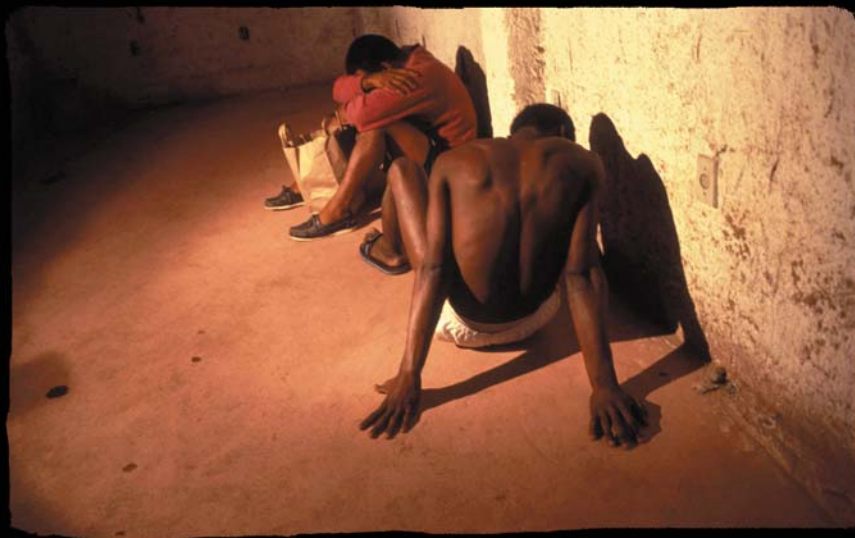


Commonwealth Caribbean Human Rights Seminar



September 12th - 14th, 2000
Radisson Fort George Hotel, Belize City

Penal Reform International
Simons Muirhead & Burton
Foreign & Commonwealth Office
Attorney General's Ministry (Belize)

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UNIVERSAL DECLARATION OF HUMAN RIGHTS

Whereas recognition of the inherent dignity and of the inalienable and inalienable rights of all members of the human family is the basis of freedom, justice and peace in the world,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy the rights of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be deprived of his rights, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote friendly relations between nations,

Whereas the peoples of the United Nations have affirmed their faith in the rights, in the dignity and worth of the human person, in the equality of men and women and have determined to promote and to encourage standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of the rights and freedoms,

Whereas a common standard of achievement and a common system of measures of the greatest importance for the well-being of mankind have been proclaimed,

Now, Therefore,

THE GENERAL ASSEMBLY

This meeting of the General Assembly has adopted the following Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every State should keep this Declaration constantly in mind, educating their people in the rights and freedoms set forth in it, and by progressive measures, national and international, to secure their universal and effective recognition and observance, which is the primary concern of the United Nations.

The General Assembly has also adopted the following Declaration of the Rights of the Child, which is hereby proclaimed:

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Foreword

Said W. Musa
Prime Minister of Belize

To deny the importance of human rights is to deny the very process that brought the people of the Caribbean region adult suffrage, self-government and, ultimately, independence. For included in the broad and ranging panoply of human rights is the right of a people to political, economic, social and cultural self-determination.

Indeed it was by vigorously lobbying for and utilizing the principle of a people's right to self-determination that Belize was able to, in 1981, win the support of the majority of member states of United Nations for recognition of Belize's right to independence in the face of staunch opposition by the Republic of Guatemala who claimed - and today continues to claim - Belize as part of its territory.

But it would be wrong to consider that the importance of human rights was consummated with the collective attainment of self-determination in the Caribbean. This was only the very first step. The challenge before us now as a people is to daily nurture the seeds of that national right to self-determination until there is a brilliant flowering of respect and recognition for individual human rights all across the region.

Would it not be considered a pyrrhic victory if we attained our countries' freedom from colonialism but our people do not themselves enjoy that freedom on an individual basis? We would merely have replaced foreign exploitation with our own homegrown brand of exploitation.

Governments hold national independence in trust for the people. To us, therefore, falls the moral - even legal - obligation to actively roll out the frontiers of individual liberty and fundamental rights so that our people may enjoy the full measure of fundamental rights and freedoms and palpably feel the benefits and meaning of independence.

The process of ensuring that people enjoy the broadest possible measure of fundamental rights and freedoms is an on-going, constantly evolving process. The foundation for the development of the process is laid, domestically, by the fundamental rights and freedoms provisions in our independence constitutions. Internationally, the process is buttressed by a matrix of interlocking human rights conventions and protocols, some of which we in the Caribbean are state parties to.

The role of lawyers and the judges is to interpret these constitutions and international human rights norms so as to ensure their practical application and utility for individuals as they go about their daily lives, balancing, at all times, the freedoms of other individuals and the public interest.

But as society evolves scientifically, socially and culturally, as the norms and ethos of the society evolves, the fundamental rights and freedoms must evolve and move apace. If this is not so, then the rights and liberties will remain frozen in time and cease to be of relevance in a new era. Only by keeping abreast of the latest developments in human rights thinking do we guard against being the unwitting practitioners of obsolete or outdated human rights notions.

It is against this backdrop that I welcome this publication of the papers presented at a training seminar in Belize on *Human Rights for the Commonwealth Caribbean*. It provided the opportunity for Belizean lawyers and lawyers from across the Caribbean region and the United Kingdom to discuss and debate recent judgments and trends in the human rights process. I was, regrettably, unable to open the seminar as was originally scheduled, but I am pleased that I was presented with a second opportunity to express some thoughts on this very important issue, through this foreword.

I note from copies of the papers presented to me by the seminar organizers that important topics included in the seminar were *Legal Aid and Access to Justice, The Commonwealth Caribbean and Evolving International Attitudes towards the Death Penalty, Gender and Equal Treatment under the Law and International Standards of Fair Trial*.

I am pleased that Belize was given the opportunity to host such a great assembly of human rights lawyers and activists. It is my hope that from the

seminar, and this very useful publication of papers by some of the leading lawyers in the human rights field, will come a renewed interest in and championing of basic human rights and freedoms, in all their manifestations: political, economic, social and cultural.

Rapporteur's introduction and summary recommendations

Parvais Jabbar, Simons Muirhead & Burton

I should like to begin by remembering the context in which this conference took place. This conference has been a long term objective of the Commonwealth Caribbean Death Penalty Project, a joint initiative between Penal Reform International and Simons Muirhead and Burton.

It has been made possible through the support of the Foreign and Commonwealth Office who sponsored the conference and we are particularly grateful to His Excellency Tim David, British High Commissioner to Belize. I would also like to point out that this conference would not have happened without the commitment and dedication of Wendy Singh of Penal Reform International.

The Commonwealth Caribbean Death Penalty Project has worked closely for many years with a number of lawyers in the region. The project has also been provided with invaluable assistance by a number of regional non-governmental organisations such as Caribbean Rights. The very nature of human rights work requires such co-operation and mutual understanding.

Human rights jurisprudence is developing within each Caribbean country and in the region as a whole. Now more than ever individuals and organisations need to be aware of this growing body of information. As Saul Lehrfreund stated at the opening of the conference, 'the primary purpose of the seminars is to stimulate debate between all delegates on matters of great importance to the fundamental rights and freedoms of individuals in the Commonwealth Caribbean.'

It would not be an exaggeration to say the conference was privileged to be able to draw upon a talented array of speakers and wide ranging representation from delegates from the Commonwealth region and beyond. It brought together over 60 individuals from Antigua, Bahamas, Belize, Barbados, Grenada, Guyana, Jamaica, Puerto Rico, St Christopher & Nevis, St Lucia,

St Vincent, Trinidad & Tobago, United Kingdom and The United States of America.

Our host country, Belize, and in particular the Attorney General, Godfrey Smith, have been most welcoming and we must extend our gratitude to the Chief Justice of Belize, the Hon. Abdulai Conteh, for his presence and active involvement throughout the sessions. The conference was attended by other members of the Judiciary, the police and the legal profession. This was indeed a seminal conference.

With such a wide array of delegates the conference had to address a range of issues of relevance to all. It is hoped it will lead to greater communication and cross-fertilisation. The Attorney-General himself recognised this in his feature address when he argued that 'the 21st Century has dawned with the centrality of human rights, not only within states but also between states at the international level.' In fact such has been the dominance of international standards within the sphere of human rights that it is no longer possible to operate without due regard and understanding.

Fortuitously, on the very first day of the conference, 12th September 2000, the Judicial Committee of the Privy Council delivered judgment in the landmark case of *Neville Lewis and others*. The appeal was brought on behalf of six prisoners under sentence of death in Jamaica. A number of those involved in the case were present at the conference. The Privy Council overturned a much criticised previous decision and this resulted in the commutation of the appellant's death sentences. The principles established will impact on the lives of other prisoners on death row in the Caribbean. The timing and outcome of the case set the tone of the conference and as the Chief Justice of Belize stated in his address, 'this seminar could not have come at a more auspicious time for its theme and purpose.'

The decision of *Neville Lewis* generated much interest and debate. Edward Fitzgerald QC (who acted for two of the appellants) delivered a paper on the very issue in that case, Pardon and Judicial Review of Executive Clemency. He described the system of mercy and went on to discuss the effects of the decision. (At the time of the writing of his paper, judgment was still to be delivered). Lawyers and judges in the region are now faced with legal issues that were never before justiciable. The conference provided the opportunity

to discuss the resulting new procedures and its impact on the application of the death penalty.

The conference delegates decided it would be appropriate to publish a press statement (appendix 2) acclaiming the decision of the Privy Council on the basis it would "provide protection for all citizens of our countries against the abuse or deprivation of their fundamental rights and freedoms in several areas."

The presentations dealt with a range of human rights issues concerning for example pre-trial rights, the right to a fair trial, legal aid and access to justice, corporal punishment in Belize as well as the role of international law in the application of capital punishment. All the papers were well received.

Bryan Stevenson's presentation on capital punishment in the United States revealed similarities between the US and the Caribbean on the question of punishment and crime. He expertly described the failure of the US to develop and keep pace with international human rights norms that restrict the use of the death penalty. In particular, the application of the death penalty on juveniles and the mentally impaired continued to conflict with established principles of international law. Tracy Robinson delivered a paper on gender and criminal justice. She forcefully argued that the debate on human rights and criminal justice continued to ignore concepts of gender and equality. This session created much interest and it is clear there are many human rights issues of which gender is a prime example, that require much more attention. Tracy Robinson reminded us that the rights of women in the region needs to be seriously addressed and added an important dimension to our discussions.

Recommendations and follow-up activities

The conference exposed the need for better communication and closer co-operation:

- between legal practitioners;
- between legal practitioners and non-governmental organisations; and,
- between legal practitioners non-governmental organisations and the international human rights community.

It was agreed that given the geographical constraints, greater communication would be achieved efficiently through the creation of a web site. It would provide easy and timely access to relevant information such as current litigation and judgements from domestic and international human rights tribunals. It is envisaged that the web site will offer a message board whereby users can share their concerns or request practical assistance.

The conference has truly provided an opportunity to stimulate the human rights debate and for people with a common interest to benefit from the experience of others and to broaden their knowledge. It is hoped that further similar events can be staged in the future.

The Commonwealth Caribbean Death Penalty Project with sponsorship from the Foreign and Commonwealth Office has undertaken to implement the following follow-up activities:

- The publication of this conference report. It is hoped that the publication of the conference papers will continue to stimulate discussions on a broad range of human rights issues
- Each jurisdiction in the Caribbean has been provided with a set of relevant materials and authorities relied on in the case of *Neville Lewis and others*
- The web site is currently being designed
- The Commonwealth Caribbean Death Penalty Project will aim to co-ordinate specific training or offer assistance to those undertaking litigation on a broad range of human rights issues

Address at opening session

Wendy Singh, Penal Reform International (PRI)

Honourable Godfrey Smith, Attorney General of Belize, Your Excellency Tim David, British High Commissioner of Belize, Your Lordship Abdulah Conteh, Chief Justice of Belize, Distinguished Guests, Colleagues, it is indeed an honour for Penal Reform International (PRI) to participate in this seminar. PRI is represented by Board member Alvin Bronstein and myself. I bring greetings from our Secretary General, Baroness Stern and our Chairman, Mr Ahmed Othmani.

The death penalty is not a favourite topic for many of our governments in the Commonwealth Caribbean, as seen in the current trend of withdrawals from obligations required under international law covenants pertaining to the protection of full due process guarantees for prisoners on death row.

The abolition of the death penalty is at the core of PRI's mandate. PRI opposes the death penalty on the basis of ethics as well as international human rights norms and standards. The death penalty, which is a cruel and inhuman form of punishment, is at the heart of human rights violations and therefore cannot be reconciled with the international norms and guidelines which PRI promotes and implements in its work.

PRI believes that this seminar will certainly help us achieve our aim to contribute to the development of fair and effective penal justice systems. This becomes especially crucial as we become more cognisant of cases of miscarriages of justice in many countries. Let me emphasise that in opposing the death penalty, PRI does not in any way wish to disregard the rights of victims of violent crime and their families. Indeed, we feel that urgent attention should be given to the enactment of legislation to provide for compensation for these victims and their families. However, PRI believes that revulsion for an act of murder should not result in an equally barbaric act of the death penalty. There are alternative ways to protect the public.

PRI has been working since 1994 together with Simons Muirhead & Burton, in particular with Saul Lehrfreund who was recently awarded an MBE for his work, and Parvais Jabbar. Together, we have been providing legal assistance to persons under sentence of death in the Commonwealth Caribbean. Remedies following appeal have included, murder convictions being quashed, followed by release or lesser sentences including life imprisonment.

PRI has become very well known in the region, where we also co-operate with the Caribbean Human Rights Network, for its work in the area of penal reform, and has devoted much resource to the promotion and implementation of alternative to custody for non-serious offenders. At the same time, we also have to work on behalf of those who have committed serious offences and been sentenced to death. This seminar is indicative of our continued commitment to ensure justice for all.

Let me take this opportunity to thank the Foreign and Commonwealth Office, the Office of the Attorney General of Belize, and in particular Ms Mariana Lizarraga, the staff of the San Juan Office of PRI, and all those who contributed to making this seminar possible.

I wish you all a successful seminar. Thank you for your kind attention.

Welcoming remarks

Saul Lehrfreund MBE

Welcome to the human rights seminar for the Commonwealth Caribbean. It is an honour for me to extend to you, on behalf of Simons Muirhead and Burton and Penal Reform International, a warm welcome to this three day human rights conference, which we regard as a most important initiative. We are delighted to see so many prominent and distinguished delegates and we hope you have the opportunity to meet each other during the next few days.

I would particularly like to welcome Your Lordships, Abdulai Conteh, Chief Justice of Belize, Justices of Courts of Appeal and the High Courts, The Honourable Godfrey Smith, Attorney General of Belize, Your Excellency Tim David, British High Commissioner to Belize, distinguished guests and colleagues from Caribbean Rights.

It is our hope that during the course of the next three days people will be able to share experiences, thoughts and ideas in a relaxed atmosphere. Whilst the main programme consists of presentations each session will be followed by a period for discussion. The primary purpose of the seminars is to stimulate debate between all delegates on matters of great importance to the fundamental rights and freedoms of individuals in the Commonwealth Caribbean. We sincerely hope you will all feel free to participate whenever you come across a topic or issue of interest to you.

For many years Simons Muirhead and Burton have dedicated themselves to provide free legal representation to indigent prisoners who have been sentenced to death. In 1992, Simons Muirhead and Burton and Penal Reform International came together to establish the Commonwealth Caribbean Death Penalty Project. I have had the privilege to run the project since its inception and later with my colleague Parvais Jabbar. Through our work we have come to know and work with many of the people who are here today. This conference is a culmination of many years of co-operation between different people in different countries with a shared objective, namely the respect for

fundamental human rights and freedoms. It is our hope that this conference will further stimulate the existing momentum and ultimately have an impact upon the lives of people throughout the region.

We would like to thank the British Foreign and Commonwealth Office for sponsoring the conference. We would also like to thank the Government of Belize for their co-operation in helping to organise and host the event. I would like to make special mention of Wendy Singh for her dedication and enormous efforts in arranging the conference and to Mariana Lizarraga for her huge assistance.

Ladies and Gentlemen it is now my privilege to ask Mr Fred Lumor the distinguished President of the Bar Association of Belize to introduce the special guest speakers of this opening session.

Thank you.

Opening statement by the British High Commissioner

HE Mr Tim David

Chief Justices, Justices of the Court of Appeal and High Court, Attorney General, Executive Director of the Caribbean and Latin American Office of Penal Reform International, Distinguished Guests, Ladies and Gentlemen.

Thank you for inviting me to address this opening session of your Human Rights Training Seminar. You do me and the country I represent a signal honour. I am grateful for that.

No British Government has given a higher priority to human rights than the one I represent. Human rights constitute a central concern of all Government policy. Of course including foreign policy. Three and a half years ago, when the present Government came to office, the Foreign and Commonwealth Secretary set out a Mission Statement to guide foreign policy. And this included a commitment to put human rights at the heart of Britain's overseas activities.

Some have been cynical. The argument that there is a dichotomy between the promotion of our values, including human rights, and the defence of national interests seems a strong one. At least at first. But in a global age, those activities are complementary not contradictory. Britain - Belize, the Caribbean, wherever - will be richer and more secure in a world where democracy has replaced dictatorship, where the rule of good law instils stability and security.

In July this year Robin Cook presented his annual human rights report to Parliament. This details how Britain responded to human rights challenges world-wide in the period June 1999 to June 2000 - through diplomatic activity, through our work in international organisations and by funding practical projects. Our concerns and responses were myriad, work that included tackling torture, supporting free media, protecting human rights in conflict situations, supporting the International War Crimes Tribunal, promoting civil

society and lobbying for the abolition of the death penalty. I will spare you a complete list. As befits such global activity, all 175 pages of the Foreign Secretary's Report are available on the world-wide web.

Our support of this seminar and follow-up activity - worth nearly £ 80,000 over two years - is part and parcel of this world-wide activity. We share Penal Reform International's aims for it: training for lawyers in the Commonwealth Caribbean in undertaking representation at trial and appeal level for prisoners charged with capital offences; through training in procedures and law, help for lawyers initiating human rights and prison litigation cases; and - an overarching objective - to make justice and human rights remedies more accessible to poor and disadvantaged persons charged with committing serious offences including murder. I commend PRI for developing this initiative. My congratulations also to the Government of Belize and to its partner Simons Muirhead and Burton.

My authorities have asked me to take the opportunity provided by this seminar to bring another initiative to your attention. As you may know, Caribbean leaders met in London in May at the UK/Caribbean Forum 2000. They addressed a range of issues including human rights and judicial matters. The British delegation, led by Foreign and Commonwealth Minister of State Baroness Scotland of Asthal, herself a lawyer with Caribbean connections, suggested the possible establishment of a UK/Caribbean Jurists' Association. Baroness Scotland had in mind - and I quote from the relevant intervention at the Forum - "an Association ... set up on a professional to professional basis, something which would provide a solid platform for the development of areas of Judicial exchanges and the like ... I would also hope that the Association can contribute to mutual understanding on issues such as the special relationship we have with the Caribbean concerning the Judicial Committee of the Privy Council".

The initiative was well received at the time. I am now informed that the UK Law Society and the General Council of the Bar are following up the proposal with legal contacts in the Caribbean, and that the UK/Caribbean Follow Up Committee is liaising in parallel, via the channels that exist between the Foreign and Commonwealth Office and Commonwealth High Commissioners in London.

Ladies and Gentlemen, I have done as instructed. It only remains for me to give you my own and my Government's best wishes for the success of your deliberations. I would remind you, as my authorities constantly remind me, that neither talk itself nor meetings constitute outcomes in themselves. What matters is the difference that you will make as a result of this seminar. I am confident that this will be great.

Feature address

Hon. Godfrey P. Smith
Attorney General of Belize

Dr. Abdulai Conteh, Chief Justice of Belize, Justices of the Supreme Court, Chief Magistrate, Magistrates, H.E. Tim David, British High Commissioner, Director of Public Prosecutions, Distinguished delegates, Members of the Belize Bar Association, Ladies and Gentlemen:

I have the honor of extending a very warm welcome, on behalf of the Government and People of Belize to all of you, especially to our distinguished international guests from the Caribbean, the United States and the U.K.

Recently in the local press, I was accused of sympathizing with "liberal do-gooders from the former colonial power" in putting on this "show conference" so that they might "instruct Belize on its backwardness in clinging to the outmoded and barbarous death penalty."

Owing to its provenance and provinciality, that statement can be dispensed with. Allow me to clarify the position: the seminar certainly does not have my sympathy, but it has my active support and participation.

I view this seminar as important for several reasons. Human rights have today, in a real sense, become the new theology of the modern world. There can be no doubt that the twenty-first century has dawned with the centrality of human rights, not only within states but also between states at the international level. And well should this be so. Human rights are essentially concerned with respect for universal values and the fundamental dignity of the human being. Nothing can be more basic than this.

The respect for and observance of human rights have become a kind of litmus test to gauge the good governance and legitimacy of a government. This, in turn, has come to exert an increasing leverage between a government and its interaction with the governments of other states in the international community.

This acknowledgement of the paramouncy of human rights is not an echoing of the liberal perspectives of English do-gooders. Our own distinguished Caribbean jurists have long ago recognized and trumpeted the importance of human rights.

