



Capital Punishment Jurisprudence in the Caribbean

The Honourable Mr Justice Adrian
Saunders, Judge of the Caribbean Court of
Justice

A Lecture to the Guyana Judiciary

Guyana
23 June 2012

The Judicature of Guyana comprises of the Supreme Court of the Judicature which consists of the Court of Appeal and the High Court (both of which are superior courts of record). The Court of Appeal, which came into operation in 1966, consists of the Chancellor, the Chief Justice, and such number of Justices of Appeal as may be prescribed by the National Assembly. The High Court of the Supreme Court consists of the Chief Justice as President of the Court and Puisne Judges. Its jurisdiction is both original and appellate. A magistrate has jurisdiction to determine claims where the amount involved does not exceed a certain sum of money, specified by law. Appeal lies to the Full Court.

Distinguished Lecture

by

The Honourable Mr Justice Adrian Saunders, Judge of the Caribbean Court of Justice,

to the

Guyana Judiciary

23 June 2012

The objectives of this lecture are briefly to: (a) articulate the broad published position of the Caribbean Court of Justice (CCJ) on the death penalty; (b) offer some views on the concept of death as a punishment; (c) trace the development of death penalty jurisprudence over the last 40 years in the Caribbean; (d) address the impact of international law on death penalty jurisprudence; and (e) examine specific aspects of death penalty jurisprudence. It concludes with some words on the author's personal view on the future of death penalties.

THE BROAD POSITION OF THE CCJ

The CCJ revealed more than just a clue as to what its broad approach was going to be on death penalty matters when it decided the Barbados cases of *Boyce and Joseph*¹. When that case came to us at the CCJ, there had been considerable debate about what the likely position of the CCJ would be. Much of that debate was fueled by the fact that as a matter of sheer coincidence, the active role of the Judicial Committee of the Privy Council (JCPC) in radically shaping the region's capital punishment jurisprudence coincided with the time when regional governments were

¹ *The Attorney General, Superintendent of Prisons and Chief Marshal v Jeffrey Joseph and Lennox Ricardo Boyce* [2005] CCJ 2 (AJ).

putting in place the machinery for the establishment of the CCJ. It must be stressed that this was sheer coincidence because at the time, the displeasure of members of the Executive of various Caribbean Community (CARICOM) States at the rulings of the JCPC were unfortunately linked to the establishment of the CCJ in a way as to suggest to some that the CCJ was being established to give rulings on death penalty matters that would be more pleasing to the Governments and at variance with those of the JCPC. This notion tainted the court and left many persons with questions they wished to have answered. *Was the CCJ going to be an independent and impartial court? Was it a hanging court? What would be its position on the rapidly evolving death penalty jurisprudence? Would the Court reverse Pratt and Morgan?*²

This was the climate that existed when the court heard its first death penalty case. And it was a fitting case for all these questions to be explored. Four young boys had been charged with murder in Barbados. They were involved in a brawl and had beaten another youth to death. The Crown offered to accept from them a plea of manslaughter. The main defendants accepted that plea. They were, it seems, the most culpable of the lot. The other two, Joseph and Boyce, pleaded not guilty. They were tried, found guilty of murder and sentenced to the death, that being the mandatory punishment for murder. Their appeal was dismissed. They appealed to the JCPC on the ground that the mandatory death penalty was unconstitutional in Barbados. They lost on that issue before the JCPC. They petitioned the Inter-American Commission on Human Rights (IACHR). While those petitions were pending the Mercy Committee advised their execution and death warrants were read to them. They launched fresh constitutional motions in Barbados claiming that it would be unlawful to execute them. It was those motions that ultimately came before the CCJ. We will

² *Earl Pratt and Ivan Morgan v The Attorney General for Jamaica and The Superintendent of Prisons, St. Catherine's Jamaica* [1994] 2 AC 1.

examine the case in greater detail later. But the Court's judgment was awaited anxiously because it was going to answer (hopefully once and for all) the questions that were still lurking in the minds of many.

Suffice it to say that the CCJ acknowledged in *Boyce and Joseph* that its main purpose was and is to promote the development of a Caribbean jurisprudence—a goal which Caribbean courts are best equipped to pursue. But in promoting that goal, the CCJ stated that it will consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. The CCJ recognized and accepted that the death penalty is a constitutionally sanctioned punishment for murder and that the imposition of death sentences for the most serious crimes still falls within internationally accepted conduct on the part of civilised States. The Court stated, however, that the death penalty should not be carried out without scrupulous care being taken to ensure that there is procedural propriety and that in the process fundamental human rights are not violated. The Court also noted that courts have an obligation to respect constitutions and laws that retain capital punishment and if a judge is so uncomfortable with imposing or sanctioning the imposition of a constitutionally permitted punishment, such as a death sentence; if a judge cannot be dispassionate in resolving legal issues that bear on the subject, then the judicial function is compromised and public confidence in the administration of justice is undermined. In other words, if a judge cannot in good conscience uphold a death sentence if the law and circumstances warranted it, the judge is obliged either to recuse from death penalty cases or to demit office altogether.

DEATH—A PUNISHMENT LIKE NO OTHER (HUGHES AND SPENCE)

In April, 2001, while a trial judge in Anguilla, I was temporarily drafted in to sit in the Court of Appeal of the Eastern Caribbean Supreme Court on a case in which two men had been sentenced to death for separate murders they had committed – in Saint Lucia and St Vincent and the Grenadines respectively.³ Each had been sentenced to death. They were appealing the sentence and because a common issue was involved the cases were consolidated. The appellants argued, for the first time in the region, that the mandatory death penalty was unconstitutional.

At the outset of my judgment I pointed to three facets of the death penalty that gave me pause. Death is a punishment like no other. It differs from all other punishments not by degree but rather by its very nature. It deprives the prisoner of the right that is an indispensable condition for the enjoyment of any and all other human rights; and it is a deprivation that is completely irrevocable. Once this punishment is carried out all that remains of the prisoner is a memory of him. If an error is subsequently discovered, if a witness recants his testimony or new evidence turns up exonerating the accused, the executed prisoner cannot be reprieved. Consider for example the case of *Mahmoud Hussein Mattan*⁴ who was hanged in Cardiff Prison, in the UK on 8th September 1952. In 1998, the Court of Appeal quashed his conviction and in delivering judgment, Lord Justice Rose stated that the case clearly demonstrated that “*Capital punishment was not perhaps an appropriate culmination for a criminal justice system which was human and therefore fallible.*” Death is not to be treated as simply just another punishment. It is a punishment in a class of its own, warranting special procedures before it is carried out. The United States Supreme Court has

