IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. CV 2 of 2005
BB Civil appeal No 29 of 2004

BETWEEN

THE ATTORNEY GENERAL	**FIRST APPELLANT**
SUPERINTENDENT OF PRISONS	**SECOND APPELLANT**
CHIEF MARSHAL	**THIRD APPELLANT**

AND

JEFFREY JOSEPH	**FIRST RESPONDENT**
LENNOX RICHARD BOYCE	**SECOND RESPONDENT**

Before The Rt Honourable **Mr Justice de la Bastide, President**
And the Honourables **Mr Justice Nelson**
Mr Justice Pollard
Mr Justice Saunders
Madame Justice Bernard
Mr Justice Wit
Mr Justice Hayton

Appearances:
Mr Roger Forde QC and Mr Brian L St. Clair Barrow for the Appellants

Mr Maurice Adrian King and Ms Wendy Maraj for the First Respondent

Mr Alair Shepherd QC, Mr Douglas Mendes, SC, Mrs Peta Gay Lee-Brace and Mr Phillip McWatt for the Second Respondent

20th and 21st June 2006

JUDGMENT
of
The Honourable Mr Justice Wit

Delivered the 8th day of November, 2006

[1] On February 2, 2001 two citizens of Barbados, Jeffrey Joseph and Lennox Boyce, the respondents in this appeal, were convicted of murder and subsequently sentenced to death. Their appeals against conviction were dismissed by the Court of Appeal on March 27, 2002.

[2] The laws of Barbados make it abundantly clear that there can be only one sentence for murder: death by hanging. The courts do not have any discretion at the sentencing stage. Their hands are tied. Usually, when someone is sentenced and all relevant appeals have been exhausted, the sentence can and should be executed forthwith. Generally, an execution of a non-capital sentence will not be stayed when the convicted person seeks the benevolence of mercy. This is, however, significantly different in case of a death sentence, the only penalty where execution of the sentence comes down to execution of the person sentenced. In such a case, therefore, the Constitution of Barbados (section 78) dictates that prior to any possible execution the case has to be referred to the Barbados Privy Council (BPC). That august body, usually presided over by the Governor-General himself (or herself, as the case may be), will have to decide whether "mercy" should be bestowed upon the condemned man or not. In other words, they decide whether the sentence of death, although legally imposed and in an abstract way "just", should or should not be executed. Only if and when it is decided that the execution must take place, can death warrants be issued. If that decision is properly made and carried out, then can the hanging take place.

[3] In the case before us the BPC twice decided (in the constitutionally prescribed form of a binding advice to the Governor-General) that Boyce and Joseph must be hanged. We do not know how they came to that decision nor do we know what kind of information they had at that point in time. However, we do know the relevant facts of this case, and those facts are clear from the record before us. On

April 10, 1999, four young men beat up a fifth in such a brutal way that he died some days later. All four were arrested and prosecuted. All four were charged with murder. All four were, nevertheless, offered by the Crown to be tried for the lesser crime of manslaughter in exchange for a guilty plea. Two of the four, one of them being the person who actually seemed to be at the root of the problem with the victim and who involved the other three, chose this avenue.

[4] Although manslaughter carries a maximum sentence of life imprisonment, the two who pleaded guilty to that charge were each sentenced to twelve (12) years. The other two, the respondents, opted to be tried on a charge of murder on the basis of a not guilty plea. They came to regret that. They were convicted for murder and subsequently, one could say automatically, sentenced to death. There are no facts to suggest that the involvement of the respondents in the crime was more serious than that of the other two. Joseph did have a criminal record but an unimpressive one. Boyce had no criminal record whatsoever. Reports by the prison authorities on their behaviour were in neither case unfavourable. The only relevant difference between the respondents and their fellow accused seems to be that the latter spared the Crown the time and costs of a trial.

[5] Taking these facts at face value, it would not have surprised me if it had been argued that no reasonable person in Barbados would claim that this is one of those cases that clearly demanded the execution of the death penalty or that the respondents were persons who must be hanged "though the heavens fall". Even given the right of the people of Barbados to have the death penalty on their law books, a right both recognised by the Barbados Constitution and by international law, the reality is that the authority to execute such a sentence has been, and probably will be, used only sparingly. The legal system of Barbados has a built-in flexibility as to the execution of death sentences. Executions are never automatic. That means that choices have to be made. It goes without saying that these choices, which are in fact decisions on life or death, are extremely difficult and dramatic. But they have to be made and those who have to make them are charged

with a grave responsibility. It follows that these decisions, like all decisions in the public domain, will have to be rational. Decisions on who will be hanged and who will be spared are, of course, no longer a matter of turning the imperial thumb up or down, whether divinely inspired or not. In 21st century Barbados, these are policy decisions as to how to individualise the impersonal reflection of abstract justice. They should therefore not only be rational but also unequivocally reflect that rationality. Although one cannot ignore the fact that the BPC has a very broad discretion as to the exercise of mercy, in the present case, however, the decision to have these death sentences executed leaves the objective observer somewhat bewildered as the Crown apparently seeks to take the lives they initially wanted to spare; seemingly for the reason that the condemned men could have spared the Crown the time and costs of a trial. That might very well be a proper reason for a difference in sentencing, but a difference between twelve years and death for that "circumstance" seems clearly disproportionate and utterly unreasonable (or, in the sometimes obscure vernacular of English law, *Wednesbury* unreasonable).

[6] Instead of approaching the case in this straightforward way, the respondents took a roundabout route. They submitted that the BPC had treated them unfairly and in breach of the principles of natural justice. In other words, they did not attack the rationality of the decision of the BPC in advising the Governor-General against commutation of their death sentences, but they attacked the procedure that was followed by the BPC in reaching that decision. They argued that the unfairness of this procedure was such that it amounted to a serious violation of their fundamental right to the protection of the law as laid down in section 11(c) of the Constitution of Barbados. They were therefore, so it was argued, entitled to a remedy provided in section 24 of that Constitution, notwithstanding the fact that this provision can only be invoked if "any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened." Apart from that, it was argued that so much time had gone by since the day they had been sentenced to death that, by now, the execution of that sentence would be "inhuman or degrading" and thus in contravention of section 15 of the Constitution, a provision clearly covered

by section 24 of the Constitution. It was further argued that in the circumstances of this case, commutation of the death penalty was the proper thing to do. In terms of case law, the Courts below were asked to follow the ruling of the Judicial Committee of the Privy Council (JCPC) in the Jamaican case of *Neville Lewis and others v Attorney-General*[1] as this was, so the Courts were told, binding precedent.

[7] What was it that the BPC had done wrong? According to the respondents, the BPC had twice unnecessarily and unduly triggered the issuance of their death warrants, the first time in June 2002, after the Court of Appeal had dismissed their appeals on March 27, 2002 and the second time in September 2004, after the JCPC, the then court of final appeal for Barbados, had dismissed their appeals against the mandatory character of their death sentences. On the first occasion the BPC had informed the attorneys of both respondents that the BPC would meet on June 24, 2002 to advise the Governor-General as to the exercise of the "prerogative of mercy", despite the fact that these attorneys had already informed the BPC that they had in fact petitioned the JCPC applying for special leave to appeal the decision of the Court of Appeal (which leave was subsequently obtained). On the second occasion the BPC had, without further ado, again advised the Governor-General that a date for execution should be fixed, even though the BPC was formally informed by the attorneys of the respondents that a complaint had been filed with the Inter-American Commission on Human Rights (IACHR). The respondents forcefully argued that the BPC should have awaited the results of this international law procedure as this outcome, whether in the form of a recommendation of the Commission or, ultimately, of a judgment of the Inter-American Court of Human Rights, should in good faith be considered before a decision could be reached on the granting or denying of mercy.