Writing in 1989, Albert Fiadjoe, then lecturer, now Professor of Law at the University of the West Indies, who is here with us today, said:

*"Never in the history of the world has there been such unity of purpose in promoting the concept of human rights and basic freedoms."*¹

Today, there is the view, in some quarters, that it is the Privy Council that is importing and ramming down foreign notions of human rights into our jurisdictions and laws. Ironically, eleven years ago, Maurice O. Glinton of the Bahamian Bar, who is also here with us today, in writing on the right to life and safeguards guaranteeing protection of the rights of those facing the death penalty, pointed to:

*"reluctance on the part of the Privy Council to play a more formidable role in rights adjudication ...as far as this region is concerned, it therefore falls to regional Courts which are afforded no excuse in light of the clear duty which has been assigned to them, to play the lead role in this endeavor."*²

It is interesting to note that the first ever Human Rights Act for the United Kingdom comes into force on October 2nd 2000. *The Economist* magazine for August 26th-September 1st, opined that "the new act marks a significant transfer of power from the legislature and the executive to the judiciary." A separate article in the same issue quotes British Chief Justice Lord Woolf as saying that the act will "revolutionize our legal world." Caribbean courts have, since the introduction of written constitutions, always had this power, and a very respectable record in exercising it in the promotion of human rights.

But thirty-nine years ago, in 1961, the first Caribbean Bill of Rights was promulgated in Guyana. By 1981, Bills of Rights appeared in every Commonwealth Caribbean Constitution, including Belize's Constitution. By

1. A.K. Fiadjoe, *Human Rights and Comparative Constitutions*, Vol. 13 *West Indian Law Journal*, 1989.

2. Maurice O. Glinton, *The Right to Life and Physical Integrity of the Person (Torture and Other Cruel or Degrading Punishment, Safeguards Guaranteeing Protection of the Rights of those facing the death penalty)*, Vol. 15 *West Indian Law Journal*, 1991.

1967, *Collymore v Attorney General*³ had become the locus classicus for the Supreme Court's jurisdiction to strike down legislation for repugnance with human rights guarantees, rejecting the classical doctrine of parliamentary sovereignty that shields the U.K. Parliament. The Privy Council agreed with this decision of the Trinidadian Courts.

I doubt very much that even with the incorporation of the Human Rights Act in the U.K., the U.K. courts will be able to strike down legislation repugnant to the Act, in the way that Caribbean courts have so consistently done. Have we not, in a sense, come full circle?

Nor is the notion that Bills of Rights are not static but rather living instruments, a novel one for the Caribbean. Caribbean lawyers have cited innumerable times the words of Lord Wilberforce in the Bermudian case of *Minister of Home Affairs v Fisher*⁴ that the Bill of Rights should be given "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights."

The distinguished Caribbean jurist, Telford Georges, sitting as President of the Belize Court of Appeal in *Mejia, Bull and Guevara v Attorney General*⁵, relying on *Fisher*, said:

"An identical approach should be adopted to the interpretation of the provisions put in place for the 'enforcement of protective provisions'...The rights to which persons in Belize are entitled would be gravely imperiled if the provisions for their enforcement were not interpreted in the most generous and purposive manner so as to afford the greatest protection."

Among the various important topics that form the subject matter of this seminar are Legal Aid and Access to Justice, the Commonwealth Caribbean and Evolving International Attitudes towards the Death Penalty and Gender and Equal Treatment under the Law. I note too that one of the topics to be discussed at this conference is savings clauses that appear in Caribbean Constitutions protecting laws that pre-date independence from constitutional

3. (1967) 12 W.I.R. 5.

4. [1990] A.C. 319.

5. 3 BzLR 248.

challenge. Again, the exploration of legal avenues to get around these stultifying savings clauses and so accord individuals the full enjoyment of their human rights, is not new in the Caribbean.

In grappling with the issue of the savings clause in the Belize Constitution as it affected the right to protection from the deprivation of property, Mr. Justice Henry, President of the Court of Appeal, read section 21 (which protected existing laws for 5 years after independence) in combination with section 134 (1), which also saved existing laws but required that they be read with such modifications to bring them into conformity with the Belize Constitution. He found that:

*"...the object of section 21 [of the Belize Constitution] was to ensure that during the five years following Independence no attacks were to be launched against the constitutionality of existing laws. The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law "with such modifications, adaptations, qualifications, and exceptions as may be necessary" to bring them into conformity with the Constitution."*⁶

I have selected these few references in the hope of showing that not only has an appreciation for the paramouncy of human rights been firmly rooted and nurtured in the Caribbean, but also that there has been a tradition of vigorous advocacy for evolving and expanding human rights interpretation.

It is unfortunate, then, that in Belize, as well as perhaps the broader Caribbean region, when a section of the public thinks of human rights advocacy what comes to mind are lawyers and other activists who agitate for fair criminal trials, due process and the abolition of the death penalty. Fair trials, due process and capital punishment relate to only one small area in a broad and ranging panoply of human rights that exist to safeguard the well-being of all of us.

This eclipsing of general human rights by the death penalty issue has the effect of absorbing and diverting much of the Caribbean's legal time and energy that could otherwise be channeled into developing and evolving other important areas of human rights law, for example, economic rights.

6. *San José Farmers Cooperative Society Ltd. v Attorney General* 3 BzLR 1.

This distortion of the fundamental importance of human rights finds its origins in the issue of capital punishment. On the one hand, in the Caribbean, there is a growing public outcry for hanging in response to escalating criminal activity, which, understandably, Governments must be politically sympathetic to. The penalty of death by hanging forms part of our laws and Governments feel it is their sovereign right and responsibility to exercise it or to decide when and how to abolish it.

On the other hand, the Privy Council, fueled by the arguments and advocacy of many lawyers in this room, has been rendering judgments, the effect of which is to prescribe circumstances in which the death penalty can be lawfully carried out. For example, in *Pratt v Attorney General for Jamaica*⁷, the Privy Council used the prohibition against 'cruel and unusual punishment' in the Jamaican Constitution to restrict the implementation of the death penalty in the context of delay between conviction and execution. It held that it was unlawful to execute a prisoner who has been held for a five- year period under sentence of death.

Some in the Caribbean view this as an unwanted whittling away of the death penalty through the back door. But it is erroneous to consider the kind of reasoning employed in *Pratt and Morgan* as alien to Caribbean thinking.

H. Aubrey Fraser, an eminent Caribbean jurist and Director of Legal Education at the Norman Manley Law School in Jamaica, writing in 1983, hailed the dissenting judgment in *Riley and Others v Attorney General*⁸ with the words:

"...a resonant voice of hope has found expression in a dissenting judgment which deserves to join that honourable roll of dissenting judgments which, in the passage of time, have adorned the common law, by their common sense, their fairness and their recognition of individual rights and freedoms."

In that case the Privy Council had by a slim majority of 3 to 2 rejected the argument that prolonged delay in executing the death sentence constitutes inhuman and degrading punishment under the Bill of Rights.

7. [1993] 3 WLR 995, [1993] 4 All ER 769.

8. (1982) 3 WLR 557.

Fraser ended his article hoping that:

"If it were possible to look into the future it might be within the justifiable expectation of the present generation of lawyers in Jamaica, and other countries of the Commonwealth Caribbean, that the enlightenment offered in this dissenting judgment ...might, within this decade, reach beyond the realm of hope, to rescue some of the condemned who, since the middle years of the 1970s and onwards, have been awaiting with anguish the execution of their lawful sentences."

He expressed the hope that that dissenting judgment would prevail, preferably first, he said, somewhere in the Commonwealth Caribbean.

Within the decade, in 1993, Fraser's hope and prediction did come to pass in the judgment of *Pratt and Morgan*, except that he did not live to see it, nor did the decision emanate from Caribbean Courts as he had hoped.

The fallout from *Pratt and Morgan* and similar cases is that today there is a strident public call in some quarters to revisit the position of the Privy Council as the ultimate Court of Appeal for most Commonwealth Caribbean countries. I am personally not assured that repatriating the final Court to the Caribbean would solve the problem. This issue is compounded by the otherwise laudable move to establish a Caribbean Court of Justice within the context of the CARICOM Treaty.

Whether the death penalty is a human rights issue goes way beyond the Privy Council. It is now part of a strong international movement supported by powerful countries, economic unions, international and regional bodies to persuade other countries not to use the death penalty.

The existence of the movement and the prominence of the debate are not surprising.

The most important human right is, after all, the right to life. Of what use are the other rights without the right to life? Of course, the conditions and circumstances that conduce to making that life itself worth living are part and parcel of the totality of human rights.

Ought the State as part of its criminal justice system, stipulate and exact the death penalty?

Is the death penalty itself compatible with that most elemental of human rights, the right to life?

Should penal reform not be about reforming and rehabilitating the offender and is the exaction of the death penalty not antithetical to this?

What constitutes international standards of fair trial?

Ranged on one side are the traditionalist law and order brigade. They view the issue as simply one of upholding and applying the law. For them, hanging, the stipulated statutory method of implementing the death penalty in almost all if not every Commonwealth Caribbean state, is the surest antidote to the rise in more serious crimes of violence such as murder.

On the other side are those who strongly feel that societies have come a long way and that punishment should be reformatory of the criminal and that the imposition of the death penalty, apart from its irreversibility, debases society and represents a cruel and inhuman punishment. They also contend that the death penalty has not empirically, in any event, resulted in a reduction of crimes like murder. In other words, its effect as a deterrent is insignificant.

Where does the truth lie in this debate? No one knows for certain. But what is certain is that more public disclosure and exchanges afforded by conferences and seminars such as this will, in addition to informing and enlightening the public, help to steer the administration of justice in the right direction. Regardless of where we stand, we should not be afraid of squarely and soberly entering into the vortex of these debates. In the United States, for example, the debate over issues like abortion, minority rights and affirmative action, has raged for many years.

Whether we like it or not, our sovereign independent statehood cannot withstand the battering of global trends like the internationalization of law which is characterized by increasing application of international law within individual state borders and the move to create a supranational jurisdiction for human rights and international crime.

But at the risk of being irreverent, I must state frankly to this conference that I would not wish to see the Caribbean expend its greatest energies on human rights aspects of the death penalty for too much longer. I would much rather that we in the Caribbean and the Third World concede the ineluctability of

the abolition of the death penalty and then embark with unbreakable determination, unity and resolve to manipulate the very same international human rights movement for the recognition of the right to development for people in developing countries.

Of what use are civil and political rights when our children die because there is no access to clean water? Of what use is international copyright protection if we cannot afford to buy textbooks for our children's education? Of what use is respecting the right to life if, because of new WTO rules, we cannot export our bananas to feed ourselves?

These are the human rights realities of this region. Should not therefore our energies be concentrated on developing economic rights as international human rights and lobby to have these reflected in the burgeoning and seemingly limitless international instruments and covenants?

If international trends in human rights law will ultimately reshape our judicial and legal landscape and the way we practice law, let us be actively involved in determining the nature and content of international human rights.

Clearly, much more debate and civil education is needed. To quote from a once prominent Eastern political leader: "...let a hundred schools of thought contend."

A more enlightened and informed public is one that can ultimately be trusted to take more rational positions.

It is in this spirit that I welcome this conference in Belize. Gathered here today, in this room, in Belize, for the first time in the history of this region, are some of the most powerful and nimble minds in human rights law from across the Caribbean and the United Kingdom. Let it therefore never be said that we did not have a unique opportunity to take steps to influence the worldwide human rights thinking.

Closing address

By Hon. Abdulai O. Conteh
Chief Justice of Belize

I am told that there is an ancient Chinese saying, which has a truly Delphic quality to it because of its deliberately obscure or ambiguous intent, capable of meaning well or ill at one and the same time. It goes like this:

"May you live in interesting times".

We certainly seem to be living in interesting times, but I hasten to add in the more wholesome meaning of the Chinese saying; for this seminar could not have come at a more auspicious time for its theme and purpose. On the very day the seminar was opened, there was animated buzz circulating around the red hot decision of the Judicial Committee of the Privy Council in London concerning the case of *Neville Lewis and Others* delivered on 12 September 2000.

The case itself is truly a Commonwealth Caribbean one in terms of its *dramatis personae*. Although the actual appellants were from Jamaica, the Board of the Judicial Committee of the Privy Council stated that because it was being asked to review its decisions in *deFreitas v Benny* (1976) A.C. 239, and *Reckley v Minister of Public Safety and Immigration* (No. 2) (1996) A.C. 527, the Attorney-General of Trinidad and Tobago and The Bahamas were given leave to intervene in addition to five petitioners from Belize.

Of course, the *ratio decidendi* of the Board's decision in the case of the importance of the principles enunciated therein go far, far beyond the region and will no doubt reverberate around the Commonwealth and beyond especially in cases involving the death penalty and pardon or mercy and the process by which a decision is reached on it; and the commutation of sentence. Some of the architects of the victory for human rights vindicated in the *Neville Lewis* case are present with us at this seminar. I would like to congratulate and salute them for their tenacity and courage.

But it is also salutary to remind ourselves, as the Hon. Attorney-General did remind us in his opening address, that elemental as the right to life is, the

corpus of human rights does contain other pressing issues that warrant urgent attention. For example, the debate that ensued yesterday after the presentation of Tracy Robinson's paper on "*Serious Offences, Gender and Criminal Justice: A Plea for Reason-in (g) Equality*", amply demonstrated the need to articulate the issues and concerns presenting obstacles in the way of women to enjoy the full panoply of human rights on the same level as men. There is an evident need in this regard to articulate disseminate and follow-through on the provisions of the *Convention on the Elimination of All Forms of Discrimination against Women*. It must always be remembered that the human rights of women form an inalienable, integral and indivisible part of human rights. To contend otherwise, would be, to paraphrase Jeremy Bertham, render human rights as nothing but nonsense on stilts!

As we come to the conclusion of what, by all accounts, has been a most interesting and useful seminar and discourse on human rights, permit me, if you will, to adapt the words of the benediction said at the Roman Catholic Mass:

"Benedictus qui venit in nomine Domini" (Blessed is he who comes in the name of the Lord"

I hasten to add that, with all due respect, I do so in an ecumenical and inter-denominational spirit as follows:

"Benedictus qui venit in nomine juris": (Blessed is he who comes in the name of the law)

On this score therefore, I would like to express my appreciation and thanks to the sponsors, organisers, presenters, participants and those who had anything to do with this seminar here in Belize. We are all, I am sure, grateful to Her Majesty's Foreign and Commonwealth Office, Penal Reform International, the firm of Solicitors of Simons Muirhead and Burton; and of course, the host government, in particular the Attorney-General's Ministry. It is perhaps worth noting that in the interesting times we live in, it might not have been easy to host a seminar anywhere in the region as the present where you have not only the Attorney-General of the country but the Solicitor-General also and now the Chief Justice himself to say the benediction. Even the Prime Minister was slated to have been present for the opening of the

seminar but I suspect his other pressing engagements, and in particular the fact that he has been away from the country at the recent United Nations Millennium Summit, denied him the opportunity. This can only happen in Belize. This is a measure of the maturity and confidence of Belizeans. I would like to read this seminar as an affirmation of Belize's commitment to human rights.

When the invitation was first extended to me, I was informed that the purpose of the seminar was to train and assist Commonwealth Caribbean Lawyers in undertaking representations at trial and appellate levels for prisoners charged with serious offences, and to help them to initiate human rights and prison litigation cases.

I must confess that this caused me some anxiety, for I thought I saw on the horizon the spectre of the already stretched judicial resources of the countries in the region being swamped and overwhelmed by a new spate of litigation, an opening of the floodgates, as it were. This, I feared, could only lead to more delays, particularly in the sphere of the administration of criminal justice, that would tellingly underscore the problems adumbrated by the Judicial Committee of the Privy Council in its decision in the case of *Pratt and Morgan*, a decision about which so much has already been said here at this seminar.

My anxiety, I am happy to say, was however, easily dispelled by the realisation that here in this sub-region, there are, within the matrix of the Constitutions and laws of various Commonwealth Caribbean countries a large catenae of human rights provisions relating to the criminal litigation process that resonate in various international and regional human rights instruments.

The debate is therefore about the extent and applicability of some of these provisions whether in national Constitutions and laws or in what has been called the interlocking web of international and regional Conventions, Protocols, Declarations and Treaties on human rights and then to strive to vindicate and uphold these provisions in individual countries throughout the region.

Also, I became a little more comfortable when I perused the draft agenda for the seminar that was forwarded to me. It included subjects such as *legal aid access to justice, the right to adequate legal representation, international*

human rights and international remedies, preventive detention and pre-trial rights, innocence and the death penalty, cruel and inhuman punishment, fair trials and international standards.

These are in a way, staple fare that address such critical issues in the criminal judicial process like *due process, presumption of innocence, the right to a fair trial and the prohibition of cruel and inhuman punishment*. They are, I believe, to be found, in one form or the other in the Constitutions and laws of various Commonwealth Caribbean counties.

These are of course emanations from various international and regional human rights instruments to which most of the States in the sub-region are either signatories or parties.

There is however, in my view and with the greatest respect, an unfortunate trend by some counties in the sub-region of withdrawing from some of these international and regional treaties, dealing with human rights touching some of these issues there is also again with respect, the unfortunate oversight or neglect by some countries to adhere to some of these instruments. It can only be hoped that this neglect or oversight is not one of deliberate policy and that the situation will soon be rectified.

In the case of the countries withdrawing from or suspending the operation of some of these human rights instruments, I dare say that the situation is regrettable and has rightly caused some perturbation not only at home but abroad as well. This action seems to me, with respect, to be striking a posture of seeming petulance, presumably stemming from what the authorities in these countries view as the overzealousness of the human rights lobby whom they regard as soft-hearted do-gooders even in the face of alarming increase in crimes of violence, often resulting in murder. This posture is, unfortunately, further stiffened by decisions like in the *Pratt and Morgan case*, which they regard as cramping their judicial style and autonomy, particularly in the area of executing of judgments in capital cases.

As a result, there is an increasingly clangorous beat in some quarters for the need to bring to the Caribbean the ultimate court and turn away from the Judicial Committee of the Privy Council as the Court of last resort for Commonwealth Caribbean. Laudable and perhaps eminently desirable as a final Caribbean Court of Justice is, in my humble view however, it should

not be rushed in, in the wake of the swirling controversy attendant on the *death row phenomenon cases like Pratt and Morgan* and the more recent decision of *Neville Lewis and Others*. Of course, as an institution for the interpretation and application of the CARICOM Treaty, the case for the Caribbean Court of Justice is almost unassailable. But if it is simply in reaction to the seeming humbug flowing from some expansive decisions of the Judicial Committee of the Privy Council in cases involving human rights issues, I beg to demur and to urge circumspection and deliberation.

The issue of whether or not to establish a Caribbean Court of Justice, whether with two steams of jurisdictions, that is as an institution of CARICOM and the final Court of Appeal in cases from the courts of member States of Commonwealth Caribbean or not, is, in my humble opinion, too important a subject to be discussed in any detail, let alone settled, under the stultifying shadow of such an emotive issue as the *death penalty* or whatever the Judicial Committee of the Privy Council in London might or might not have decided on this all too human drama.

Perhaps in the social and political fields, the greatest legacy of the Twentieth Century could be regarded as the heightened awareness and spread of human rights. This was achieved through various Treaties, Conventions, Protocols and Declarations at both the international and regional levels.

However, the dichotomy in terms of application that has for long existed between international law and domestic law, presents a certain problem for the application of human rights in all their plenitude in most Commonwealth Caribbean countries. The position that international treaty law is not readily applicable in domestic courts until it has been incorporated into the domestic legal structure such as in an Act of Parliament is seemingly on the retreat in so far as mainstream human rights standards are concerned.

There is a decidedly growing body of jurisprudence to the effect that in fleshing out fundamental human rights and freedoms declared and recognised in the Constitutions of Commonwealth Caribbean countries, international treaties and conventions are a proper and relevant source material for interpretation. This point was underscored by the Judicial Committee of the Privy Council in the Bermudan case of *Minister of Home Affairs v Fischer* (1980) A.C. 319 to uphold the position that the *United Nations Declarations*

on the Rights of the Child and the *International Covenant on Civil and Political Rights* guaranteed the protection of the law to every child without discrimination, as to the circumstances of its birth.

In this respect, the *Bangalore Principles* on the domestic application of international human rights norms have come to inspire quite a number of judges in the Commonwealth to develop human rights jurisprudence in conformity with international human rights standards and norms. Indeed, as late as September 1996, the *Bangalore Principles* were reaffirmed in the sub-region at the latest judicial colloquium for Commonwealth judges in Georgetown, Guyana. These principles and colloquia stress the need for the incorporation of human rights into domestic jurisprudence. In Guyana also, there was recently held a Judicial Colloquium from April 14 to 17 1997, on the need to *Use International Human Rights standards to promote the human rights of Women and the Girl-Child at the National Level*.

It is in this process of articulating or incorporating human rights law into domestic jurisprudence that a special duty, in my view, devolves on the judge. This necessarily involves the judge in what has come to be termed as judicial law making. In a speech entitled "*The Judge as Lawmaker*" in 1972, Lord Reid for example, acknowledged the law-making function of the British judiciary as follows:

"There was a time when it was thought almost indecent to suggest that judges make law, they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden a common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words, "open sesame". Bad decisions are given when judges muddle their passwords and the wrong doors open. But we do not believe in fairy tales any more".