³ *Peter Hughes v The Queen (Criminal Appeal No. 20 of 1998, St. Vincent and the Grenadines); and Newton Spence v The Queen (Criminal Appeal No. 14 of 1997, St. Lucia).*

⁴ *R v Mattan, The Times*, 5 March 1998, Court of Appeal, Criminal Division.

consistently held that death is a unique punishment that differs from all other forms of criminal punishment, not in degree but in kind. [See: Furman v Georgia⁵; Gregg v Georgia⁶; Woodson v North Carolina⁷; and Lockett v Ohio⁸]

The second point to note about death sentences for murder is that murder is an offence for which (prior to 2001) the court had no discretion to determine the appropriate sentence. In deciding the punishment for other offences the court usually has a broad discretion and can pay regard to a wide variety of circumstances in arriving at a fit sentence. That was not then the case upon a conviction of murder. Yet, and this was the third observation, murder is peculiarly a crime that admits of an enormous range both in character and in culpability. The circumstances in which murder is committed and the personal background and motive of the offender may vary radically from one accused to another. Those three observations continue to inform my judicial conception of the death penalty. They are by no means original observations. US Supreme Court Justice Thurgood Marshall was often quoted as stating that "Death is different".⁹ In his judgments he repeatedly emphasized the following four positions: (1) The death penalty is not a deterrent; (2) As retribution, the death penalty is inappropriate to a civilized society; (3) Innocent people will invariably be executed; and (4) The death penalty cannot be consistently applied. Justice

⁵ (1972) 408 U.S. 238.

⁶ (1976) 428 US 153.

⁷ (1976) 428 US 280.

⁸ (1978) 438 US 586.

⁹ See his 1986 opinion in Ford v Wainwright 477 U.S. 399 (1986) [citing earlier language in the 1976 case of Woodson v North Carolina 428 U.S. 280 (1976)].

Marshall's positions were naturally influenced by his own experiences as a young black man growing up in the southern states of the USA.

THE TREND TOWARDS ABOLITION

The imposition in the Caribbean of the sentence of death by hanging for murder is a legacy of British colonialism. Outside of Cuba, the death penalty is not a feature of the former colonies of France, or of Spain, or of The Netherlands. According to Amnesty International¹⁰, more than two-thirds of the countries in the world have now abolished the death penalty in law or in practice. Some 97 countries have abolished the penalty for all crimes. A further 36 countries retain the penalty for ordinary crimes such as murder but these countries can be considered abolitionist in practice because they have not executed anyone during the past 10 years and they are believed to have a policy or established practice of not carrying out executions. Eight countries are abolitionist for ordinary crimes. In other words these eight countries retain laws that provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as war time crimes. The worldwide trend is unmistakably towards its abolition. A total of 141 countries are currently abolitionist in law or in practice. Significantly, all the independent Commonwealth Caribbean States are among 57 countries and territories that are considered retentionist in that these countries retain the death penalty for ordinary crimes.

It is interesting to note that in Jamaica, two independent studies have recommended the abolition of the death penalty. The Report of the Commission of Enquiry into incidents which occurred at

¹⁰ See: <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#allcrimes> accessed on 17 July 2012.

the St Catherine District Prison on 27 December 1974, known as the Barnett Report, had expressed the view that the long delay in the execution of the death penalty after it had been pronounced constituted cruel and inhumane punishment. The Report recommended that capital punishment, being of questionable deterrent effect, should be abolished. Similarly, in 1981 a Committee under the chairmanship of Justice Aubrey Fraser, Director of the Norman Manley Law School, was mandated to consider and report whether the death penalty should be abolished. The Fraser Committee reported in December 1981. In its recommendations the Committee concluded that death as a penalty for murder should be abolished.¹¹

FACTORS DRIVING THE DEBATE ON THE DEATH PENALTY

The debate on capital punishment in the Commonwealth Caribbean is driven by a variety of factors. In the first case, over the last decade or so there has been an alarming rise in homicide rates in the region. The UN Office on Drugs and Crime (UNODC) in its first-ever global study on homicide¹², recorded appalling murder rates for CARICOM States for 2010. Jamaica was highest at 52.1 murders per 100,000 persons followed by Belize with 41, St Kitts and Nevis at 38, Trinidad and Tobago 35.2, The Bahamas 28.0 and Saint Lucia 26.2. Guyana came in at 18.4. These alarming homicide rates are fuelled by gang-related killings, the economic and financial crisis that has gripped the World and drug-trafficking. Paradoxically, while homicide rates are rising in the region they are decreasing in many countries, mainly in Asia, Europe and Northern America. It is all too easy for members of the public and public officials to respond to this increase in the

¹¹ See *Watson v The Queen* [2004] UKPC 34 at [9].

¹² See: http://www.unodc.org/documents/data_andanalysis/statistics/Homicide/Globa_study_on_homicide_2011_web.pdf, accessed 17 June 2012.

homicide rate by simply calling for more hangings or a return to hanging as the case may be. Such calls are a knee jerk reaction to a serious social problem and they are often made without regard to any considered analysis of the causes of the increase in homicides and the best methods of tackling that problem. Naturally, therefore calls for capital punishment are met by increased agitation on the part of anti-death penalty and human rights activists. The Death Penalty project¹³, for example, boldly proclaims on the opening page of its website that “*As long as the death penalty remains an enforceable punishment for those found guilty of crimes, The Death Penalty Project will continue to provide free legal representation and assistance to individuals facing execution, and it will further maintain its commitment to human rights standards by promoting the restriction of the death penalty in line with international minimum legal requirements.*” And what a job The Death Penalty Project has accomplished! The Project collaborates with a number of dedicated barristers, academics and medical experts in the UK and abroad whose *pro bono* assistance enables prisoners under sentence of death and without financial resources or legal aid to pursue the criminal, constitutional and international remedies to which the prisoners are entitled. In the process, as the CCJ acknowledged in *Boyce and Joseph*, several court decisions in the Caribbean over the last two or three decades have done much to humanise the law and to improve the administration of justice in this area.