[8] The Court of Appeal agreed with the respondents. It appears to me that they decided (1) that *Lewis* was binding precedent, and that, following *Lewis*, the

[1] (2000) 57 WIR 275

conclusion must be (2) that the BPC should have awaited the outcome of the procedure before the IACHR before deciding on the mercy issue, (3) that the refusal of the BPC to do so amounted to a violation of the fundamental right of "protection of the law" which was said to be in effect the same as an entitlement to "due process of law" and that the violation of this right, although not in so many words mentioned in sections 12 to 23 of the Constitution of Barbados, was indeed covered by section 24 of that Constitution so that a remedy under this provision would be available, (4) that, considering the fact that already four years and four months had gone by after the respondents had been sentenced and that in the circumstances it was highly unlikely that a report from the IACHR would be forthcoming within the five year time frame laid down in the case of *Pratt and Morgan v Attorney-General of Jamaica*[2], a violation of section 15 of the Constitution was imminent and that this also called for a section 24 remedy, and (5) that the only relief that could properly be given would be the commutation of the imposed death sentences to sentences of life imprisonment.

[9] The Crown has launched strong objections against this decision of the Court of Appeal. In the first place, although appreciating that *Lewis* was and is binding precedent in Jamaica, they vehemently disagree that it was binding in Barbados. They have pointed out that under the Constitution of Jamaica the courts are not inhibited from considering "the transaction of business" of the Jamaican Privy Council (JPC), in contradistinction to Barbados where the Barbados Constitution has an "absolute" ouster clause that excludes the courts from inquiring into the question whether the BPC "has validly performed any function vested in it by this Constitution" (See: section 77(4) of the Constitution). The Crown further argued that even if it was binding in the past, *Lewis* is not so anymore, now the Caribbean Court of Justice has replaced the JCPC as the court of final appeal in Barbados. In the second place, they submit that *Lewis* cannot even be considered as persuasive authority, meaning that it cannot and should not be used as a stepping stone for the further development of the law in Barbados. In their eyes, *Lewis* is "bad law"

[2] (1993) 43 WIR 340, [1994] 2 AC 1

because: (a) it does not appreciate the non-justiciability or non-reviewability of the "prerogative of mercy" and (b) ratified but unincorporated treaties cannot have any legal effect on domestic law. In the third place, they argue that even if there was a violation of "the right to protection of the law" or there was some form of "unfairness" in the procedure of the BPC, *quod non*, this could have only attracted the sanction of nullity of the decision of the BPC (based on section 1 of the Constitution) but not one of the sanctions of section 24 of the Constitution and certainly not commutation of the death sentences to life imprisonment. The respondents have, unsurprisingly, vigorously contested these submissions of the Crown.

[10] Why does the Crown so vehemently object to the *Lewis* decision? That is not difficult to guess. *Lewis* is, not wholly without reason, conceived as an ingenious device to effectively dismantle the application of the death penalty even though that sentence is still on the books. The decision is seen and felt as a jurisprudential Catch 22 from which no Caribbean State can escape as it requires them to choose between "a rock and a hard place" or "the devil and the deep blue sea." *Lewis* clearly comprises two unlike poles, although it is open to discussion which of those might be "the devil" and which "the deep blue sea".

[11] On the one hand *Lewis* holds that when the State "acceded to the American Convention and to the International Covenant [without incorporating them into domestic law] and allowed individual petitions to [the international human rights bodies], the petitioner became entitled under the protection of the law provision [as enshrined in the Constitution] to complete [that] procedure and to obtain the reports of [such] bodies for [in Barbados: the BPC] to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered"; that where a petition had been lodged with such a body, execution without consideration of that body's report would therefore be unlawful.[3]

[3] Supra at p 303

[12] On the other hand, *Lewis*, being the result of a petrifaction process that can be traced back as early as *Bradshaw v Attorney-General of Barbados*[4], applied a version of *Pratt and Morgan* that reduced the latter to its formal fabric. Although the JCPC in *Pratt* had said that they "did not purport to set down any rigid timetable", that is exactly what they did in *Lewis*. Their Lordships had said in *Pratt* that when "execution has to take place more then five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'." Thus the five year period merely ushered in a rebuttable presumption. However, in *Lewis* which actually combined six similar cases they did nothing more than simply establish the fact that in four of the six cases "the period of five years referred to in *Pratt* has already elapsed" and that in the two other cases "it is inevitable that, by the time the appellant's advisers have been able to see the material which was before the Privy Council of Jamaica and to make representations on it…, the period of five years will have elapsed", and that they were "therefore satisfied that the sentences of death should be set aside in all cases and commuted to ones of life imprisonment." Thus, in *Lewis* the form of *Pratt* got precedence over its substance.

[13] What is the substance of *Pratt*? It would seem to me that it is this: "a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it." And: "Their Lordships are very conscious that the … government faces great difficulties with a disturbing murder rate and limited

---

[4] (1995) 46 WIR 62

financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition." (per Lord Griffiths)[5]. See also Lord Goff in *Guerra v Baptiste*[6]: "problems facing the judicial system … cannot be allowed to excuse long delays." In the latter case "the time which had elapsed between sentence of death and completion of the hearing of the Court of Appeal was four and a half years" and "the overwhelming reason for this excess was the failure to make available the judge's notes of the evidence at the trial until four years after the trial was over." On the basis of these facts the JCPC felt "bound to conclude that there has been a substantial and unjustifiable period of delay in the disposal of the appellant's appeal, a period which in all probability exceeds three years." Or, to paraphrase the European Court of Human Rights, it is for the State to organise their domestic legal system in such a way that it can effectively ensure the right of every person charged with a criminal offence to be tried without undue delay or within a reasonable time.[7]

[14] "Trial" in this particular context, in my view, clearly includes the appellate procedures and even the legal processes for the consideration of reprieve, and beyond that, up to the final moment of execution itself. It would seem that the broad scope of this concept, ultimately, flows from the fundamental right which underlies all other fundamental rights, the right to human dignity and the corresponding prohibition on the negation of a person's basic humanity, even if that person is a death row prisoner. I will come back on this point later. For now, it suffices to remark that, whatever the substance of *Pratt*, it was that decision in its strictly formal manifestation with its narrow focus on the "five years' deadline" that constituted the law which the Court of Appeal had to, and did, apply. That part of *Lewis* was binding precedent when the Court of Appeal decided the instant case, whatever opinion our Court might now have on this matter. The question is then: was the other part of *Lewis*, which was obviously

[5] Supra at p 361
[6] (1995) 47 WIR 439 at p 451
[7] ECHR, *Mansur v Turkey*, 8 June 1995, Series A, No 319-B, at p. 53 [68]

founded on the case of *Thomas v Baptiste*[8], also at that time binding for the Court of Appeal?