(1972 12 Journal of Society for Public Teachers of Laws 22).

I might add that today in most parts of the world, the human rights activist, it seems, should not only continue to believe in fairy tales, he or she needs in addition to be a sorcerer or sorceress or a least the Sorcerer's Apprentice!

But by judicial innovation and courage, which I hope, the judiciary in Belize

and hopefully in our sub-region will emulate and not flinch from, a predecessor of mine, the late George Singh J, as he then was, was for example, able to repudiate the ouster clause contained in *sub-section (15) of section 54* of the Constitution of Belize dealing with the Belize Advisory Council. This body is under the Constitution charged with the responsibility of advising the Governor-General on the exercise of the prerogative of mercy. The subsection however provides that the question whether or not the Advisory Council has validly performed any functions entrusted to it by the Constitution (including, of course, the issue of the exercise of the prerogative of mercy), shall not be enquired into by any court of law.

In re *John Rivas' Application for Judicial Review*, Singh J gave short shrift to this provision as follows:

"The Solicitor-General also submitted that such "august", "unique" and "powerful" institution as the Belize Advisory Council, should not be liable to have its decisions subject to the supervisory jurisdiction of the Supreme Court. With respect, I disagree. Unique or not, any institution, be it inferior court or superior tribunal, which deals with the legal and human rights of any subject, in any capacity whatsoever, must conform to the time-honoured and hallowed principles of fundamental rights and natural justice. Any allegation that there has been a breach of any of these principles in relation to any person must, in my view, be subjected to inquiry by the Supreme Court, irrespective of the calibre of the institution in respect of which the allegation has been made."

This position has, *ex Cathedra* as it were, recently again received the imprimatur of the Judicial Committee of the Privy Council in the *Neville Lewis case* where Singh J was cited with approbation.

These developments must register an encouraging fillip to the cause of human rights. This more so in the area of the most vital of decisions - whether after conviction to recommend commutation or not of a death sentence. This will help throw much needed light on an otherwise opaque process that is the deliberations of mercy Committees in the region. Surely, transparency of the proceedings when a person's life is on the line can only be decent.

When the Human Genome Project was finally completed this year there were simultaneous announcements from both Downing Street in London and the White House in Washington. During the announcements, President Clinton said that through science humankind was now able to understand the language in which God created man.

This, if true, which I've no evidence to doubt, means that man may now be poised to acquire the ability to play God in the creation of human life.

As science advances humankind's ability to understand and unravel the mysteries of life, it must be perplexing that some societies still want to cling to the right to snuff out that life itself through penal systems that are increasingly being shown as far from infallible. This therefore puts a considerable burden on everyone involved in the administration of justice to ensure transparent due process with all the attendant rights and guarantees. This I would like to believe is part of the mission of the human rights movement.

It is not therefore even more ennobling for human rights activists to strive by all legitimate means to prevent human life itself from being extinguished at the hands of a fellow mortal, albeit, within what can only be described as tabulated austere legalism and penology in those countries that still have the death penalty?

Let me however, say this: This empirical evidence tells us that a society which flagrantly abuses the human rights of its people or callously brutalises them, is wasting away its most valuable resource: the potential of its human resources, in particular the contributions they can make towards that society's development. Such a society is therefore less wholesome and its growth would be stunned. Therefore, human rights are not simply the province, preserve or sport of the so-called "do-gooders". Human rights should, in my view, be the concern of everyone including the Bench and Bar at every turn and opportunity.

Can there be any serious doubt that the administration of justice is about human rights? Puzzling as this may sound, I believe it is evident and elementary when it is realised that every single litigation that wends its way through the law courts of any county at whatever level, is concerned, from

the individual litigant's point, with the assertion, defence or vindication of some interest or right that touches and concerns either the *liberty, property* and in some agonising cases *the very life of that individual*.

It is therefore my submission that the administration of justice is at the end of the day really about human rights and human development. The administration of justice should therefore in both its civil and criminal aspects, be vigilant and solicitous of human rights.

It is however, in the sphere of criminal litigation that human rights present perplexing challenges. How else can one justify or plausibly argue for the right of an accused to adequate legal representation other than to show that this is a requirement of the *presumption of innocence and the right to a fair trial and as a desideratum of due process itself*? For an accused who cannot afford proper or adequate legal representation and winds up being convicted can hardly be said to have had a fair trial or due process, at least he would not have had the means to vindicate his constitutionally-guaranteed-and-presumed innocence. These and similar human rights issues abound in the field of the criminal litigation process.

In my view, no trial can be said to be fair at which the accused was not represented by counsel, or given the opportunity to be so represented, especially in the face of a professional prosecuting side. Surely, not to have an attorney in a strange and confusing environment like the criminal court, undermines the constitutional stipulations regarding fair trial and due process.

I submit nonetheless that it is the duty of both the practitioner and the bench to rise up and meet these challenges as and when the occasion requires it. But above all awareness and sensitivity are vital for the protection and enhancement of every facet of human rights. It is our collective duty to foster a culture of respect for and observance of human rights.

Before I conclude, permit me if you will, to report an apocryphal exchange that ensued between a senior lawyer and a crusty and choleric judge late in the afternoon in Court during the address stage in a rather lengthy trial.

After the Attorney had been addressing the Court for some hours, he noticed, or he thought he did, that the judge's attention was waning. He thereupon in the middle of his address inquired:

"My Lord I hope you heard what I have been saying?"

The judge looked balefully at the lawyer and replied:

"Counsel, you have been going on for so long that I have reached the stage that whatever you have said has come into one ear and promptly exited through the other."

The lawyer in a tremulous but quiet voice replied:

"That, my Lord is the problem, for I fear that there might be nothing between one ear and the other to stop whatever I have been saying from getting out!"

The message of this seminar I am sure has been heard and I only hope that unlike our apocryphal judge, there is something in between our ears to retain the valuable exhortations, counsels and strategies we heard here these past couple of days.

This must be so in the cause of the law, in the name of our common humanity and decency, as we strive in our several ways at our respective stations to advance and consolidate the province of human freedom and rights.

I would like to end on a note of optimism and my optimism is premised on the discussions and exchanges that have taken place here these past couple of days. I am confident that from these, there will be born a rekindled determination that will contribute towards cultivating and enhancing that culture of respect for and observance of human rights in all their manifestations throughout the region and beyond. This is the challenge of the new Millennium.

Papers



Cruel and inhuman punishment: The treatment of long-term and death row prisoners

By Alvin J. Bronstein¹

On behalf of Penal Reform International, I want to thank the Honorable Said Musa, Prime Minister of Belize, the Honorable Godfrey Smith, Attorney General of Belize, His Excellency Tim David, British High Commissioner, the Honorable Abdulai Conteh, Chief Justice of Belize, and Fred Lumor, the President of the Belize Bar Association for all of their assistance in putting together this important seminar. I particularly want to thank the Foreign and Commonwealth Office of the United Kingdom for their financial support and I should acknowledge the assistance and the work of three people who put this seminar together: Wendy Singh, Saul Lehrfreund and Parvais Jabbar.

I appear before you wearing two hats. First, as a Board member of Penal Reform International (PRI) an organization working in more than 40 countries at this time. Second, as Director-Emeritus of the National Prison Project of the American Civil Liberties Union. In that latter capacity, I have litigated death penalty cases and, for purposes of my presentation today, cases involving conditions of confinement on death rows and maximum security prisons throughout the United States.

I have been involved in this kind of litigation and legal work for more than 40 years and I have come to believe that to do this kind of work you must feel a certain kind of sadness, a pain in your belly, at the inhumanity involved in the treatment of death row and other long term prisoners throughout the world. You will hear more about this pain and understand it when you hear Bryan Stevenson and others who will be speaking about their work on death row later in the program. For a brief examination of close custody prisons in the Americas I recommend that you look at the recently published book,

1. Director-Emeritus, The National Prison Project of the American Civil Liberties Union; Board Member, Penal Reform International.

*A Sin Against the Future*² by Baroness Vivien Stern, Secretary General of PRI, in which she describes long-term confinement, particularly in the United States, and goes on to say:

*The way such long-term prisoners are treated is at the heart of the implementation of human rights - they are the ultimate undeserving, the most extreme test of humanity, the touchstone for any prison system, in every society.*³

I find it somewhat disconcerting that these meetings are held in these beautiful settings. Some years ago after another meeting on these issues I wrote a chapter called *Legal and Constitutional Issues Related to Last-Resort Prisons*,⁴ and I started that chapter with the following words:

Exactly one year ago, I attended an international seminar on long-term imprisonment which was sponsored by the Solicitor General of Canada and held at Mont Gabriel, Canada. The scenery was beautiful and the accommodations at the ski lodge where the conference was based were more than comfortable. After having cocktails by the pool, and as we enjoyed five course gourmet meals complete with wine, we worried about those poor devils serving life sentences.

I said then that I thought it would be singularly appropriate that we meet and discuss these issues at some maximum security prison rather than in a lush surrounding and I feel the same would probably be true today. We ought to be having this meeting in a prison instead of in a setting looking out at the beautiful Caribbean Sea.

Of necessity, I have to talk in somewhat general terms as I am unfamiliar with the relevant statutes and constitutions in the various countries represented here. Other speakers are in a position to respond to specifics. I have been asked to talk about the limitations on, or the permissible quality of, punishment for prisoners awaiting execution or facing the alternative of a life sentence. It is important that we not just look at the cold letter of the law.

2. Vivien Stern, *A Sin Against the Future*, Penguin Books (London, 1998).

3. Note 2, *supra*, at chapter 3, pp.36-63.

4. Alvin J. Bronstein, *Legal and Constitutional Issues Related to Last-Resort Prisons, Chapter 7 in Confinement in Maximum Custody*, Ward & Schoen, editors, Lexington Books (Lexington, Mass. 1981).

We should listen to our feelings as well.

A first principle that we must always argue is that for a person sentenced to die, or alternatively to life imprisonment, the only permissible punishment is, in the one case death and removal from society until then, and in the other case, that of life imprisonment, removal from society. No other or further punishment while in custody is justified, unless there is a specific violation of a legitimate prison regulation.

The fact that I talk about men and women under sentence of death, without going further, does not mean that I approve of such a sentence in any circumstances. I have fought against capital punishment all of my life. Other speakers will discuss challenges to the death penalty. My limited role is to discuss challenges to conditions of confinement.

I shall only briefly touch on the international standards and covenants that are relevant to our concern about conditions of confinement. They will be discussed in detail by other speakers.

I highly recommend that you obtain two publications, if you do not already have them. One is a compilation of international standards published by the United Nations,⁵ and the other is a PRI handbook on making standards work.⁶ The international instruments are as follows:

- The International Covenant on Civil and Political Rights, Articles 6, 7 and 10.
- The Universal Declaration of Human Rights, Article 5.
- The United Nations Standard Minimum Rules for the Treatment of Prisoners, Rules 9-20, 22-26, Part II.
- The Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
- The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Part I, Articles 1 and 16.

5. *A Compilation of International Standards, United Nations 1988.*

6. *Making Standards Work, An International Handbook on Good Prison Practice, Penal Reform International (The Hague, 1995)* Now available in 12 languages.

- Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty
- The American Convention on Human Rights (Enforced in the Inter-American Court of Human Rights)

I do not know which of the Caribbean countries represented here have withdrawn from the American Conventions and other treaties, thereby theoretically preventing prisoners from having recourse to the international forums. My recommendation is to argue them anyway and to use any and all relevant standards. We must continue to argue for outside and international scrutiny and, at the same time, move our respective governments to take action. In the United States, the Courts almost never give any credence or authority to international standards but nevertheless we continue to argue them.

We must all work hard to expose human rights violations in the media. Many of the perceptual problems about crime and punishment are created by the media and we must work diligently to overcome those perceptions. The importance of educating the media cannot be overstated. Let me give you two examples of how the media have made our struggles more difficult. In 1993, in the United Kingdom, there was a terrible and unfortunate occurrence when two very young boys, I think they were 9 and 10 respectively, killed a third child even younger than they. The young child was named Bulger and every day in the newspapers, especially in the tabloids, and on television and radio in the U.K. there were stories about the Bulger case with people crying out for vengeance and for harsh punishment to be imposed on these two children who had committed this awful offense. Because of the overwhelming media exposure, everyone believed that that was what crime was all about in England, that all over the country little kids were killing other little kids and of course that's not true. Nevertheless, people were calling for harsher punishment for all offenders. The same thing happened in the United States not long ago when an ex-offender, out on parole in the state of New Jersey, sexually assaulted and killed a little girl by the name of Megan. There was a terrible outcry - it was all over the papers and the press and in every state legislature and in the federal congress - and pretty soon you had dozens of American states and the federal Congress enacting what are

known as "Megan's laws." These laws called for registration of any sex offender, and public exposure of any sex offender coming out of prison. This was a terrible overreaction to an admittedly awful crime but far in excess of what was needed. The press created the impression that these crimes were occurring every hour in every town in America and conservative politicians reacted with calls for harsher punishment. Therefore educating the media is extremely important.

Another situation that is closer to home is here in Belize. According to the Penal Reform International Newsletter most recent edition, flogging has been resumed in Belize.⁷ They quote a story from the February 2000 issue of the *Belize Times* which talks about four prisoners being punished because they were objecting to the flogging that had been carried out the day before and then another story from the March 2000 issue of the *Belize Times* quoting the governor of the Hattieville Prison who said that although he would not like whipping to become a frequent practice "one has to look at the broader picture" and said that they would continue the new practice of flogging or whipping for disciplinary violations in prison. That is a terrible development and I understand it is becoming the practice in other Caribbean Commonwealth countries. I think we have to fight against this awful treatment of human beings wherever it happens. It is clearly an express violation of United Nations standard minimum rule 31 and every other international covenant, all of which prohibit corporal punishment. Whipping is certainly an extreme example of corporal punishment.

I would compare this with the movement a few years ago to restore the chain gang in the United States. Beginning in Alabama, prisoners worked on the road in chains, in striped uniforms, guarded by armed guards on horseback. This was clearly a move back to the days of slavery since most of the prisoners out on the chain gang were Black. Although it was a difficult practice to challenge in the courts given the conservative nature of the courts in the United States these days, the media exposure helped to shame the officials in the few states that had the chain gang and shamed them enough to have them abandon the practice. Sometimes you may succeed in the court of public opinion when you cannot succeed in the law courts.

7. *Penal Reform International Newsletter*, Spring 2000.

Another example of succeeding with public pressure involved a case I handled together with some other lawyers about 20 years ago. Some of you may recall that in the early 1950's five Puerto Rican nationalists on two separate occasions created serious disturbances in Washington, D.C. On the first occasion, two of the nationalists attacked Blair House, the temporary residence of the President, injuring some of the Secret Service guards and in the second incident three of the nationalists, in the balcony of the United States Congress and in the midst of a session, began shooting guns up into the air creating a very serious situation although no one was injured. All five of these nationalists were tried and convicted of various offenses and sentenced to essentially life sentences. By the time I got involved they had spent over 25 years in prison. All of those years were in solitary confinement. One of the prisoners was a woman, Lolita Lebron, and the other four were men. The four men were kept in the infamous United States Penitentiary in Marion, Illinois and the woman was at a maximum security women's prison. They were kept under the most onerous conditions. They were not allowed to participate in prison programs, and not allowed to have visits except for the immediate family and those were rare because of the distance from Puerto Rico. They were allowed visits with their lawyers but they had no access to any other forms of communication. We brought an action, particularly because of the medical condition of one of the prisoners, and also complaining that their various conditions of confinement not only violated the United States Constitution but all the international standards that I mentioned earlier. The case got a lot of attention in the press and fortunately got to the attention of the Assistant Secretary of State for Human Rights who familiarized herself with the case. She then introduced us to President Jimmy Carter and after some public exposure, although the case was going nowhere in the courts, President Carter pardoned all five of those prisoners in 1979. Unfortunately the one that was ill died shortly thereafter but the others are alive and well in Puerto Rico and still engaging in political activity as part of the independence movement there.

There is a good deal of support in the literature for challenging long-term confinement as being impermissibly damaging. Most of the prisoners suffer from mental illness which often led them to commit the act for which they are being punished and this kind of confinement invariably makes them

worse. I refer you to an important article written by Dr. Stuart Grassian who is a psychologist on the faculty of the Harvard Medical School in Massachusetts and who discusses the psychiatric effects of severe isolation.⁸ The article is particularly important because of Dr. Grassian's reputation and also because it has as appendices, various other reports of studies, and then cites all of the major articles and books on the theme of the psychological or psychiatric impact of long-term isolated confinement. In particular, Dr. Grassian says:

Many of the prisoners who are housed in long-term confinement are undoubtedly a danger to the community and to the corrections officers charged with their custody. But for many they are a danger, not because they are coldly ruthless but because they are volatile, impulse-ridden, and internally disorganized.

It is a great irony that as one passes the levels of incarceration - from the minimum to the maximum security institutions, and then to the solitary confinement sections of those institutions - one does not pass deeper and deeper into a sub-population of the most ruthless prisoners. Instead, ironically and tragically, one comes full circle back to those who are emotionally fragile and, often severely mentally ill. The laws and practices which have established and perpetuated this tragedy deeply offend any sense of common human decency.⁹

Vivien Stern points out that the terrible cycle caused by extreme punishment is predictable:

Dealing with high-security long-term prisoners who do not settle down into a hedgehog-like existence challenges all prison systems. After all, would not most people take desperate measures to escape even if they had nowhere to go and no one to go to, just to keep alive their sense of life, having a purpose, just to see the world and breathe free air? Because this is the normal reaction, the prison authorities often decide they have to subject long term prisoners to stringent security measures. What then have such prisoners got to lose? Not much. So they fight the system. The system fights

8. Stuart Grassian, M.D., *Psychiatric Effects of Solitary Confinement*, statement undated.

9. Note 8, *supra* at p.17.

*back. Their conditions worsen until they and their custodians are locked into a downward spiral of violence and extreme deprivation. When they have nothing else left they smear their own excrement on themselves and their cells.*¹⁰

I experienced this sort of situation myself about 20 years ago when the state of Virginia built a supermaximum security prison called the Mecklenberg Correctional Center and housed what they claimed were the most dangerous prisoners in the system. Of course it turned out that most of the prisoners suffered from serious mental health problems which were the cause of their behavior problems. After months of total isolation without any program opportunities, or anyone to speak to, the prisoners felt they were being treated like animals and in order to achieve some attention they began throwing excrement and urine at the officers. Soon thereafter the officers began storing up bags of urine and excrement and throwing them back at the prisoners. The whole prison descended into a sort of living hell for the keepers and the kept.

Unlike most other international treaties which talk about cruel or unusual or degrading treatment the International Covenant on Civil and Political Rights has some additional language. Earlier this year there was a two-day seminar on the new American phenomenon of supermaximum security prisons which are spreading throughout the nation. This seminar was jointly sponsored by the National Prison Project, Amnesty International and Human Rights Watch and one of the speakers was Dr. Andrew Coyle, a former prison governor in Scotland and England and now the Director of the International Centre on Prison Studies at Kings College, London. Dr. Coyle quoted the language from the International Covenant, Article 10 which says: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Dr. Coyle then went on to say "This is an obligation which should be engraved on the heart of everyone engaged in the task of 'deprivation of liberty'. It is not always easy to observe this obligation. Some of the people who are in prison are dangerous to other people and to themselves, some of them can be difficult and unpleasant. But to treat them in a manner which respects their inherent dignity as human beings is the

10. Vivien Stern, *supra* at p. 187-9.

greatest challenge which faces those public servants who work in prisons."¹¹ Many of the countries represented here are parties and signatories to the International Covenant, having ratified that treaty, and the treaty should be relied on in all litigation challenging conditions of confinement in the cases we are talking about.

Let me now refer you to what I described as fundamental rights of all prisoners in a civilized society in a chapter on Criminal Justice, Prisons and Penology in a book entitled *These Endangered Rights*.¹² These fundamental rights should be articulated and pressed forward in all litigation challenging conditions of confinement.

- (1) The right to personal safety. Large overcrowded prisons are dangerous places and a person in custody is generally helpless to protect him or her self. The obligation of the state to provide safe custody is imperative.
- (2) The right to care. Decent, clean housing, adequate diet, enough clothing, and medical care are basic needs of all citizens and they must be provided for prisoners who cannot provide for themselves.
- (3) The right to personal dignity. Self-respect is hard to come by in the poor and racially disadvantaged persons who fill our prisons, and a prisoner's sense of worth must not be damaged by the humiliation of confinement.
- (4) The right to keep busy. Idleness is a disease of all prisons. A prisoner should be provided work if he or she wants it. There should be a range of educational vocational recreational and artistic programs available to every prisoner.

To conclude, permit me to remind you about the sadness, feeling the pain and inhumanity I talked about earlier. A colleague of mine, Professor Michael Jackson at the University of British Columbia in Vancouver wrote a marvelous book some years ago called *Prisoners of Isolation: Solitary Confinement in*

11. Andrew Coyle, Dr., *Supremax Prisons: A New American Phenomenon*, Paper delivered at Supermax Conference, Washington, D.C. Feb. 23-4, 2000.

12. Alvin J. Bronstein, *Criminal Justice: Prison and Penology*, Chapter in *Our Endangered Rights*, Dorsen, Editor, Pantheon Books (New York 1984).