THE PROGRESSION FROM AUTOMATIC DEATH SENTENCES FOR MURDER

There has been an extraordinary progression in the Caribbean’s capital punishment jurisprudence since independence and more particularly since the 1990s. Before then, as I stated in the Foreword

¹³ See <http://www.deathpenaltyproject.org/> accessed 17 July 2012.

to Sir Fred Phillips' book on The Death Penalty, "*When a Judge, in a hushed, packed courtroom, solemnly intoned that, on a day to be appointed, the prisoner, who was just convicted of murder, was to be taken to a certain place and hanged by the neck, until he was dead, the gallery might have gasped, a tear may have been shed, but everyone accepted the punishment as automatic, just, lawful*".¹⁴ The prevailing view in the colonial era was that a death sentence for murder was mandatory and the practice was that the sentence was carried out swiftly. The criminal procedure and rules supported this approach. In St. Vincent and the Grenadines, for example, while the criminal procedure rules allowed for the Court of Appeal in its discretion to grant extensions of time to appeal a death sentence, there was one class of case where the Court of Appeal had no such discretion and that was in instances where a prisoner had been convicted of murder and a death sentence had accordingly been imposed.¹⁵

What factors underpinned the change of approach? The underlying basis for the fundamental sea change in capital punishment jurisprudence was of course the Constitutions which we adopted at independence and which each contained a Bill of Rights that is judicially enforceable. These Constitutions protect the right not to be subjected to inhuman treatment. They guarantee the right to life and to a fair trial and to due process and to the protection of the law. But the Constitutions and the Bill of Rights by themselves did not bring about the change. They only provided the platform upon which the change was premised. Even after the new Constitutions were adopted judgments were still being handed down as if there had been no change from pre-independence times. In the immediate post independence period the Bills of Rights were construed very

¹⁴ Sir Fred Phillips, *The Death Penalty and Human Rights* (Caribbean Law Publishing Company, 2009).

¹⁵ But see: *Cannonier v The DPP, St Kitts and Nevis Criminal Appeal HCRAP 2008/002* (unreported) where it was recently held that such Rules are unconstitutional

restrictively¹⁶. During this early period, the courts often determined that the new Bills of Rights represented no more than a re-statement of common law principles. The rights were not regarded as a Charter that could be exploited to expand democracy and hold governments and parliaments to strict standards of accountability.

The approach taken to the rights in the 60s and 70s was a conservative one. Consider for example, *Baker v The Queen*¹⁷. The Jamaica constitution proscribed the imposition of a more severe penalty than might have been imposed at the time the offence was committed. This provision was considered in relation to a section of a Jamaica law and amazingly, the section, which was in fact susceptible of two interpretations, was itself employed to determine the meaning of the right as stated in the Constitution¹⁸. In *Kitson Branche v The Attorney General of Trinidad and Tobago*¹⁹, the Trinidad and Tobago Court of Appeal could not accept that a prisoner sentenced to death could seek a declaration that it would be unconstitutional to enforce the death penalty.

The point is that it took a long time before it was recognized that the Bill of Rights were capable of having an impact on the imposition of death sentences. This was in keeping with the mores of the day. But the common law is never static. Nor is interpretation of statutes. Interpretation of the Bill of Rights evolved. The evolutionary process was propelled by several factors. First of all, with the waning of the Cold War followed by the collapse of socialism in Eastern Europe and the

¹⁶ See for example *Director of Public Prosecutions v Nasralla* (1967) 2 AC 238 and *King v R* (1969) 1 AC 304.

¹⁷ [1975] AC 774.

¹⁸ See Margaret Demerieux, *Fundamentals in Commonwealth Caribbean Constitutions* (Cave Hill, Barbados: Faculty of Law, 1992), page 61.

¹⁹ *Civil Appeal No. 63 of 1977*.

dismantling of the socialist bloc, States in the West could afford to accord greater individual freedoms to their citizens. The balance between national security and individual rights tilted towards a greater respect for individual rights. In Europe, the European Court on Human Rights began to make bold statements expanding the meaning of the Rights which we had inscribed in our Constitutions.

The JCPC judges came under the influence of these judicial interpretations and themselves began to move away from the conservative approach to interpretation of our Fundamental Rights that characterized their judgments in the 70s and 80s. In *Minister of Home Affairs v Fisher*²⁰ Lord Wilberforce rejected what he called "the austerity of tabulated legalism" and declared that our Constitutional rights provisions called for "a generous interpretation" suitable to give to individuals the full measure of the fundamental rights and freedoms referred to in the Bill of Rights.²¹ This was a fresh, forwarding looking approach to constitutional rights contrasting sharply with the old notion that the rights were common law codified.

The judgments in the case of *Riley v Attorney General of Jamaica*²² neatly illustrate the tension between the old and the new approaches. This case was the precursor to *Pratt and Morgan*. The question in each was whether inordinate delay in the execution of the death sentence could render unlawful the carrying out of the sentence. *Is it a breach of a man's constitutional rights to keep him on death row indefinitely, for years on end, oscillating between hope and despair? And if it*

²⁰ [1980] AC 319.

²¹ *ibid* 328.

²² [1983] 1 AC 719.

is, what remedy should be afforded him for this breach of his rights? In *Riley*, three judges of a five member Board took the view that delay in the execution of a death sentence could not be an infringement of rights guaranteed by the constitution. The minority, however, delivered what the late Aubrey Fraser referred to as a haunting dissent. And it was this dissent that was fully validated ten years later in *Pratt and Morgan v The Attorney General for Jamaica*²³ when in 1993 a seven member panel unanimously rejected the view of the *Riley* majority.

Between 1993 and 2004 Caribbean capital punishment jurisprudence has taken giant leaps forward. As with all progress, the path was neither smooth nor did it follow a straight line. As I stated in *Hughes and Spence*, at the level of the highest court important decisions on crucial judgments of life or death were departed from, or expressly reversed, with an unsettling frequency.²⁴ As noted previously, *Pratt and Morgan v Attorney General for Jamaica*²⁵, reversed *Riley v Attorney General of Jamaica*²⁶. Then we had *Fisher v Minister of Public Safety and Immigration (No. 2)* (1999) 2 W.L.R. 349 and *Thomas v Baptiste* (1999) 3 W.L.R. 249, where differently constituted Boards, faced with basically the same legal question, arrived at opposite conclusions. Later, in *Higgs v Minister of National Security*,²⁷ when the same question again arose for consideration, the Board understandably could not reconcile those two earlier decisions. Ultimately, so as not to throw the law into even greater confusion, their Lordships felt obliged

²³ [1994] AC 1; (1993) 43 WIR 340.

²⁴ *Peter Hughes v The Queen (Criminal Appeal No. 20 of 1998, St. Vincent and the Grenadines); and Newton Spence v The Queen (Criminal Appeal No. 14 of 1997, St. Lucia)* at [175].

²⁵ [1994] AC 1.

²⁶ (1983) A.C. 719.

²⁷ (2000) 2 W.L.R. 1368.

reluctantly to uphold the dubious justification advanced in *Thomas* for not following *Fisher*. But that was not the end of that matter. In *Lewis et ors. v Attorney General of Jamaica*,²⁸ the majority overruled *Fisher* and *Higgs* and confirmed the correctness of *Thomas v Baptiste*. In the process, the Board also departed from its own decision in *Reckley v Minister of Public Safety and Immigration No. 2* (1996) A.C. 527.