[15] Before dealing with this question, it seems appropriate and useful to dwell briefly on the general issues of the interpretation of written constitutions such as the Caribbean Constitutions in general and the Barbados Constitution in particular. Interestingly, these constitutions are still portrayed as being of the Westminster Model. They were, and to a certain extent still are, seen by many as a mere evolutionary, written variant of the original in the former Mother Country, be it with some additional constitutional "gadgets" (like a Supremacy Clause and a Chapter on fundamental rights and freedoms). Thus, the largely unwritten English Constitution shaped by conventions and common law seemed to have been set in ice in all its perceived magnificence and splendor. From a more cynical angle it could be, and has been, observed that the older Caribbean Constitutions contained general "savings clauses" (as they still do after decades of independence) which brought the existing (mainly English) law, perfect and pristine as it seemed, beyond the reach of judicial review, whereas newly created local legislation could always be reviewed judicially all the way up to the trusted and familiar Judicial Committee of the Privy Council manned by the British Law Lords.

[16] Unsurprisingly, the JCPC and in their footsteps the Caribbean courts themselves for many years approached these constitutions, in the words of Lord Bingham in *Gairy v Attorney-General of Grenada*[9], on the assumption "that the rights specified in the Constitution were already secured to the people and that the object of embodying them in the Constitution was to restrain future enactments which might derogate from them." Lord Bingham compared in this context Lord Diplock's "somewhat conservative approach to the substance of the law" in *Jaundoo v Attorney-General of Guyana*[10] with his "enlightened approach to the procedural implications of protecting fundamental rights" in that same case. And

[8] (1998) 54 WIR 387
[9] (1999) 59 WIR 174 at p 198-199
[10] [1971] AC 972

he concluded: "In interpreting and applying the Constitution of Grenada **today**, the protection of guaranteed rights is a primary objective, to which the traditional rules of the common law must so far as necessary yield. The Board cannot regard *Jaundoo* as an accurate statement of **the modern constitutional law** applicable in Grenada." In the same line is the reasoning of Lord Hoffmann in delivering the judgment of the JCPC in the recent case of *State of Trinidad and Tobago v Boyce*[11] where he held that there was a substantial difference between the "old common law rule" of "due process of law" and the "constitutional meaning" of that same concept.

[17] Thus, an awareness that the interpretation of Caribbean Constitutions is a legal activity in its own right seems to be emerging gradually, although there is still, perhaps understandably, an inclination to take the (English) common law as a point of departure. One would hope, as I envisage, that these flashes of enlightenment will be taken to their ultimate conclusion, so that a genuine constitutional law will be developed on the basis of the Caribbean Constitutions themselves as the embodiments of the democratic societies they endeavour to establish and guard. That does not mean that the common law has no role to play in construing these constitutions. The historical and systematic ties between the legal systems of the Caribbean and that of their former colonial master are still manifest and multiple. But the common law focused as it is on the unwritten Constitution of the United Kingdom cannot be the centerpiece of Caribbean constitutional law as these constitutions, contrary to what was thought for so long and despite the many similarities at the outset of their governmental systems, are fundamentally different. This is so because of the very fact that they are written and because of the fact that the people themselves, and therefore their constitutions, are deemed to be sovereign and supreme. Further, the legislatures under the Caribbean Constitutions, although extremely important, cannot, as Parliament can in the United Kingdom, claim superiority over the other two branches of government. Caribbean parliaments are not at liberty to legislate

[11] [2006] UKPC 1 [14]

whatever or however they see fit without having regard to the limits enshrined in the constitutions which ultimately have to be construed, and guarded, by the Judiciary.

[18] I now turn to the Barbados Constitution. This founding document clearly embodies and constitutes a constitutional democracy. Although this Constitution is largely concerned with seemingly formal and institutional issues, it is undoubtedly a qualitative and normative document. This is not only clear from the content of Chapter III on the protection of fundamental rights and freedoms of the individual, but also from the Preamble in which the people of Barbados, amongst other things, proudly "proclaim that they are a sovereign nation founded upon principles that acknowledge the supremacy of God, the dignity of the human person, their unshakeable faith in fundamental human rights and freedoms" and "affirm their belief that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law." It is in this light that the Barbados Constitution as a whole has to be understood and interpreted as these words fill the Constitution with meaning reflecting the very essence, values and logic of constitutional democracies in general and that of Barbados in particular.[12]

[19] These normative parts of the Constitution breathe, as it were, life into the clay of the more formal provisions in that document. Thus, the fact that the three branches of government are formally dealt with in separate Chapters and the fact that the Chapter on the Judiciary contains strong procedural safeguards against undue influence from the political branches, all taken together with the Supremacy Clause in section 1, establish in the light of the solemn affirmation of the rule of law the substantive concept of the separation of powers, which is considered to be the backbone of any constitutional democracy[13]. Some aspects of this principle as a Caribbean constitutional principle had already been

[12] See about interpretation of constitutions in general: Aharon Barak, The judge in a Democracy (2006), p 127-135

[13] Op cit, Barak, at p 35

acknowledged in 1977 by Lord Diplock in the well-known case of *Hinds v The Queen*[14], although that result was reached through his "somewhat conservative approach" of assuming that the principle was a feature of the original Westminster Constitution and that the constitution at hand was basically modeled after that original.

[20] The multi-layered concept of the rule of law establishes, first and foremost, that no person, not even the Queen or her Governor-General, is above the law. It further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and arbitrary exercise of power. It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive "due process of law" and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect. The right to protection of the law requires therefore not only law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. It also requires the availability of effective remedies. These requirements are inherent in the Barbados Constitution. Section 24 which expressly guarantees the right to an effective remedy is, therefore, merely a reflection of that fundamental right to the protection of the law. Hence, the existence of that section, cannot, without more, be construed in a manner so as to limit that right or to frustrate the granting of an effective remedy for a breach of the Constitution.

[21] These are the principles that I think should guide us in the determination of the remaining issues which I now turn to. The first question which has to be answered is whether the exercise of mercy by the BPC is an area which by its nature is unsuited for any form of adjudication, and, if it can be reviewed as such by the courts, whether the ouster clause of section 77 (4) of the Barbados Constitution

[14] (1975) 24 WIR 326

has the effect of declaring the exercise of the prerogative of mercy non-justiciable or non-reviewable. It is clear that the BPC are part, although being a special branch, of the Executive. It is also clear that the BPC are not above the law. The BPC discharge their functions under the Constitution and therefore they cannot, however eminent the members of that body may be, go unchecked by the courts. But at the same time the courts have to respect the scope of the discretion afforded to the BPC in the exercise of mercy. Both the executive acceptance of judicial scrutiny and judicial respect for executive discretion are required under the rule of law and flow from the separation of powers.[15] Generally speaking, depending on the subject-matter of the executive power, discretion may vary from the very narrow to the extremely broad. In the case of the latter the exercise of the discretion, whether called “prerogative” or by any other name, might be so deep in the realm of being “political” and so far removed from any legal frame-work that the courts will be strongly inclined to deem the discretion exercisable in this sphere as being non-justiciable or non-reviewable, meaning that the matter can or should not be adjudicated. This is usually so in cases of war and peace and foreign affairs in general.

[22] In the area of decision making on mercy one has to distinguish between those regimes where the sentencing process was part of the judicial process as a whole, including the appellate phase, with full judicial discretion as to the mode and severity of sentence and those where the hands of the courts were tied to such extent that no discretion whatsoever was afforded to them in meting out sentence. One should also distinguish between death penalty cases and other cases, given the severity, finality and irrevocability of the execution of the former. It follows then that the discretion as to the exercise of mercy in a mandatory death penalty regime would be much narrower than in cases where the courts have full discretion to tailor the punishment to fit the crime. However broad the discretion in the exercise of mercy might be though, it is my view that the BPC can never be discharged of their constitutional duty to be rational, reasonable or fair and to

[15] See, also, Barak, oc, at p.39

eschew improper procedures. The broader the discretion the less chance there is that the courts, bound as they are to respect the scope of that discretion, will reach the conclusion that the decision is irrational or utterly unreasonable, but that chance is never zero. Procedural impropriety is, of course, easier to detect, and an intervention by the courts on this ground will therefore be seen to occur more regularly.

