

**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
SUPERINTENDENT OF PRISONS
CHIEF MARSHAL**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT**

AND

**JEFFREY JOSEPH
LENNOX RICARDO BOYCE**

**FIRST RESPONDENT
SECOND RESPONDENT**

**Before The Rt Honourable
And The Honourables**

**Mr Justice de la Bastide, President
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 Philip Mc Watt for the Second Respondent

20th and 21st June 2006

**JUDGMENT
of
The Honourable Mr Justice Pollard
Delivered the 8th day of November 2006**

- [1] The background to this appeal from the Barbados Court of Appeal has been fully set out in the judgments of my learned colleagues. However, I approach some issues in this appeal with perspectives different from my learned colleagues even though our conclusions are essentially similar. The first issue is as follows:

Whether the exercise by the Governor General of the powers under section 78 of the Constitution of Barbados is justiciable and, if so, to what extent.

Justiciability of the Prerogative of Mercy

- [2] As concerns this issue the weight of authority supports a finding for the justiciability of the exercise of the prerogative of mercy. In this context, a clear distinction was made by Lord Slynn who delivered the majority advice of the Judicial Committee of the Privy Council (“*the Board*”) in *Neville Lewis v Attorney General of Jamaica*¹ between the process informing the exercise of discretionary powers and the merits of the exercise of such powers by a competent authority. In recent decades the courts have determined that curial intervention in the exercise of executive discretion is less a function of its source, be it prerogative or statutory, than the subject matter under consideration. In *Council of Civil Service Unions and Ors. v Minister for the Civil Service*² Lord Scarman captured the prevailing judicial view: “*Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.*”

- [3] In examining the justiciability of the exercise of the prerogative of mercy I propose to adopt as my point of departure the elucidatory *dictum* of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*³ as follows:

“To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which

¹ (2000) 57 WIR 275; [2001] 2 AC 50 at p 75

² [1985] AC 374 p 407

³ *Ibid* at p 408

either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been given an opportunity to comment or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending they should not be withdrawn.”

[4] Learned counsel for the appellants, in vigorously submitting that the exercise of the prerogative of mercy was beyond judicial review, relied heavily on the decision of the Board in *de Freitas v Benny*⁴ which was followed in *Reckley v Minister of Public Safety and Immigration*⁵. However, the Board in *Neville Lewis*⁶ distinguished those two cases by reference to the personal character of the discretion to be exercised by the competent Minister in advising the mercy committee as contrasted with the decision-making power of the Jamaica Privy Council on whose recommendation the Governor General was required to act. Consequently, the Board determined that in exercising the prerogative of mercy the requirement to act fairly fully justified curial intervention in the process preceding a determination on the merits.

[5] Similarly, in the instant case, the Court of Appeal found for the justiciability of the exercise of the powers by the Barbados Privy Council (BPC) under Section 78 of the Constitution on the premise that the BPC was a quasi-judicial or decision-making body. Be that as it may, there is good authority for holding that where a body, be it public or private, judicial, quasi-judicial or administrative is charged with making determinations affecting the rights or interests of persons, the process employed in reaching such determinations is subject to judicial review. In *Breen v Amalgamated Engineering Union*⁷ Lord Denning observed:

“even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so, the courts can review its decision, just as it can review the decision of a statutory body... If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: See the cases cited in Schmidt v Secretary of State for Home Affairs (1969) 2 Ch 149, 170-71. But if he is a man whose

⁴ (1975) 27 WLR 318; [1976] AC 239

⁵ (1996) 47 WIR 9; [1996] AC 527

⁶ Supra at p 2

⁷ [1971] 2 QB 175 at 191

property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down and he should be given a chance to be heard. I go further: If he is a man who has some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand”

[6] Contrary to the submissions of counsel for the appellants, the weight of authority argues against the need to determine whether the function to be performed by the BPC was quasi-judicial or administrative since the distinction appears to have lost all significance for determining the legality of the acts of public authorities, which, in making determinations affecting the rights or interests of private citizens, are required to act fairly⁸.

[7] Indeed, the principle of procedural fairness is such an imperative of the conduct by bodies, public or private, called upon to determine rights or interests of parties that its absence has been determined to constitute a lack of jurisdiction such that the courts will intervene to ensure compliance therewith⁹. Consider in this context the judgment of the Court of Appeal delivered by Lord Woolf MR in *Regina v Lord Saville of Newdigate et al, ex parte A & Others*¹⁰. In affirming this principle in *O'Reilly and Others v Mackman & Others*¹¹ Lord Diplock averred:

“But the requirement that a person who is charged with having done something, which, if proved to the satisfaction of a statutory tribunal, has consequences that will, or may, affect him adversely, should be given a fair opportunity of learning what is alleged against him and of presenting his case is so fundamental to any civilized legal system, that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.”

[8] Developing public law principles establish that it is not important whether the Barbados Privy Council acting pursuant to powers conferred on it by section 78 of the Constitution,

⁸ See Lord Denning in *Schmidt and Another v Secretary of State for Home Affairs* (1969) 2 Ch 149 at p 170

⁹ *Attorney General v Ryan* [1980] AC 718 at 730; *Regina v Secretary of State for Home Department ex parte Fayed* [1998] 1 WLR 763 at 772; *Anisminic Limited v Foreign Compensation Commission* [1969] 2 AC 147

¹⁰ [2000] 1 WLR 1855 at [38]. See also *Lloyd v Mc Mahon* (1987) AC 625; *Regina v SS for the Environment ex parte Hammersmith & Fulham London Borough Council* [1991] AC 521 and *Regina v Secretary of State for Home Dept ex parte Fayed* (1998) 1 WLR 1 WLR 763 at pp 774 and 776

¹¹ [1983] 2 AC 237 at p 276

was required to perform a quasi-judicial or administrative function or whether the subject matter to be determined was a legal right, a legitimate expectation or other interest falling short of a legal right, the requirement of procedural fairness must be satisfied. And it is of no avail to counsel for the appellants to submit that the source of the power to be exercised was prerogative rather than statutory because the courts' intervention would not ordinarily address the merits of the determination but the process involved in reaching it.¹² Fitzpatrick JA in *Yassin v Attorney General of Guyana*¹³ said:

“In this case justiciability concerning the exercise of mercy applies not only to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And where the principles of natural justice are not observed in the course of the process leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty intervene, as the manner in which it is exercised may pollute the decision itself.”

[9] This *dictum* was approved by the Board in *Lauriano v Attorney General of Belize*.¹⁴ Refusal of the courts to be shut out by legislation from reviewing the exercise of discretionary powers which affect the rights of the individual is evidenced in a line of authorities which drew a distinction between process and the merits of a decision.¹⁵ The critical question to be determined here, however, is whether the courts are entitled to put shut out clauses set out in national constitutions, which are expressed to be the supreme law, in the same category as such clauses appearing in ordinary national legislation. Although this issue was carefully addressed by the Hon. Attorney General in the court below it was not raised before us by learned counsel for the appellants.

[10] In addressing the ouster clause in his written submissions Mr. Forde QC, lead counsel for the appellants, pointed out that this Court should uphold the provision set out in Section 77(4) of the Constitution of Barbados since it was plain and unambiguous in meaning. He emphasized that the only other ouster clause employed by the draftsman in the Constitution was under Section 106. He maintained that both Sections 77(4) and 106 of

¹² *Anisminic Ltd v Foreign Compensation Commissions* (1969) 2 AC 147

¹³ (1996) 62 WIR at p 98

¹⁴ (1995) 47 WIR 74

¹⁵ *Anisminic Ltd v Foreign Compensation Commission* (1969) 2 AC 147; *Breen v Amalgamated Engineering Union* (1971) 2 QB 1751; *Attorney General v Ryan* (1980) AC 718; *Council of Civil Service Unions v Minister of the Civil Service* (1984) 3 All ER 935 and *Lauriano v Attorney General and Another* (1996) 2 LRC 96; *Regina v Secretary of State for Home Department ex parte Fayed* (1998) 1 WLR 763 at pp 774 and 776

the Constitution encapsulated powers which were traditionally prerogative in nature and as such the instant case should be distinguished from *Harrikissoon v Attorney General*¹⁶ and *Endell Thomas v Attorney General of Trinidad and Tobago*¹⁷ where the plaintiffs' private rights had been infringed due to certain procedural irregularities. In effect, the inference to be drawn was that the ouster clauses set out in Sections 77(4) and 106 of the Barbadian Constitution, encapsulating as they did prerogative powers, were materially different from those engaged in the aforementioned cases and should be construed differently by this Court. However, learned counsel for the appellants declined to produce any authorities to support the inference that ouster clauses set out in national constitutions were qualitatively different from those contained in ordinary legislation, requiring different treatment by the courts.

- [11] Consequently, I am constrained to rely on authorities which make no distinction between these two types of ouster clauses. A case in point turned on the interpretation of Section 102(4) of the Trinidad & Tobago Constitution (1962) which, *mutatis mutandis*, anticipated the provision of Section 77(4) of the Barbados Constitution. The provision reads as follows:

“(4) The question whether – (a) a commission to which this section applies has validly performed any function vested in it by or under this Constitution; (b) any member of such a commission or any other person has validly performed any function delegated to such member or person in pursuance of the provisions of Section 84(1), or Section 93(1) or Section 99(1), as the case may be, of this Constitution; or (c) any member of such a commission or any person has validly performed any other function in relation to the work of the commission or in relation to any such function as is referred to in the preceding paragraph; shall not be inquired into in any court.”

