punishment, and these independent states were obvious reference points for the British dependencies.[122] British officials in Bermuda also worried that raising the issue of corporal punishment would derail the campaign to abolish capital punishment, which was a much more pressing human rights concern.[123] Bermuda's attorney general, a Canadian, suggested that after the capital punishment referendum, the Foreign Office should write to the governor saying that corporal punishment "must be abolished because of Bermuda's international obligations. This would give the government of Bermuda an excuse to say they had been forced to abolish it."[124] The attorney general's approach left Bermuda's Deputy Governor "somewhat uneasy given its potential to reopen the independence debate."[125]

Montserrat's (British) Governor, Christopher Turner, pressed the island's ministers to end judicial corporal punishment on the grounds that it threatened Montserrat's status as a civilized country. "In retaining this penalty Montserrat is out of line with most civilised states which have the same standards as ourselves … . Council would wish to avoid the potential embarrassment of Montserrat being seen as an unenlightened island which retains a punishment which many countries regard as barbaric and dehumanising." As we have seen, the European Court of Human Rights itself described the rejection of physical punishment as a sign of civilization and thus membership of "the European family," and activists in Britain were quick to couch the issue in terms of civilization and barbarism, though ministers and civil servants steered clear of this language in their dealings with the Isle of Man. While Turner invoked civilization in his effort to persuade Montserrat's elected politicians, he was also not above presenting the defense of human rights as an unfortunate irritant: "There is a danger of unhelpful publicity from some

[120] FCO 58/5189, "Caribbean Heads of Mission/Governors Conference: 10–12 November 1989: Human Rights Matters in the Dependent Territories," briefing document prepared by the United Nations Department of the Foreign and Commonwealth Office, October 1989.

[121] FCO 58/5595, P. A Penfold to Mr Beamish, n.d. (1990).

[122] FCO 58/5595, Mark Lennox-Boyd to John Osborne, December 31, 1990; FCO 58/5595, P. A. Penfold to David Taylor, October 24, 1990.

[123] FCO 58/5189, Desmond Langley (governor of Bermuda), telex to West Indian and Atlantic Dept, FCO, [mid-] July 1989.

[124] FCO 58/5189, "Record of a Meeting with the Attorney General of Bermuda: 29 June" (1989).

[125] FCO 58/5189, B. G. J. Canty to R. S. Gorham, June 28, 1989.

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human rights group taking up a case and our having to change our laws in as a result of outside pressure."[126] The Executive Council agreed and the Foreign Office celebrated: Montserrat's decision was made in time for the news to be included in the United Kingdom's third report to the United Nations' Human Rights Committee. And then the opposition in Montserrat's Legislative Council resisted abolition and the executive put it "on ice."[127] By the late 1990s, Montserrat and every other British overseas territory other than the British Virgin Islands had abolished judicial corporal punishment, by which time the United Nations Human Rights Committee had ceased to probe the United Kingdom on the issue.[128]

Montserrat is a long way from the Isle of Man, and the whip, as an emblem of slavery, could hardly be defended as a local tradition in the Caribbean as the birch was on the Isle of Man. It is striking that Bermuda's attorney general thought that the way to get the territory's government to abolish corporal punishment was for the United Kingdom to tell them they had to because of Britain's human rights obligations, combining two kinds of external pressure, whereas the Foreign Office had thought that the message would be more palatable coming from an international human rights body than from London. It turned out that both kinds of external pressure were objectionable, and that on the Isle of Man, at least, they could be conflated, with "Brussels" thrown in as well. Even in its dealings with a territory the size of Montserrat, with its population of about 10,000, the British government had to coax rather than give orders. Attempting to exercise the powers, the United Kingdom formally possessed risked pushing overseas territories toward independence. Officials were well aware that their government's powers could dissolve upon use.[129] In the nineteenth century, Walter Bagehot drew a famous distinction between the British constitution's "dignified" part (the ceremonial, the mythology of the Crown) and its "efficient" or functional part.[130] The British government's dealings with its dependencies over the issue of corporal punishment suggest

[126] FCO 58/5189, "Paper by His Excellency the Governor: Judicial Corporal Punishment," June 16, 1989.

[127] FCO 58/5595, P. A. Penfold to Mr Beamish, n.d. (1990); David Taylor to Barbara Procter, September 19, 1990 (the source of the quotation); Mark Lennox-Boyd to John Osborne, December 31, 1990.

[128] *House of Lords Debates*, December 14, 1998, col. WA135; United Nations General Assembly, Official Records, Fiftieth Session, Supplement No. 40 (A/50/40), *Report of the Human Rights Committee*, vol. 1 (New York: United Nations, 1996), 66–70.

[129] Compare the way the Privy Council—the London-based court of final appeal for self-governing Commonwealth Caribbean countries such as Jamaica, as well as the dependent territories—"has often itself limited the exercise of its appellate jurisdiction, even where the criteria set out above appear to have been satisfied," and ultimately, in its handling of death penalty cases in the 1990s, prompted eleven Commonwealth states to announce that they were withdrawing from its jurisdiction and would establish a Caribbean Court of Justice. Rose-Marie Belle Antoine, *Commonwealth Caribbean Law and Legal Systems*, 2nd ed. (London: Routledge-Cavendish, 2008), 312–16, quotation from 312; Laurence R. Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes," *Columbia Law Review* 102, no. 7 (2002): 1832–911, especially 1883–1884.

[130] Walter Bagehot, *The English Constitution* (London: Chapman and Hall, 1867), 4–11.

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that, at least in the advanced stages of decolonization, the “efficient” aspect of government as well as the “dignified” was, on some level, a collaborative fiction.

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