Canada.¹³ The book describes a particular piece of litigation that he was involved in and the lead plaintiff in that litigation was a long-time prisoner named Jack McCann who wrote poetry while in solitary confinement and in the frontispiece of the book Michael Jackson quotes two things. The first reads as follows:

I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers and in guessing at it myself, and from reasoning from what I have seen written upon their faces, from what to my certain knowledge they feel within, I'm only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom in which no man has a right to inflict upon his fellow creatures.

That was written by Charles Dickens in 1842, and then there are just two paragraphs from a much longer poem written by Jack McCann the prisoner. The name of the poem is "My Home is Hell." The paragraphs read as follows:

I cannot tell to those in hell, the dreams I send above, nor how the shrill of whistles kill, each passing thought of love.

Within these walls that never fall, the damned will come to know the rows of cells - the special hell, called Solitary Row.

Another colleague and friend is Erik Andersen, a retired Danish prison governor who during his career established what was first an experimental prison in the Danish system in the town of Ringe. Officers who were hired to work there had to have no previous experience in prisons to eliminate old ideas. They did not wear uniforms. All the prisoners male and female had their own rooms, with their own keys even though this was a maximum security prison. There were many other innovative features to this facility which was probably one of the best prisons I've ever visited in the world. On one occasion Andersen was in the United States and I had him come to a meeting of lawyers and judges at the American Bar Association, where he described this prison. When he finished his description he was asked whether

13. Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada*, University of Toronto Press (Toronto 1992).

it cost more than other Danish prisons and whether the evidence showed that it worked better. He said that it did at that point cost more than most prisons because it was still experimental but that the cost would be going down and they really had no evidence that it had any big impact on recidivism but they did feel that it was not damaging as much to prisoners as other facilities. A judge at the session then asked: "Mr. Andersen, if the prison costs more and doesn't seem to work better or you can't prove that it works better, why are you doing it? Why is the government of Denmark doing it?" Anderson looked down over his glasses and said "Decency, human decency, isn't that enough reason."

And so my friends as we go about our work let us always remember that human decency is what we must strive for in the way our society treats people who we imprison.

Legal aid and access to justice

Adrian King, Attorney-at-Law

From a structural perspective I intend to deal broadly with the question of legal aid in Barbados generally and how it relates to accused persons in Barbados. I then propose to give an overview of the most recent constitutional motions filed in Barbados in respect of legal aid and our approach to those motions.

Community Legal Services Act

The current legislation in Barbados which facilitates an accused person's access to Legal Aid in Barbados is the Community Legal Services Act Cap 112A of the Laws of Barbados. Some also hold the view that Section 18 (1) of the Constitution of Barbados which guarantees all citizens of Barbados a right to a fair trial inherently extends itself to the principle of Legal Aid. The interpretation of that section is currently under appeal from the Appeal Court of Barbados to the Privy Council in England. In short the present position in Barbados is that a only person who is charged with a criminal offense listed under the First Schedule of the Act is entitled to Legal Aid in Barbados. Those offences are :-

1. Any capital offence
2. Manslaughter
3. Infanticide
4. Concealment of Birth
5. Rape
6. All indictable offences where the person charged is a minor
7. Any indictable offence the trial of which is certified by the trial Judge to be, or as likely to be, of any difficulty and require the assistance of an attorney-at-law on behalf of the person charged therewith for its proper determination.
8. Any indictable offence the trial of which or an appeal from the conviction of which is certified by the trial Judge or the Court

of Appeal, as the case may be, to involve, or as likely to involve, a point of law of public importance and require the assistance of an attorney-at-law on behalf of the person charged or convicted, as the case may be, for its proper determination.

Statistically therefore the majority of accused persons who come before the criminal courts in Barbados are not entitled to legal aid.

More narrowly a person who is accused and charged of a capital offence murder for instance faces execution by hanging as a mandatory penalty. Given the provision of limited legal aid the State is largely able to execute without being out to much expense in providing a fair trial for accused persons. While our Government and the public are committed to the retention of the death penalty and any hope of changing this commitment is minimal it is submitted that there ought to be a challenge to the adequacy of the present minimum standards that the Courts have required the Crown to put in place to ensure a fair trial for murder.

The Present Barbadian Position

At present an accused person is arrested, interrogated and charged. A Preliminary Inquiry is then conducted by an examining Magistrate and if committed that person is tried by a jury at our Assize Court. The individual thereafter has a right of appeal to the Court of Appeal in Barbados and afterwards as of right again to the Judicial Committee of the Privy Council in London.

As we are a fused profession our Community Legal Services Act¹ provides the accused with one attorney-at-law only for the Preliminary Investigation, the trial at the Assizes and the appeal. The Act makes no provision for the retention of counsel for an appeal to the Judicial Committee of the Privy Council in London or for access to an attorney at law during the investigation or any of the pre preliminary trial procedures. As regards the appeal to the Judicial Committee of the Privy Council the Government provides minimal assistance in paying for these costs.

Once an attorney is on the Legal Aid List, he or she can be granted a Legal Aid Certificate, so it is possible, and often the practice, for an accused person

1. Community Legal Services Act Cap 112A.

to be assigned a very junior member of the bar, who will then be required to prepare the defence, usually without the aid of any expert help, medical or otherwise.

The Accused is not entitled as of right to assistance in obtaining any expert medical and/or psychiatric evidence or any other assistance. In regard to the medical expert testimony, if there is evidence to suggest that the defence of insanity or diminished responsibility is available to the accused for instance, the Crown generally takes the position that it will make available a Doctor of its choice to the defence. No funds are made available as that Doctor will be in the employ of the Government at the psychiatric hospital.

On the other hand the Act does provide for the provision of a Legal Aid Certificate for the filing of Constitutional Motions. Once granted an attorney is remunerated by receiving two thirds of the taxed costs.

The assistance in relation to trials for murder or any other capital offence is simply not adequate and so accused persons facing death are essentially forced to rely upon the inadequately rewarded services for attorneys and the pro bono services of solicitors and barristers in London. Persons who face the death penalty are tried and convicted mostly upon challenged confession evidence given at a time when legal aid is not available and after a trial at which that person has been represented by a junior attorney who may lack some of the basic skills and expert help to necessary to adequately prepare a defence.

Thus far while the provisions of the Community Legal Services Act remain largely acceptable to the courts, they arguably do not meet the Constitutional requirements for a fair trial. Certainly case law suggests that this position would unacceptable in the American and English jurisdictions. Section 18 of our Constitution contains a provision providing for a right to a fair trial. Our courts have traditionally not accepted that the right to a fair trial includes an absolute right to counsel or to assistance beyond what is granted by the Act.

It is suggested that at a minimum, a person facing the death penalty ought to be represented by at least two counsel one of which should be at a senior level in addition to properly funded access to expert assistance medical or otherwise.

While we are a fused profession the practice of law contains at least the two sciences of taking instructions and preparing the case and the other science of presenting that case. From a practical perspective it is difficult for one attorney to take adequate notes and no transcripts are made available until the Record of Appeal is prepared. An attorney-at-law must do all the preparatory work and present the defence in circumstances where she or he is being inadequately remunerated and is often without any form of medical or other expert advice.

In addition, it is clear that we in the Caribbean cannot continue to rely on the pro bono services of English solicitors and barristers to prosecute appeals to the Judicial Committee of the Privy Council.

In the United States of America the cases of *Powell v the State of Alabama*², *Gideon v Wainwright*³, *Argersinger v Hamlin*⁴, have established that in all cases where the liberty of the accused is at stake, that accused person cannot obtain a fair trial without representation by counsel. This principle has been recognised in Ireland where the courts have stated:

"The principles enshrined in these provisions of the Constitution require fundamental fairness in criminal trials - principles which encompass the right to legal aid in summary cases no less than in cases tried on indictment - whenever the assistance of a solicitor or counsel is necessary to ensure a fair trial. Ours is an adversarial system of criminal justice. On the one side is the State with all its resources, which it properly and justifiably uses in the prosecution of crime. It has available to it a trained and skilled police force, and lawyers to prosecute in the interest of the public. On the other side is the person charged with a crime; if he has the resources, he will retain the best solicitor and counsel obtainable for the preparation and conduct of his defence. If he is too poor to engage a solicitor or counsel, can he be assured of a fair trial unless legal aid is provided for him? It seems to be me to be beyond argument that if lawyers are necessary to represent persons with the means to pay for them, they are no less necessary for poor persons who

2. US Rep. 335.

3. 372 US Rep.335.

4. 407 Rep. 25.

are unable to provide for them out of their own resources. Very few laymen, when charged in court where their liberty is in jeopardy, can present adequately their own cases, much less identify and argue legal questions."

The Irish courts have also had this to say about the American position:

"In the United States of America the development of judicial opinion on the meaning of the right to "due process" guaranteed by the 14th Amendment has reached a similar conclusion. In Gideon v Wainwright the Supreme Court of the United States held that, in a criminal trial for a serious offence, the right of an indigent defendant to have the assistance of counsel is a fundamental right which is essential to a fair trial, and that a trial and conviction without such assistance violated the 14th Amendment.

It seems to me that in 1962 the State recognised the existence of this fundamental right when the [the Irish Parliament] passed the Criminal Justice (Legal Aid) Act of that year. Under the Act of 1962 provision is made, both in the District Court and in relation to persons returned or tried on indictment, for legal aid where the person's means are insufficient to enable him to obtain such aid himself. Such aid is granted where "it is essential in the interests of justice that he should have legal aid in the preparation and conduct of his defence." To the extent that this Act provides for legal aid, it discharges what I consider to be the constitutional duty imposed on the State.

However, the Act of 1962 lays down as a condition for the grant of legal aid both in the District Court and on return for trial, that the person seeking it must apply for it. No one can be compelled to accept legal aid and a person charged is entitled to waive his right in this respect and to defend himself. No objection can be raised if these provisions of the Act operate to cover such cases where a person, knowing of his right, does not choose to exercise it and, therefore, decides not to apply. However, if a person who is ignorant of his right fails to apply and on that account is not given legal aid, then, in my view, his constitutional right is violated.

*For this reason it seems to be that when a person faces a possible prison sentence and has no lawyer, and cannot provide for one, he ought to be informed of his right to legal aid. If the person charged does not know of his right, he cannot exercise it; if he cannot exercise it, his right is violated."*⁵

The position in Canada would seem to mirror the position in the United States of America as set out in the cases of *Gideon, Powell and Argersinger*.⁶

There is no doubt that the present position in Barbados and most likely the Caribbean needs to be challenged and while there may be several ways in which this challenge can be made, I propose to outline how we have approached this matter in Barbados by the filing of certain Constitutional Motions. These motions have not been successful at first instance but it is our view that challenges must be made to the present system.

I appreciate that most of our Constitutions contain provisions that preclude the Courts from granting relief if other forms of redress are available. In addition in a recent Australian case⁷ the courts concluded that if a trial Court came to the conclusion that a fair trial could not be granted to an accused person without a funded attorney at Law then that Court had the power to stay the proceedings. However that section has not proven to be a bar to the bringing of our motions and we have utilised this form of application. It has been our experience that by taking these points by way of Constitutional Motions we are able to launch pre-emptive strikes to the Constitutionality of the trials. In addition it has given us an opportunity to put before the Court affidavit evidence in support of our contentions. The arguments are presented more fully than they can be on an application for a stay.

The other advantage is bringing the motions is that they place the issues before the Courts in a manner which has forced the Judiciary to give reasoned decisions.

The applicants Licorish, Nelson and James were all convicted of murder. They were represented at their trials and on appeals to the Court of Appeal in Barbados pursuant to Legal Aid Certificates. Their appeals against conviction and sentence were all dismissed by the Court of Appeal.

5. *The State v Donnahue (1976 Ir)*.

6. *Re Ewing and Kearney and The Queen*, 49 dlr (3d) 8619.

7. *Deitrich v R*.

They sought assistance from the Crown in relation to the prosecution of their appeals to the Judicial Committee of the Privy Council. That correspondence resulted in the Crown committing to pay minimal costs in connection with the prosecution of the appeals. This position, as put forward by the Crown, was rejected by the accused and Constitutional Motions were then filed seeking declarations that at all times during the applicants trials for murder, including their appeals to the Judicial Committee of the Privy Council in London, the applicants were entitled to properly funded barristers and solicitors and for further declarations that the decision of the Crown to limit financial assistance amounted to a breach of the applicants Constitutional rights to a fair trial.

The matter came on for hearing before the High Court in Barbados and the applications were dismissed. In delivering its decision the Court held that:

*"the question whether the applicants representation by English solicitors and barristers in prosecuting their appeals to the Judicial Committee of the Privy Council should be fully funded by the Government of Barbados, is an economic and political problem, the solution of which rests with the Government. This court has no power to direct the Government as to how much it should pay to provide solicitors and barristers for indigent persons such as the applicants. The Government has determined how much it will pay and that is the end of the matter as far as this court is concerned."*⁸

This decision has been appealed. The appeal has been argued and we are currently awaiting a decision from the Court of Appeal.

Effectively it is clear that by virtue of the Community Legal Services Act that an accused charged with the capital offence of murder is entitled to Legal Aid. The argument is therefore that where the final Court of determination is the Judicial Committee of the Privy Council that the minimal amounts provided by the Government if anything at all are simply inadequate for the retention of legal representation and as such the Crown is denying the accused person

8. High Court Actions Nos 1126 of 1996, 1127 of 1996 and 971 of 1997 entitled *Carlos Arthur Liquorish vs The Attorney General, Nathaniel Nelson vs The Attorney General and Arleigh Hector James vs The Attorney General*. Unreported decision of the High Court delivered the 17th day of December 1998.

his or her statutory and constitutional right to legal representation in a capital case where the ultimate penalty is death.

In another Barbadian case Richard Hinds was arraigneded before a judge and jury on the 1st of July 1991. He was charged with unlawfully and maliciously setting fire to a house. He pleaded Not Guilty and after his trial he was sentenced to 8 years imprisonment. He was unrepresented at his trial. He appealed his conviction and sentence and he was represented at that appeal by counsel. At the appeal, counsel took the point that he ought to have been provided with a funded attorney at law at his trial and as he was not, his conviction was therefore unsafe and unsatisfactory. The Court of Appeal held that the matter was a relatively simple matter and he was not entitled to legal representation and dismissed the appeal. In delivering the decision, the Court stated as follows:

*"The Appellant through his Counsel argued three grounds, mainly that his constitutional rights were infringed and two that he was not allowed legal representation. Arson is the offence. It is not an offence where an Appellant automatically gets Legal Aid. It can only therefore fall under paragraph (g) of the Community Legal Services Act Cap 112 A of the Schedule, which clearly states and it reads: Any indictable offence the trial of which is certified by the Trial Judge to be or as likely to be of difficulty and to require the assistance of an attorney-at-law on behalf of the person charged therewith for its proper determination. The case does not fall under (g). It is not a difficult case nor is it likely to be of difficulty and therefore demand the representation of an attorney-at-law and the Trial Judge obviously averted his mind to the question of whether he should get Legal Aid for a simple case. If the Learned Trial Judge had granted Legal Aid he would have set a very bad precedent and then the whole Act would have to go by the door. Everybody would come in and claim their case falls under (g) of the schedule. He is not entitled to it automatically. It does not fall under (g). On the record of the facts of the case, any person reading the deposition would see it is not a case of difficulty or likely to be of difficulty."*⁹

9. Unreported decision in Criminal Appeal No 24 of 1991, *Richard Hinds vs The Queen*, delivered by the

As he was financially unable to prosecute any further appeals a Constitutional Motion was filed for declarations that at all times during his trial by jury and sentencing, the appellant was entitled to be legally represented by an attorney-at-law funded by the Crown.

Richard Hinds had applied for counsel at his trial and the affidavit evidence put forward in support of the motion was to the effect that the Trial Judge had dismissed the application, saying that the offence for which he was charged was not a scheduled offence. Further evidence was lead to the effect that Richard Hinds would have relied on the defence of insanity, which was not put forward. The High Court dismissed the Constitutional Motion, holding that the issue was res judicata.¹⁰

An appeal was filed against the decision of the High Court dismissing his Constitutional Motion. The critical point argued at the Court of Appeal was that both the Community Legal Services Act as well as section 18 of the Constitution applied to Hinds and that he should have had the benefit of Counsel at his trial. The relief sought therefore in respect of those grounds was simply a declaration that the failure of the State to provide Hinds with adequate Counsel was a breach of his constitutional right. The Court of Appeal on the 30th September 1999 dismissed that appeal and efforts are now being made to prosecute a further appeal to the Judicial Committee of the Privy Council.

In dismissing the appeal the Court stated:

"However, the following points need to be made: first, the applicant was represented on his appeal by an attorney-at-law, no application was made under Section 29 of the criminal Appeal Act Cap. 113A for the reception of evidence that was not called at the trial and the judgement of the Court of Appeal does not disclose that the question of a possible defence of insanity was even raised; second, had the defence of insanity been successfully raised at the trial, the appellant would not have been freed but an order would have been made for his detention in the Psychiatric Hospital until Her Majesty's pleasure was known; third, the

Court of Appeal on the 14th October 1992.

10. Unreported decision of the High Court delivered on the 27 October 1997 in High Court action numbered 1424 of 1993.

appellant has an insuperable difficulty in obtaining redress under Section 24 of the constitution for the Trial Judge's failure to inform him adequately of the terms of paragraph (g), because redress under that section is available only where one of the provisions of Sections 12 to 23 has been contravened. The Community Legal Services Act is not part of those provisions nor was it enacted under or by virtue of any of those provisions. The grant of Legal Aid is not even mentioned in the Chapter of which those provisions form part. As stated earlier they contemplate that there can be a fair trial of a person charged with a criminal offence without that person being legally represented. The Community Legal Services Act was enacted pursuant to Parliament's power to make laws for the peace, order and good government of Barbados.

If the applicant has a remedy in respect of the Trial Judge's failure to adjudicate adequately on a provision of the Community Legal Services Act, it is not one by way of redress pursuant to Section 24 of the Constitution because the provision of the Act was not a provision or an off-shoot of Sections 12 to 23 of the Constitution.¹¹

In light of the decision in *Hinds* it becomes readily apparent that the preliminary pre-emptive strikes challenging the constitutionality lack of counsel is fundamentally imperative prior to the start of the trial even at the stage of the Preliminary Inquiry.

Jeffrey Joseph has recently been committed to stand trial at the Assizes for murder. A Constitutional Motion has been filed for Declarations that he is entitled to the assistance of two attorneys during his trial. An interlocutory application to stay his trial until the outcome of the Constitutional Motion failed and the Motion is now scheduled to be heard prior to his trial. This matter is in its early stages but it is important to note that there are matters of psychiatric and other medical evidence in this case which need to be addressed by professionals prior to the trial of Joseph. The Court will be moved to adjudicate on the question of his right to funded access to these medical professionals by the Crown.

¹¹. Unreported decision of the Court of Appeal dated the 30 September 1999 in Civil Appeal No 20 of 1997 *Hinds v the Attorney General and ors*.

It is in our view important that these challenges are made outside of the criminal justice system where most questions are decided by reference to the question as to whether the verdict is unsafe or unsatisfactory. The argument must be that a person's right to a fair trial can be infringed even though his conviction can not be set aside on an appeal within the criminal justice. If these arguments are raised within the criminal appeal the test will always be, did it affect the result. It would be an impossible task to convince an appeal court that the verdict should be set aside because the accused did not have the advantage of representation by silk at his trial. However it seems to us to be self evident that if the Crown wish to retain the death penalty as a mandatory punishment or at all, it ought to provide an accused with counsel beginning with the investigation stage and with senior attorney throughout the conduct of his trial. If the Crown fails to meet that Constitutional obligation we must aggressively challenge its position and lay the foundation for new arguments in respect of an accused person's right to a fair trial by access to funded competent attorneys-at-law.

Capital punishment in the United States

Bryan Stevenson¹

It gives me great pleasure to participate in an event that will be recorded as a significant moment in the development of human rights across the Commonwealth Caribbean. In an era where protection of international human rights has been asserted to justify military intervention, political conflict and war, international laws and treaties prohibiting the death penalty and protecting the imprisoned have been largely ignored. It is perhaps no small coincidence that dominant powers like the United States, Russia and China have been among the most resistant to the demands of human rights in the capital punishment arena, which is rarely asserted as a critical human rights concern despite the fact that thousands of people are executed by their governments each year. While those nations that have abandoned capital punishment have courageously urged retentionist states to abolish it, we continue to struggle against government sanctioned killing.

The United States and Commonwealth Caribbean countries have been linked in very dubious ways, in the last several years when it comes to punishment and crime. The United States currently has the highest incarceration rate in the world. Capital Punishment in both societies has created substantial questions about the commitment of each society to international human rights and the legitimacy of any claim to be a defender of human values. The United States has become increasingly entrenched and myopic with regard to capital punishment, despite censure from the international community and all indications the death penalty serves no useful purpose in efforts to eradicate crime.

The American Death Penalty in Context

There are currently 3,800 people on death row in the United States and thirty-eight of the fifty states have death penalty statutes. Since the death penalty was resurrected in 1976,² there have been nearly 700 executions, most of

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2. The death penalty in the United States was temporarily ended in 1972 after the United States Supreme

which have been in the American South. Women, juveniles and the mentally ill are among the hundreds who have been shot, electrocuted, asphyxiated and injected with lethal poisons by state governments in the U. S. Most of these executions have taken place in the last ten years when support for capital punishment has generated greater political resonance and federal courts have retreated from the kind of oversight and review of death cases that existed in the early 1980's. In the first year of the twenty-first century, the world's "leading democracy" will probably execute over 100 of its citizens. Almost all of them will be poor, a disproportionately high number will be racial minorities with crime victims who were white, many of the executed will be mentally ill, some will have been juveniles at the time their crimes occurred and there is no meaningful assurance that all of the executed will be guilty of the crimes for which they have been convicted.