- [12] In delivering the judgment of the Board on this issue in *Endell Thomas v Attorney General of Trinidad & Tobago*¹⁸ Lord Diplock observed:

“The full doctrine laid down in *Smith v East Elloe Rural District Council* as to the effectiveness of ‘no certiorari’ clauses has since fallen into disfavour and has been whittled down considerably in England after the 1962 Constitution of Trinidad & Tobago had been drafted, particularly by the decision of the House of

¹⁶ (1979) 3 WIR 348

¹⁷ (1981) 32 WIR 375; [1982] AC 113

¹⁸ Ibid at p 393, p 135

Lords in Anisminic Ltd v Foreign Compensation Commission (1969) 2 AC 147 where one of the few remaining ‘no certiorari’ clauses that had survived the Tribunals and Inquiries Act 1958 was held to be insufficient to oust the jurisdiction of the High Court to set aside an order of an administrative tribunal that acted outside the limited jurisdiction conferred on it by Parliament... However, their Lordships do not find it necessary in the instant case to analyze the speeches in Anisminic and later English cases that have followed it, or to do more than say that it is plainly for the court and not for the commission to determine what, on the true construction of the Constitution, are the limits to the functions of the Commission.”

- [13] Consistently with the opinion of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service*¹⁹, the Board in *Neville Lewis* acknowledged that the exercise of the prerogative of mercy was for the Governor General acting beyond curial review. Such a finding, however, did not immunize the entire process from judicial review since as Lord Diplock in *Abbott v Attorney General of Trinidad and Tobago*²⁰ and Lord Goff in *Thomas Reckley v Minister of Public Safety & Immigration*²¹ had intimated, there was a right to have a petition of mercy considered by the Advisory Committee. The requirement of procedural fairness, which, in the majority advice of the Board in *Neville Lewis*, was a function of assimilating “protection of the law” set out in section 13 of the Jamaican Constitution and “due process of the law” set out in section 4(a) of the 1976 Constitution of Trinidad and Tobago, also prescribed that the Jamaica Privy Council was obliged to await and consider the recommendations of the Commission before making a determination in the exercise of the prerogative of mercy. And since the relevant provisions of the Constitutions of Jamaica and Barbados were almost identical in object and intent the Court of Appeal correctly held that, notwithstanding section 77(4) of the Barbados Constitution, which was not replicated in the Jamaica Constitution, the exercise by the Governor General of the powers conferred under section 78 was subject to judicial review. I was not persuaded by the submissions of learned counsel for the appellants that the determination of the Board in *Neville Lewis* was not applicable to Barbados since the doctrine of precedent was not, in his submission, ambulatory in Commonwealth Caribbean states. For the reasons set out above as well as those adduced by my learned

¹⁹ Supra at p 418

²⁰ (1979) 32 WIR 347 at p 350

²¹ Supra at p 539, p 18

brothers and sister in their judgments, I concur in the determination of the Court of Appeal that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review. In so doing the Court of Appeal applied *Neville Lewis* which was expressed to be legally binding. I also concur in the Board's determination in **Neville Lewis** but I entertain strong reservations about endorsing the reasoning which was expressed to inform it.

- [14] Accepting as authoritative Lord Millett's clarification in *Briggs v Baptiste*²² of the *ratio decidendi* in *Thomas v Baptiste* where he asserted that "(i)t confirmed the principle that the consideration of a reprieve is not a legal process and is not subject to the constitutional requirement of due process...", then it does appear to follow, *aequo vigore*, in my opinion that by applying the determination in *Thomas v Baptiste*, *mutatis mutandis*, to the facts in *Neville Lewis*, the Board could not by compelling reasoning have arrived at the conclusion that the process preceding the exercise of the prerogative of mercy was justiciable. The flawed reasoning of the majority of their Lordships probably prompted an exasperated Lord Hoffmann to remark in his vigorous dissenting advice:

*"On the Inter-American Commission issue the majority have found in the ancient concept of due process of law a philosopher's stone undetected by generations of judges, which can convert the base metal of executive action into the gold of legislative power. It does not, however, explain how the trick is done. Fisher v Minister of Public Safety and Immigration (No. 2) and Higgs and Mitchell v Minister of National Security are overruled, but the arguments stated succinctly in the former and more elaborately in the latter are brushed aside rather than confronted ..."*²³

- [15] In *Higgs & Mitchell v Minister of National Security*²⁴ Lord Hoffmann divined the *ratio decidendi* of *Thomas v Baptiste* as positing "that the due process clause in Section 4(a) of the Trinidad and Tobago Constitution gave the Crown power to accept an international jurisdiction as part of the domestic criminal justice system." At the material time he hesitated to say whether the Board's action was right or wrong. In *Neville Lewis* the Board, endorsing the determination of the Jamaica Court of Appeal, assimilated "due

²² (1999) 55 WIR 460 at p 472; (2000) 2 AC 40 at p 54

²³ *Supra* at p 88

²⁴ (1999) 55 WIR 10 at p 22

process of law” set out in Section 4(a) of the Constitution of Trinidad and Tobago and “protection of the law” appearing in Section 13 of the Constitution of Jamaica in order to incorporate the relevant international jurisdiction of the American Convention on Human Rights (“the Convention”) in the domestic criminal justice system and to determine that the Jamaican Privy Council was obliged to await the reports of the Inter-American Human Rights Commission (IAHRC) before exercising the prerogative of mercy.²⁵ The Board’s decision was clearly intended to secure for the convicted murderers on death row the common law requirement of procedural fairness and to reflect the evolving higher standards of international human rights law which have impacted positively on the administration of domestic criminal justice systems the world over, especially in relation to matters of life and liberty.

[16] Many Commonwealth Caribbean states which expressed their intention to make this Court their court of last resort have internalized the decision of *Neville Lewis* in their common law and, in the case of Barbados, in its supreme law. Consequently, I apprehend that the overriding regional public interest in procedural fairness and stability in the administration of criminal justice strongly advise adopting the Board’s decision even if this decision does not constitute the conclusion of sound reasoning, subject to placing it on a juridically feasible basis. Postulated in other terms, the primordial requirements of legal certainty and procedural fairness in my view must be seen by this Court to trump the flawed reasoning of the Board with a probable positive impact on good governance in the sub-region based on the rule of law.

[17] The second issue is as follows:

In what manner, if at all, might unincorporated 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?

[18] In addressing this issue it may be useful to bear in mind that international treaties, irrespective of their subject matter, which are not in force for a state nor are being

²⁵ *Neville Lewis v Attorney General* (2000) 57 WIR 303

provisionally applied by that state, may have no legal incidence for that state either at the international or municipal plane unless, of course, their provisions encapsulate norms of *ius cogens*, or in the case of dualist jurisdictions customary international law which are, *ipso facto*, incorporated in the common law. Having established that the state concerned has consented to be bound by a treaty, its legal incidence for persons or entities within the contemplation of relevant provisions will depend on the adoption, entry into force or provisional application of the instrument, as the case may be. Where the instrument has entered into force or is being provisionally applied, actual or prospective states parties to the regime, as the case may require, would have acquired rights or assumed obligations under the instrument such that violation of its terms would engage their international responsibility. Normally, provisions of treaties in force or provisionally applied are incapable of conferring rights or imposing obligations on private individuals in dualist jurisdictions in the absence of incorporation. And even in monist jurisdictions treaty provisions intended to have direct effect must satisfy specified conditions relating to operability. In effect, unless an unincorporated human rights treaty has entered into force by signature, ratification, or some other agreed procedure, or is being provisionally applied by prospective parties, it cannot affect the rights of a private person.

[19] There appears to be a disconnect also between this issue as formulated by learned counsel for the parties and the facts established in this case. However, given the context of its elaboration, this issue must be seen to address, inferentially, two questions as follows:

- (a) to what extent, if any, may an unincorporated ratified treaty providing for a personal right of access to international human rights bodies affect the rights and status of a convicted murderer sentenced to the mandatory death penalty by hanging?
- (b) to what extent may the executive rely on relevant provisions of the constitution of a state to extend its “protection of the law” provisions by incorporating an international complaints procedure set out in an unincorporated treaty in its municipal criminal law system?

[20] As concerns the first question to be addressed, I am of the view that an unincorporated ratified treaty has legal incidence in the municipal law of interested parties of the ratifying state subscribing to dualism where the executive concerned have implemented its provisions by engaging in conduct at the municipal plane engendering legitimate expectations on the part of representees that the executive will comply with the relevant provisions of the unincorporated ratified treaty. The second question addresses the issue of the allocation of state powers among the principal branches of government in dualist jurisdictions and the competence of the executive to modify by the exercise of treaty-making prerogative powers the provisions of the constitution through the employment of procedures not sanctioned by the constitution and whose effect compromises the separation of powers principle. I shall consider these questions under various rubrics.