[23] As every person and institution in Barbados functions under the Barbados Constitution, being the supreme law of the land, and as therefore all are duty bound to act rationally, reasonably and fairly and all, including the courts themselves, have to bear the weight of judicial scrutiny, ouster clauses seeking to relieve that onus must of necessity be construed as narrowly and restrictively as possible. This is *mutatis mutandis* the case with the ouster clause of section 77(4) of the Barbados Constitution which apparently seeks to shield the BPC from judicial review that might be deemed inappropriate or unnecessary. But in my view this clause does not relieve the BPC from their constitutional duty of rational and reasonable decision making nor does it mean that they could freely ignore the law. And it goes without saying that the ouster clause does not imply that the BPC would be free to indulge in procedural impropriety. The clause does mean that the confidentiality of their deliberations must and will be protected, save, perhaps, in exceptional circumstances where the interests of justice so compellingly require. It follows, then, that the ouster clause does not preclude the courts from having a look at the proceedings of the BPC or from adjudicating certain aspects of those proceedings and their outcome. And so, in my opinion the very existence of this ouster clause can have no relevant negative effect as to the question whether *Lewis* was applicable in Barbados. Neither the prerogative character of the exercise of mercy nor the ouster clause prohibited the application of *Lewis* in Barbados. On the contrary, the Court of Appeal was bound to consider the aspect of *Lewis* that upheld *Thomas v. Baptiste* as binding and likewise the aspect of *Pratt* that *Lewis* reinforced. The Court of Appeal simply had to follow the *Lewis* decision in its entirety, and they did.

[24] As *Lewis* reflected the law of Barbados as it then stood, the Court of Appeal rightly concluded that the BPC should have deferred arriving at its decision until the Inter-American Human Rights System had run its course and the results produced by that system were in hand and considered. The Court below also rightly concluded that these results would not have been received within the five year time-frame. It is a matter of record that these results were still not in at the time we heard this appeal. This brings us to the question as to what remedy was available and appropriate in this case. The Court of Appeal came to the conclusion that the BPC's violation of the principles of natural justice in this respect justified a stay of execution, and they reasoned, in conformity with *Lewis* and quite logically, that this stay would inevitably lead to a transgression of the five year time limit, which in turn would trigger the remedy of commutation. The Crown, on the other hand, insisted that violations of sections 11(c) and 77 or 78 of the Barbados Constitution could only attract the sanction of nullity as section 24 of the Constitution cannot be resorted to for a breach of section 11 (c).

[25] Quite apart from *Lewis*, in my view the reasoning of the Crown on this point cannot be followed. Besides the fact that the Barbados Constitution inherently requires the courts to give effective protection against violations of its provisions, the procedural violations of the BPC amounted to a violation of section 12 of the Barbados Constitution. This provision holds that "no person shall be deprived of his life intentionally **save in execution of** the sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted." As we have seen earlier, the Barbados Constitution has to be understood as a normative document, which means that the words "save in execution of" must be read as "save in **due** execution of". Reading this provision in an anormative or strictly literal way would imply that it is not constitutionally prohibited to deprive someone of his life by executing him in contravention of the law or fundamental principles of law. It would mean, for example, that hanging a condemned man pending an appeal, although unlawful, would not be unconstitutional as the man's

life was taken "in execution of the sentence of a court, etc." In fact, this was exactly what the BPC ostensibly sought to do when in June 2002, knowing that an application for special leave was pending, they advised against mercy for the respondents, a point to which I shall return.

[26] In conclusion, in my judgment the decision of the Court of Appeal was in accordance with the law as it then stood. Of course, that does not necessarily mean that the decision as such is correct. As indicated above, one can, looking back at how the relevant jurisprudence has developed, be critical of the way in which the JCPC decisively resorted to the barren form of *Pratt.* They unfortunately did so to the detriment of the well-reasoned and important substance of that decision. Thus, their Lordships austerely turned *Pratt* into a legalistic pillar of procedural salt with solemnly engraved time-limits of tabulated rigidity. Accordingly, the *Pratt deadline*, being made inflexible, emerged in *Lewis* as a virtually indefeasible *lifeline*. The Court of Appeal had to follow, and correctly followed *Lewis*, but our task as a new court of final appeal is quite different from theirs. We should only follow those earlier decisions if we find them persuasive. Put differently, we are not to follow but to lead. It should be clear, however, that even if we concluded that *Lewis* was completely wrong and that, accordingly, the Court of Appeal should have come to a decision other than one leading to commutation of the death sentences of the respondents, our decision could not have the effect of putting the men back on death row. It is a clear legal principle that no change in the law, whether by means of legislation or by means of judicial interpretation overturning precedent, detrimental to the condemned men should affect them negatively[16]. That would be unfair, uncalled for and inhuman. I take it that for that very reason the Crown conceded that they were no longer seeking the execution of the death sentences in this case. However, it is still our duty to give our views on, what I summarised as, the *Thomas v. Baptiste* aspect of *Lewis*. The question to be answered here is: how, if

[16] See, eg, *Roodal v State of Trinidad and Tobago* (2003) 64 WIR 270 and *Matthew v State of Trinidad and Tobago* (2004) 64 WIR 412

at all, may ratified but unincorporated international human rights treaties which give a right of access to international tribunals affect the rights and status of a person convicted of murder and sentenced to the mandatory punishment of death by hanging.

[27] The State of Barbados has signed and ratified the American Convention on Human Rights, although it has never incorporated it into its domestic law. This Treaty provides for the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Barbados has accepted the jurisdiction of that Court. Article 44 of the Convention gives "any person or group of persons, or any nongovernmental entity legally recognised in one or more member states of the Organization [of American States]" the right to "lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." Any such petition must be processed by the Commission, which has to decide whether the petition is admissible. If it is and no "friendly settlement" can be reached between the parties, the Commission must draw up a report in which "it may make such proposals and recommendations as it sees fit." The report should then be transmitted to the State concerned. Within three months after that transmittal the matter should either be settled or be referred to the Inter-American Court. If this does not happen, the Commission may decide to pursue the matter further by making "pertinent recommendations" and prescribing "a period in which the state is to take the measures that are incumbent upon it to remedy the situation examined." If the Commission is of the opinion that the measures taken by the State were not adequate, it can decide to publish the report.[17]

[28] On close scrutiny, it is clear that the right to petition the Inter-American Commission exists whether or not it is authorised or implemented by national legislation. Any person in Barbados, or elsewhere, who wants to lodge a petition, can do so. The State cannot prevent anyone from initiating these proceedings.