Despite a worldwide trend toward abolition of the death penalty, most of the American states have without apology increased use of capital punishment in the last two decades. This embrace of capital punishment should be seen as part of a larger movement to impose harsh sentences on violent and non-violent offenders across the United States. Over the last twenty-five years, tougher sentencing practices in the U.S. have resulted in an unprecedented increase in incarceration rates and cost billions of dollars in increased spending related to prisons³. The U.S. locks up its citizens at a rate five to ten times greater than that of most industrialized nations. The American prison population has increased from 200,000 in 1972 to 2 million in 2000. Women and racial minorities have been most affected by these developments. There was a 400 percent increase in the number of women behind bars from 1980

Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), held that capital punishment was arbitrary, unpredictable and too capricious to meet American constitutional requirements. While the Court could have permanently ended the death penalty by declaring that it violates the U.S. constitutional prohibition against punishments that are "excessive," or "cruel and unusual," the Court declined to take this approach. Interestingly, unlike other Courts that have recently struck down the death penalty, see, e.g., State v. Makwanye and M Mchumu, Constitutional Court of Republic of South Africa, Case No. CCT/3/94 (1995), the U.S. Supreme Court in Furman conducted no analysis of international law or "evolving standards of decency" as defined by international practice.

3. To keep pace with the explosion in the number of prisoners, federal and state governments are building prisons at an alarming rate. In this year, the cost of building and operating prisons and in the U.S. will reach \$40 billion dollars. In many states, including California and Ohio, state governments will spend more money on the operation of prisons than on public schools and education. For economic reasons, investing billions of dollars in correctional facilities and prison beds necessarily commits American society to maintaining the unprecedented level of incarceration of its citizens, regardless of potential decreases in crime rates.

to 1995. Today, one in three African American men between the ages of 18-35 are under the supervision of the criminal justice correctional system.

One cause of this upsurge in incarceration rates has been the unnecessarily harsh punishment of large numbers of non-violent, minor offenders, leaving nothing but the ultimate penalty for violent criminals. After all, if some states sentence non-violent offenders to life imprisonment without parole for stealing a bicycle under habitual offender statutes⁴, what is to be done with the person who commits a heinous murder? The popularity of state crime policies that are justified as retribution or vengeance for the victims of violent crime have also created an atmosphere where enthusiastic political support for the death penalty is never questioned or confronted.

There have been tremendous costs to an approach to crime prevention that favors the expansion of incarceration and use of the death penalty. The indifference of many American policymakers to the demands of international standards relating to capital punishment has damaged the reputation of the United States on human rights issues generally. American foreign policy has and will continue to be undermined by the retention of capital punishment in the United States unless there is reform.⁵ Additionally, disturbing questions of fairness and discrimination in the application of capital punishment in the U.S. have created problems with the retentionist position of the American jurisdictions that permit the death penalty.

Juveniles and the Death Penalty

Ten years ago, the highest Court in the United States declared that the U.S. Constitution permits the execution of juveniles as young as sixteen years old and of persons who are mentally retarded.⁶ According to the Supreme Court, America's "evolving standards of decency" had not yet developed to

4. I currently represent Jerald Sanders. He is one of thousands of non-violent offenders in the United States who has been sentenced to life imprisonment without parole. Mr. Sanders is an indigent black man who has never committed a violent crime. He was sentenced under Alabama's habitual offender statute after he was convicted of stealing a bicycle from a porch in Mobile, Alabama.

5. Following the execution of the Paraguayan national in the U.S., the State Department issued a statement acknowledging that it had violated the Vienna Convention and issued an apology to Paraguay. See, U.S. Department Of State Office of the Spokesman, Press Statement, (Statement released in Asuncion, Paraguay), November 4, 1998.

6. In Penry v. Lynaugh, 492 U.S. 302 (1989), the U.S. Supreme Court held by a five to four vote that the Eighth Amendment does not prohibit states from executing people with mental retardation. The Court acknowledged that the majority of citizens are against executing people with mental retardation but refused

the point at which most Americans would reject capital punishment for those with deficits in logical reasoning, impulse control and the ability to anticipate and appreciate consequences. It is now clear that the evolution of "decency" in America has failed to keep pace with the development of international human rights norms that prohibit the use of the death penalty against juveniles and the mentally disadvantaged.⁷

The United States leads the world in executing juvenile offenders. Of the six countries known to have executed juvenile offenders since 1990,⁸ only the United States executed juvenile offenders last year. Sixty-five juvenile offenders are currently being held on death row in America⁹. Of the thirty-eight states and the federal government that have statutes authorizing the death penalty, four states have set the minimum age of eligibility for a death sentence at seventeen, and twenty states use age sixteen as the minimum age.¹⁰ In light of recent increases in violent juvenile crime, political leaders have proposed legislation under which children as young as eleven could be sentenced to death.

Discrimination on the basis of race is particularly egregious among juvenile offenders. Seventy-five percent of juvenile offenders executed in the U.S. were people of color, while nearly ninety percent of the victims were white. Of the nine girls executed in United States history, eight were African

*to make a broad ruling that all people in this condition should be excluded from the death penalty without a clear consensus supporting such a ruling from legislative action on the part of the states. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), five out of nine Justices voted that execution of offenders aged sixteen or seventeen at the time of their crimes did not violate the Eighth Amendment.*

7. Article 6(5) of the International Covenant on Civil and Political Rights and the American Convention on Human Rights provide that the death penalty shall not be imposed for crimes committed by persons below eighteen years of age. The U.S. signed both agreements but reserved the right to execute any person except a pregnant woman. The U.S. is also the only country in the world that has not yet ratified the United Nations Convention on the Rights of the Child, also prohibiting the execution of juveniles.

8. These countries are: Iran, Yemen, Pakistan, Saudi Arabia, Nigeria, and the United States.

*9. These figures are not readily obtainable, so this figure may represent an underreporting of juvenile offenders on death row. There may have been as many as seventy-four juveniles on death row as of October 1998. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1973 - October 1998* (Claude W. Pettit College of Law, Ohio Northern University, Ada, O.H.), 1999, at 9. The United States has the most juveniles awaiting execution on death row of any country in the world.*

10. Eighteen is the minimum age in California, Colorado, Connecticut, Illinois, Kansas, Maryland, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee and Washington. Seventeen is the minimum age in Georgia, New Hampshire, North Carolina and Texas. Sixteen is the minimum age in Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia and Wyoming.

American and one was Native American. Today, juvenile death sentences are given much more frequently to African Americans and Latinos than to whites. Of those sentenced to death for crimes committed as juveniles, nearly two-thirds are African American. The trend toward executing younger children in the U.S. seems to get worse each year. Last year in the state of Alabama, nearly fifty percent of those sentenced to death were nineteen years old or younger

The backgrounds of the vast majority of juvenile offenders on death row entail numerous mitigating circumstances that court-appointed attorneys or public defenders often fail to discover.¹¹ Of the thirteen juvenile offenders executed since 1974 - ten of whom were put to death in this decade - most had backgrounds of serious emotional or material deprivation. A 1988 study of fourteen juvenile offenders sentenced to death revealed that all had suffered head injuries as children and had serious psychiatric problems. Twelve of these boys had been beaten, whipped, or otherwise physically abused, and five had been sodomized by older male relatives. Only two had IQ scores above ninety and three did not learn to read at all until they reached death row. Nine boys showed serious neurological abnormalities, including brain damage, seizures or unusual brain wave patterns. All suffered from mental illness - seven were psychotic, four had a history of severe mood disorder, and the other three had periodic paranoid ideation,¹² yet only five received any psychiatric evaluation before their trials.¹³

Executing the Mentally III

Histories of severe abuse, mental illness and retardation are not unique to juveniles on death row. Despite the Supreme Court's mandate that mental disorders must be presented to juries as mitigating factors, thirty-four adults and juvenile offenders known to be mentally retarded have been executed in

11. *Poor children are likely to get minimal representation and therefore are more likely to get the death penalty. Court-appointed attorneys or public defenders often fail to conduct adequate investigations into the juvenile's background or psychiatric history and thus miss the opportunity to present important mitigating evidence at trial or at sentencing.*

12. *Paranoid ideation is a condition under which an individual has suspicions of being harassed and persecuted, often leading the afflicted individual to assault perceived enemies.*

13. *The study was conducted by Dr. Dorothy Otnow Lewis, a psychiatrist at the New York University School of Medicine, and Dr. Jonathan H. Pincus, Chairman of Neurology at the Georgetown University Medical Centre. Amnesty International, United States of America: The Death Penalty and Juvenile Offenders 1 (Supp. 1994), at 73.*

the United States to date. The American public and twelve states have recently opposed capital punishment for the mentally retarded, but more than three hundred people known to be retarded currently await execution on death row.¹⁴

Mental illness among those sentenced to death is prevalent but likewise tends to go undetected. The Supreme Court held in 1986 that the insane cannot be executed, but this decision protects only "those who are unaware of the punishment they are about to suffer and why they are to suffer it."¹⁵ Mentally ill and retarded defendants who display even fleeting or minimal comprehension are considered "death eligible."¹⁶

The Poor and the Death Penalty

It is frequently said that in the United States, "capital punishment means them without the capital gets the punishment." Critics of the American system of justice have long maintained that the U.S. system works much better for the rich and guilty, than the poor and innocent. There is a great deal of anecdotal evidence to support this view. There is no question that the problems of indigent capital defendants and death row prisoners in obtaining adequate legal assistance is one of the most troublesome aspects of capital punishment in the United States. Much has been written about capital trials in the U.S. where the defense attorneys were asleep, intoxicated, publicly stating a personal desire that the client be convicted and executed, directing racial slurs at the client, or otherwise providing ineffective assistance of counsel. In many of these cases, courts permitted the accused to be executed because judges have become increasingly reluctant to reverse cases due to claims of ineffective assistance of counsel.¹⁷

14. Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Nebraska, New Mexico, New York, Tennessee, Washington and the federal government forbid the execution of the mentally retarded. Still, some estimate that ten percent of death row inmates may be afflicted with mental retardation, which would mean there are more than 600 mentally disadvantaged inmates on death row nationwide.

15. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the insane cannot be executed, but failed to define "insane." Later decisions have adopted this standard set out by Justice Powell in his concurrence.

16. Denis W. Keyes and William J. Edwards, Mental Retardation and the Death Penalty, 21 MPDLR 5, 687, Sept. - Oct. 1997. The United States Constitution mandates that states may execute only those persons whose culpability and moral blameworthiness are proportional to the punishment. "Culpability" refers to a defendant's capacity to distinguish between right and wrong. Today, courts determine that defendants are "death eligible" if there is at least a minimal showing of moral awareness and a basic comprehension that the criminal act was wrong. Ibid.

17. See e.g., Stephen Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the

The inadequate legal assistance many capital defendants receive is partly a function of the low priority such representation is given in the American capital punishment system. Lawyers who are forced to handle these cases are frequently overwhelmed, underpaid and grossly unprepared to make an effective case for life. In some jurisdictions, a shockingly high percentage of the lawyers who have handled capital cases at trial have since been disbarred for illegal or unethical conduct in other areas of their practice (at three to forty-six times the normal rates for disbarment in the practice of law generally).

Inadequate representation is even more severe for those who have already been sentenced to death. There are hundreds of death row prisoners in the United States who currently have no legal representation and dim prospects of finding counsel. With no constitutional right to counsel, unaided condemned prisoners cannot effectively access collateral appeals that have frequently proved vital in demonstrating innocence or other law violations. The American death penalty is unquestionably influenced by class and wealth considerations.

Racial Bias in the Administration of Capital Punishment

The imposition of the death penalty in the U.S. continues a nefarious tradition of racial discrimination in violation of international human rights treaties.¹⁸ Of the 3,700 people currently on death row more than half are people of color: 46.48 percent are white, 42.53 percent are black, 8.39 percent are Latino, and 1.35 percent are Native American. African Americans are disproportionately represented given that black people comprise only twelve percent of the U.S. population. Examining the statistics for some states reveals an even bleaker picture. In Pennsylvania, eighty-three percent of people sent to death row from its capital, Philadelphia, are African American.

The race of the victim also affects the likelihood that an accused will face a death sentence. Strikingly, of the 500 people executed between 1976 - the year the U.S. Supreme Court permitted the reinstatement of the death penalty - and the end of 1998, eighty-one percent were convicted for the murder of

Worst Lawyer, 103 YALE LAW JOURNAL 7, May 1994.

18. The U.S. ratified the International Convention on the Elimination of all Forms of Discrimination twenty-eight years after signing the treaty. The U.S. has not, however, submitted any of the reports required of signatories describing its efforts to bring domestic law into compliance with the Convention.

a white person despite the fact that about half of all U.S. murder victims are black. These figures are a stark indication of the insignificant value frequently given to the lives of African Americans and other people of color in the U.S. criminal justice system. The racial composition of those executed and of current death rows in certain geographic locations also reveals a strong bias in the administration of capital punishment. In the southern states of Alabama, Georgia, and Mississippi, two-thirds of those executed have been black.

In addition to the laws of the individual states permitting executions, the federal government permits the use of capital punishment for certain offenses that violate federal law. Since 1988, the U.S. Attorney General has authorized 156 prosecutions in which the death penalty has been sought-of that total, seventy-four percent of the accused individuals have been members of minority groups.¹⁹ The U.S. federal government has permitted the expansion of the death penalty although its own government study has found evidence of racial discrimination.²⁰

The death penalty is not mandated in the U.S. for any crime. This introduces a large element of uncertainty and discretion into the selection of who will die. Prosecutors, guided by state statutes, determine in which murder cases to seek the death penalty. The discretion given to prosecutors results in the unconscious and conscious discriminatory prosecution of individuals.²¹ Racial discrimination also occurs in the selection of juries for capital cases. Prosecutors and defense attorneys are permitted discretionary strikes to exclude some people from serving on a particular jury. Despite a Supreme Court ruling forbidding it,²² prosecutors frequently utilize these strikes to exclude racial minorities. Ramon Mata, on death row in Texas, was sentenced to death by an entirely white jury. Mata's own attorney agreed with the prosecutor to remove all non-white potential jurors. The case was appealed

19. The total is comprised of eighty-three African Americans, twenty-nine whites, twenty-four Hispanics, and ten Asians/Indians.

20. In 1990, the United States General Accounting Office reviewed twenty-eight state studies on death penalty sentencing throughout the U.S. and found that the studies consistently show "a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition of the death penalty." The Agency also found that in eighty-two percent of the studies the race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty.

21. For example, in 1993, Walter McMillan, a black man, was released from death row after serving six years for a crime in which the prosecutors buried evidence of his innocence.

22. See *Batson v. Kentucky*, 476 U.S. 70 (1986).

to a higher court, which found that Mata's right to a fair trial had not been violated.²³

In 1986, the case of *McCleskey v. Kemp*²⁴ went before the Supreme Court of the United States, providing the Court with an opportunity to remedy these egregious racial disparities. It did not do so. William McCleskey, a black man, presented a study²⁵ that established that people accused of killing a white person were 4.3 times more likely to receive the death penalty than individuals accused of killing African Americans. If the accused was African American and the victim was white the probability of being sentenced to death increased. McCleskey fell into this category. The Court accepted the disparities "as an *inevitable* part of our criminal justice system."²⁶ The Court concluded that the Baldus study did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process."²⁷ For the Supreme Court of the United States the evidence presented of systemic racism in the criminal justice system was not sufficient to establish racial bias in this individual case.

The opinion of the Court in *McCleskey* also stated that the claims raised by McCleskey would be better addressed by the legislature; however, the legislature has failed to act. In 1988, the Fairness and Death Sentencing Act -- also known as the Racial Justice Act -- was proposed in the U.S. Congress. In short, the Racial Justice Act would have permitted individuals to do what the Supreme Court did not permit Walter McCleskey to do--use evidence of systemic racism in the administration of the death penalty as a basis for overturning individual sentences of death. To date, despite reintroduction of the Act to the legislature on numerous occasions the Act has not become law. Only the state of Kentucky has passed a Racial Justice Act. The *McCleskey* decision has effectively made racial bias an inevitable feature of

23. In Alabama there have been at least twenty-eight death penalty cases in which courts have concluded that prosecutors illegally excluded black people from jury service in a racially discriminatory manner.

24. 481 U.S. 299, reh'g denied, 482 U.S. 920 (1987).

25. The study, conducted by Professors Baldus, Charles Pulaski, and George Woodworth - known as the "Baldus study" -- is the most authoritative study conducted on the racial disparities in the administration of the death penalty. The Baldus study examined over 2,000 murder cases that took place in the southern state of Georgia. The analysis took into account 230 factors that could have explained the gap between whites and blacks who are sentenced to death.

26. *McCleskey*, supra, 481 U.S. at 312-13.

27. *Id.* at 313.

the American death penalty. The International Convention on the Elimination of All Forms of Discrimination (ICERD), Part I, Article I, defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent . . . *which has the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of human rights . . ." (emphasis added). In Article 5, the Convention imposes an affirmative duty on countries to "eliminate racial discrimination." The U.S. is in direct contravention with this Convention with regard to unequal application of the death penalty.

Executing the Innocent

Despite the elaborate review process surrounding capital cases in the United States, there have been ninety documented cases to date of innocent people who have been wrongly sentenced to death for crimes they did not commit. Some of these innocent men and women came within hours of an execution before being spared.²⁸ For every eight people executed in the United States, an innocent person has been identified. This shockingly high rate of error has caused a few states to consider a moratorium on capital punishment, but has left most proponents of the death penalty undeterred.

Recent advances in DNA testing have played a role in identifying some of the innocent on death rows across the United States. However, police and prosecutorial misconduct, mistaken identifications, inadequate defense lawyering and other inherent problems in the politicized, wealth-dependent system of American justice may account for most of these unjust death sentences. These problems do not lend themselves to quick or immediate solutions, which is why the call for a moratorium may have greater resonance in years to come.

Much Cost with Little Benefit

The current research suggests that capital punishment has had no measurable impact on reducing violent crime in the United States. The majority of death penalty states have murder rates higher than those of non-death penalty states. Indeed, the average murder rate per 100,000 population in death penalty states was 6.6 in 1997, while it was only 3.5 in non-death penalty states.

²⁸. For example, in 1996, due to his innocence, Joseph Payne had his sentence commuted by the Governor of Virginia a mere few hours before his execution.

Even when controlling for geographic location, these trends persist. Missouri, a death penalty state, has a murder rate more than four times that of Iowa, a non-death penalty state. Similarly, Illinois, a death penalty state, has a murder rate more than twice that of Wisconsin, a non-death penalty state. While none of this evidence is conclusive, it does suggest that there is no measurable benefit to public safety that can be correlated to capital punishment. However, there are extraordinary costs.

Administration of the death penalty is alarmingly expensive and in several studies much more so than incarcerating an individual for life with no possibility of parole. In Texas, for example, a death penalty case costs the taxpayers an average of \$2.3 million in 1994 -- about three times what it would have cost to incarcerate an individual in a maximum security prison for forty years. The cost in Florida was \$3.2 million. The death penalty costs California an average of \$90 million a year beyond the ordinary costs of its criminal justice system. Seventy-eight million dollars of that \$90 million total is expended at the trial level. With a viable alternative to capital punishment at our disposal - life without parole - the maintenance of a criminal justice system that includes capital punishment makes no economic sense.

Conclusion

There has been, within the past couple of years, some movement toward closer examination of the death penalty and even the implementation of a moratorium on executions in the U.S. On February 3, 1997, the American Bar Association called for a moratorium until severe problems with the application of capital punishment in the U.S. are addressed.²⁹ Specifically, the Bar Association is concerned with the lack of adequate counsel for defendants in capital cases, adequate access to state post-conviction and federal habeas corpus proceedings, racial discrimination in the application of the penalty, and the execution of mentally retarded and juvenile individuals.

The widespread use of capital punishment in the United States has created serious questions about the commitment of America to international human rights. Exacerbated by race and economic discrimination, politicized trials and review procedures, execution of juveniles and the mentally ill, and the

29. *American Bar Association Recommendation 107 (Approved by ABA House of Delegates, February 3, 1997).*

serious risk of executing the innocent, the death penalty has isolated the United States from many of its allies in the international human rights community. The lack of self-examination and debate about U.S. non-compliance with international law and standards on this issue is particularly disconcerting for advocates of human rights. Capital punishment, regardless of what one thinks of it morally, is an unfulfilled promise which has failed to deter violent crime, as well as to meaningfully cure the emotional wounds suffered by the families of the victims of these crimes. It has, in the United States, provided only a high cost vehicle for vengeance which is delivered without the necessary safeguards to ensure its fair administration.

When the answer to the ills of our society becomes vengeance - a distorted and irreversible need for "justice" that involves the very violence it seeks to eradicate - we cannot help but to tarnish our individual and collective core values. Our need to seek revenge, and to have the state sanction such revenge, provides the wrong message for our youth, as the recent tragedies in our schools involving mass shootings have demonstrated. How can we blame children for seeking revenge on those who betray them when we, as legislators, lawyers and policymakers, seek to do the very same on the errant members of our society?