Unincorporated Treaties and Legitimate Expectations

[21] Treaties normally have legal incidence only at the international plane. Given that international law and municipal law are ordinarily conceived as two non-convergent normative regimes, municipal courts maintain that unincorporated treaties are incapable of creating legal rights for private entities²⁶. Many Commonwealth Courts following, somewhat uncritically, the decision in *Minister of Immigration and Ethnic Affairs v Teoh*²⁷, have accepted, nevertheless, that a ratified unincorporated treaty engenders a legitimate expectation at the municipal plane, particularly in the area of international human rights law, even though as a matter of law, an international act is normally perceived as incapable, *ipso facto*, of having legal incidence in the municipal law of dualist jurisdictions²⁸. I propose to examine below the issue of treaty-derived legitimate expectations as a more credible basis for the determination in *Neville Lewis* than the

²⁶ *Malone v Metropolitan Police Commissioner* (1979) Ch 344; *Blackburn v Attorney General* (1971) 1 WLR 1037 at p 1040

²⁷ (1995) 183 CLR 273

²⁸ See, for example, the following cases: in Britain *Regina v Secretary of State for Home Department ex parte Brind* (1991) 1 AC 696; in New Zealand see *Tavita Minister of Immigration* (1994) 2 NZLR 257; *Ashby v Minister of Immigration* 1 [1981] NZLR 222; in India, *Vishaka v State of Rajasthan* AIR 1997 SC 3011 and *Peoples Union for Civil Liberties Union v Union of India* AIR 1997 SC 1203; in Canada, *Ahani v Attorney General of Canada* (2002) Ont Reports 8.2.02; in Trinidad and Tobago, *Ismay Holder v Council of Legal Education* HCA No 732 of 1997; in Jamaica, *Seafood and Ting Int Ltd* (1999) 58 WIR 269

reasons adduced by the Board. Before doing so, however, I shall address in a general way some important features of a legitimate expectation in public law.

- [22] Where public authorities are called upon to exercise discretionary powers, be they prerogative or statutory, they may engage in conduct creative of legitimate expectations on the part of representees liable to be affected by such conduct. In the opinion of Lord Fraser of Tullybelton, the source of a legitimate expectation may be a promise or an established practice by a public authority indicating how discretionary powers will be exercised²⁹. The genesis of the term, which is analogous to the private law principle of estoppel, has been located, not without considerable historical significance, in Lord Denning's judgment in *Schmidt v Secretary of State for Home Affairs*.³⁰ Legitimate expectations sought to be relied on as a basis of judicial review must emanate from an unequivocal and unambiguous representation, expressed or implied, of a public authority indicating the manner of employment of executive discretionary powers³¹. Although a legitimate expectation may not be assimilated to a legal right amenable to vindication in the courts of law, the claimant must, except otherwise permitted by statute, establish to the satisfaction of the courts sufficient of a legitimate interest in order to secure the leave of the court to apply for judicial review.³² In Barbados, for example, no leave is required to apply for judicial review under the *Administrative Justice Act, Cap 109*. Leave is required under Order 53 of the Rules of the Supreme Court, however, but this is no longer used by anyone. In addressing the legitimacy of an expectation Sedley J commented:

*"Legitimacy in this sense is not an absolute. It is a function of expectations induced by government and of policy considerations which militate against their fulfilment. The balance must be in the first instance for the policy-maker to strike; but if the outcome is challenged by way of judicial review, I do not consider that the court's criterion is the bare rationality of the policy maker's conclusion. While policy is for the policy-maker alone, the fairness of his or her decision ... remains the court's concern."*³³

²⁹ Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at p 401

³⁰ (1969) 2 Ch, 149 at p 171

³¹ R v Jockey Club ex parte Ram Race Courses Ltd [1993] 2 All ER 225; Regina v Secretary of State for Education & Employment ex parte Begbie (2000) 1 WLR 1115

³² Regina v Secretary of State for the Home Department ex parte Hargreaves [1997] 1 WLR 906 at 917-8

³³ Regina v Ministry of Agriculture Fishers & Food ex parte Hamble (Off Shore) Fisheries Ltd [1995] 2 All ER 714 at 731

- [23] The principle of legitimate expectations in public law seeks to ensure for private individuals procedural fairness³⁴ and legal certainty by preventing public authorities resiling from the substance of undertakings.³⁵ Sir David Simmons, Chief Justice of Barbados, stated the essential rationale of the doctrine “*as resting upon an all-pervasive duty to act fairly*”.³⁶ Legitimate expectations may, on the one hand, relate to a substantive benefit which the competent authority has power to confer when it exercises its discretionary powers; on the other hand, they may relate to the procedure to be employed by the executive before exercising its discretionary powers. The courts, in determining whether or not to offer judicial protection to a legitimate expectation or allow it to be frustrated by a change of executive policy, are inevitably caught up in a balancing exercise involving, on the one hand, competing claims of overriding public interest in legality and administrative autonomy and, on the other hand, of an enduring private interest in procedural fairness and legal certainty. But, before determining whether to afford protection to an expectation, the courts will have to be satisfied about its legitimacy. In order to be legitimate the expectation must derive from lawful, unambiguous conduct by the executive.³⁷ Further, the claimant must establish that in all the circumstances the expectation was reasonably entertained at the material time and justifies the protection of the courts.³⁸
- [24] Fundamental to the legitimacy of an expectation is its legality.³⁹ To accord legitimacy to an unlawful act undermines the principle of legality and compromises the *ultra vires* doctrine by unlawfully sanctioning the augmentation of administrative power by executive fiat. To be legitimate the conduct of the executive must not only be lawful, it

³⁴ Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629

³⁵ R v North and East Devon Health Authority ex parte Coughlan (2000) QB 213

³⁶ Pearson Leacock v Attorney General of Barbados: No 1712 of 2005 (unreported) at 26

³⁷ South Buckinghamshire District Council v Flanagan (2002) 1 WLR 2601; R v Inland Revenue Commissioners ex parte MFK Underwriting Agencies Ltd (1990) 1 WLR 1545 at 1569; R v Jockey Club, ex parte Ram Race Courses Ltd [1993] 2 All ER 225

³⁸ R v Secretary of State for Education & Employment ex parte Begbie [2000] 1 WLR 1115

³⁹ R v Ministry of Agriculture, Fisheries & Food ex parte Hamble (Offshore) Fisheries Limited [1995] 2 All ER 714 at 735

must also have been authorized⁴⁰ or must have been within the ostensible authority of the decision-maker.⁴¹

[25] Consistently with the principle of legality the House of Lords held that a public authority was not competent to give a commitment not to perform its statutory duties.⁴² Nonetheless, there is some persuasive authority to the contrary that an *ultra vires* act may, in appropriate circumstances, engender a legitimate expectation.⁴³ But even where the exercise of discretionary powers is *intra vires*, judicial constraints may be placed on its exercise. Thus the British Court of Appeal held that a competent authority may not without warning discontinue an established practice for twenty-five years since this would defeat unfairly the legitimate expectations of the claimant and may even constitute an abuse of power.⁴⁴

[26] In special circumstances a substantive legitimate expectation may be accorded judicial protection such as where, in a particular case, the decision-maker has, contrary to an undertaking made to a specific claimant, effected a change in policy.⁴⁵ The courts will offer protection to the claimant unless the competent authority had granted a hearing and overriding considerations of the public interest had advised a change in policy. Similarly,⁴⁶ it was held that a public authority was required to act in accordance with declared policy unless overriding considerations of the public interest advised a departure therefrom. Where, for example, a claimant relies in good faith on the representation of a public authority to his prejudice, otherwise referred to as detrimental reliance, and the authority purports to resile from the resulting legitimate expectation, the courts would intervene where it can be established that the private interest in fairness and legal

⁴⁰ Coghurst Wood Leisure Park Ltd v Secretary of State for Transport (2002) EWHC 1091

⁴¹ R v Leicester City Council ex parte Powergen UK Limited (2000) 80 P & CR 176; South Buckingham District Council v Flanagan (2002) EWCA Civ 690; R v Secretary of State for Home Depot ex parte Bloggs (2002) EWHC 1921

⁴² Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629; see also R v Inland Revenue Commissioners ex parte Preston (1985) AC 835

⁴³ Rowland v The Environment Agency (2004) Ch 1

⁴⁴ R v Inland Revenue Commissioners ex p Unilever (1996) STC 681

⁴⁵ R v Home Secretary ex parte Khan (1984) 1WLR 1337

⁴⁶ R v Home Secretary ex parte Ruddock (1987) 1 WLR 1482 and R v Home Secretary ex parte Gangadeen (1998) 1 FLR 762

certainty trumps the overriding public interest in the flexibility of the exercise of discretionary powers. The attempted policy change may even be construed to constitute an abuse of power by the executive.⁴⁷

- [27] In several important Commonwealth Caribbean death penalty cases,⁴⁸ the public law principle of legitimate expectations was addressed by the Board. However, this was done in an uneven and marginal manner. For the greater part the principle of legitimate expectations was perceived by the Board as engendering a mere procedural interest vulnerable to frustration by a change in executive policy communicated to the representee and accompanied by the opportunity to make representations. Sometimes the principle was perceived as deriving from the mere ratification of a treaty and at other times from both ratification and treaty-compliant executive conduct at the municipal plane. In either case, however, the Board concluded that such legitimate expectations could be frustrated by a change in executive policy. The Board did not think that treaty-derived legitimate expectations could eventuate in the conferment of a substantive benefit since this would be giving indirect effect to an unincorporated treaty contrary to the relevant constitutional principle which was well established in the common law. Unfortunately, in my view, the Board appeared to treat the decision in *Minister of Immigration and Ethnic Affairs v Teoh* as having crystallized the principle of treaty-derived legitimate expectations rather than as expressing an evolving public law principle with peculiar attributes readily adaptable to changing international human rights standards.