The final chapter in this turbulent period involved the countries of Trinidad and Tobago and Barbados. It concerned the effect of the so called Savings Law clause contained in the Constitutions and whether that clause could preclude the now admittedly inhuman mandatory death penalty from being held by a court to be unconstitutional. In *Balkissoon Roodal v The State*²⁹ the JCPC had answered that question in the affirmative. But within a year or so that judgment was overturned and replaced by *Matthew*³⁰ so far as Trinidad and Tobago was concerned and by *Boyce* in relation to Barbados. The ten or so extremely unsettling years of capital punishment jurisprudence following the decision in *Pratt and Morgan* have not promoted confidence in the justice system. An exasperated Lord Hoffman was impelled to say in *Lewis* that it appeared to him that his colleagues had a doctrinal pre-disposition for the cases they heard to come out differently.³¹

²⁸ Privy Council Appeals Nos. 60/99, 65/99, 69/99 and 10/00 (unreported) September 2000.

²⁹ [2003] UKPC 78.

³⁰ *Matthew v State of Trinidad and Tobago* (2004) 64 WIR 412; [2004] UKPC

³¹ *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 at 90.

THE IMPACT OF INTERNATIONAL HUMAN RIGHTS ON DEATH PENALTY JURISPRUDENCE IN THE CARIBBEAN.

International Human Rights has been another important factor that impelled the changing capital punishment jurisprudence. International jurisprudence has, in a sense, made all the difference in the evolution of Caribbean capital punishment jurisprudence. Since the Bill of Rights in our Constitutions was spawned by international human rights Conventions it is perhaps not surprising that international law tribunals have influenced domestic courts in the latter's interpretation of these rights. To quote Lord Hope in *Lambert Watson v The Queen*³²:

The march of international jurisprudence on this issue began with the Universal Declaration of Human Rights which was adopted by a resolution of the General Assembly of the United Nations on 10 December 1948 (1948) (Cmd 7662). It came to be recognised that among the fundamental rights which must be protected are the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment: see articles 3 and 5 of the Universal Declaration; articles I and XXVI of the American Declaration of the Rights and Duties of Man which was adopted by the Ninth International Conference of American States on 2 May 1948; articles 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969); articles 6(1) and 7 of the International Covenant on Civil and Political Rights which was adopted by a resolution of the General Assembly of the United Nations on 16 December 1966 and entered into force on 23 March 1976 (1977) (Cmnd 6702); and articles 4.1 and 5.2 of the American Convention on Human Rights which was signed on 22

³² [2004] UKPC 34 at [30].

November 1969 and came into force on 18 July 1978. So the practice was adopted, as many of the former British colonies achieved independence, of setting out in their Constitutions a series of fundamental rights and freedoms which were to be protected under the Constitution. The history of these developments is fully set out in *Reyes*. It is as relevant to the position under the Constitution of Jamaica as it was in that case to Belize. There is a common heritage. In *Minister of Home Affairs v Fisher* [1980] AC 319, 328 Lord Wilberforce referred to the influence of the European Convention in the drafting of the constitutional instruments during the postcolonial period, including the Constitutions of most Caribbean territories.

That influence is clearly seen in Chapter III of the Constitution of Jamaica.

Article 6(2) of the International Covenant on Civil and Political Rights 1966 (“the Covenant”) states:

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence and not contrary to the present Covenant.”

As noted by Mr. Saul Lehfreund of The Death Penalty Project:

“Article 4 of the American Convention on Human Rights (“the Convention”) contains extensive provisions concerning the death penalty. It is similar to article 6 of the Covenant but specifically prohibits the extension or reintroduction of the

death penalty. The prohibition of execution of juveniles and pregnant women appears in both the Convention and the Covenant, but the Convention adds to this group of protected persons anyone over the age of 70.”³³

The Inter-American Court of Human Rights stated in *Restrictions to the Death Penalty*:³⁴

“On this entire subject, the Convention adopts an approach that is clearly incremental in character. That is, without going as far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance.”

Lehrfreund also notes that:

“The United Nations has also set new procedural and other standards to safeguard the rights of those facing the death penalty. These range from basic due process principles to adding “persons who have become insane” as a category of individuals who should enjoy absolute protection from execution. In 1989, these standards were further developed by the United Nations Economic and Social Council. It recommended *inter alia* that there should be a maximum age beyond which a person could not be sentenced to death or executed and that persons suffering from mental retardation should be added to the list of those who should be protected from capital punishment.³⁵³⁶ The Covenant and the regional human

³³ Saul Lehrfreund, *International Legal Trends and the Death Penalty in the Commonwealth Caribbean* (presented at the Conference on International Law and the Abolition Of The Death Penalty organised by the Irish Centre for Human Rights, National University of Ireland and Centre de Recherche sur les Droits de l’Homme, Université Pantheon-Assas Paris II; Galway, September 21 and 22, 2001 [Session 4: Towards Universal Abolition], page 4.

³⁴ See *Restrictions to the Death Penalty* (Articles 4(2) and 4(4) of the American Convention on Human Rights), Advisory Opinion OC-3/83 of September 1983, Series A No. 3, 4 HRLJ 352, at para. 57.

³⁵ ECOSOC Res. 1989/64 at para. 1(d).

³⁶ nd Optional Protocol to the International Covenant on Civil and Political Rights; 6th Protocol to the European Convention on Human Rights; Protocol to the American Convention on Human Rights Abolishing the Death Penalty.

rights instruments all have separate protocols to abolish the death penalty.³⁶ In 1998, The United Kingdom Parliament voted to incorporate Protocol 6 of the ECHR into British domestic law by an amendment to the Human Rights Act 1998.³⁷ Its restoration is prohibited by international law.”

The international jurisprudence reflects itself in domestic law because in interpreting the domestic Bills of Rights, States cannot but have regard to international norms as “illustrative of contemporary standards of justice and humanity”.³⁸

SPECIFIC ASPECTS OF DEATH PENALTY JURISPRUDENCE:

(i) Mandatory death penalties

The judgment of the ECSC delivered in the conjoined cases of *Newton Spence v The Queen* and *Peter Hughes v The Queen*, from St Vincent and the Grenadines and Saint Lucia respectively, was the first to declare the mandatory death penalty to be unconstitutional. This judgment sparked a tsunami of change in death penalty jurisprudence throughout the Commonwealth. For the very first time a Court in the Commonwealth decided that the automatic death penalty for murder was unconstitutional because its mandatory character constituted inhuman and degrading treatment. In taking this view the court swept aside contrary judicial opinions of distinguished jurists. The judgment involved a consideration of the meaning of inhuman treatment. The relevant Constitutions clearly stated that that no one shall suffer inhuman treatment. *What constitutes inhuman treatment? Is a regime that imposes a one size fits all approach, to a punishment as*

³⁷ Article 1 of Protocol 6 provides: “The death penalty shall be abolished. No one shall be condemned to such penalty or executed.”