Dostoevsky and Tolstoy were great thinkers whose observations of humankind convinced them of a basic truth: each of us is more than the worse thing that we have ever done. This truth is relevant to our understanding about human rights and capital punishment. I believe that if someone tells a lie, he is not just a liar; if a person steals something, she is not simply a thief; that even if you kill someone, you are more than just a killer. I congratulate all of those who have pushed the Caribbean forward on the issue of capital punishment because through your acts you have reflected the kind of respect for human worth and human rights that challenges and inspires us all. All of us must stand for the proposition that the deepest value we as a society can claim is our humanity. It is encouraging to human rights advocates around the world to see the legacy of justice for all honored by the courageous acts taken by reformers and leaders in this region.

One day a new chapter in the evolution of human rights in the Caribbean will be written. The future story will almost certainly recognize this important

gathering of activists and attorneys who came together in Belize to reinforce the importance of confronting injustice, capital punishment and unfair systems of punishment. I'm pleased to share in this moment with you and to join in the continuing struggle for justice throughout the Caribbean.

The Commonwealth Caribbean and evolving international attitudes towards the death penalty

Saul Lehrfreund MBE*

International Standards

The retention of the death penalty for grave offences at common law is not contrary to international law. Article 2 of the European Convention on Human Rights ("ECHR") recognises execution as an exception to the right to life. 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."

Article 4 of the American Convention on Human Rights ("The Convention") contains extensive provisions concerning the death penalty. It is very similar to article 6 of the ICCPR but specifically prohibits the extension or re-introduction 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.

As the Inter-American Court of Human Rights observed in *Restrictions to the Death Penalty*:¹

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

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1. 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.

designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance. (para.57).

The UN 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. These were further developed by the UN Economic and Social Council in 1989. 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.²

The ICCPR and the regional human rights instruments all have separate protocols to abolish the death penalty.³ 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 1998.⁴ Now it has been abolished, its restoration is prohibited by international human rights law.

The number of states that choose to bind themselves, as a matter of international law, to the abolition of the death penalty continues to grow. Those countries that have not yet accepted the abolitionist norms are subject to a number of specific rules limiting the use of the death penalty. The question that must now be answered is whether Caribbean countries remain separate from the emerging international order on the death penalty.

International law and domestic courts

In the exercise of its constitutional jurisdiction the domestic courts in the Caribbean, when determining issues concerning the application of capital punishment, should have regard to international norms as illustrative of contemporary standards of justice and humanity.

2. ECOSOC Res. 1989/64 at para.1(d).

3. 2nd 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.

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

National courts of several states including South Africa,⁵ Zimbabwe,⁶ Canada⁷ and the United Kingdom,⁸ have found international law to be particularly helpful in the interpretation of such notions as the right to life and the protection against cruel, inhuman and degrading punishment. In the decision of the South African Constitutional Court, which found capital punishment to be unconstitutional, Chaskalson P said:-

"The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention".⁹

The reach of the Bills of Rights within the constitutions determines to a large extent the role the constitutional courts are able to play in the application of the death penalty. The human rights provisions in the earlier Caribbean constitutions are grounded in international human rights standards derived from the UN Declaration on Human Rights and the ECHR. Later Bills of Rights (e.g. Trinidad & Tobago) draw from the Canadian Bill of Rights Act of 1960. The approach taken by international tribunals to the interpretation of international human rights instruments is that they are living instruments which must be interpreted in light of present-day conditions¹⁰. Like international instruments contemporary constitutions should also be regarded as living instruments, whose broad words should be given a generous interpretation "suitable to give individuals the full measure of the fundamental rights and freedoms referred to".¹¹

In contrast to the dynamic approach afforded to the interpretation of international instruments, the resolution of constitutional issues by the domestic courts, concerning the application of the death penalty, is severely hampered by limitations to the existence and enjoyment of human rights.

5. *Makwanyane and Mchunu -v- The State* (1995) Case No. CCT/3/94.

6. *Catholic Commission for Justice and Peace in Zimbabwe -v- Attorney-General et al* (1993) 1 Z.L.R 242 (S).

7. *Kindler -v- Canada* [1991] 2 SCR 779.

8. See for a recent example in the field of criminal law *R -v- Sec State for the Home Department ex p Simms* [1999] 3 WLR 328.

9. *supra* note 5, at para.34.

10. *Tyner -v- UK* (1978) 3 EHRR 1 at para.31, adopted by the Inter-American Commission of Human Rights in *Hilaire -v- Trinidad and Tobago* (Report No.66/99, 21 April 1999).

11. *Minister of Home Affairs-v- Fisher* [1980] AC 319 at 328 F-G. See also *A-G of the Gambia -v- Jobe* [1984] 689 at 700.

Some Caribbean constitutions contain a general savings clause preserving the validity of all pre-existing law, thus providing the state with a shield to protect itself from a claim that a law or action is unconstitutional. In addition, nearly every constitution contains a special clause ensuring the lawfulness of punishments which were lawful prior to the constitution coming into force.¹² There can therefore be no challenge either to the lawfulness of the death penalty *per se*, to hanging as the preferred method of execution, or to the mandatory nature of the death penalty based on the prohibition against inhuman or degrading treatment or punishment.¹³

The one exception to this rule is Belize where the savings clause is expressed to apply for a period of five years after Independence Day.¹⁴ The intention of the framers of the Constitution was to allow for the development of constitutional protections in accordance with a developing sense of what was acceptable in a civilised society. In contrast to the constitutions of other Caribbean jurisdictions Belize has a living instrument which is no longer tied to the colonial *status quo*.¹⁵

The preservation of pre-existing law in most Caribbean states has had the effect of freezing certain provisions at the time of independence thus depriving judges from applying contemporary standards of justice and humanity to fundamental rights and freedoms.

It is an accepted canon of construction that domestic legislation, including the constitution, should, if possible be construed so as to conform to the obligations undertaken by State Parties to international human rights instruments.¹⁶ This is particularly so where a court is construing human rights provisions of a constitution grounded in international human rights standards. The existence of savings clauses has, however, in many cases prevented the courts from construing human rights provisions in a way which is compatible

12. See, for example, Art. 17(2) of the Bahamian Constitution and Art. 17(2) of the Jamaican Constitution.

13. See, for example, *Greene Browne -v- The Queen* [1999] 3WLR 1158, on the effect of savings clause provisions in *St. Christopher and Nevis*.

14. Independence Day was 21 September 1981.

15. The Report of the Constitutional Review Commission of Barbados (1998), recommended the deletion of the "Existing Law Clause" and the "Torture Proviso" on the basis that they did not reflect the international norms to which Barbados has subscribed. In relation to the "Torture Proviso", the Commission stated that it "constitutes a reservation that in essence defeats the very purpose and sense of the right which the section purports to protect".

16. See, *Matadeen -v- Pointu* [1998] 3 WLR 18, in relation to the impact of the ICCPR on the Constitution of Mauritius at 31G-33C; and, in relation to the ECHR, see *Ireland -v- UK* (1978) 2 EHRR 25.

with that countries' obligations under international human rights treaties, such as the Convention and the Covenant.

New international attitudes to the death penalty, as articulated by international tribunals, all too often remain outside the domestic legal sphere. Domestic courts are unable to ensure the incremental development of the constitutions in harmony with those countries international obligations. The unfortunate result is that too many Caribbean states remain separate from an emerging new international legal order on the death penalty.

The development of international legal principles concerning the application of capital punishment

International human rights instruments are clear that the application of capital punishment has to be severely restricted. The death penalty is associated with two fundamental human rights norms, the right not to be arbitrarily deprived of the right to life and the protection against cruel, inhuman and degrading punishment. Both of these rights have served to restrict and in some cases prohibit the use of the death penalty. These principles are the raw material from which the domestic interpretation of Caribbean constitutions should be derived.

The Inter-American Commission of Human Rights ("The Commission") has recently examined the compatibility of the mandatory death penalty with the Convention in cases from Trinidad, Grenada and Jamaica.

In *Hilaire -v- Trinidad*¹⁷ the Commission held that the mandatory death penalty breaches articles 4(1), 4(2), 5(1) and 5(2) of the Convention.¹⁸ The Commission concluded that:

*"International and domestic authorities suggest that individualized sentencing or the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of offenders and offences is a condition sine qua non for the non-arbitrary and humane imposition of capital punishment."*¹⁹

17. Commission Report 66/99 (21st April 1999).

18. The Inter-American Court of human Rights is now examining the compatibility of the mandatory argument in a series of cases from Trinidad and Tobago, referred to it by the Commission.

19. Baptiste, *Supra*. Note 17 at para. 59.

In *Hilaire*, the Commission reviewed numerous international and domestic authorities, including *Woodson -v- State of North Carolina*²⁰, *State -v- Makwanyane and Mchunu*²¹ and *Bachan Singh -v- State of Punjab*.²² The Commission also made reference to the Ndiaye Report²³ by the UN Special Rapporteur on Extra-Judicial, Summary or Arbitrary Executions. Based on this review, the Commission concluded that:

"In determining whether capital punishment has been imposed in an arbitrary manner, the Commission considers that article 4(1) of the Convention should be interpreted to permit the imposition of the death penalty only through individualised sentencing, whereby the sentencing authority is afforded a discretion to consider the potentially mitigating circumstances of an offender and his or her offence in determining whether the death penalty is the appropriate punishment."

"Such an interpretation [of article 4 of the ACHR] accords with contemporary human rights standards, as articulated by international and domestic tribunals, which reject the blind infliction of the death penalty based solely upon conviction for a designated offence as arbitrary and inconsistent with the objective of ensuring that the death penalty is applied in only the most exceptional and appropriate circumstances."²⁴

On this basis the Commission found that the mandatory imposition of the death sentence in all cases of murder in Trinidad and Tobago breached Article 4 of the Convention. The Commission also found that individualised sentencing was a lawful imposition of capital punishment under Article 5 of the Convention, which, inter alia, prohibits "cruel, inhuman and degrading punishment or treatment".²⁵

In the cases of *Baptiste -v- Grenada*²⁶ and *Rose and Others -v- Jamaica*²⁷ the Commission also found that the mandatory death penalty in Grenada and

20. (1976) 428 US 280 (US Supreme Court).

21. *Supra*. Note 5, at pp. 32-36.

22. (1980) 2 SCC 475 (Supreme Court of India).

23. UN Doc.E/CN.4/1995/61, 14 December 1994.

24. *Supra*. Note 17, at

25. *ibid.* at paras. 73 and 74.

26. Commission Report 38/00 (13 April 2000).

27. Commission Report 41/00 (14 April 2000).

Jamaica breaches Articles 4 and 5 of the Convention. The Commission, however, went further in finding that the imposition of a mandatory death sentence could not be reconciled with an offender's right to due process as contemplated in, and as provided for, in Articles 4 and 8 of the Convention.

In *Baptiste* they concluded that:

*"The due process guarantees under Article 8 of the Convention, when read in conjunction with the requirements of Article 4 of the Convention, presuppose as part of an individual's defence to a capital charge an opportunity to make submissions and present evidence as to whether a death sentence may or may not be permissible or appropriate punishment in the circumstances of his or her case."*²⁸

The Commission considered that international and domestic jurisdictions indicated that:-

*"... a principle of law has developed common to those democratic jurisdictions that have retained the death penalty, according to which the death penalty should only be implemented through "individualized" sentencing."*²⁹

In those countries whose constitutions contain a general savings clause, the impact of the pre-existing law rule means that certain grievances are only capable of examination at the international stage. The constitutional courts in Jamaica, Trinidad and Tobago, the Bahamas and Barbados are powerless to consider any challenge to the mandatory nature of the death penalty. The inability of the domestic courts in the Caribbean to effectively examine all the issues has made the adherence to international instruments such as the Convention and the Covenant even more critical.

The constitutional framework in these countries prohibits the courts from adopting a dynamic approach to the application of human rights within a state. As a consequence, constitutional review of legislation is reserved for governments making new law who are anxious to be able to respond to concern at rising crime, the supposed deterrent effect of the penalty and the increasing call for public retribution against those who commit heinous crimes.

28. *Baptiste*, *Supra* Note 26, at para. 92.

29. *Ibid.* at para.95.

In contrast to the restrictive constitutions of Jamaica, Trinidad and Tobago, Barbados and the Bahamas, the constitutions of a number of countries including St. Lucia and St Christopher & Nevis only partially immunise from attack the mandatory death penalty. Whilst no argument can be mounted that the mandatory death penalty constitutes inhuman and degrading punishment, the constitutional courts can determine whether such a penalty infringes the right to the protection of the laws and the right to be free from arbitrary treatment.³⁰ Given the similarity between the provisions of the constitutions and the Convention, the domestic courts should take into account the highly relevant recent decisions of the Commission.

In *Baptiste* and *Rose and others* the Commission also considered whether the exercise of the Prerogative of Mercy, as mandated in the constitutions and interpreted by the domestic courts, provides condemned men with an effective right to apply for amnesty, pardon, or commutation of sentence, in accordance with Article 4(6) of the Convention. The Commission held that in order to render Article 4(6) "practical and effective" the right to apply for mercy "must be interpreted to encompass certain minimum procedural guarantees for condemned prisoners."³¹

In *Reckley -v- Minister of Public Safety (No.2)* and *de Freitas -v- Benny*,³² the Privy Council held that the exercise of the Prerogative of Mercy involved an act of mercy that is not the subject of legal rights. As a consequence, there is no right to a hearing before the local mercy committee, no right to see material placed before that body and no right to challenge its conclusions.

In a series of constitutional appeals from Jamaica,³³ the Judicial Committee of the Privy Council were recently asked to re-consider *Reckley (No.2)* and *de Freitas*. The appellants submitted that when construing the provisions of the Jamaican Constitution relating to the exercise of the Prerogative of Mercy, the constitution should be interpreted so as to conform to the specific obligation arising out of article 4(6) of the Convention, as considered by the Commission.

30. A number of appeals are pending determination in the Eastern Caribbean Court of Appeal and the Privy Council. It is submitted that the mandatory death sentence passed on the appellants is unconstitutional on the basis that it amounts to an arbitrary deprivation of life.

31. *Baptiste*, *Supra*, note 26, at para. 123.

32. *Reckley (No.2)* [1996] 2 WLR 281 and *de Freitas* [1976] 2 AC 239.

Public opinion and changing international attitudes

It is recognised that countries in the Caribbean have rising crime rates, and an unacceptably large number of murders. Capital punishment remains popular as a penalty with the electorate, although the basis for its popularity has never been properly examined. There is a popular misconception that the death penalty deters people from committing murder and thus safeguards the lives of others. There is however, no evidence for such a proposition. Every statistical survey that has been conducted and examined by the courts suggests that the death penalty produces no deterrent effect on the murder rate any different from a long sentence of imprisonment.

In *Makwanyane*,³⁴ the South African Constitutional Court rejected arguments that the death penalty deters crime:

"We would be deluding ourselves if we believe that execution of...a comparatively few...people each year...will provide the solution to the unacceptably high rate of crime...The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system."³⁵

The South African Constitutional Court also rejected the proposition that public opinion should be a determining factor in a state's decision whether or not to use the death penalty.

"Public opinion...is no substitute for the duty in the Court to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication...The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and the marginalised people of our society. It is only if there is a

33. *Lewis and Others -v- Attorney General of Jamaica*. The appeal was heard in April 2000. Judgement was reserved and is pending delivery.

34. *Supra*, Note 5.

35. *ibid*, at paras. 117-122.

*willingness to protect the worst and weakest amongst us that all
of us can be secure that our own rights will be protected.*³⁶

Political popularity of a particular practice, is no guide as to whether it is just, lawful, or constitutional and in accordance with fundamental rights and the international obligation of states.

Whilst the death penalty retains its popularity with the electorate, international attitudes towards the death penalty are changing as more countries have taken steps to exclude the death penalty from domestic law. As support for abolition internationally has grown, so have efforts to influence those states that retain capital punishment through the development of restrictions and limitations in international law.

So far, one hundred and eight states have abolished the death penalty in law (86 states) or in practice (22 states). Of those which have formally abolished the death penalty, thirteen retain it for exceptional crimes such as those committed in wartime. Eighty-seven states retain the use of the death penalty, although not all execute prisoners in a given year.³⁷

In Europe there is strong political support for the abolition of the death penalty. By 1994, the Parliamentary Assembly of the Council of Europe expressed the clear view of most European Governments that *"the death penalty has no legitimate place in the penal system of modern civilised societies...it's application may well be compared to torture."*³⁸

The United Kingdom recently translated this principle into foreign policy, announcing that Britain would take a clear, unequivocal stand against the death penalty.³⁹ In June 1998, under the United Kingdom Presidency of the EU, guidelines were agreed towards third countries which had not abolished the death penalty. The guidelines state that the objectives of the European Union are to work towards the abolition of the death penalty as a strongly held policy view agreed by all European Union member States.

36. *Ibid.*, at paras. 87 and 88.

37. Further information can be found on Amnesty International's website at www.amnesty.org.

38. Council of Europe, Parliamentary Assembly Recommendation 1246 (1994). In Resolution 1097 (1996), The Parliamentary Assembly of the Council of Europe stated that: *"the willingness...to introduce moratorium [on executions] upon accession [to the Council of Europe] has become a prerequisite for membership of the Council of Europe on the part of the Assembly."*

39. Statement by Foreign Secretary Robin Cook, October 16, 1998, UN. Doc. E/CN4/1998/82 (1998).

This approach is not restricted to European countries. When the United Nation's Security Council drafted the Statute of the Rwanda Tribunal, the death penalty became one of the most contentious issues. It was eventually agreed that international judges should not be able to impose the death penalty for Genocide.

A further illustration of the changing international attitude towards the death penalty, is provided by the moves to establish the International Criminal Court. The International Law Commission's draft statute for a permanent international court, which is to have jurisdiction over serious violations of humanitarian law and crimes against humanity, including genocide, also excludes the death penalty.⁴⁰ This was re-iterated at the Rome Diplomatic Conference in 1998, where it was confirmed that the Court would have no power to impose death sentences.

Commonwealth Caribbean states whilst relying on popular support for the retention of the death penalty, feature prominently as states who are out of step with the general international trend towards abolition and the emerging new international order on the death penalty. The recent decisions of Jamaica and Trinidad and Tobago to denounce the Optional Protocol to the Covenant, and Trinidad's withdrawal altogether from the American Convention on Human Rights provide further compelling evidence that these countries are out of step with changing international attitudes towards the death penalty.

The removal of international scrutiny in the application of capital punishment

In *Pratt and Morgan -v- The Attorney General of Jamaica*⁴¹ the Privy Council concluded that by prohibiting the infliction of inhuman and degrading treatment or punishment, the Constitution of Jamaica precluded the carrying out of a sentence of death after unreasonable delay following sentence. The overall conclusion was that any delay of over five years from sentence to the carrying out of execution would constitute strong grounds for the conclusion it would be inhuman and degrading treatment. It was recognised that some period must be allowed for the condemned prisoners to access international bodies in accordance with the state's ratification of the Optional

40. UN Doc. A/49/10 (1994), Art.47.

41. [1994] AC 239.

Protocol and the Convention, but time continued to run against the state whilst the advice of such bodies was sought.

Jamaica and Trinidad and Tobago considered that *Pratt and Morgan* required them to consider their adherence to both the Optional Protocol and the Convention. This was on the basis that they would not be able to carry out the death penalty, given the risk that the domestic and international process would not be completed within the five years

In May 1998, Trinidad denounced the American Convention on Human Rights, an action not unconnected to Jamaica's move in October 1997, when it became the first state ever to withdraw the right of individual petition to United Nations Human Rights Committee under the Optional Protocol. Unprecedented in international law, these actions go against and undermine fifty years of international human rights protection.

On 26 May 1998, the Government of Trinidad and Tobago also withdrew from the Optional Protocol. Nevertheless, on the same day it re-acceded to that Instrument, subject to a reservation to exclude any communication:

"Relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith".⁴²

On 31 December 1999, the UN Human Rights Committee issued a landmark decision rejecting Trinidad and Tobago's attempt to stop appeals to international tribunals on behalf of individuals sentenced to death. In its decision, the Committee rejected Trinidad's reservation stating that:

"The Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population.... This constitutes a discrimination which runs counter to some of the most basic principles embodied in the Covenant and its Protocols".⁴³

42. On 5 January 1999, The Government of Guyana denounced the Optional Protocol. On the same day they re-acceded to the Optional Protocol subject to a Reservation precluding the Human Rights Committee from considering petitions brought by people under sentence of death.

43. *Rawle Kennedy v The Republic of Trinidad and Tobago*, Communication No. 845/1999. The Committee ruled 9-4 against the reservation being invalid.

As a result, capital defendants in Trinidad and Tobago were free again to petition the UN Human Rights Committee in order to complain that their internationally protected human rights have been violated. That was until the government's decision on 27 March 2000 to withdraw from the Optional Protocol.