[17] American Convention on Human Rights, articles 46-51

And once the petition has been received by the Commission, a legal procedure is set in motion which will run its own course and lead to a legal conclusion of some sort, irrespective of whatever domestic legislation might be in place in the State whose national filed the petition. Accordingly, the absence of domestic legislation normally does not pose a problem. However, if the State were to act in such a manner as to render the international procedure illusory, as for example where the petitioner is a death row prisoner whom the State decides to hang without allowing a reasonable time for his petition before the Inter-American bodies to be concluded, problems do arise. It would seem rather obvious that the State should not act in this way. States are bound to perform the treaties which they have ratified in good faith. This obligation, it would seem to me, prohibits the State from pre-empting the outcome of pending legal processes by executive action, a general legal principle that also exists in the common law: see *Thomas v Baptiste*. And as the Barbados Constitution has a normative structure, this principle should obviously be regarded as equally forming part of that same constitution. One would have thought, therefore, that the resolution of this issue should be a fairly simple one, guided as it is in my view by plain common sense. But, perhaps surprisingly for those not familiar with the intricacies of legal reasoning, in the Halls of Justice throughout the Commonwealth the issue has been perceived as being anything but simple.

[29] As constitutional doctrine has it, ratified treaties are, indeed, binding upon the State on the international plane but they can only be binding on the domestic plane after they have been incorporated, or enacted, by the Legislature. Unincorporated treaties are said to be incapable of effectively conferring rights on the citizens of the State, even though the executive branch of the State has ratified those treaties and, by doing so, has solemnly affirmed the granting of these rights. Most treaties do not need to be enacted at all as they concern relationships among States themselves. But some treaties, notably human rights treaties, appear to be mainly concerned with the relationship between the State and the individuals within its jurisdiction. In terms of the constitutional doctrine, however, these

treaties merely purport to confer rights on citizens. Or sometimes it is said that these treaties do confer rights on individuals but that these rights are not enforceable under domestic law. What strikes me, as one hailing from a monist legal tradition, is that for more than a century this doctrine has been staunchly defended and upheld by appellate courts with an apparently burning passion. It appears, in a sense, that the doctrine has obtained a status comparable to that of religious dogma. Any attempt to subject it to sober analysis seems to be perceived and frowned upon as heretical. Even in the many instances where the courts did give, allegedly indirect, effect to unincorporated treaties, they never failed to pay reverence to and, at least formally, uphold this "firmly established", "sacred" or "hallowed" principle.

[30] Lord Millett, who had proclaimed in *Thomas v. Baptiste* that "[b]y ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic system and thereby temporarily at least extended the scope of the due process clause in the Constitution", went out of his way in the later case of *Briggs v Baptiste*[18] to assure the parties that his decision in *Thomas* "did not overturn the constitutional principle [*sic*] that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation", although his robust but controversial words in *Thomas* had been introduced by a, faint, disclaimer: "The applicants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution." Another intriguing example of religious adherence to the doctrine can be found in Lord Hoffmann's philippic in *Higgs v Minister of National Security*[19] where, after tracing the origins of the doctrine all the way back to "the great principle which was settled by the Civil War and the Glorious Revolution in the 17th century", he equated "an international court" created "by the Crown in conjunction with other sovereign states" with England's infamous

[18] (1999) 55 WIR 460
[19] (1999) 55 WIR 10

"Star Chamber", adding that the objection to both such "prerogative courts" should be "equally strong".

[31] The bedrock of this judge-made doctrine, when looked at carefully, seems rather ambiguous. In the many cases that deal with this subject several approaches can be found. Very often one finds that more than one concept has been used in one and the same judgment without much clarity as to their logical structure. Sometimes it is said that the doctrine is founded on the fact that treaties do not form part of our domestic law and hence form no part of our domestic legal system. On occasions one is made to understand that, as far as individuals are concerned, treaty law is *res inter alios acta* (a thing done between others) which is by its nature incapable of affecting them either positively or negatively, making it irrelevant as a source of rights and obligations. A third concept points to the fact that treaties are made in the conduct of foreign relations which are a prerogative of the Crown., and as that activity is said to be non-justiciable, the domestic courts have no jurisdiction to construe or apply such instruments. A fourth underpinning of the doctrine has been found in the principle of separation of powers. This principle has it that under the Constitution the Crown, or rather the Executive, has an unrestricted power to make, enter into, ratify and withdraw from treaties, whereas only the democratically elected Legislature can make and unmake laws.

[32] Intriguingly, the courts, although never having relinquished their reverence for the doctrine that unincorporated treaties "cannot create rights", gradually devised methods to escape the dire consequences of rigid orthodoxy. These methods invariably led them to accept concepts that, on closer look, seem to be at variance with the official doctrine. In this context it has since long been accepted by the courts that it should be presumed that Parliament intends to legislate in conformity with the international obligations of the State, unless it was clear that there was not such an intention. Accordingly, domestic statute law found to be ambiguous or unclear should be construed in conformity with the State's

international obligations. This rather technical approach developed into the "well established principle that the Courts will [in case of ambiguous legislation] so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations", a development that transformed a judicial fiction into a judicial obligation. This became even clearer when the courts commenced embracing the proposition "that the principle requires one to construe the constitution and other contemporary legislation in the light of treaties which the governments **afterwards** concluded." (see *Boyce and Joseph v the Queen*[20], per Lord Hoffmann). It is obvious that with this last development the courts have left the solid ground of legislative construction. What is more, it comes close to the very negation of the sacred premise that unincorporated treaties can have no legal effect on the domestic plane.

[33] Another convenience used by the courts has been the doctrine of legitimate expectation as it was formulated in the Australian case of *Minister for Immigration and Ethnic Affairs v Teoh*[21]. In this case the legitimate expectation, which has its origins in administrative law, was elevated to the level of constitutional law. In *Teoh* the Australian High Court considered the ratification by a State of, at least, human rights treaties as "a positive statement by the Executive government … to the world and to the … people that the Executive government and its agencies will act in accordance with the [treaty]."[22] And the Court added: "That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the [treaty]." What makes this approach rather remarkable, in my view, is the point that it is apparently not deemed necessary that the person seeking to rely on the legitimate expectation actually entertains the expectation. As long as the non-existent expectation "is reasonable in the sense that there are adequate materials to support it", "it" will be honoured. The strength of this construction seems to be then, that,

[20] (2004) 64 WIR 37, [2005] 1 AC 400
[21] [1995] 3 LRC 1
[22] Ibid at p 17

de jure, the doctrine of unincorporated treaties is followed and upheld, as legitimate expectations can become relevant only where no legal rights exist, whereas, *de facto*, it provides the citizens with the protection of these rights, be it in a limited way. The weakness of this construction is of course that it is highly artificial and that it might easily be made ineffective by the Executive. From a pragmatic point of view, the "teoh-logical" approach might, for the time being, be useful. Dogmatically, however, I am afraid it will, in due time, prove to be untenable.