Treaty-derived Legitimate Expectations

- [28] An examination of the decisions in several Caribbean death penalty cases does appear to exhibit a measure of ambiguity on the part of their Lordships concerning the origin of a treaty-based legitimate expectation. For example, in some instances the Board appeared to focus on the treaty-compliant conduct of the executive at the municipal plane as

⁴⁷ R v Inland Revenue commissioners ex parte Preston (1985) AC 835 and R v Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd (1995) 2 ALL ER 714

⁴⁸ Fisher (1998) 53 WIR 27; Fisher v Minister of Public Safety and Immigration (No 2) (2000) 1 AC 434; Thomas v Baptiste (1998) 54 WIR 387; Thomas v Baptiste (2000) 2 AC 1; Higgs (1999) 55 WIR 10; Higgs v Minister of National Security (2000) 2 AC 228; Neville Lewis (2000) 57 WIR 275; Neville Lewis v A-G of Jamaica [2001] 2 AC 50

engendering the legitimate expectation; but, in so doing they appear to be applying *Teoh* whose primary focus is on executive conduct at the international plane, namely, the ratification of a treaty. However, in my view treaty-compliant conduct of the executive at the municipal plane is necessary to establish a “foothold”⁴⁹ as the basis of curial intervention at this level in order to protect the expectation engendered.

[29] In *Fisher No 2*, for example, the focus was on the treaty-compliant conduct of the executive at the municipal plane. Here, the executive of the Government of the Bahamas had, pursuant to Article 51 of the Regulations of the Inter-American Human Rights Commission (IAHRC) allowed, not unwittingly, convicted murderers to submit petitions to the IAHRC. The executive had also expressly undertaken not to exercise the prerogative of mercy before considering the recommendations of the IAHRC. This must be seen to be treaty-compliant conduct since although the Bahamas did not ratify the Convention like other Commonwealth Caribbean States, the Statute of the IAHRC formed part of the international constituent instruments of the Organization of American States (OAS) of which the Bahamas was a member.

[30] Similarly, in *Higgs* the Board, also focusing on treaty-compliant executive conduct, determined that the existence of a treaty may, in appropriate circumstances, engender a legitimate expectation on the part of a representee. In the *dictum* of Lord Hoffmann:

*“(s)uch legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow. And as the High Court of Australia made clear in Teoh’s case, the legal effect of creating such a legitimate expectation is procedural. The executive cannot depart from the expected course of conduct unless it has given notice that it intends to do so and has given the person affected an opportunity to make representations”*⁵⁰

But even Lord Hoffmann did not draw a clear line of distinction between treaty-compliant executive conduct at the municipal plane and executive conduct at the international plane.

⁴⁹ The concept of a “foothold” at the municipal plane as a basis for municipal courts exercising jurisdiction was employed in *Occidental Exploration and Production Company v Republic of Ecuador* (2005) EWCA Civ 1116 at [43] and [55]

⁵⁰ *Supra* per Lord Hoffmann at p 17

[31] In *Thomas v Baptiste* learned counsel for the respondents challenged the public law principle of legitimate expectations as the basis of a finding in favour of the appellants on two grounds. Firstly, ratification of the Convention was expressed to be a private act between two subjects of international law unaccompanied by any public statement by the executive. Secondly, ratification of the Convention was incapable of engendering an expectation that the Government would enact legislation to incorporate the Convention. In rejecting the submissions of counsel the Board maintained that the appellants were not merely relying on the ratification of the Convention but also on its implementation by relevant treaty-compliant conduct of the executive. The Board, however, relied on *Teoh* to determine that the legitimate expectations of the appellants had been frustrated by the relevant instructions of the executive even though such instructions were unlawful. The executive were entitled to act inconsistently provided the competent body acted fairly towards the representee. In the characterization of the Board:

*“The short answer to this is that the appellants do not rely on the government’s ratification of the Convention alone. They rely on the fact that the government implemented the Convention, which did not need the introduction of any legislative measures to bring it into operation. Condemned men were allowed to petition the Commission; the government responded to the Commission’s request for information; and confirmed the position by publishing the instructions”*⁵¹

[32] In *Neville Lewis* the majority of the Board did not examine the principle of legitimate expectations in any depth. The Board did focus on the treaty-compliant or implementing conduct of the executive such as allowing the condemned men to submit petitions to the international human rights bodies; allowing the Jamaica Privy Council (JPC) to consider the recommendations of these bodies before exercising the prerogative of mercy; staying of executions pending determination of petitions by international bodies. The majority of the Board conceded, however, that despite the legitimate expectations engendered by these actions, the executive was at liberty to act inconsistently to frustrate those expectations by issuing contradictory instructions. Furthermore, by assimilating “protection of the law” set out in section 13 of the Jamaican Constitution and “due process of law” set out in section 4(a) of the Constitution of Trinidad and Tobago, the Board was able to determine that the executive, by ratifying the Convention and engaging

⁵¹ Supra at p 424

in treaty-complaint conduct at the municipal plane, grounded the entitlement of the condemned men to have the JPC await and consider the recommendations of the international human rights bodies before exercising the prerogative of mercy.⁵²

[33] I am persuaded, however, that the courts, in addressing the issue of legitimate expectations of condemned felons, should examine the nature and provenance of the executive conduct relied on; ascertain the private and public interests to be safeguarded; determine the standard of review applicable to the decision-maker's action as a basis for according the desired quality of curial protection to the legitimate expectation of the claimant. Where the legitimate expectations of representees are being compromised by the arbitrary or abusive exercise of discretionary powers, the courts should offer the representee the highest level of protection, particularly where human rights of the representees are involved. In the four death penalty cases issuing from the Caribbean mentioned above, the Board appeared to have approached the principle of legitimate expectation, exemplified in **Teoh** as if it had crystallized.

[34] In analyzing and according curial protection to legitimate expectations deriving from treaties, reliance is often placed by municipal courts of the Commonwealth on the majority judgment in *Minister of State for Immigration & Ethnic Affairs v Teoh*⁵³ which may be regarded as the *locus classicus* on this issue. In this case Mason, CJ and Deane J determined:

“Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act particularly where the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. 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 convention...”
It is not necessary that a person seeking to set up such a legitimate expectation

⁵² Supra

⁵³ (1995) 183 CLR 273

should be aware of the convention or should personally entertain the expectation...”

[35] This *dictum* did not find favour with the Australian Government. The Attorney General and Foreign Minister of Australia, within five weeks following the judgment in *Teoh*’s case, averred “*on behalf of the Government, that entering into an international treaty is not reason for raising any expectation that government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law.*”⁵⁴ The joint statement mentioned above was accompanied by an acknowledgement of the fact that Australia at that time was party to 920 treaties any of which might engender a legitimate expectation. Within three months of *Teoh*’s decision a bill was introduced in the Parliament intituled *The Administrative Decisions (Effect of International Instruments) Bill 1995*, proposing to override the decision of the Court in *Teoh*’s Case. Clearly, this case did not crystallize the law on legitimate expectations issuing from treaties.

[36] The Board in *Fisher (No 2), Higgs, Thomas v Baptiste and Neville Lewis*, cited with approval the relevant determination in *Minister of State for Immigration and Ethnic Affairs v Teoh*⁵⁵ that ratification of an international treaty, *ipso facto*, engendered a legitimate expectation. This determination omitted to explain, unfortunately, how such an unobtrusive and virtually surreptitious a process as ratification of a treaty which, according to Article 2(1)(b) of the Vienna Convention on the Law of Treaties, is an international act operating entirely at the international plane, was capable of creating a legitimate expectation, *ipso facto*, at the municipal level in dualist jurisdictions subscribing to the constitutional principle relating to the inability of unincorporated treaties to have legal incidence in municipal law for private entities. Furthermore, in the majority advice the executive were free to act inconsistently provided that the representee was notified in advance of an intention to effect a change of executive policy and given an opportunity to make representations in order to persuade the executive against a

⁵⁴ See Joint Statement by Minister of Foreign Affairs, Senator Gareth Evans and the Attorney General Michael Lavarch made in 1995: See Allars, (1995) 17 Sydney L Rev 204 at pp 237-41

⁵⁵ Supra at footnote 53

change of policy. It seems to me, however, that unless appropriate executive conduct is established at the municipal plane, municipal courts would have no jurisdiction to accord curial protection to legitimate expectations engendered by international acts. To invest an international act like ratification with substantive conduct at the municipal plane must be seen to compromise the constitutional principle that unincorporated treaties form no part of domestic law in dualist jurisdictions.⁵⁶

- [37] The foregoing observations notwithstanding, nearly all common law jurisdictions in the Commonwealth have endorsed the determination in *Teoh*'s case as good law, and the requirements of legal certainty and stability in the administration of criminal justice do appear to advise against challenging it at this late stage. Lord Woolf in endorsing the majority judgment in *Minister of State for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 stated:

*"I will accept that the entering in a treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the treaty. This legitimate expectation could give rise to a right to relief as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which the country had undertaken": R v Secretary of State for the Home Department ex parte Mohammed Husain Ahmed & Others.*⁵⁷

- [38] However, Lord Woolf was quite emphatic, in rendering his opinion, that the executive may defeat a legitimate expectation deriving from a treaty by issuing a contradictory policy statement on the relevant provisions of the instrument. This opinion as qualified accurately reflects the position of the Board in *Fisher v Minister of Public Safety and Immigration (No 2)*⁵⁸; *Thomas v Baptiste*⁵⁹; *Higgs v Minister of National Security*⁶⁰ and *Neville Lewis v A-G of Jamaica*.⁶¹

⁵⁶ R v Secretary of State for the Home Department ex parte Brind (1991) 1 AC 696

⁵⁷ Supra

⁵⁸ Supra

⁵⁹ Supra

⁶⁰ Supra

⁶¹ Supra

[39] As the executive arm of what is indisputably a mini state subscribing to the dualist system of international law and, *ipso facto*, vulnerable to informal coercion or the blandishments of considerably more powerful actors in the community of nations, due in large measure to an irreversible deficit in relevant capabilities, the appellants must be assumed to entertain a visceral concern about the innovative juridical postulate relating to the ability of unincorporated ratified treaties to alter the constitutional provisions of an independent state. Such a postulate would also operate, somewhat unwittingly, to facilitate third state intervention in the domestic affairs of weak sovereignties. In addressing this issue in both his written and oral submissions to this Court, counsel for the appellant was adamant that small states ratified treaties for various reasons and that unincorporated treaties were incapable of conferring rights on private persons in municipal law.