³⁸ Lehfreund, op. cit, page 6.

serious as death, in keeping with current standards of what constitutes humane treatment? In this regard, who determines what is or is not inhuman treatment?

The decision, like many of the important death penalty cases, was a majority one. Some people said afterwards that the majority was legislating; that this was for parliament; that we were involved in judicial activism. The minority opinion was also to that effect. The charge did not perturb me in the least. It seemed to me then and I still believe that if judges are the ones to interpret the Constitution, then it is for judges to state what is or is not inhuman treatment. And it is also for the judges to determine what remedy to afford a person who is subjected to a regime that permits inhuman treatment. The granting of appropriate remedies to persons who complain of a violation of the rights declared under the Constitution is neither the duty of the executive nor the legislative branches of government. It is a specific, unqualified constitutional obligation of the judiciary. It would be equally remiss of the court to permit this task to be laid at the feet of the Advisory Committee on the Prerogative of Mercy or to sit back and await possible Parliamentary intervention.

Every citizen, even if he or she is regarded as the scum of society, has a right to life and a right to humane treatment. The constitutional enshrinement of those rights coupled with the irrevocability of death, suggest that, even if there are occasions when the State may lawfully deprive one of the right to life (say by a death sentence), courts should scrupulously ensure that a person is not lightly deprived of that right. This means, *inter alia*, that all the processes and procedures involved in imposing and carrying out a death sentence should be jealously guarded. It also means that death

sentences should only be imposed in rare cases. Indian jurisprudence refers to “the rarest of the rare” cases.

In *Hughes and Spence* the majority held that an automatic death penalty which precluded the court from considering mitigating circumstances even as an irrevocable punishment was meted out to the prisoners, reduced human dignity. And where a law compelled a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence, that law should be struck down as being unconstitutional. In my judgment I noted that a vital precept of just penal laws is that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. Where punishment so excessive, so disproportionate *must* be imposed courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. This judgment was subsequently upheld by the JCPC and applied not only by that court³⁹ but also by courts in Uganda and Malawi.⁴⁰ As Professor Vasciannie points out⁴¹ these decisions are in line not only with the decisions of

³⁹ See for example, *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235; *Fox v The Queen* [2002] UKPC 13; [2002] 2 AC 284

⁴⁰ See: *Kigula & Others -v- Attorney General* Constitutional Petition No.6 of 2003, unreported; Francis Kafantayeni et al v Attorney General of Malawi (High Court of Malawi, unreported),

⁴¹ See: Stephen Vasciannie, *The Decision of the Judicial Committee of The Privy Council in The Lambert Watson Case from Jamaica on the Mandatory Death Penalty and the Question of Fragmentation*, 41 N.Y.U. J. Int'l L. & Pol. 837 (2009) accessed at http://www.law.nyu.edu/ecm_dlv2/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_064127.pdf.

international courts⁴² but also with domestic courts in the United States⁴³ and in South Africa. In the South African case of *State v Makwanyane* 1995 (1) SA 269 (CC) at par. 42 (S. Afr.), the Constitutional Court of the Republic of South Africa, in its review of death penalty cases in the United States of America, noted that: “Statutes providing for mandatory death sentences, or too little discretion in sentencing, have been rejected by the [United States] Supreme Court because they do not allow for consideration of factors peculiar to the convicted person facing sentence, which may distinguish his or her case from other cases.”

The other point the majority in *Hughes and Spence* noted in the judgment was that what constitutes inhuman treatment today may have been perfectly acceptable treatment fifty years ago. But because it was acceptable half a century ago, that does not mean that we must continue to pay homage to it even if we find it inhuman today. This is what I said in my judgment:

“... The spirit and intent of [the section of the constitution barring inhuman treatment] combined with the broad manner in which that section is drafted permit courts of law a wide discretion. ..[T]he court, at the instance of litigants with standing, is entitled to place punishments and treatments under continuous judicial scrutiny in order to ensure that they are not *or have not become* inhuman and degrading. A Constitution is a living document and the prohibition against inhuman treatment is peculiarly conditioned by

"evolving standards of decency". Were it otherwise, then the full measure of

⁴² See for example, the Inter-American Court of Human Rights. In November 2007 that Court held in the case of *Boyce v Barbados* that the mandatory death sentence authorized by the Offences against the Person Act of Barbados is contrary to the American Convention on Human Rights.

⁴³ See: *Woodson v North Carolina*, 428 U.S. 280 (1976) at 305 and also *Roberts v Louisiana*, 431 U.S. 633 (1977). In *Woodson v North Carolina*, the Supreme Court held that legislation in North Carolina mandating the death penalty for all first-degree murderers was invalid because it violated the Eighth and Fourteenth Amendments of the US Constitution.

the right assured to the citizen by [the] section ... would be severely compromised either by the paying of homage to unenlightened common law relics or by slavish adherence to the outmoded mores of yesteryear.”⁴⁴

As a means of ameliorating the harshness involved in the imposition of an automatic death penalty to all convicted of murder, Jamaica enacted the Offences Against the Person (Amendment) Act in 1992.⁴⁵ The Act reserved automatic death sentences only to persons who commit murder in particular circumstances. Belize also has a similar Act.⁴⁶ And Guyana’s new Criminal Amendment Act is to like effect. As previously indicated, these Acts are welcome attempts to mitigate against the inflexibility of the automatic nature of mandatory death sentences. But would the courts uphold the mandatory death sentencing regime which is applicable to the most serious murders as outlined in the Act? While I would prefer to make no comment on how the CCJ might determine that issue in relation to the Guyana Act, the approach of the JCPC to the Jamaican Act may be considered. In the case of *Lambert Watson*⁴⁷, a nine member Board of the JCPC held that the mandatory death penalty even in those limited circumstances was unconstitutional for the same reasons as the mandatory death sentence was struck down in *Hughes* and *Reyes* and *Fox*.⁴⁸ In Jamaica the judge now has the option of imposing the death sentence even in those kinds of murder.

⁴⁴ *Peter Hughes v The Queen (Criminal Appeal No. 20 of 1998, St. Vincent and the Grenadines); and Newton Spence v The Queen (Criminal Appeal No. 14 of 1997, St. Lucia)* at [217].

⁴⁵ See: <http://www.moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act.pdf>

⁴⁶ See Criminal Justice Act of Belize, 1994.