[34] Unsurprisingly, the courts have always rejected the view that by using these routes they had been partaking of forbidden fruits. But in 1999, in a lecture titled *The Way We Live Now: Human Rights in the New Millennium*, Lord Bingham "confessed" to having committed that very sin. Speaking about the European Convention on Human Rights and the ways in which British courts endeavoured to side-step the difficulties caused by the revered doctrine of the unincorporated treaty, he said: "In these ways the Convention made a **clandestine entry** into the British law **by the backdoor**, being forbidden to enter by the front."[23] This is an interesting metaphor. It raises some profound questions. Who are the ones that opened the backdoor? Are those not the same courts that once closed the front door? Why the secrecy? And are courts not required to act against clandestine entry or trespassing instead of indulging in that very activity? Or have the courts just been trying to administer justice and doing the proper thing? As Lord Bingham said in his lecture: "If the United Kingdom binds itself by international treaty to guarantee these [fundamental] rights to its citizens, it makes no sense that the rights should not be enforceable in and by British courts." Is that not a simple truth capable of setting us free from doctrinal idolatry? But if that is so, why use the backdoor? Why not use the front door which we might very well find not to be locked if only we would push at it. In this respect it is difficult to resist harking back to Sir Robert Phillimore in *The Parlement Belge*[24], the authority always

[23] In: Tom Bingham, The Business of Judging: Selected Essays and Speeches (2006), at p 162-163.
[24] [1874-80] All ER Rep 104

cited as the very first case in which it was held that the Crown is not permitted, by entering into and ratifying a treaty, to legislate without the authority of Parliament. Sir Robert had said no such thing. In that case, he said nothing more than that, by ratifying a treaty, the Crown cannot **adversely** affect the private rights of its subjects, which is a common sense dictum with which it is difficult to disagree. But that dictum is far more restricted than it is usually portrayed.

[35] Returning to the foundations of the doctrine of unincorporated treaties as summarised in paragraph 31, I should be rather brief as none of this has been the subject of serious argument. It seems to me that the first three grounds for the doctrine are all "begging the question" and hence are fallacious. And even if one accepts that international and domestic law as systems are unable to converge upon each other, this does not mean that no conflict of legal obligations can occur, where on the domestic plane the State or one of its branches is unable or reluctant to act in a manner required by international law, and in particular by treaty law. It does not logically follow that because negotiations as to the entering into a treaty and the possible conditions under which the same should take place are probably non-justiciable, the fruits of those activities, the concluded and ratified treaty itself, its provisions, and in particular any rights it might confer on individuals and the obligations it may impose on the State, cannot be adjudicated on the domestic plane. Suffice it to say that I strongly disagree with the view that domestic courts are in any way inhibited from construing treaties provided, of course, the treaties themselves do not prohibit such activity (as does, for example, the Revised Treaty of Chaguaramas by giving the Caribbean Court of Justice exclusive jurisdiction to interpret and apply its provisions[25]).

[36] The most solid ground for the doctrine of the unenforceability of unincorporated treaties is undoubtedly the principle of the separation of powers, which, unlike the doctrine itself, is by its nature a constitutional principle. This brings us back to a point I made earlier. It is clear that the doctrine of the unenforceability of

[25] Article 211

unincorporated treaties was planted and nurtured in the soil and social climate of the unwritten English Constitution. It is also clear that in many respects the Caribbean Constitutions are fundamentally different from that unwritten Constitution as are the realities of the Commonwealth Caribbean compared to those of the United Kingdom. One should therefore take care not to transplant so precious a doctrine from the one to the other without regard to those differences. Unfortunately, that is exactly what has happened

[37] What then are the relevant differences? First and foremost, in the United Kingdom Parliament is sovereign and supreme. Its powers are unlimited which may explain the monumental emphasis on the constitutional commandment: "There shall be no Lawmaker, but Parliament!' In the Caribbean, on the other hand, it is the constitution that is sovereign and supreme, which causes the Legislature to assume a somewhat more modest role and places this branch of government on the same footing as the other two. Secondly, although the Constitution of the United Kingdom has never distinguished itself by a strong separation between the executive and the legislative branch, as the members of the former are mainly recruited from the ranks of the elected members of parliament, only a limited group of MP's may, by virtue of statutory legislation[26], form part of the executive branch, whereas in Caribbean States usually almost all elected members of parliament of the governing party appear to be, at the same time, members of the Executive. Thirdly, in the United Kingdom time-honoured legal, conventional and organisational mechanisms are in place that promote and seem to establish thorough and serious efforts to examine and, if necessary, update existing legislation prior to the ratification of a treaty, whereas in the day to day reality of most Caribbean States such mechanisms are practically non-existent or almost never used.

[26] The House of Commons Disqualification Act 1975, section 2. See: Colin R. Munro, Studies in Constitutional Law, second edition (2005), at p 323

[38] The doctrine of the unenforceability of unincorporated treaties, as I have made abundantly clear, is in my view an old, mouldered and creaky structure, unsuitable for Caribbean climate and soil. Consequently, it would seem to me that it should be dismantled and that a new structure should be raised on the *terra firma* of the Caribbean Constitutions themselves, making use of course of all those parts of the old structure that are still useful and in good shape. What domestic materials, then, do we have? At first sight, we are seemingly confronted with an insurmountable problem as almost all of the Caribbean Constitutions, the Barbados Constitution not excluded, maintain a deafening silence on the subject of treaties (Guyana, however, forms a modest exception). This is rather remarkable. Most of the newly created States in the world do have constitutions that elaborately deal with the relationship between their domestic law and international law, the treaty-making power of the State and possible democratic involvement at the ratification stage. Not so in the Commonwealth Caribbean. In their constitutions these issues are simply ignored. Quite surprisingly, notwithstanding the fact that in today's globalising world these subjects have become more important than they already were in the past, even the two recently produced drafts for a new Constitution of the modern Republic of Trinidad and Tobago are silent on them. The absence of any provision on these subjects in the constitutions is the more curious when it is realised that the independent Caribbean States have been forged, almost without exception, with the support of the same international law their constitutions so vigorously ignore, having emerged on the basis of the human right of self-determination enshrined as it was, and still is, in many important treaties and other international instruments. Thanks to international law even small States have a voice in the world of nations and thanks to international law they are not likely to be crushed easily or arbitrarily by other, bigger and more powerful, States. No sovereign State, and certainly not the small Caribbean States, thriving on tourism and international services as many of them do, can live and breathe outside the sphere of international relations and international law. So, it seems rather odd that as to these subjects our constitutions appear to be playing the ostrich. And odd it is when wandering through the

provisions of the Constitutions one tends to get the impression that beyond the skies of the State no relevant law exists. So, at first blush anyway, these constitutions do not seem to give the courts much guidance. Nevertheless, it cannot be denied that there is more law between heaven and earth than we have dreamt of in our own doctrinal philosophy.

[39] All this, again, begs the question: what materials do we have and how are we going to structure them in order to create a clear, solid and genuine approach as to treaty law and its effects on our domestic law. Let me first say this. Most of what we call international law will never reach or penetrate the atmosphere of the domestic State for the simple reason that it is not meant to have any domestic effect. And the light that, figuratively speaking, emanates from those treaties creating specific obligations for States with respect to individuals within their jurisdiction, which obligations reciprocally mirror the rights conferred on these individuals, will only enter into the State's legal atmosphere if, when and to the extent that the executive branch of the State "unlocks" that treaty by signing and ratifying it. By ratifying a treaty the State gives its solemn word to the other contracting States or the international community as a whole that it will give due and proper effect to its treaty obligations. Like men and women, States must be as good as their word. They have to comply, in good faith, with legal obligations. As democratic States comprise three branches of government, the Executive, the Legislature and the Judiciary, all three have the obligation, within their respective possibilities, to make the treaty work. But not all three have the same means and power to do so. And all three have to stay within their own limited sphere. If the Executive are unwilling to comply with the obligations stemming from the treaty, and the Legislature is not acting, it will be the Judiciary that has to hold the State to their word as "*pacta sunt servanda*" is a peremptory rule, common to all civilised legal systems. In doing so, however, the courts can only go so far as the constitution allows them to. The reason for this is clear. Although in my view municipal courts can, should, and sometimes are bound to construe and apply relevant treaty law and even have been officially recognised as creators of

international law (see: article 38 (1)(d) of the Statute of the International Court of Justice), the fact that these courts are created by or, as is the case with the Caribbean Court of Justice in its capacity of the court of final appeal of Barbados, have to discharge certain functions under the Constitution, their first loyalty is and must be owed to that Constitution. Consequently, the effect, the figurative light that emanates from the ratified treaty does not pour in abundantly but is, as it were, filtered through the ozone layer of the Constitution with its inherent values, logic and principles. And that ozone layer might for the most part be so impenetrable that much of the light will never, on its own, reach the individuals on the domestic ground.