Convention Rights and Legitimate Expectations

[40] The constitutional dilemma likely to confront dualist jurisdictions by postulating that the exercise of prerogative powers at the international plane may engender, *ipso facto*, legitimate expectations at the municipal level appeared to have been overlooked in the general acceptance of the determination in *Teoh's* case. Accepting the validity of this perception, it does appear to follow from the nature of treaties as solemn commitments liable to engage the international responsibility of states, that a legitimate expectation issuing from Article 4(6) or Article 44 of the Convention conferring legal rights directly on an ascertainable body of private individuals, reinforced by treaty-compliant executive conduct implementing relevant treaty provisions at the municipal plane, was qualitatively different from the generalized expectations engendered by the mere ratification of a treaty. Such a legitimate expectation in my view may not be easily frustrated by a mere contradictory statement of policy by the executive at the municipal plane. What appears to be required in order to frustrate the expectation, reinforced and validated as it was by treaty-compliant executive conduct implementing the relevant provisions at the municipal plane, in my opinion, are appropriate normative measures at the international plane to defeat the relevant treaty commitments, namely, denunciation or entry of reservations, coupled with effective measures at the municipal plane. Compare in this context the

repeal or amendment of the provisions of an enactment constituting the source of a legitimate expectation thereby operating to defeat the same.⁶² Absent such conditions, the legitimate expectation must be seen to be indefeasible where a change in executive conduct would work injustice or unfairness to a current representee without safeguarding an overriding public interest in the change.

- [41] Legitimate expectations issuing from treaty provisions conferring rights directly on private entities and reinforced by implementation or treaty-compliant executive conduct at the municipal plane must be seen, in my opinion, to have a peculiar character requiring a higher standard of curial protection. For the purpose of this analysis I propose to employ the term “conclusion of a treaty” in preference to “ratification of a treaty”, since Article 2(1)(b) of the Vienna Convention on the Law of Treaties assimilates the terms “ratification”, “acceptance”, “approval”, and “accession”. And, in any event, many synallagmatic treaties enter into force on mere signature by competent authorities. Where the executive, in the exercise of its prerogative powers, conclude a treaty, relevant case law supportive of *Teoh* has determined, somewhat curiously for dualist jurisdictions in my view, that such an act constitutes a statement to potential beneficiaries at the municipal plane of the state concerned that the executive intend to pursue a course of conduct specified in the instrument. Consistently with this position Lord Hoffmann remarked in *Higgs v Minister of National Security*:⁶³

“... the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the Government in its acts affecting them, will observe the terms of a treaty: see Minister for Immigration and Ethnic Affairs v Teoh (1995) 193 CLR 273. In this respect there is nothing special about a treaty. Such legitimate expectations may arise from any course of conduct which the executive has made it known that it will follow... The executive cannot depart from the expected course of conduct unless it has given notice that it intends to do so and has given the person affected an opportunity to make representations.

- [42] However, I have considerable difficulty in admitting that an international act, *ipso facto*, engenders a legitimate expectation at the municipal plane in dualist jurisdictions. Such an admission would, by compelling inference, call into question the validity of the

⁶² Rowland v The Environment Agency (2005) Ch 1

⁶³ Supra at p 17

constitutional principle regarding the inability of unincorporated treaties to have legal incidence at the municipal plane in dualist jurisdictions. Ratification according to Article 2(1)(b) of the Vienna Convention is “*the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.*” Treaty-derived legitimate expectations from the perspective of *Teoh* must be seen to have their provenance in executive conduct which in public law is still immunized from curial intervention. The public law principle of procedural propriety would not apply in the absence of compliance with relevant legislative provisions such as set out in the *Ratification of Treaties Act (1989) of Antigua and Barbuda*.

- [43] Decisions of the Board issuing in death penalty cases from the Caribbean mentioned above have, questionably, intimated that legitimate expectations deriving from ratification of the Convention are merely procedural in nature and vulnerable to frustration by a change in executive policy communicated to death row claimants accompanied by an opportunity to make representations. *Nevertheless, the requirements of good governance based on the rule of law, in my opinion, prescribe that where international commitments are implemented by unequivocal executive conduct at the municipal plane which is compliant with relevant treaty provisions of unincorporated instruments conferring rights directly on individuals relating to life and liberty, the legitimate expectations engendered thereby are not only sui generis but should also be seen to be infeasible for current representees.* In effect, such treaty-derived legitimate expectations should not be perceived as merely procedural and amenable to frustration by a change in executive policy communicated to a representee or a small body of ascertainable representees, such as condemned convicts on death row, coupled with an opportunity to make representations to the competent authority.⁶⁴

- [44] Given the finality of the ultimate sanction, where the executive engender legitimate expectations by treaty-compliant conduct at the municipal plane intended to implement, unequivocally, rights accorded to a representee by Articles 4(6) and 44 of the

⁶⁴ R v Secretary of State for Education & Employment ex parte Begbie (2000) 1 WLR 1115; R v North & East Devon Health Authority ex parte Coughlan (2000) QB 213

Convention and seek to resile therefrom by conduct which works unfairness to a condemned representee, in the absence of a corresponding overriding benefit to the public, the courts should accord the highest level of protection to such expectations, even in the absence of detrimental reliance. Inconsistent executive conduct in this context must be seen to constitute an impermissible abuse of power. The *sui generis* nature of the legitimate expectations within the contemplation of this judgment is expressed to be engendered by treaty-complaint executive conduct implementing the provisions of Article 4(b) and 44 of the Convention. These provisions which do not require legislative enactment for their implementation confer rights directly on the condemned men which they are liberty to enjoy without the intervention of the state. In the characterization of Lord Mance, “...*treaties may in modern international law give rise to direct rights in favour of individuals ... particularly where the treaty provides a dispute resolution mechanism capable of being operated by individuals on their own behalf and without their national states involvement or even consent ... In the area of human rights a number of treaties provide individuals with rights of access to vindicate the protection afforded by the treaty*”⁶⁵ Consequently, the legitimate expectations engendered by established treaty-compliant executive conduct implementing provisions conferring rights directly on individuals were more akin to rights which could not be unilaterally or arbitrarily curtailed by the executive. As the majority of the Board said in *Thomas v Baptiste*: “*Their Lordships accept the general proposition that the executive may withdraw rights which it has granted. But this principle is not without exception. Executive action may give rise to a settled practice, and this in turn may found a constitutional right which cannot lawfully be withdrawn by executive action alone.*”⁶⁶

- [45] In my view legitimate expectations do not comprise a homogeneous class of extra-legal private interests. And, given that treaties comprehend a wide range of subject matters and are creative of legion rights and obligations, it would not be unreasonable to assume that the expectations arising from the conclusion of such instruments admit of classification into various categories. In this case, the legitimate expectations created by

⁶⁵ Occidental Exploration and Production Co & Republic of Ecuador [2005] EWCA Civ 1116 at p 10

⁶⁶ Supra at p 422-423; also *Thornhill v Attorney General* (1974) 27 WIR 281

treaty-compliant executive conduct at the municipal plane implementing the provisions of Article 4(6) and Article 44 of the Convention appear to have singular and peculiar attributes requiring the highest level of curial protection. In *Occidental Exploration and Production Company v Republic of Ecuador* it was held that if two states agreed in an unincorporated bilateral investment treaty to confer rights intended to be enforceable domestically by private persons, accompanied by action at the municipal plane engaging curial intervention, the courts will enforce such rights; for example, where the instrument “*makes clear that an investor national of one of the States may pursue direct rights against the other, without the involvement, presence or even consent of his own national state,*”⁶⁷ and such rights are given a “foothold” at the municipal plane by treaty-compliant conduct.