The actions of Trinidad, Jamaica and Guyana have dramatically reduced the remedies available to death row prisoners under international law. The government's justification for such draconian and unprecedented measures is to avoid delays in carrying out the death penalty, due in part to the time taken to consider communications by international tribunals. While these countries claim to be concerned about the length of proceedings before international bodies, this claim is actually a smoke screen as these measures are unnecessary as well as undesirable for a number of reasons. Pre-trial delays that were entirely the consequence of poor administration of justice can be readily eliminated. Secondly, in *Thomas -v- Baptiste*,⁴⁴ the Privy Council confirmed that international remedies are part of the remedies made available by the state to a condemned man whereby injustice can be cured. This is particularly critical when the pre-existing law rule gives rise to grievances only capable of examination at an international level. Thirdly, in *Thomas* the Privy Council recognised that different considerations apply to domestic and international post conviction delay. Where there has been compliance with the target period in domestic proceedings, subsequent delay at international level will not necessarily preclude execution if commutation is not granted.

Trinidad's reaction to the decision in *Rawle Kennedy*,⁴⁵ by withdrawing from the Optional Protocol altogether, can only be seen as an attempt to avoid international scrutiny in the application of capital punishment. This course of action has also taken away, from all citizens, many rights unrelated to the death penalty such as the guarantee of non-discrimination, the rights to privacy, freedom of expression and freedom of religion.

Trinidad and Jamaica have now taken a lone stance in the international arena as the only group of countries to withdraw deliberately from the rule of

44. [1999] 3 WLR 249.

45. *Supra*. Note 43.

international human rights law. To impose and carry-out the death penalty in conditions that would escape international accountability is a clear indication that certain Caribbean countries are isolating themselves from international principles concerned with the application of the death penalty. It is hoped that the states concerned will re-accede to the regional and international human rights bodies, and so enable domestic executive practice to be informed by new international attitudes to human rights and fundamental freedoms.

Conclusion

Countries in the Commonwealth Caribbean are fortunate to have constitutions guaranteeing to all individuals fundamental rights and freedoms. Parliamentary sovereignty is exercised within the confines of those rights, reflecting international norms, and the effective enforcement of those rights is for the domestic courts. It has, however, been noted that the scope for dynamic jurisprudence by the courts, by examining the compatibility of ancient practices with modern standards, is all too often precluded by the saving of pre-existing laws. Thus practices such as the mandatory death penalty by hanging, close confinement pending execution, flogging, and the use of slop buckets, manacles and leg irons are precluded from being considered cruel and unusual treatment or punishment. In the circumstances, a worthwhile constitutional amendment would be one removing the restriction, imposed since independence, that colonial laws can never be considered to be cruel and unusual or inhuman or degrading. That would indeed enable the constitutionality of the death penalty to be considered and kept under review in changing circumstances by the domestic courts.

The evolution of international norms restricting the application of capital punishment and the gathering pace of the abolitionist movement have not been based on inappropriate sympathy towards those who have been convicted of dreadful crimes. In the United Kingdom the sequence of miscarriage cases has demonstrated that execution prevents rectification of injustice where cases of malpractice come to light.

The British courts have recently faced a series of references back to the Court of Appeal from murder convictions where the death penalty was carried out. In 1998, the Court of Appeal quashed the conviction of *Mahmoud Hussein*

Mattin,⁴⁶ who following his conviction at Glamorgan Summer Assize of murder was hanged in Cardiff Prison on September 8, 1952. In delivering judgement, Lord Justice Rose stated that the case had wide significance and clearly demonstrated that "*Capital punishment was not perhaps an appropriate culmination for a criminal justice system which was human and therefore fallible.*" There is no reason to believe that the British police officers dealing with the Guildford Four and Birmingham Six cases were uniquely wicked or that the prosecutors and scientists who have failed in their duties in other miscarriage cases have no counterparts elsewhere in the world.

International attitudes to the death penalty have evolved in the knowledge that the system of criminal investigation and prosecution is fraught with the possibility of human error and an over hasty response to appalling crimes.

In its recent Report on *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*⁴⁷, the UN Economic and Social Council found that from 1994 to 1999, a further 21 countries had abolished capital punishment. Opposition to abolition of the death penalty is currently concentrated mainly in the Middle East, North Africa and the continent of Asia. The Federal Government of the United States of America and 38 of its states, together with the countries of the English-speaking Caribbean, are the only jurisdictions in the Western hemisphere to retain the death penalty.

The UN Economic and Social Council observed that:

"... several states that retain the death penalty dispute the claim that the enforcement of capital punishment is a breach of human rights per se. It is maintained that it is an essential element in their armoury of punishment to ensure the control of serious crime. They also maintain that it is possible to enforce capital punishment equitably, without discrimination and with respect to legal due process and rights. The extent to which any system of capital punishment meets these objectives and requirements should be subject to empirical investigation drawing upon the experience of jurisdictions where the death penalty has been abolished. It is

46. *R -v- Mattin* (1998) Court of Appeal, Criminal Division.

47. *Report of the Secretary-General*, 31 March 2000, E/2000/3.

*notable therefore that, apart from the United States of America, very little work of this kind has been carried out by independent researchers in retentionist countries.*⁴⁸

In going against the trend of restriction and reduction, there are concerns that Caribbean states continue to keep the death penalty without assuming proper responsibility for the just and humane execution of it. States that wish to retain the death penalty have a duty to satisfy themselves and the international community at large that their policies and practices are in tune with their international human rights obligations and the emerging international order on the death penalty.

48. *ibid.* at para. 134.

Serious offences, gender and criminal justice: A plea for reason-in(g) equality

Tracy Robinson*

Introduction

In the Caribbean we have been engaged in ongoing and often heated dialogue, in and out of courtrooms, about the relation between criminal justice and human rights. Yet, this debate has failed to produce a clear idea of what concerns are raised by an examination of the concepts of gender, criminal justice and equality together. Interestingly, to the extent that this subject is raised, it often originates in a version of equality that concludes that women are, in both the literal and figurative senses, getting away with murder.

The goals of this paper are simple: As a feminist lawyer I want to respond to and challenge the understanding of equality offered in this type of reasoning. I hope to establish that the mandate of equality does not necessarily demand identical treatment or gender neutral laws. I will also try to demonstrate how matters of criminal justice, including the death penalty, are gender issues. Second, I want to encourage a more expansive vision of the issues of gender equality within the criminal justice system, one that attempts, among other things, to come to terms with women's realities. Finally, I will make an appeal for a broader human rights litigation agenda that is consistent with that vision.

I must also declare my limitations. My response rests largely at the level of theory because in the Caribbean we do not have the kind of empirical research that is essential to a fuller treatment of this subject. Although it is possible to get statistics on numbers of men and women arrested and convicted for various crimes, there is a need for a sophisticated gender analysis of all aspects of the trial process, including sentencing.

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Versions of equality-Efforts to Democratise Crime

My starting point is a series of remarks made in recent times about gender and criminal justice in the Caribbean, all of which present versions of the meaning of equality that I wish to challenge.

Mr. Charles Leacock, the Director of Public Prosecutions in Barbados, addressed the issue frontally in a paper titled "Sexual or Gender Discrimination in the Criminal Justice System of Barbados" presented at the University of the West Indies, Faculty of Social Sciences International Criminology Conference in October 1998. He began the paper by citing the introductory section to the chapter of the Barbados Constitution 1966 protecting 'fundamental rights and freedoms'.¹ Like other introductory sections, it states, *inter alia*, that every person is entitled to the fundamental rights and freedoms regardless of sex.² The DPP then went on to observe that in Barbados women constitute 52% of the population, but that there were only 32 women, as compared with 700 men, in the prison population, and that only 13 of these women were Barbadian.³ He immediately concluded that the underrepresentation of women in prison relative to the general population was as a result of 'differential treatment of women'.⁴

Extemporaneously, during his presentation at the conference, the DPP cited examples where women who killed men, in his view, received less harsh punishments than did men in *similar situations*. The DPP eventually concluded that "there is adequate evidence of differential although favourable treatment for women in the criminal justice system [and that] the justification for such discrimination remains elusive."

Others have echoed similar concerns about the application of capital punishment to men and women. The editorial in the Trinidad Guardian of June 27, 1998, "Should Women Hang?", offered the view that justice in the twin island republic of Trinidad and Tobago unduly favoured women in cases of murder and extreme violence, because the death sentence, even where passed,

1. C Leacock, "Sexual or Gender Discrimination in the Criminal Justice System of Barbados", presented at the University of the West Indies, Faculty of Social Sciences International Criminology Conference, 14 - 16 October 1998, 1.

2. Constitution of Barbados 1966, s 11.

3. Leacock, *supra*, at 1.

4. Leacock, *supra*, at 2.

is almost never carried out on women, and that the same is true for flogging for crimes such as serious wounding. The editorial continued:

"Maybe the time has come for our society to seriously consider whether this anomaly in the treatment of men and women murderers should be changed. It appears to be a tradition we inherited from the British judicial system, reflecting no doubt the mores and social attitudes of generations ago when women were considered the weaker and more tender vessel. Still, although the status of women has radically changed and in many areas they have achieved virtual equality with men, there may be some who would prefer to retain the tradition that they should not be subject to capital punishment."

In response to these types of remarks, the Attorney General of Trinidad and Tobago, The Hon. Mr. Ramesh Maharaj, assured the public that his government believed in 'equality of treatment' and that women, like men, would be hanged for murder.⁵ One prominent female attorney-at-law interviewed by the Trinidad Express in principle agreed, saying she could think of no reason, ethical or moral, as to why a woman should not be hanged.⁶ Another female attorney interviewed insisted that hanging was not a gender issue.⁷

Equality Abstracted and De-Moralised

It is the rhetorical force of equality that drives the comments and conclusions made by the Barbados DPP, Trinidad and Tobago Attorney General and the two Trinidadian attorneys. This is especially true of the statements of the first two who invoke the language of the chapter protecting 'fundamental rights and freedoms' in the Constitutions.⁸ I am about to take issue with the reasoning and conclusions made in these remarks because I believe they

5. *Ucil Cambridge, "AG: Women Will Hang" 26 September 1998, Trinidad Express.*

6. *Ibid.*

7. *Ibid.*

8. *This is somewhat ironic because Caribbean women have gained nothing in constitutional litigation from those provisions. Where sex is mentioned, in the introductory section to the bill of rights of most constitutions and article 29 of the Guyana Constitution, its presence is said to mean nothing because those provisions are said to be non-justiciable. Where sex is not mentioned, this time in the anti-discrimination clause of the Jamaica, Barbados, and Bahamas constitutions, its exclusion is said to mean everything and it cannot be implied within that section. Tracy S Robinson, "Protection of Fundamental Rights and Freedoms: Locating Women in Caribbean Constitutions" (unpublished manuscript) (on file with author).*

comprehend the mandate of equality both as an abstract idea and an amoral standard.

Take, for example, the DPP's concern about the lack of correlation between the numbers of women in the population and in prisons. I do not want to delay in pointing to the patent illogic of this conclusion. There is no doubt room for in-depth research and study, but the irresistible rejoinder is that women generally commit considerably fewer serious crimes and we would therefore expect to find smaller numbers of women in prisons.⁹ Gender remains the strongest predictor of criminal involvement.¹⁰ In Jamaica in 1999, for example, women accounted for only 10% of all arrests. Of the 551 persons arrested for murder in that year in Jamaica, only 24, a mere 4.4%, were women and it has been observed that most of the women arrested were accomplices.¹¹ It has also been noted that most of the women in Jamaican prisons are there on non-violent offences relating to drugs.¹²

Only if equality is conceived of so abstractly that we overlook the fact that men dominate criminal activity, can the small percentages of women in prisons be suspect under equality's scrutiny. Here we see a version of equality that says, without regard to context and gendered realities, that men and women must be treated the same. But notice also the amoral quality to the standard. The DPP somehow (ab)uses equality to concentrate on the question 'Why aren't there more women in prisons?', rather than the more pressing one about the normalisation of criminal conduct within the construction of Caribbean masculinity.

I want to make this same point about the amorality of equality in the versions presented in the previous section, this time using the call for women to receive similar treatment to men in respect of capital punishment. Equality here is a morally indifferent standard which does not display a distinct preference for whether the differential treatment identified as suspect should be remedied either by treating the women the same as men (hanging and flogging women

9. Belatedly, at the end of his paper, the DPP noted that "the fact that women offenders are less professional, more remorseful and highly amendable (sic) to police intervention as legitimate may explain this practice. Female offenders have few previous convictions and less serious offences than men. Thus, their under-representation in prisons seems justified." (*Ibid.*, at 7).

10. Messerschmidt, *Masculinities and Crime: Critique and Reconceptualisation of Theory* (1993) 1.

11. "Men outstrip women in crime" 13 August 2000, *Sunday Gleaner* 2 A.

12. *Ibid.*

as well as men), or the men the same as women (hanging and flogging neither men or women). The latter, hanging and flogging no one is the option consistent with the imperative against cruel and inhuman punishment, but it escapes equality's gaze, at least on this reading. The perverse outcome is that equality is employed to advance claims that are antithetical to the protection of other rights. To put in stronger terms, equality is manipulated to hijack other rights issues and to blind the eyes of human rights practitioners who cannot to be seen to repudiate equality-one of the most central and fundamental rights. Bringing it back to the death penalty issue, the question of women being hanged is presented as an example of gender discrimination, a rights issue to be addressed by hanging women as well as men; this in turn deflects attention away from substance of the punishment and whether it is consistent with human rights norms.

Having said this, I want to emphasise that I am not suggesting that gender and equality are irrelevant to the question of criminal justice, and sentencing in particular. Quite the contrary, I strongly believe in their relevance, but in ways very different to that conceived of in the version of equality just mentioned. I am about to say more about this, looking specifically at the charges that women are getting away with murder.

A. Confronting the Charge: 'Women getting away with murder'

In his speech to the Criminology Conference, the Barbados DPP gave the following examples of women being treated more favourably in sentencing: a woman convicted of manslaughter for setting fire to a man who was asleep who received three years probation, while a man convicted of a *similar offence* received fifteen years; another woman convicted of inflicting about 30 stab wounds on her lover who received eight years for manslaughter, a man in *similar circumstances* was convicted of inflicting about 28 injuries on his lover got fifteen years in prison.¹³

One could challenge the DPP's sentencing anecdotes purely by testing whether they formed part of a scientific study. Certainly elsewhere in the Caribbean women's groups have argued exactly the opposite, that women who kill are treated more harshly.¹⁴ However, I want us to focus on the premise of his

¹³. *The Nation*, October 15, 1998 (Barbados).

¹⁴. The following are media releases by the Trinidad and Tobago Coalition against Domestic Violence.

"In five cases recently before the courts where men have been charged with the murder of their wives,

conclusion of discrimination-that these were *similar circumstances* and *similar offences* that therefore deserved similar treatment. This assumption that men killing women is intrinsically *similar* to women killing men is misguided. In a not infrequent number of cases, women murdered have been killed as the final act of domestic violence. Also, many women who kill have endured significant periods of violence at the hands of the deceased.

Underlying the call for 'same treatment' is generally an assumption that, as the editorial referred to earlier argues, "the status of women has radically changed and in many areas they have achieved *virtual equality* with men" (emphasis added).¹⁵ But as we have just seen, there is no *virtual equality* between men and women with respect to the experience of domestic violence. Nevertheless, this version of equality assumes that there is as a rationale for similar treatment. In doing so, it overlooks the gender inequality produced by the endemic violence women experience at the hands of men they know. Having side-stepped domestic violence, killings by men then become in principle no different to killings by women and therefore deserve similar treatment.¹⁶ This abstract version of equality, of which I also spoke earlier, manages to ellipse and neutralise gender violence, and more particularly,

the tendency appears to be to replace the charges of manslaughter and to give sentences ranging from five to 12 years in length." The examples quoted are: Hollis Maloney, 12 years for killing his pregnant wife; Winston Joseph, 5 years for killing his pregnant wife; Christopher Sirju, five years for killing his wife and six years for attempting to drown his 2 children; Anne Marie Boodram, sentenced to death for killing her husband, whom she previously caught in bed with her sister.

"It would appear that while the murder of a man by his wife is a murder and to be regarded seriously, the murder of a woman and an unborn child by her husband is only a killing and therefore is not such a serious offence. Longer sentences are given for possession of cocaine." 6 July 1994, Women's Weekly 1

"At its meeting on May 27, 1998, the Coalition Council once again had the sentencing inconsistencies brought before it, this time in reference to the sentencing of former police officer Don Renaud to a scant ten years imprisonment for the killing of his fiancée, Allison Majardsingh, with whom he said he was trying to end a relationship. It is ironic that in today's crime reports, a rapist of an 18-year-old girl, who also abused her niece, was sentenced to 15 years imprisonment.

"Does this send a message of any sort to violent and abusive men in Trinidad and Tobago? A message that says killing a woman will bring a lighter sentence than rape and assault? So, if you are going to commit one of these crimes, you might as well commit both, and get off with half the sentence?"

"We note that, despite numerous "policy" statements by a "caring" government about diminishing the incidence of domestic violence crimes, despite yeoman service being given by the Community Police Service, despite the interim years of public education, nothing seems to change the sentencing practices of the judiciary." 5 June 1998, Trinidad Guardian 7.

15. "Should Women Hang" 27 June 1998, Trinidad Guardian.

16. T Robinson, "Fictions of Citizenship, Bodies without Sex: The Production and Effacement of Gender in Law" (2000) 7 Small Axe 1.

domestic violence, in criminal justice matters. We see the DPP talking about *gender* and *violence*, but never about *gender violence*. Recognition of gender violence must leave us radically different accounts than that presented by the DPP.

B. Rethinking the death penalty as a gender issue

On this note I want to reflect on the viewpoint that the death penalty raises no gender issues that should interfere with the principle of 'equality of treatment'. Let me say quickly why this view cannot be right. It is now common ground that the defences to murder reflect male centred images of life and have not readily accommodated women defendants, especially those who kill an abusive male partner. This is a form of gender discrimination. That Indravani Ramjattan languished on death row until last year, is in part testimony to that. (But I will say more about her case shortly). Quite simply, if appropriate defences to murder are not available to women defendants, then this must put the integrity of the sentence for that crime, generally death, in question. For this reason alone, the death penalty is a gender issue, and this may very well present 'ethical and moral reasons' why certainly some women should not be hanged.

But I am obliged to explain more fully this emphatic conclusion, especially given developments relating to the admission of evidence of battered woman's syndrome (BWS) and the growing flexibility of the reasonable man standard.

"In so far as [the legal categorisation of defences to murder] cater for anyone, they cater for men."¹⁷ Violence is one socially recognised way of being a man¹⁸ and we can see the normalisation of male violence implicit within the defences to murder. The paradigmatic example of a provocative event is a husband discovering that his wife has been unfaithful. It rests firmly within our contemplation that a *reasonable man* in the Caribbean, on hearing of a confession of adultery by his wife would "lose his self-control and thus react by slapping, cuffing or if he has something in his hand, by striking his wife."¹⁹

17. Nicola Lacey, Celia Wells, *Reconstructing Criminal Law: Texts and Materials* 2 ed. (1998) 587.

18. Messerschmidt, at 27.

19. Israel Khan, *Scales of Justice* (1993) 57. Khan, a Trinidadian attorney-at-law had represented Christopher Sirju, a man convicted in 1992 of unlawfully killing his wife, who had made to him an admission of infidelity, and attempting to kill his two children and was sentenced to five years for the former and three years for the latter. According to Khan, the trial judge said:

"[Your attorney] has submitted that any normal male in Trinidad and Tobago would have reacted

Women defendants have had to fit into the existing categories that, until fairly recently, gave little thought to women's realities. Two related developments have ameliorated the situation somewhat. The 'reasonable man' now takes on some of the important characteristics of the defendant, including sex. The extent of the metamorphosis is now a bit uncertain for us in the Caribbean because of a very new House of Lords decision, *R v Smith*²⁰ which disavows the narrow approach taken by the Privy Council in *Luc Thiet Than v R*.²¹ Also very important is the admissibility of evidence of Battered Woman's Syndrome (BWS) in assessing the subjective and objective elements of the provocation defence and in diminished responsibility.²² We do also have the Canadian Supreme Court case *R v Lavallee*²³ to encourage its admission in establishing self-defence.

C. Why Ramjattan is not enough

For us, *Ramjattan v State*²⁴ from Trinidad is perhaps the first decisive case in which expert testimony on BWS played a role in establishing a partial defence to murder. This resulted in the substitution of a conviction of murder for manslaughter by reason of diminished responsibility. Ramjattan moved off death row and was given an additional five years to serve in prison.²⁵

All of these developments are not enough. More than that, the Ramjattan case, which is in some respects a groundbreaking one in the Caribbean, does little to engender optimism or signal radically new ways of understanding women's experiences in the criminal justice system. We need go no further than the reasons given by the Court of Appeal in their oral judgment, having considered the fresh expert evidence of BWS, for their sentence of five years imprisonment in addition to the eight she had already served.

perhaps even more violently that (sic) you did, and in fact your very act was not one of viciousness or a violent attack... In my view the memory that you killed your wife is, in itself, a kind of psychological punishment in itself and that goes by way of a mitigating factor."(emphasis added) (Ibid., at 63).

20. 27 July 2000 (publication on the Internet at <http://www.parliament.the-stationery-office.co.uk>).

21. [1996] 2 All ER 1033.

22. See generally *Ahluwalia v R* [1992] 4 All ER 889.

23. [1990] 1 SCR 852.