⁴⁷

⁴⁸ See [2004] UKPC 34, [2005] 1 A.C. 472.

It is important to observe that the key element in shaping the views of courts that the mandatory death penalty for murder is inhuman is the international jurisprudence on human rights. That jurisprudence frowns on the death penalty as a whole and specifically it regards as entirely out of keeping with modern standards of human rights any regime that sanctions an automatic death penalty.⁴⁹

In *Hughes and Spence* the ECSC decided that after a conviction of murder, the jury should decide whether to impose the death sentence but this aspect of the judgment was reversed by the JCPC.⁵⁰ In *Trimmingham v The Queen*⁵¹ the JCPC outlined the approach judges should take in relation to judicial discretion in imposing a death sentence. The Board stated that that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, “the worst of the worst” or “the rarest of the rare” and secondly, that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death.⁵² Lord Kerr noted that in *Maxo Tido v The Queen* [2011] UKPC 16 the Board acknowledged that difficulties can arise in deciding which cases should be categorised as “the worst of the worst” or “the rarest of the rare”. In *Lockhart v R*, he said, “It is quite clear, however, that only the most exceptional will qualify.”⁵³

⁴⁹ See for example, Lord Bingham in *Reyes* [2002] 2 AC 235 at 244 [17] and 257 [45].

⁵⁰ At [58]-[60].

⁵¹ (2009) UKPC 25

⁵² At [21].

⁵³ [2011] UKPC 33 at [7].

(ii) The effect of delay on a sentence of death

It is unnecessary to spend a long time on this issue. In 1983 *Riley* had decided that delay in carrying out execution could afford no ground for holding an execution to be in breach of the Jamaican Constitution. The judgment of the Board in *Pratt and Morgan* overturning the majority judgment in *Riley* has laid this issue to rest. *Pratt and Morgan* has been embraced by the CCJ.

There are two contradictory forces at play here. A prisoner sentenced to death has a natural human urge to avoid death. The prisoner will therefore exploit the legal process to the full in order to save his life. This means that he will exhaust every possible legal recourse in order to challenge his conviction or his sentence or both. This is the right of the prisoner in a society governed by the rule of law. But on the other hand, if a State consciously chooses to retain the death penalty that State may not facilitate the prisoner by tolerating unnecessary or unreasonable delay or else it may find itself in a position where, because of the inordinate delay, it becomes unconscionable and unconstitutional ultimately for it to execute the death sentence. If a State desires to engage in capital punishment it should execute that punishment as swiftly as the law and the legal processes can reasonably accommodate and, in any event, those processes should be fair, efficient and expeditious. If the State falls short of this obligation courts may hold that it is no longer permissible to carry out the sentence.

Part of the basis for rulings like this lies in the reality of death row. Death row is like a prison within a prison. The conditions there are harsh and security is extremely strict since death row

prisoners literally have nothing to lose and so may be capable of any manner of evil. In the words of Patrick Hudson:⁵⁴

“Words such as harsh and brutal are often used, but they cannot capture the prisoner’s transformation from human being to caged animal. Amid countless horror stories from prisoners on death row, a terrifying vision of the system emerges. Prisoners are usually confined to small cells for up to 23 hours a day, while reading materials and contact with others is severely restricted. The prisoner’s mind has little to contemplate except the crimes which been committed, the impending execution, and the chances of a successful appeal. Many times, prisoners will face the moment of their execution, only to have a last minute stay granted, forcing them to relive their suffering until the next execution date.”

In *Rajendra Prasad v State of Uttar Pradesh*⁵⁵, the Indian Judge Krishna Iyer, J stated that a death row prisoner is reduced to no more than a vegetable and hanging a vegetable is not death penalty. The jurisprudence on delay constituting cruel and inhuman treatment is also derived from international law. The case of *Soering v The United Kingdom*⁵⁶ is often considered the starting point. In *Soering*, the ECtHR determined that delay caused by the prisoner could constitute cruel and inhuman treatment because it is a natural urge of the prisoner to exploit delay. On the other hand it is the obligation of the legal and judicial system to ensure that there is no such delay. In 1989, the United Nations Human Rights Committee (UNHRC) dealt with the petition of two

⁵⁴ Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law?* EJIL 11 (2000) 833-856 at 836 [<http://ejil.oxfordjournals.org/content/11/4/833.full.pdf>, accessed on 17 July 2012].

⁵⁵ (1979) 3 SCR 78 at 130.

⁵⁶ ECHR (1980) Series A. No. 161; (1989) 11 European Human Rights Reports 438.

Jamaican convicted murderers - Pratt and Morgan who had been on death row for inordinate periods of time. The UNHRC decided that although in principle prolonged judicial proceedings do not per se constitute inhuman treatment, the position could be different in cases of capital punishment. It was this opinion that set the stage for the Privy Council's overruling of *Riley* in the famous *Pratt and Morgan* decision where a unanimous seven member JCPC declared:

“In their Lordships’ view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence... Their Lordships are very conscious that the Jamaican government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition. Capital appeals must be expedited and legal aid allocated to an appellant at an early stage. The aim should be to hear a capital appeal within twelve months of conviction. The procedure contained in the Governor General’s Instructions should be reinstated so that the JPC consider the case shortly after the Court of Appeal hearing and if an execution

date is set and there is to be an application to the Judicial Committee of the Privy Council it must be made as soon as possible, as both the rules of the Judicial Committee of the Privy Council and the Governor-General's Instructions require, in which case it should be possible to dispose of it within six months of the Court of Appeal hearing or within a further six months if there is to be a full hearing of the appeal. In this way it should be possible to complete the entire domestic appeal process within approximately two years. Their Lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets which, if achieved, would entail very much shorter delay than has occurred in recent cases and could not be considered to involve inhuman or degrading punishment or other treatment...

...in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment".⁵⁷

In *Lewis* [2000] 3 WLR the JCPC seemed to have converted the "presumption" in Pratt to a rule. It is also useful to note that in *Henfield v AG of The Bahamas* [1997] AC 413, the JCPC held that because Bahamian citizens were not at liberty to petition the IACHR the five year rule was inapplicable and delay for a period of 3½ years would be considered an inordinate time.

⁵⁷ [1994] 2 AC 1 at 33-35.