- [46] The decision in *Teoh*’s case cannot be regarded as requiring all legitimate expectations to be treated as homogeneous. Indeed, there is sound reason to conclude that legitimate expectations aroused by the mere ratification of a treaty should attract a low level of curial protection, if any, since the majority in *Teoh*’s case determined it was not necessary for “*a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation*”.⁶⁸ Further, there is some judicial scepticism whether ratification of a treaty constitutes a representation by the executive regarding the performance of its functions.⁶⁹ In my opinion legitimate expectations engendered by treaty-compliant executive conduct at the municipal plane implementing provisions purporting to confer treaty rights directly on the claimant and addressed to the representee are *sui generis* requiring the highest standard of curial protection. Such legitimate expectations may only be frustrated by a change in policy for future representees where the courts, in balancing the public interest in expeditious enforcement of the law and the private interest of the individual in legal certainty and procedural fairness are satisfied that the executive have established an overriding public interest in the policy change. For example, in addressing the determination in *Teoh* in their joint dissenting judgment, Lords Slynn and Hope, consistently with this position,

⁶⁷ (2005) EWCA Civ 1116 at [43] and [55]

⁶⁸ *Supra* at p 17

⁶⁹ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817

emphasized in *Fisher v Minister of Public Safety & Immigration (No 2)*⁷⁰: “We fully accept that a change of policy might be announced to prevent legitimate expectations arising in the future, but we do not read the judgment as saying that once a procedure like the present has actually begun a Government can by a unilateral announcement terminate legitimate expectations already created.”

[47] Where a legitimate expectation is engendered by a ratified unincorporated treaty whose relevant provisions purport to confer rights directly on private individuals and which have been implemented by lawful, unequivocal treaty-compliant executive conduct at the municipal plane, thereby grounding municipal curial intervention, the requirements of good governance prescribe that such an expectation become, *ipso facto*, indefeasible for the current representee despite a change of executive policy communicated to the representee coupled with an opportunity to make representations. In death penalty cases the indefeasibility of such a legitimate expectation is eminently justified by the fact that the ultimate sanction is involved, and “protection of the law” constitutional provisions entitle the condemned man to a continuing right to procedural fairness which the executive is unable to trump by establishing an overriding public interest in expeditious execution of the law.⁷¹

[48] The conduct of the executive in implementing the relevant provisions of the Convention by allowing access by condemned men to an international complaints process pursuant to a treaty obligation not violative of a *ius cogens* norm or other customary international norm, cannot be seen to compromise the principle of legality since it is neither unconstitutional nor unlawful at the international nor municipal plane. Indeed, the applicable rule of construction that in the absence of a contrary intention, legislation must be construed to bring a state in compliance with its international treaty obligations does appear to support the legality of such conduct.⁷² Nor is such conduct unauthorized since it emanates legitimately from the executive who will be hard put to establish an overriding countervailing public interest in acting contrary to generally accepted evolving

⁷⁰ (1998) 53 WIR at 45

⁷¹ *Reckley v Minister of Public Safety (No 2)* (1996) 47 WIR 9 at 19B

⁷² *Garland v British Rail Engineering Limited* (1983) 2 AC 751 at 771

higher standards of international human rights. Given the facts in the *Neville Lewis* case, it would be arbitrary and an abuse of power for the executive to rely on a change in executive policy to frustrate the legitimate expectation of the condemned representee to have the competent authority await the report of the relevant international human rights body for a reasonable period before making its determination on the exercise of the prerogative of mercy.

[49] In arriving at this conclusion, I am cognizant of the fact that a municipal appellate court like the Caribbean Court of Justice has no competence to construe the Convention⁷³. There can be no doubt, however, that municipal courts may examine the relevant treaty provisions of the Convention.⁷⁴ In my opinion, implementation of a treaty by treaty-compliant conduct on the part of the executive engenders a legitimate expectation but does not constitute giving indirect effect to legally binding rights of an unincorporated treaty.⁷⁵ Such conduct gives effect to treaty obligations which do not require legislative enactment to make them operable at the municipal plane. Legislation to implement treaty provisions is required only where new or amended enactments are contemplated or expenditure from the national consolidated fund is needed to implement provisions of a treaty.⁷⁶

[50] An indefeasible legitimate expectation within the contemplation of paragraph [40] must be seen to subsist for a reasonable period corresponding to the duration of an efficient international review process of the competent human rights body. Such an expectation must also be seen to require the Barbados executive to allow the petitions of the respondents to be examined and considered by the competent human rights body prior to its transmission to the Barbados Privy Council. In this context it is important to point out that in order to respect the continuing right of the respondents to the protection of law guaranteed by section 11(c) of the Constitution, the legitimate expectation engendered by relevant treaty-compliant conduct of the Barbados executive must be seen to be

⁷³ *Malone v Metropolitan Police Commissioner* (1979) Ch 344

⁷⁴ *Littrel v The United States* (No 2) (1995) 1 WRL 52 at 93

⁷⁵ Contrast the dictum of Lord Millett in *Thomas v Baptise*, *supra*, at 747

⁷⁶ *The Parlement Belge* (1879) LR 4 PD 129

indefeasible for a reasonable period consistent with procedural fairness. Procedural and substantive legitimate expectations may be frustrated by a change of policy communicated to the claimant and whose deleterious effects may be subsequently ameliorated; in the former case by affording the representee a belated opportunity to be heard, and in the latter case by appropriate compensation either voluntarily offered by the executive or mandated by the courts⁷⁷. In the latter case “*a payment of money is not an anticipatory payment of damages: it is a practical means of eliminating unfairness which a policy change is otherwise going to inflict.*”⁷⁸ But since neither of these ameliorative measures may afford the respondents the protection of the law to which they are constitutionally entitled while they are alive, I would agree, subject to the conditions and qualifications set out above, that an indefeasible status must be accorded to the legitimate expectation of the current representees as inferred from the persuasive joint dissenting opinion of Lords Slynn and Hope in *Fisher (No 2)*.⁷⁹

Unincorporated Ratified Treaties and Municipal Law

[51] In what appeared to be a dramatic and remarkable reversal of historical understanding of dualism and the separation of powers principle, the Board to all intents and purposes determined in *Neville Lewis* that ratified unincorporated human rights treaties had direct, determinative legal incidence on the Westminster-type constitutions of Commonwealth Caribbean States. The Board made this determination despite the clarifying *dicta* of Lord Millett in *Briggs v Baptiste* quoted above where he confirmed that *Thomas v Baptiste* “**did not overturn the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation**”, and authoritative Commonwealth case law to the contrary⁸⁰:

⁷⁷ R v North & East Devon Health Authority ex parte Coughlan; R (on the application of Bibi) v Newham LBC, *supra*

⁷⁸ Per Sedley LJ in R v Commissioner of Excise ex parte FI Services Limited (2001) EWCA Civ 762

⁷⁹ *Supra*, at Note 70

⁸⁰ See *The Parlement Belge* (1879) 4 PD 129; *Garland v British Engineering Ltd* (1983) 2 AC 751; *Regina v Secretary of State for the Home Department ex parte*; *Brind and Others* (1991) 1 AC 696; *Chung Chi Cheung v the King* (1939) AC 160; *JH Rayner (Mincing Lane) Ltd v Department of Trade & Industry* (1990) 2 AC; *Higgs v Minister of National Security* (2000) 2 AC 228; *R v SS for Foreign and Com Affairs ex parte Rees- Mogg* [1994] QB 552

[52] Since this novel juridical postulate articulated by the Board in *Thomas v Baptiste* appeared to be at large, I apprehend that it could have farreaching implications for good governance and structured, social and economic development of Commonwealth Caribbean States. Firstly, given the peculiar attributes of Westminster-type constitutions prevalent in the region, this determination boldly challenged the validity of hallowed constitutional principles generally regarded as indispensable for constitutional democracy as this system of government was understood and practised in the region, and analysed by Lord Diplock in *Moses Hinds v the Queen*.⁸¹ Secondly, this innovative determination inadvertently provided a convenient vehicle for third country interference in the domestic affairs of Caricom States with probable far-reaching negative implications for the national interest, given their lack of capabilities to ratify treaties with due diligence. It has been authoritatively established that the status of an unincorporated international human rights instrument is identical to that of other treaties and may not be perceived to justify so fundamental a change in the applicable law. Sir Robert Megarry in addressing the obligation assumed by the United Kingdom in Article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedom affirmed: “*The United Kingdom as a High Contracting party which ratified the Convention on March 8, 1951 has thus long been under an obligation to secure these rights and freedoms to everyone. That obligation, however, is an obligation under a treaty which is not justiciable in the courts of this Country.*”⁸² Similarly, in *Ahani v The Attorney General of Canada*⁸³ Dambrot J held in the court below, “*if there is a right protected by section 7 of the Charter not to have the outcome of any pending appellate or other legal process preempted by executive action, it does not extend to an analogous legal process such as a petition to an international body whose advice is not binding domestically.*” I propose to examine the current and developing Commonwealth case law on the legal incidence of unincorporated treaties in municipal law, as well as some applicable norms of international law in an attempt to evaluate the legal legitimacy of this novel juridical postulate of the Board.