[40] Does the Barbados Constitution allow any of this "light" to enter its legal atmosphere? As the Constitution seems to be silent on the subject, is this then a silence that gives consent? Or does the Barbados Constitution in another, indirect, way convey an opinion on the possible effect of treaty law on the domestic plane? In my judgment, the Constitution leaves the subject completely open. There might have been a restriction or prohibition in the way the Constitution defines what law is. However, it mentions "law" in the definition section 117 (1) without saying what "law" really means. The concept of "law" is not limited, but the definition only states that "law" **includes** (1) any instrument having the force of law and (2) any unwritten law. Accordingly, the Constitution leaves room for other forms of law and hence does not exclude international law in general or treaty law in particular. The sole section in the Barbados Constitution where international law is mentioned with so many words is section 79A (2)(b), that requires the Director of Public Prosecutions to act in accordance with general or special directions given by the Attorney-General in case of certain offences, *inter alia*, those "under an enactment relating to any right or obligation of Barbados under international law." However, I fail to see how that should lead to the conclusion that international law or rights conferred upon individuals by such law are thus logically and as a matter of principle excluded from being considered law under the Barbados Constitution.

[41] Does not the principle of the separation of powers, so firmly enshrined in the Barbados Constitution, prohibit us from accepting that by ratifying a treaty the executive branch could somehow cause legal rights, unknown on the domestic plane, to "fall from the heavens"? This would indeed have been the case if the Constitution had said that the Legislature has the exclusive power to make and unmake law. But that is not what the Barbados Constitution says. Section 48 (1) merely states that "subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government." It is, moreover, a well-established fact that the executive branch, in the form of subsidiary legislation, also legislates. In terms of quantity such legislation is even greater than that of the Legislature, although it could of course well be argued that this legislative activity is only exercised and justified because, and so far as, it has been delegated by the Legislature itself. In this connection a distinction must be made between "making laws" and "making law". Although "laws" is the plural of "law", the latter nevertheless conveys a wider meaning than the former. "Making laws" is merely one form of "making law". This is clearly appreciated by the Constitution as it expressly recognises the existence of "unwritten law", meaning the common law as it has been developed and is being developed exclusively by the judicial branch. There is worldwide acceptance that the development of unwritten or common law is not simply the discovery of law and the making of declarations as to "what it is and always has been", but that it is a form of creating law. This is even true as to the interpretation of statute law which also, in part, might be regarded as a form of law creating.

[42] Although the Barbados Constitution endows only the Legislature with the authority to make laws, so that, under that Constitution the Legislature may be considered the sole creator of laws, they are not the sole creator of law. The Constitution apparently accepts and leaves some room for law-creating activity by other branches, if, and to the extent that, such activity is carried out within the boundaries of the respective constitutional sphere of the other branches. However,

and this logically flows from the democratic values that underpin the Barbados Constitution, although the Legislature is not the sole creator of law, they clearly are, as they must be, the most important law-maker and they have, as they must have, primacy and hence an overriding power in this area. This means that they may always rein in the other branches if they think that these branches have gone too far or have taken an undesirable route in any law-creating activity which, expressly or impliedly, might have been afforded to them. The Legislature can thus, on the domestic plane, always unmake or nullify what was made, provided that the Legislature keeps within the ambit allotted to them by the Constitution. For these reasons, I would not be inclined to accept that the Barbados Constitution places an absolute fetter on the enforceability on the domestic plane of rights conferred by ratified but unincorporated treaties, a disinclination which is fortified by the fact that the realities of constitutional democracy in the Commonwealth Caribbean do not reflect the degree of separation between the executive and legislative powers that would justify such an absolute approach.

[43] This does not mean, however, that drastic changes in the law would flow from this departure from traditional thinking on this subject. Things are not as radical as they may seem. The Barbados Constitution has in section 1 an effective protective shield as it makes clear that the Constitution is the supreme law in Barbados and that any other law, international law included in my view, that is inconsistent with the Constitution shall, to the extent of the inconsistency be void (so far as the State of Barbados is concerned). The Barbados Constitution bestows upon the Legislature the exclusive "power of the purse". And the principle of the separation of powers that forms part of the Constitution confers on the Legislature the primacy of law making. It follows then, that ratified but unincorporated treaties cannot adversely affect the existing rights of the citizens under the Barbados Constitution (as was rightly decided in *The Parlement Belge* with respect to the English Constitution). These treaties can therefore not deprive the citizens of their existing rights, impose legal duties on them, authorise public expenditure, or create new crimes, without authorisation by the Legislature, as

this would violate the separation of powers. What they can do, however, is to confer rights on the citizens, provided that these rights have been formulated in a way that makes them directly applicable and that they are compatible with the Constitution in general, and do not entail an infringement on the rights of other citizens in particular. It also follows that in the case of a conflict between a domestically enforceable provision in an unincorporated treaty and a clear statutory provision, the latter has to be given precedence by the courts, be it only if the meaning of the statutory provision is beyond reasonable discussion. In the words of Dame Rosalyn Higgins, the current President of the International Court of Justice: "[I]f a statute is truly unambiguous (which can often not be ascertained with confidence until relevant related texts are examined), then it will necessarily prevail over a contrary provision in an unincorporated treaty. But that is all."[27]. Moreover, international treaty law undoubtedly has, as it should have, a substantial impact on the development of the common law – of which customary international law, according to tradition, already forms part. Furthermore, the rights conferred by ratified but unincorporated treaties may well comprise, and introduce to the domestic plane, strong guiding principles as to the exercise of discretionary powers by any of the branches of government. How this eventually will affect the development of the law can, of course, within the confines of the present case neither be set out nor predicted. Caribbean constitutional law will majestically and inexorably unfold as it gradually advances from one case to another.

[44] Section 1 of the Constitution ensures that unincorporated treaties, or incorporated treaties for that matter, cannot, without more, change or amend the Constitution. Counsel for the Crown took the position that the JCPC had done just that in *Thomas v Baptiste* and *Lewis* where they held that the government by ratifying the American Convention had temporarily extended the scope of the due process clause and the protection of the law clauses in the respective Constitutions of

---

[27] See: Professor Rosalyn Higgins QC, The Relationship between International and Regional Human Rights Norms and Domestic Law, in: Commonwealth Law Bulletin (October 1992), at p 1274

Trinidad & Tobago and Jamaica, and counsel urged us to reject that approach. It has to be admitted that the formulation that was used was rather unfortunate but I do not think that the JCPC for a moment meant to say that thereby the Constitution was extended or amended. It seems to me that the JCPC merely accepted, without explaining why or how, that by ratifying the American Convention the government made the legal procedure of article 44 "for the time being" part of the domestic system and thereby made it a domestic legal procedure. Being a domestic legal procedure, it was of course covered by the existing due process or protection of the law clause. It was therefore not the constitutional clause that was extended but the number of legal procedures that fell under this clause. The "trick"[28] that Lord Hoffmann correctly discerned in *Lewis* was not that the JCPC miraculously managed to amend the Constitution but that they somehow succeeded in converting a legal procedure on the international plane into one on the domestic plane. For Lord Hoffmann, a very articulate and firm believer in the immaculacy of the doctrine of the unenforceability of unincorporated treaties, that could however be nothing else but a trick.