(iii) The right to seek and obtain the views of international bodies where appropriate before executing the sentence of death

This is an area which was addressed by the JCPC in the case of *Lewis v The Attorney General of Jamaica* and by the CCJ in *Boyce and Joseph*. The independent CARICOM States have all subscribed to the American Convention on Human Rights. Any national of these States is entitled to submit an application to the Inter-American Commission on Human Rights alleging that rights under the ACHR have been violated. The question is this: *In the case of a convicted murderer who submits an application, are the domestic authorities (specifically the local Committee that advises or recommends on the prerogative of mercy) required to await the processing of this application before they execute a death sentence?* At the core of these questions lie a number of subsidiary questions: *What is the effect of an unincorporated treaty on domestic law? Is the Executive entitled to ignore treaties which gave rights to citizens and to which the Executive had bound the State because those treaties were not enshrined as domestic law? How should the courts treat a situation where the processing of the applications takes a long time and the five year Pratt and Morgan yardstick is in danger of being compromised? Does a condemned man have any rights in domestic law?*

The unsatisfactory dilemma created by the decisions of Pratt and Morgan and Lewis

Pratt decided that, where execution was delayed for more than five years after sentence, there would be strong grounds for believing that execution after such delay infringed the Constitution's prohibition against inhuman or degrading punishment. In other words, if a convicted murderer were to be executed, he should be executed as soon as lawfully possible after sentence. To have him linger on death row indefinitely, not knowing what his ultimate fate would be, was

constitutionally impermissible. A period of five years following sentence was established as a reasonable, though not by any means inflexible, time-limit within which the entire post-sentence legal process should be completed and the execution carried out. If execution was not carried out within that time-frame, there was a strong likelihood that the court would regard the delay as amounting to inhuman treatment and commute the death sentence to one of life imprisonment. The JCPC arrived at the five-year standard by reasoning that an efficient justice system must be able to complete its entire domestic appellate process within two years, and that eighteen months could safely be set aside for applications to international bodies to which condemned prisoners might have rights of access.

In *Lewis*, the JCPC decided *inter alia*, that, where a State has ratified a treaty conferring on individuals the right to petition an international human rights body, a person sentenced to death by a court of that State is entitled by virtue of his constitutional right to the protection of the law, to require that the sentence of death passed on him be not carried out until his petition to the human rights body has been finally disposed of and the report of that body is available for consideration by the State authority charged with exercising the prerogative of mercy. But crucially, the five year clock set by Pratt is running.

The dilemma facing a State wishing to execute is obvious. If that State is a State Party to a human rights treaty like the American Convention on Human Rights (ACHR) it has no control over the pace of proceedings before the relevant international human rights body. Notwithstanding this absence of such control the five year standard prescribed in *Pratt* has come to be applied with

guillotine-like finality. A State, for example, desirous of making good its pledge under Article 4(6) of the ACHR not to execute a prisoner while his petition is pending, may find that when the period of five years after conviction elapses, the international proceedings before the Commission or the Inter-American Court have not yet been completed. The result is that the State may ultimately through no fault of its own be unable to carry out the constitutionally sanctioned death penalty because of the conjoint effect of the decisions in *Pratt and Morgan* and *Lewis*.

The relationship between domestic law and unincorporated treaties:

Article 4 of the ACHR recognises the right of States to impose capital punishment for the most serious crimes, but the Convention, like most other human rights treaties,⁵⁸ discourages use of the death penalty. The penalty is not to be extended to crimes to which it does not presently apply.⁵⁹ It shall not be re-established in States that have abolished it.⁶⁰ In *Hilaire v Trinidad & Tobago*⁶¹, the Inter-American Court declared that “without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty and to bring about its gradual disappearance.”⁶²

⁵⁸ See for example the International Covenant on Civil and Political Rights.

⁵⁹ See Art. 4(2).

⁶⁰ See Art. 4(3).

⁶¹ Case of Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago, Judgment of June 21, 2002 (Merits, Reparations and Costs), Series C 94.

⁶² I/A Court H.R., Restrictions to the death penalty (Arts. 4(2) and 4(4) American Convention on Human Rights); Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, paras. 52 and 57.

The common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot ipso facto add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. See: *JH Rayner (Mincing Lane) Ltd v Dept of Trade & Industry*.⁶³ Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law. See: *The Parlement Belge*.⁶⁴

It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity. See: *R v Home Secretary, ex parte Brind*⁶⁵ and *R v Chief Immigration Officer, ex parte Salamat Bibi*.⁶⁶

⁶³ [1990] 2 AC 418 at page 476; See also *Thomas v Baptiste* [2002] 2 AC 1 at page 23 A-D per Lord Millett.

⁶⁴ (1879) 4 PD 129.

⁶⁵ [1991] 1 A.C. 696.

⁶⁶ [1976] 1 WLR 979 at 984 per Lord Denning MR.

The enforcement of the right of a condemned man to the protection of the law Does a Condemned man have a right to the protection of the Law set out in section 40(1)(a) of the Guyana Constitution? In Joseph and Boyce the argument was made that in accordance with de Freitas v Benny,⁶⁷ no constitutional rights of a condemned man could be infringed if the Mercy Committee did not accord to the man a fair hearing of his plea for clemency before the Advisory Committee on Mercy. It was said that any entitlements such a person had were not enforceable by the Constitution; that even if the BPC in advising on the prerogative of mercy while the international proceedings were still pending had adopted a procedure in relation to the condemned men that was deemed to be unfair, the Court of Appeal could not properly commute the death sentences.

The CCJ rejected these arguments in Joseph and Boyce and held that even condemned men have the right to the protection of the law and although the ACHR may not be regarded as “law”, nevertheless a citizen had a legitimate expectation that the State would afford him a reasonable time to pursue his petition on the international plane and have the appropriate body consider the response before executing a sentence of death. This decision of the CCJ was a little different from the one given by the JCPC in Lewis and in Thomas v Baptiste.

In Lewis the JCPC stated that “when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before

⁶⁷ [1976] A.C. 239.

it dealt with the application for mercy and to the staying of execution until those reports had been received and considered".

The two material differences are that (1) while the JCPC did not explain how the international legal process became part and parcel of domestic legal rights, the CCJ rationalized the end result through the doctrine of legitimate expectation; and (2) while the JCPC appeared to permit unlimited time to the petitioner before the international tribunals while at the same time retained application of the five year threshold in *Pratt*, the CCJ found that the five year threshold had to be enlarged by any unreasonably long period that was spent at the international level given that the State had no control over that process.

On that score the CCJ said at [138]: “It follows that, while in principle we affirm the decision in *Pratt*, as previously intimated, we would have been inclined to take the view that where the relevant international human rights process initiated by a condemned man exceeds eighteen months, the time taken in excess of that period has to be disregarded in computing time for the purpose of determining compliance with *Pratt* or, alternatively, such excess must be added to the five-year limit prescribed by *Pratt*. This is all on the premise that the additional time taken is not attributable to delays in the process for which the Government concerned is responsible.”