⁸¹ (1975) 24 WIR 326

⁸² *Blackburn v Attorney-General* (1971) 1 WLR 1037 at 1040; In *Malone v Metropolitan Police Commissioner* (1979) Ch 344 at 328

⁸³ (2002), Ont Reports, Feb 8 (2002) at 115

- [53] An authoritative judicial determination of the legal incidence of ratified unincorporated treaties on municipal legislation in Caricom Member States, comprising as they do common law and civil law jurisdictions, must address the differential impact of treaties in both the monist and dualist systems of law: For the position in Commonwealth countries, see Note 28 *supra*. More importantly, in addressing the impact of unincorporated ratified treaties in dualist Caricom Member States, courts of competent jurisdiction cannot be insensitive to the peculiar vulnerability of these states in the unorganized international community and the critical importance of constitutional provisions reflecting the foundational commitments of these states designed to promote generally accepted principles of good governance as intimated by learned counsel for the appellants.
- [54] Constitutions of Member States of the Commonwealth Caribbean invariably incorporate provisions designating these instruments the supreme law, which, in the characterization of Lord Diplock “... *embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in future.*”: *Moses Hinds v The Queen*.⁸⁴
- [55] Such constitutions, given the extremely volatile political environment in which they were elaborated and are required to operate, axiomatically assumed that the cherished constitutional principle of the separation of powers providing the basis of good governance according to conventional wisdom would inform the responsible exercise of governmental authority. In a majority advice of their Lordships, however, “(t)o say that a constitution is based upon the principle of the separation of powers is a pithy description of how the constitution works. But different constitutions apply this principle in their own ways and a court can concern itself only with the actual constitution and not with what it thinks might have been an ideal one.”⁸⁵ Notwithstanding the foregoing, it is common ground that Westminster-type constitutions allocate legislation to the legislature even though it is very often the case that in several Caricom jurisdictions members of the

⁸⁴ (1975) 24 WIR 326 at p 331

⁸⁵ per Lord Hoffmann in *Boyce and Anor v R* (2004) UK PC 32 at p 17

executive constitute the bulk of the lower House and take the initiative in the introduction of legislation. But even in such situations, Ministers of Government as members of the executive, are quintessentially engaged in performing a legislative function.

[56] The later Westminster-type constitutions, in the opinion of Lord Diplock “*include a Chapter dealing with fundamental rights and freedoms. The provisions of this chapter form part of the substantive law of the state and until amended by whatever special procedure as laid down in the Constitution for this purpose, impose a fetter upon the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers.*”: *Moses Hinds v the Queen*.⁸⁶ And it does appear to follow, *a fortiori*, that it is not open to any one branch of Government to take any action whose legal effect would be tantamount to an amendment of the constitution except in accordance with prescribed constitutional procedures.⁸⁷

[57] In making the relevant determination the test is whether the action under consideration is in substance different; “*for if it is different ... the effect is to alter the regime*⁸⁸” established by the constitution, be it by introducing new institutional arrangements, or by enlarging the scope of existing constitutional provisions.⁸⁹ In *Neville Lewis* the Board in effect determined that the scope of due process provisions of a national constitution may be enlarged, unilaterally, by the employment of prerogative powers at the international plane. But in a later decision the Board advised: “*...the Constitution and not, as in the United Kingdom, Parliament is (save in respect of Chapter III of the Constitution) to be sovereign. It was of course foreseen that with the passage of time and the benefit of experience alteration of the constitution would on occasion be necessary, and the framers of the constitution took care to grade the provisions so as to require differing levels of popular support depending on the structural significance of the provision to be*

⁸⁶ Supra at p 332

⁸⁷ Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett & The Attorney-General of Jamaica (2005) 65 WIR 268

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⁸⁹ Darrin Roger Thomas and Another v Cipriani Baptiste and Others; Neville Lewis v Attorney-General of Jamaica supra

altered.”⁹⁰ Put another way, the courts, as guardians of the constitutions, must not be perceived to arrogate the right to effect modifications in the agreed allocation of governmental powers contrary to politically determined and constitutionally sanctioned amendment procedures. And it is of particular importance to note in this context, the acknowledged materiality of the democratic principle in the amending procedures compliance with which must be perceived as providing the generally accepted basis for constitutional legitimacy. These diametrically opposite determinations of the Board defy reconciliation.

[58] The clear inference from the institutional arrangements devised for Westminster-type constitutions is that prominent among the immutable imperatives guiding their elaboration are sanctity of the separation of powers principle, the inviolability of the democratic principle and the fundamental importance of the amendment procedures governing the realignment of the powers of government. Indeed, respect for these fundamental constitutional principles appears to have provided the essential rationale of the decision of the Board in *Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett and the Attorney-General of Jamaica*. Consequently, I would wish to adopt Lord Diplock’s authoritative and elucidating analysis of Caricom Westminster-type constitutions as a peremptory point of departure for an appreciation of judicial determinations concerning the legal incidence of unincorporated treaties in the Member States of the Caribbean Community. For such an appreciation requires unqualified recognition of the nice balance of factors - political, cultural, economic, moral and psychological among others, which inform the legal parameters of the constitutions of the complex, vulnerable, culturally-multifaceted societies of the Commonwealth Caribbean States.

[59] Judicial intervention to amend constitutions reflective of the supreme law, however, is not ordinarily entertained by competent decision-makers in the Commonwealth Caribbean even to avoid what Lord Wilberforce felicitously characterized as “the

⁹⁰ per Lord Bingham: in *Independent Jamaican Council for Human Rights v Syringa Marshal and Attorney General of Jamaica* at p 275; see also Lord Hoffmann in Higgs at Note 96 *infra*

austerity of tabulated legalism".⁹¹ Consistently with this position, the Board has recently determined that where the legislature undertakes to effect such modification, applicable constitutional procedures are required to be followed.⁹² I felt constrained to comment briefly on Commonwealth Caribbean constitutions in order to emphasize that an exercise of prerogative powers at the international plane is incapable, *ipso facto*, of modifying ordinary municipal legislation, much less the supreme law as expressed in the national constitution of the state.

[60] In *Thomas v Baptiste* the Board must also be seen to have made a quantum leap in judicial ratiocination by determining that "due process of law" as expressed in Section 4(a) of the Constitution of Trinidad and Tobago was inherent in the common law thereby validating, *ipso facto*, the incorporation of an international complaints procedure in the domestic criminal justice system. Such a determination, I would venture to suggest, in addition to transgressing the permissible parameters of interstitial articulation, was juridically infeasible in the absence of the Board establishing that the relevant provisions of the Convention, namely Articles 4(6) and 44, encapsulated customary international law and had become, *ipso facto*, incorporated in the common law.

[61] This brings me to address the relationship between the common law and customary international law, which calls to mind the authoritative statement on this issue by Lord Denning who observed that customary international law, unless in conflict with statute, constitutes part of the common law without the need for transformation by the legislature or the courts:

"(s)eeing that the rules of international law have changed -- and do change -- and that the Courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this Court -- as to what was the ruling of international law 50 or 60 years ago, is not binding on this Court today. International law knows no rule of stare decisis. If this Court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change --

⁹¹ Minister of Home Affairs and Anor v Collins Mac Donald Fisher and Anor [1980] AC 319 at p 328

⁹² Independent Jamaica Council for Human Rights Limited v Honourable Syringa Marshall-Burnett & The Attorney-General of Jamaica

*and apply the change in our English law – without waiting for the House of Lords to do it.”*⁹³

- [62] This statement of the law by Lord Denning is supported by internationally recognized publicists like RY Jennings, former president of the International Court of Justice who submitted:

*“(i)t has always been held that general customary international law is a part of the law of England and, therefore, will be applied “as such”. Thus international law is a matter of judicial notice, and there is no question of having to prove it by evidence. It is argued and applied in the same way as any other part of the common law. On the other hand, for constitutional reasons, a treaty which requires for its carrying into effect an alteration of English Law, or a charge on public funds, requires an act or other instrument making the needful changes in English Law if the Courts are to give effect to it”.*⁹⁴

But such customary rules of international law must not conflict with statute which always prevails: *Mortensen v Peters*⁹⁵

- [63] Addressing the legal incidence of unincorporated ratified treaties on national legislation in Commonwealth Caribbean States, Lord Hoffmann stated the position eruditely and persuasively:⁹⁶

*“(i)n the law of England and the Bahamas (whose constitution is representative of those in the Caribbean Community), the right to enter into treaties is one of the surviving prerogative powers of the Crown ... the Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. **But the corollary of this unrestricted treaty-making power is that treaties form no part of the domestic law unless enacted by the legislature.** This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* (1990) 2 A The second consequence is that unincorporated treaties cannot change the law of the land. They have no effect upon the rights and duties of citizens in common or statute law; see the classic judgment of Sir Robert Phillimore in *The Parlement Belge* (1879) 4 PD 129. They may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a*

⁹³ *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529 at 592

⁹⁴ R Y Jennings, *An International Lawyer Takes Stock*, ICLQ Vol 39, July 1990 at p 523

⁹⁵ (1906) 8F 93

⁹⁶ *John Junior Higgs v Minister of National Security and Others* at p 17

*legitimate expectation on the part of citizens that the government, in its acts affecting them, will observe the terms of the treaty: see Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273... **The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle which was settled by the Civil War and the Glorious Revolution in the 17th Century***” (emphasis supplied).