[45] The above does not imply that ratified unincorporated treaties cannot have any effect on the interpretation of the Constitution and other domestic law. As the metaphorical light which radiates from these treaties enters the legal atmosphere of the State, it illuminates, as we saw, the common law and statute law alike, and so directly or indirectly influences the content of the domestic law itself. It might also enlighten some of the provisions of the Constitution, most likely those provisions that embody the fundamental rights and freedoms of the citizens, even if this light is ultimately filtered out by the constitutional ozone. This is of course hardly surprising, considering the fact that the fundamental rights and freedoms enshrined in the Constitution have sprung from the same or similar human rights treaties that are regularly invoked. The Constitution and human rights treaties share, to a great extent, common values. Given the special position of the Constitution it is clear, however, that the courts should be very cautious whenever

[28] Supra at p 307

they find that such a broadening effect should be afforded to a constitutional provision. Such an effect will most likely be relevant to those provisions that contain open norms like *fair*, *cruel*, *inhuman*, *degrading*, *(un)due* and *reasonable*. But caution is required, indeed, especially when courts purport to deduce from their constitutions "principles" that are in no way expressed or clearly implied in the text of the documents themselves. Such an endeavour is, *a fortiori*, extremely precarious when "constitutional principles" of the unwritten English Constitution, which lack the supreme and overriding power of those of the Caribbean Constitutions, are read into the latter. If, for example, the exclusiveness of the executive power to ratify treaties, said to be one of the pillars of the doctrine of the unenforceability of unincorporated treaties, were a high principle of Caribbean constitutional law, then any statute limiting the scope of that executive power, like the *Ratification of Treaties Act (1989)* of Antigua and Barbuda, would be unconstitutional and, thus, null and void.

[46] Before returning to the particulars of the case before us, a few last words need to be said on this subject. International law, as far as applicable in a State, is by definition never foreign law. Treaty law can only be relevant to us if, and to the extent that, we, that is our government on behalf of us, sign, enter into and ratify a treaty. But once we do that, then it is ours. And when it is ours we have to accept responsibility for it. Certain elements of international law, called customary international law, form part of our law even without us signing anything. We simply accept those rules on the basis that we are not alone in the world; that we are, or assume we are, members of a comity, a family of civilised nations and on the understanding that the rules, emerged within that comity, have to be followed because they represent what civilised nations consider the proper thing to do. Because the signing and ratification of treaties have consequences, States should be cautious before they sign and ratify. But once they do, they are bound, and they must comply. Maintaining an old and unsound doctrine that stimulates an approach whereby treaties are ratified but almost never enacted, causes States to be perceived as having a split personality. A judicial restructuring of the judge-

made law on this point will not completely set us free of this predicament, but it will make us more conscious of the healthy tensions within our domestic legal system and it will lead to a less contrived approach towards human rights law. At the same time, it will not prejudice or compromise our own true values and norms. The restructuring will not turn "our" dualist system into a monist one. In the latter, an unincorporated treaty, ratified after approval by the Legislature, will usually prevail over all domestic statute law and in some States it might even override the constitution itself. This is a far cry from the approach I have suggested that is one which I trust saves "radical dualism", as practiced in the Commonwealth Caribbean, from appearing to be schizophrenic.

[47] In concluding, it is obvious that the American Convention conferred on the respondents a right to file a petition with the Inter-American Commission in order to obtain a determination on a complaint against the Crown of violation of one or more of the human rights secured by this Convention. By virtue of that same right the respondents were entitled to expect that the Crown would engage in that procedure in good faith. It has not seriously been disputed that a good faith attitude in this context encompasses an obligation on the State to refrain from executing these men, at least for a reasonable time, while the procedure is still in progress and to allow them the benefit of having the results of the Inter-American procedure duly considered by the BPC before that body takes the final decision on their fate. This is clearly a right that does not interfere with the rights of other citizens. Not even a murder victim's personal representative or the surviving relatives of the deceased have the legal right to have the murderer hanged. That is a matter for the Crown. The right of the respondents, or rather its exercise, might hinder the Crown in their attempts to execute in a timely manner the sentence of the court but that is just the other side of the coin, which the State accepted when it ratified the Convention. Following the reasoning as developed above, then, I must conclude that this right is enforceable and should be respected even at the domestic plane. Using the word "even" in this context must, from a common sense perspective, be utterly awkward. How could one tell a condemned man, in

deadly earnestness, that he exists on two planes and that, although he has a right to stay alive on the one plane, he will be hanged on the other? From the foregoing it is quite clear that, in my view, notwithstanding the far from satisfactory reasoning of the JCPC, *Lewis* was rightly decided and that it was correct, from my perspective, to follow *Thomas v Baptiste*.

[48] I wholeheartedly agree with Lord Bingham when he said in *R v Lyons and others*[29] that "international and national law … should be seen as complementary and not as alien or antagonistic systems." Both systems may assist us in achieving the probably unachievable, respecting the human dignity of every human being. In that endeavour I think we should be the "bold spirits" that Lord Denning once spoke about, although I do not believe that giving sufficient attention to legal certainty would make us "timorous souls". However, in giving meaning to the requirement of legal certainty we should not indulge in overly formal approaches, while losing sight of the substance. There is always such a danger. Most probably because of the absolute terms in which the JCPC had cast their procedural recommendations in *Pratt*, the BPC in July 2002 felt themselves obliged to meet shortly after the first decision of the Court of Appeal and to decide whether or not there should be mercy for the respondents, although they were aware that an application for special leave to appeal to the JCPC was pending. Of course, the BPC had no intention of being cruel or inhuman to the respondents. They just faithfully followed the procedure set out in *Pratt*. However, the substance, the gist, of the recommendations was simply that the criminal justice system as a whole should operate with reasonable expedition in order to avoid unnecessary delays. Given the fact that the final appeal in this case was already on its way, no action by the BPC was, therefore, really required to comply substantially with *Pratt*.

[49] It is in a sense regrettable that human rights almost always seem to be invoked by people who themselves have shown little respect for the rights of others. We pride

[29] [2002] 4 All ER 1028 at p 1036

ourselves, rightly so, that the rule of law embraces even those that live on the seamy side of society. But it sometimes seems to shake the "unshakable faith in the fundamental rights and freedoms" when it appears that the application of those rights has once more "saved the necks" of those that have committed very serious crimes. That is most unfortunate. The potential, the positive and creative effects of these rights abound for those who want to see them. They are there for all citizens alike and not only for condemned murderers.

[50] There can be no doubt that I concur in the conclusions arrived at in the joint judgment of the President and Saunders J. It is clear that I agree also to a great extent with the reasoning in their judgment and in the judgments of my other learned colleagues but that I respectfully disagree with part of their reasoning as to the issue of the effect and enforceability of unincorporated treaties. Having read their judgments in draft, I have greatly benefited from them not only where I am in agreement with them but also, or particularly, where our ways ultimately have parted.

/s/J. Th. Wit
………………………
Jacob Th. Wit