In granting a substantive legitimate expectation, the CCJ reasoned out the *Joseph and Boyce* case in this way at [125]: “In the case before us, there is on the one hand the legitimate expectation of the condemned men that they will be permitted a reasonable time to pursue their petitions with the

Commission with the consequence that any report resulting from the Inter-American process will be available for consideration by the Barbados Privy Council. On the other hand, there is whatever the State may advance as an overriding interest in refusing to await completion of the international process before carrying out the death sentence. It appears from what was represented to the Court of Appeal in this case that, apart from the constraints of the *Pratt* time-limit, the State of Barbados claims no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled. The BPC remains under no legal obligation to accept the report or recommendations of the Commission or UNCHR although of course it must consider them. In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. The substantive benefit the condemned men legitimately expect is actually as to the procedure that should be followed before their sentences are executed. It does not extend to requiring the BPC to abide by the recommendations in the report.”

The CCJ noted at [126] that “where the time taken in processing a condemned man's petition before an international body exceeded eighteen months, the excess should be disregarded in the computation of time for the purpose of applying the decision in *Pratt*. In any event, protracted delay on the part of the international body in disposing of the proceedings initiated before it by a condemned person, could justify the State, notwithstanding the existence of the condemned man's legitimate expectation, proceeding to carry out an execution before completion of the international process. This may be regarded either as a situation which is catered for by the terms of the

legitimate expectation itself or as one which creates an overriding public interest in support of which the State may justifiably modify its policy of compliance with the treaty.”

The CCJ’s opinion on how the Barbados Privy Council should approach its task; At [143] of the judgment in *Joseph and Boyce*, the CCJ noted: “We would recommend that the BPC should meet only once and that they should do so at the very end of all the domestic and international processes. At that stage they should make available to the condemned man all the material upon which they propose to make their decision, give him reasonable notice of the date of the meeting and invite him to submit written representations. This does not of course preclude the Governor-General in his or her discretion from convening at any time a meeting of the BPC with a view to achieving a consensus on commutation if the Governor-General considers there is a strong case for a commutation. If there is no decision in favour of commutation, then further deliberation would have to be adjourned.”

The justiciability of the processes of the Mercy Committee and the effect of a constitutional ouster clause

This area was considered in some detail by the CCJ in *Joseph and Boyce*. We held there that the modern approach to human rights with its emphasis on procedural fairness is obviously capable of impacting upon the reviewability of the prerogative of mercy and that “Ever since the House of Lords decision in *Anisminic v Foreign Compensation Commission*,⁶⁸ courts have made it clear that they will not be deterred by the presence of such ouster clauses from inquiring into whether

⁶⁸ [1969] 2 AC 147.

a body has performed its functions in contravention of fundamental rights guaranteed by the Constitution, and in particular the right to procedural fairness.”⁶⁹

Fitzpatrick JA, in *Yassin v Attorney-General of Guyana*⁷⁰, with respect to the prerogative of mercy, had earlier held that:

"In this case justiciability concerning the exercise of the prerogative of mercy applies not 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 processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene, as the manner in which it is exercised may pollute the decision itself".

In *Lewis*, the JCPC held that the processes involved in the exercise of mercy were not beyond review by the courts. The judgment stated at page 76C that:

"On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance and insofar as it is possible to ensure that proper procedural standards are

⁶⁹ At [40].

⁷⁰ (1996) 62 WIR 98.

maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly, if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way ... or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate".

In *Boyce and Joseph*, de la Bastide P and I agreed “with those who regard the power to confirm or commute a death sentence, particularly a mandatory one, as [being] far too important to permit those in whom it is vested freedom to exercise that power without any possibility of judicial review even if they commit breaches of basic rules of procedural fairness. Rooted though they be in language and literature, conceptual differences between mercy and justice cannot justify denying to a man under sentence of death, an enforceable right to have the decision whether he is to live or die arrived at by a procedure which is fair.”⁷¹

Accordingly, we held that “there was nothing to prevent the Court from examining the procedure adopted by the BPC and testing it for procedural fairness by reference to the rules of natural justice, and, for compliance with the fundamental rights and freedoms recognised in the Constitution. If the procedure adopted failed that test, then there was a breach of the respondents' right to the

⁷¹ At [39].

protection of the law, one of the fundamental human rights enumerated and recognised in section 11 of the Constitution.”⁷² We also held that the right of an aggrieved person to approach the Court for redress and the power of the Court to grant such redress, is rooted in an implied or inherent power to give redress for violations of the right to the protection of the law.

The manner of sentencing a person convicted of murder

Messrs Fitzgerald and Starmer in *A Guide to Sentencing in Capital Murder Cases* tell us that

“The proper test to apply is one that reserves the death penalty for the exceptional or worst cases, and applies the life sentence as the norm (sometimes varied to a lesser period). There is much support for the restrictive approach of Byron CJ in the *Hughes* decision that the death sentence should be imposed “only in the most exceptional and appropriate circumstances”.⁷³

“In some jurisdictions, life imprisonment is the only possible sentence for murder other than death. However, where that is not the case, life imprisonment is not the only alternative option.

Whilst by no means exhaustive, it is plain from the case law that the following are relevant aggravating and mitigating factors in the sentencing of murderers:

⁷² At [41].

⁷³ Edward Fitzgerald QC and Keir Starmer QC, *A Guide to Sentencing in Capital Murder Cases*, The Death Penalty Project Ltd (2007), page 17, para. 31-32.

- (1) Type and gravity of the murder
- (2) Mental state – including a degree of diminished responsibility
- (3) Other partial excuses including an element of provocation or undue influence
- (4) Lack of premeditation
- (5) Character
- (6) Remorse
- (7) Capacity for reform and continuing dangerousness
- (8) Views of the victim’s family
- (9) Delay up until time of sentence and prison conditions
- (10) Guilty pleas
- (11) Prison conditions.”⁷⁴

CONCLUDING WORDS

The decided cases have not ruled out the death penalty. What they have done is to impose severe strictures on States that wish to continue carrying out a punishment that is frowned upon by the international community. The legislature is obliged to modernize its criminal laws and procedures in capital cases. In this regard the recent legislation passed by the Guyana parliament is in some respects a positive development. Secondly, the cases have required governments to respect and

⁷⁴ Ibid, pages 20-21, para. 36-38.

honour international treaties into which they have entered. Thirdly, the cases demonstrate that courts are not prepared to countenance the carrying out of the death penalty “without scrupulous care being taken to ensure that there is procedural propriety and that in the process fundamental human rights are not violated”.⁷⁵ Application of the death penalty is being limited as a prelude to its complete abolition.

⁷⁵ *Boyce and Joseph*, per de la Bastide P and Saunders J at [19].