- [64] This classic statement of the law provides reliable and authoritative guidance for any court in a dualist jurisdiction and was perceptively anticipated by Lord Oliver who stated:

“(A)s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because as a source of rights and obligations, it is irrelevant.”⁹⁷

- [65] Consistently, with these authoritative statements of the law, it is a well established principle of construction “*that the words of a statute **passed after the Treaty has been signed** and dealing with the subject matter of the international obligation ... are to be construed if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it*”.⁹⁸ Application of this rule of construction to the relevant law of the Commonwealth Caribbean States, however, would have to take into account the date of enactment of relevant instruments, including their constitutions, and the date of entry into force of the applicable treaty for the state in

⁹⁷ JH Rayner (Mincing Lane) Ltd at p 500; Laker Airways v Dept of Trade (1977) 1QB at 717-18

⁹⁸ per Lord Diplock in Garland v British Rail Engineering Limited [1983] 2 AC 751 at 771; see also Regina v Secretary of State for the Home Department *ex parte* Brind and Others [1991] 1 AC 696. A similar approach to the interpretation of treaties appears to have been taken by Canadian Courts: See Baker v Canada (Minister of Citizenship and Immigration) (1999) 2 SCR 817; Pfizer Canada v Canada (Attorney General) (2003) 224 DLR (4th) 178; Reference Re Public Service Employee Relations Act (Alberta) (1987) 1 SCR 513; Canadian Foundation for Children, Youth and the Law v Canada (Attorney General) (2004) SCC 4; and 114 957 Canada Ltée (Spraytech, Société d'arrosage) et al v Town of Hudson (2001) 2 SCR 241

question.⁹⁹ It is important to bear in mind, however, that that this rule of construction cannot prevail against a clear statement of the statute to the contrary: *The Zamora*¹⁰⁰

[66] In *Thomas v Baptiste*, Lord Millett emphasized that:

“(t)he due process clause must therefore be broadly interpreted. It does not guarantee the particular forms of legal procedure existing when the constitution came into force; the content of the clause is not immutably fixed at that date. But the right to be allowed to complete current appellate or other legal process without having it rendered nugatory by executive action before it is completed is part of the fundamental concept of due process.”¹⁰¹

[67] But, as Lord Goff wryly observed in his dissenting judgment, although the widest adoption of humane standards should be sought to be achieved, this should not be done by subverting the constitutions of states or by a misuse of legal concepts and terminology. Where, however, the emergence of a new norm of customary international law may be authoritatively established, there would be ample justification for a finding that it has been automatically received in the common law so as to affect the rights of citizens. But their Lordships did not even bother to consider whether a relevant norm of customary international law was involved and its impact on municipal law.

[68] Consequently, since the Jamaican Court of Appeal had ruled in the **Neville Lewis** case that the instructions of the Governor General were unlawful, a ruling which the Board upheld in rejecting the cross-appeal by the Attorney-General of Jamaica, the appellants would have been entitled to have their petition heard within the reasonable time of 18 months established by the Board.¹⁰² However, this *dictum* of Lord Millett must be appreciated in the context of a finding for an indefeasible legitimate expectation. In my view, the Board in overruling *de Freitas v Benny*¹⁰³ and *Thomas Reckley v Minister of Public Safety and Immigration and Others (No 2)*¹⁰⁴ on the basis of a novel legal principle contrary to historical judicial understanding of the legal incidence of

⁹⁹ See *Fisher v Minister of Public Safety and Immigration* supra

¹⁰⁰ [1916] 2AC 77 at pp 91-4

¹⁰¹ (1998) 54 WIR 387 at p 423

¹⁰² *Earl Pratt and Anor v Attorney-General for Jamaica and Anor* (1993) 43 WIR 340

¹⁰³ Supra

¹⁰⁴ Supra

unincorporated treaties must be perceived as transgressing the permissible parameters of judicial activism in ruling as it did, with probable farreaching negative consequences for good and stable governance in the small, fragile states of the Caribbean Community.

[69] Incontrovertibly, the Board had earlier held that “(w)hether or not the provisions of the Convention are enforceable as such in domestic courts, it seems to their Lordships that the state’s obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review.”¹⁰⁵ In effect, I do not think it was necessary for the Board to resort to the treaty-making prerogative powers of the state to justify the determination that the prerogative of mercy was subject to judicial review. The basis for such a finding had already been persuasively established in English case law¹⁰⁶. Further, their Lordships had pertinently observed that “(e)ven without reference to international conventions it is clear that the process of clemency allows the fixed penalty to be dispensed with and the punishment modified in order to deal with the facts of a particular case so as to provide an acceptable and just result.”¹⁰⁷

[70] It is not without some considerable significance that their Lordships in *Neville Lewis* adduced the fact in support of their ruling that “*Jamaica ratified the American Convention on Human Rights 1969 on 7 August 1978 and it is now well established that domestic legislation should as far as possible be interpreted so as to conform to the state’s obligation under such a treaty: Mattadeen v Pointu.*”¹⁰⁸ But what their Lordships had, unfortunately, omitted to concede was that that principle of construction may only be applied to legislation enacted after the conclusion of relevant international instruments. For as Lord Hoffmann intimated: “... *unincorporated treaties ... may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the*

¹⁰⁵ per Lord Slynn in *Neville Lewis v Attorney General of Jamaica* (2000) 57 WIR 275 at p 296; [2001] 2 AC 50 PC at 79

¹⁰⁶ *Council of Civil Service Unions et al v Minister for the Civil Service* supra

¹⁰⁷ Per Lord Slynn, *Neville Lewis v Attorney General* at p 295

¹⁰⁸ (1999) 1 AC 98, 113 g-h

*Crown in breach of its international obligations.”*¹⁰⁹ Clearly, the presumed conformity of the legislation with the international obligation necessarily pre-supposed the existence of such an obligation at the material time and suggested, by compelling inference, that the determination of the Board that the ratification of a treaty could extend the scope of a pre-existing municipal law instrument possessing the status of a national constitution must have been juridically misconceived.

[71] Indeed, Lord Diplock had earlier articulated the principle as follows:

*“it is a principle of construction of United Kingdom statutes ... that the words of a statute **passed after the Treaty has been signed** and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed if they are reasonably capable of bearing such a meaning as intended to carry out the obligation, and not to be inconsistent with it”*¹¹⁰ (emphasis added)

[72] This statement of the law was affirmed by the House of Lords in an earlier decision¹¹¹ and reaffirmed more recently.¹¹² As pointed out by Lord Bridge¹¹³

*“... like any other treaty obligations which have not been embodied in the law by statute, the Convention (for the Protection of Human Rights and Fundamental Freedoms) is not a part of the domestic law, that the courts accordingly have no power to enforce Convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it ... **When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament’s aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.**”* (emphasis added)

[73] Viewed in the context of the peculiar and enduring attributes of Westminster-type constitutions of Commonwealth Caribbean states analysed by Lord Diplock in *Moses Hinds v The Queen*,¹¹⁴ the second sentence attributed to their Lordships in *Thomas v Baptiste*, namely, “(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 criminal justice system and thereby temporarily at least, extended the scope of

¹⁰⁹ *Higgs v Minister of National Security and Others* (1999) 55 WIR 10 at p 17; [2000] 2 AC 228 at p 241

¹¹⁰ *Garland v British Rail Engineering Ltd* supra at 751

¹¹¹ *Waddington v Miah* (1974) 59 Cr App R 149

¹¹² *Regina v Secretary of State for the Home Department ex parte Brind* (1991) 1 AC 696

¹¹³ *Regina v Secretary of State for Home Department ex parte Brind*, supra at 747

¹¹⁴ Supra

the due process clause in the Constitution” must be perceived as an innovative juridical postulate vulnerable to invalidation by serious legal analysis. Standing alone, this juridical neologism postulates, by ineluctable inference, that the supreme law of the state could be amended by unilateral executive action contrary to required constitutional procedures; that such an amendment of the supreme law need not be attended by any measure of permanence; and that the executive in its absolute discretion, and in complete defiance of the hallowed principle of separation of powers inherent in Westminster-type constitutions, was competent to modify the administration of criminal justice in the state.

- [74] This determination of the Board flies in the face of settled case law commencing with the landmark decision in *The Parlement Belge*, affirmed by the British Court of Appeal in *J.H. Rayner (Mincing Lane) Limited v Department of Trade and Industry*, approved by the Board in *Fisher v Minister of Public Safety & Immigration (No. 2)*, reaffirmed by the Board in *Higgs v Minister of National Security* and followed by various Commonwealth courts as indicated above, as well as the Court of Appeal of Jamaica in *National Resources Conservation Authority v Seafood and Ting International Limited*¹¹⁵ and the Supreme Court of Trinidad and Tobago in *Ismay Holder v Council of Legal Education*.¹¹⁶ To the extent, therefore, that the Board in *Thomas v Baptiste* affirmed that the “*appellants were 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...*”,¹¹⁷ it must be seen to follow, *aequo vigore*, that the law regarding unincorporated treaties as set out in the cases mentioned above remains good law and the offending determinations of the Board in *Thomas v Baptiste* and *Neville Lewis* should be regarded as otiose and juridically unsustainable. In point of fact in *Thomas v Baptiste* “(t)heir Lordships recognize the constitutional importance of the principle that international Conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a Treaty in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot affect any alteration to domestic law or deprive

¹¹⁵ (1999) 58 WIR 269

¹¹⁶ HCA No 732 of 1997

¹¹⁷ Per Lord Millett, *supra* at 422

*the subject of existing legal rights unless and until enacted into domestic by or under the authority of the legislature.”*¹¹⁸ In the result it is reassuring to reaffirm that unincorporated treaties do not, *ipso facto*, have determinative legal incidence in the municipal law of dualist jurisdictions.

The third issue our Court is required to examine and determine reads as follows:

- [75] Whether Section 24 of the Constitution authorizes the Court to commute a death sentence or to give relief similar to any of the measures reserved to the Governor General under Section 78 of the Constitution and, if so, whether in all the circumstances it was appropriate for the Court of Appeal to take into account the matters that it did in deciding whether to commute or give relief.

In respect of this issue I concur unreservedly in the judgments of my learned brothers and sister.

- [76] I would dismiss this appeal with costs to each of the respondents certified fit for two attorneys-at-law.

s/ Duke Pollard

Duke E.E. Pollard

¹¹⁸ Supra, per Lord Millett at p 422