24. Transcript of Oral Decision, 7 October 1999 (CA), 4 March 1999 (PC).

25. Anne Marie Boodram is currently on death row in Trinidad having been convicted in 1999 of murdering her husband in 1989. The Court of Appeal dismissed her appeal against conviction and she has appealed to the Privy Council. She does make allegations of abuse in one of her statements, but it is unclear to me whether this contributed to the killing.

I must first say something about the background to the killing. Ramjattan, on her account, had been sent to live with Alexander Jordan when she was seventeen years old, he was almost twenty years her senior.²⁶ He had bought land near her family home and threatened to burn down her family home if she was not sent to live with him. The union bore six children and she claims that there was consistent violence throughout. He threatened to shoot her with a shotgun he kept under his bed if she displeased him. She said he raped her on many occasions and she dared not resist for fear she would experience more violence. She said he was friends with the police officers, some of who saw her bruises, and she did not think they would help her. She said she tried to escape three times and each time he found her and took her back.

In January 1991, she managed to escape again and began living with another man, and was pregnant with his child. Jordan found her eventually and kicked down the door, began smashing up property, saying that he had come to 'shed blood'. He physically abused her there and dragged her to his van and continued the abuse all the way back to the house. When they arrived home he says he threatened to kill her and continued to batter her, locked her up in the house and threatened to keep her there until the child was born, saying he would kill her if the child was not his. She also said he repeatedly raped her during the eight days of confinement. Her new boyfriend and another man came during this period of confinement and beat Jordan to death. Ramjattan was found to be part of the joint enterprise.

The Chief Justice gave the oral decision. In discussing the new sentence, de la Bastide CJ insisted that courts were not in the business of apportioning moral blame. nevertheless he continued: "we must not lose sight of the fact that she was carrying the child of another man with whom she obviously ... hoped to make a life."²⁷ Had the murder been purely defensive, he said the court might have been inclined to take a more lenient view, but, he said, "it was clear that the occasion, if not the reason, for her deciding to leave the husband and all that followed thereafter was the striking up of this relationship

26. *This account comes significantly from Ramjattan's affidavit, 1 July 1998 in Ramjattan v Republic of Trinidad and Tobago Inter-American Commission on Human Rights, Case No 11.837. The biggest area of dispute between the defendant and the state was on the question of her involvement in the murder, not so much the history of abuse.*

27. *Transcript, supra, at 44.*

with her childhood sweetheart which turned into a sexual relationship that resulted in her pregnancy."²⁸

These are such disturbing and disappointing statements. For one, the Chief Justice refused to acknowledge autonomy, which is seen as being so central to male identity, as similarly relevant to a woman's life. De la Bastide did not recognise her most basic right, in defence of her bodily integrity, personal liberty and freedom of movement, to choose who she shared her body and life with. She was being judged for forming a new relationship in a context where she did not appear to have been given a choice about being with Jordan or about leaving him. In any event, the significance the Chief Justice gave to her new relationship was, to put it mildly, obscene because it is made to negative the horrific violence she experienced. When he asserts that the "occasion, if not the reason for her leaving and all that followed" was the new relationship, he stops a fraction short of saying that, like the rape victim, 'she brought it on herself'. The Chief Justice's play on whether this was a 'purely defensive' killing is disingenuous. The killings of women by men they know in Trinidad have been shocking and flagrant; so much so that the Domestic Violence Act 1999 in its preamble acknowledges that the "incidents of domestic violence continue to occur with alarming frequency and deadly consequences". Any fair reading of the background to the Ramjattan case—the repeated and severe abuse during the relationship and the escalation of the violence resulting in her imprisonment in the house and his promise to kill her on an event which was certain to happen, the birth of a child which was not his—tells a story that was likely to end up in Ramjattan's death. This, to my mind, was the paradigm of a defensive killing, and that point is completely lost in this case. If Jordan he had killed her, she would have become another statistic, albeit with headline appeal, and he would have had the perfect defence-provocation.

When the *Ramjattan* case was sent back by the Privy Council to the Court of Appeal to hear the fresh evidence of BWS, the only defence they were allowed to consider was diminished responsibility—that she suffered from an abnormality of the mind when the crime was committed. We are still left wondering what other defences might have been available at the trial stage. Like some other feminists, I dislike diminished responsibility not just because

28. *Ibid.*

it focuses attention away from the domestic violence as a constituent element of the offence, but also because I fear it will be used to characterise women as synonymous with irrationality and psychiatric ailments. If it is not one syndrome (PMS), it's another (BWS). As women we continue to be described as victims of our physiology.²⁹

Here is the crux of the matter: the unreasonableness of Ramjattan's response in participating in the killing of this man, who seemed committed to killing her first, is a perfect parallel for what is all but articulated-the reasonableness of Jordan's wrath and violence (if but a little extreme) in discovering she was involved with someone else. As Helena Kennedy observes, while violence is seen as "an inevitable extension of normal male behaviour,... women offenders are thought to have breached sacred notions of what is deemed to be truly female."³⁰

I keep coming back to gender violence as a central concept missing from discussions about murder and the death penalty. It is impossible to come to terms with Indravani Ramjattan's case unless we confront cultural norms about the justifiability of men giving women 'licks' and attitudes about appropriate behaviour for women.³¹ Donald Nicolson explains how gender discrimination works against women as criminal defendants. He says:

*"In terms of 'double standard' discrimination, women are expected to conform to standard of behaviour not expected of men. More subtly, 'formal equality' discrimination involves the application of standards of behaviour which, albeit formally gender neutral, are premised upon the experiences and behavioural patterns of men."*³²

29. Helena Kennedy, *Eve was Framed: Women and British Justice* (1993) 23.

30. *Ibid.*, at 19.

31. See generally on domestic violence in the Caribbean: Clarke, *Violence against Women in the Caribbean: State and Non-state Responses* (1998); Parsad, "Marital Violence within East Indian Households in Guyana: A Cultural Explanation" in Kanhai (ed), *Matikor: The Politics of Identity for Indo-Caribbean Women* (1999) 40; Centre for Gender and Development Studies, UWI, St. Augustine, *Women, Family and Family Violence in the Caribbean: The Historical and Contemporary Experience with special reference to Trinidad and Tobago* (1994); Bailey, *Le Franc, Branche, "Partnering and Violence"* (1998) 4(2) *Caribbean Dialogue: A Policy Bulletin of Caribbean Affairs* 1; Danns, Parsad, *Domestic Violence and Marital Relationships in the Caribbean: A Guyana Case Study* (1989).

32. Nicolson, "Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill" (1995) III/2 *Feminist Legal Studies* 185.

I will not deny that some times women defendants benefit from chauvinism in the criminal justice system. Even in the area of the death penalty, there still exists in the Caribbean protective legislation for women. Pregnant women in a number of jurisdictions cannot be sentenced to death for murder; life imprisonment must be substituted.³³ But accommodation based on a perception of women being the 'more tender vessels' has not necessarily worked to women's advantage. As the *Ramjattan* case shows, it only works if women fulfil stereotypes of appropriate femininity relating to domesticity, sexuality and pathology.³⁴ With her body swelled up with another man's sex, *Indravani* failed the 'femininity' test dramatically.³⁵

As the writers Lacey and Wells note, "Gender is an ever-present, though often hidden, element in the constructions of murder and manslaughter."³⁶ The *Ramjattan* case illustrates how notions of femininity and masculinity go to the very heart of the criminal justice system. The intractability of these stereotypes presents serious challenges to our goal of ensuring fair trials for men and women. This is one of the most important issues of gender equality in criminal justice that we must confront.

Equality Misunderstood-Exposing Gender Neutrality

Throughout this paper I have been tackling a feeling, admittedly a natural one, that gender equality inevitably means that men and women must be treated exactly the same. I have been trying to say that that is a superficial reading of the meaning of equality that would ignore the structural inequality that already exists, and so far I have been using the example of domestic violence.

Gender neutrality is flip-side of identical treatment. Consistently, we move from the argument that men and women must be treated the same to one which says gender is irrelevant and our goal is a stance of gender neutrality. If we have been saying this we are getting it wrong; our aim should be to integrate gender into our thinking about law, not ignore it. Let me briefly illustrate how gender neutrality can be artificial and unsatisfactory.

The Barbados Sexual Offences Act 1992 defines rape in gender neutral terms as an offence committed by *any person* who has sexual intercourse with

33. See, for example, *Antigua and Barbuda Sentence of Death (Expectant Mothers) Act, Cap 397*.

34. *Nicolson, supra*.

35. *Robinson, "Fictions of Citizenship", supra*.

36. *Nicola Lacey, Celia Wells, Reconstructing Criminal Law: Texts and Materials 2 ed. (1998)548*.

another person without the consent of the *other person*.³⁷ Here we see rape desexualised and the raped and the rapists become de-gendered, abstract individuals, but it is impossible to neuter rape. To be raped and rapable continues to be constituent element of women's material existence and that has not changed with alleged 'virtual equality'.³⁸ Rape is still something men primarily do, and it is done to women and, in some cases, other men. To neutralise the gendered quality to rape is to ignore how integral it is to the way inequality occurs between the sexes in life.³⁹

Not unexpected, the Barbados legislation had to struggle to keep up the veneer of neutrality. By the time the Act got around to further describing rape, it had descended into the following: "the introduction, to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape, (a) of the penis of a person into the anus or mouth of another person, (b) an object not being part of the human body, manipulated by a person into the vagina or anus of another."⁴⁰ I will concede that gender neutrality in legislation in many cases is a necessary evil, but disregarding gender only serves to blunt the essence and reality of the matter, the fundamental inequality that already exists.

By contrast, consider the Presidential Act initiated by Nelson Mandela in 1994 granting a special remission of the remainder of their sentences to mothers in prison with children under the age of twelve years. This survived the constitutional challenge of a man who was the primary caretaker of a child under twelve that it violated the guarantee of equality. The Constitutional Court of South Africa in *Hugo v President of South Africa*⁴¹ acknowledged that the Act did not provide for identical treatment of men and women but said it was justified within the parameters of equality in their Constitution. O'Regan J in her opinion observed that the goal of equality would be better served if the responsibilities of child rearing were more fairly shared between fathers and mothers, but issued this powerful reality check.

37. Nicola Lacey, *Celia Wells, Reconstructing Criminal Law: Texts and Materials 2 ed.* (1998)548.

38. T Robinson, "Fictions of Citizenship", *supra*.

39. Catharine McKinnon, *Towards a Feminist Theory of the State* (1989) 245.

40. *Ibid.*, s 3(6). The 1998 case of a Barbadian male doctor who alleged that his former girlfriend, a 58-year-old nurse, had raped him by forcing him to have sexual intercourse with her; did not survive the preliminary enquiry because of this subsection. See generally, Maria Bradshaw, "It's not rape", *Sun on Saturday*, 4 April 1998 (Barbados).

41. [1998] 1 LRC 662.

"The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in rearing of children. We cannot ignore this crucial fact in considering the impact of discrimination in this case."⁴²

The fundamental point made by O'Regan is that "insisting on equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality."⁴³ Also clear from this decision is that equality is not morally blind or divorced from other rights; equality must rest at the very centre of rights protection, permeating all other rights, not undermining them.⁴⁴

Revising the Rights Agenda

Please allow me to close with some thoughts on how I think we should be moved by a greater awareness of issues of gender equality in criminal justice as human rights practitioners.

Even though your work, and the focus of this conference, is criminal defence work, the integrity of the entire process demands that we be concerned about issues of discrimination women experience as complainants, especially in sexual offence trials.

Similarly, I believe we must broaden our thinking about gender discrimination in the criminal justice system to all its participants, including an examination of the business of advocacy and lawyering. "Wherever they stand in the courtroom", English barrister Helena Kennedy observes, "women are not deemed to have the same authority and credibility as their male counterparts."⁴⁵ We cannot expect not to address problems of sexual harassment in the legal profession, or the accessibility of litigation careers for women or the gender stereotypes that pervade and marginalise women

42. *Ibid.*, at 722.

43. *Ibid.*, at 721.

44. See *Fraser v Children's Court* [1997] 2 LRC 449, at 457 per Mahomed D-P (CCT, SA). Equality is "at the very heart of the Constitution [it] permeates and defines the very ethos upon which the Constitution is premised."

45. Kennedy, *supra*, at 21.

in law practice in the region, and somehow hope to resolve gender discrimination in serious offences.

Let me go a little bit further. Just as we need a broader vision of who we are talking about, we need to expand our vision of what we are talking about. The legitimacy of the human rights litigation agenda can only be enhanced if we ascribe the name 'human rights lawyer' to not just criminal defence advocates, but also lawyers who, as a matter of principle, routinely and often unremunerated, represent women seeking protection orders, help poor women get basic financial support from the fathers of their children, and assist children at risk.

As a region we have yet fully to recognise the important human rights implications within family relations and family law, that is until one kills another, in which case the family dimension loses significance. We need to be part of a process of constitutionalising and en-righting family law. I am very pleased that in almost every Caribbean country we now have legislation that provides a means of protection against domestic violence.⁴⁶ But I am somewhat concerned that this, especially with the choice of civil relief, might send a message that although domestic violence is wrong, it is not quite the same as other types of violence. Rarely do you hear a description of police brutality incorporates the violence perpetrated by police officers against their wives and girlfriends even though we know many do it under the colour of their office and the law, while in uniform and on duty. Again I make a plea for talk about *gender* and *violence* to include comprehensively thinking about the meaning of *gender violence*.

Let me leave you with a bit of gender irony on the broader question of a human rights litigation agenda. This group of you as human rights advocates are primarily men, who appear, for the most part in the High /Supreme Court, before *male* judges, representing mostly men, who have been investigated

46. The following is a list of domestic violence legislation passed in the Caribbean: Antigua and Barbuda Domestic Violence Act 1999; The Bahamas Sexual Offence and Domestic Violence Act 1991; Barbados Domestic Violence (Protection Orders) Act 1992, Cap 130A; Belize Domestic Violence Act 1992; Bermuda Domestic Violence (Protection Orders) Act 1997; British Virgin Islands Domestic Violence (Summary Proceedings) Act 1992; Cayman Islands Summary Jurisdiction (Domestic Violence) Law 1992; Guyana Domestic Violence Act 1996; Jamaica Domestic Violence Act 1995; Montserrat Family (Protection Against Violence Act 1998; St Christopher-Nevis Domestic Violence Act 2000; St. Lucia Domestic Violence (Summary Proceedings) Act 1995; St. Vincent and the Grenadines Domestic Violence (Summary Proceedings) Act 1995; Trinidad and Tobago Domestic Violence Act 1999.

and arrested generally by policemen. Generally we just think of all of this as normal, rather than being very male, the way we describe other things in life as being so *female*. I am being both facetious and earnest, but I leave you to ponder on it.

The flogging of prisoners in Belize - Is this practice constitutionally valid?

Kirk Anderson

The Prisons Act of Belize, which in the first instance, became law as of the 29th November 1884 provides at Section 17 that the Minister responsible for Prisons may from time to time make and when made, alter, amend or rescind rules for, inter alia, the government of any prison and the maintenance of good order and discipline among the prisoners. Pursuant to that statutory provision, the Prison Rules were first enacted in Belize in 1957. Belize was still at that time under colonial rule. In fact, Belize's first written constitution only came into effect upon the attainment by Belize of its independence from Great Britain in September 1981.

Up until February 2000, the Prison Rules provided at rule 52 that where a prisoner is charged for the offences of: -

- a) Mutiny or Incitement to Mutiny;
- b) Gross personal violence to a prison officer.

The Superintendent of Prisons shall forthwith summon a special meeting of not more than three nor less than two visiting Justices to inquire into the charge. Visiting Justices, it should be noted are for the most part, in Belize, civilians who are noted in the community at large for their character and integrity. However, they are not Attorneys-at-Law, except perhaps for a Magistrate, who once so appointed, is an "ex-officio" visiting Justice. Belize has up until just recently, throughout the year 2000, had only one Magistrate who is an Attorney-at-Law. Rule 52 further provides that the Visiting Justices, summoned as aforesaid, shall enquire into the charge and for this purpose may take evidence on oath and if they find the offence proved in the case of a male prisoner, who is serving a sentence of imprisonment, they may order that corporal punishment be inflicted upon that prisoner and that order is to specify the number of strokes which will be inflicted. Rule 53(2) of the Prisons rules provides that, "Every instrument used for the infliction of corporal punishment shall be of a pattern approved by the minister". The

undersigned's research has revealed that to date, during this year, three male prisoners have been whipped using a tamarind switch and in each case, there were 10-15 strokes inflicted. The Rules also provide that a Medical Officer is to examine the prisoner prior to corporal punishment being inflicted upon him, to ensure that the prisoner is mentally and physically fit to undergo and punishment. Also, the Medical Officer may, if he deems it necessary in order to prevent injury to the prisoner's health, recommend that no further punishment be inflicted, and the Superintendent shall thereupon remit the remainder of the punishment.

It is noteworthy that in a United Nations General Assembly Resolution which was adopted in December 1982, it was agreed that it is absolutely forbidden for doctors 'to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempt to commit torture or other cruel, inhumane, or degrading treatment or punishment. "Nor can they, certify or participate in the certification of the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments". One such 'international instrument' is of course, the UN Convention against Torture, Cruel, or Inhuman or Degrading Treatment or Punishment, which incidentally, Belize has ratified.

The laws as set out above which authorise the infliction of corporal punishment are as aforementioned, colonial laws, the validity of which ought now to be scrutinised very carefully, in light of Belize's written Constitution of 1981. Belize's Constitution provides at Section 7 without any exception thereto, "That no person shall be subjected to torture or to inhuman or degrading punishment or other treatment." Furthermore, Belize's existing laws as at the date of independence, unlike as is the case with most Commonwealth Caribbean Constitutions, which are only protected from being considered as being inconsistent with the constitution for a period of five years after Independence. Thereafter, the Constitution truly becomes paramount and the Court of Appeal of Belize has so held in the case of Anthony Bowen Jr. That five-year period expired in September of 1986. However, notwithstanding Belize's existing constitutional obligations and

international treaty obligations, the present Minister responsible for prisons has in fact, this year, twice amended the Prison Rules and thereby broadened the categories of the prison offences, if you will, in respect of which corporal punishment may now be inflicted. The additional offences now include: i) Possessions of a deadly weapon, ii) Unlawful escape from prison or other lawful custody and iii) Gross personal violence to any other person. These are of course, also offences under the criminal law of Belize, which will be taken cognisance of by the courts. In fact, a double travesty has been heaped upon a prisoner by the name of Bert Elijio, who was not only whipped for having allegedly chopped another inmate, but is presently before a court in Belize charged with the crime of Dangerous Harm as a consequence of the alleged chopping of that inmate.

In Belize, no court whatsoever has the authority to impose a sentence of corporal punishment upon a criminal offender and of course, no police officer has the power to do that either, in an effort to extract information that may subsequently turn out to be very truthful and reliable. If Belize's courts and police do not have the authority to impose such a punishment, it is difficult to understand how such authority can be given to the Prison authorities, especially since for the most part, the manner in which the prison's processes were carried out with respect to the infliction of corporal punishment are largely shrouded in secrecy, at least up until the present time.

The United Nations Standards Minimum Rules for the Treatment of Prisoners at Rule 31, provides that, "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman and degrading punishments shall be completely prohibited as punishments for disciplinary offences". These Rules were adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1955. It is also noteworthy that women are not excluded from being subjected to corporal punishment under Belize's Prison Rules, since the term "man" as used in the Prison Rules, by virtue of Belize's Interpretation Act, includes "women". Additionally, even juveniles may be so subjected, since the Rules do not set any minimum threshold age, below which such punishment may not be inflicted.

In the Barbados case of Victor Hobbs and David Mitchell Jr., the Court of Appeal of Barbados reviewed many of the decided cases related to the

infliction of corporal punishment. In the course of delivering their Judgment in that case, the Court cited with approval from a Zimbabwean case, which dealt with the meaning of the clause in the Barbados Constitution, which prohibits the infliction of inhuman or degrading punishment or other treatment. That clause is "ipassima verba" with Section 7 of the Belize Constitution. In discussing that clause, the Court said as follows, "The *raison d'être* underlying Section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the unnecessary and wanton infliction of pain are repugnant. Thus a penalty that was permissible at one time in our nation's history is not necessarily permissible today - what might not have been regarded as inhuman or degrading decades ago may be revolting to the sensitivities which emerge as civilisation advances".

In *Tyrer v UK* (1978) 2 E.H.R.R. 1, the European Court of Human Rights had to decide whether on the facts of the case which concerned the infliction of corporal punishment as a sentencing measure, there had been a breach of article 3 of the European Convention on Human Rights, which is substantially the same as Belize's Constitutional provision which prohibits the infliction of cruel, inhuman or degrading punishment. The case arose out of the "Isle of Man". In that case, the Court stated as follows, "The Court notes that the relevant Isle of Man legislation, as well as giving the offender a right of appeal against sentence, provides for certain safeguards. Thus, there is a prior medical examination; the number of strokes and the dimension of the birch are regulated in detail; a doctor is present and may order the punishment to be stopped; in the case of a child or young person, the parent may attend if he so desires; the birching is carried out by a police constable in the presence of a more senior colleague. Nevertheless the Court must consider whether the other circumstances of the applicant's punishment were such as to make it "degrading" within the meaning of article 3. The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence

that is in the present case, violence permitted by the law and ordered by the judicial authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely, a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects. The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender".

The Court accordingly concluded that such punishment was indeed degrading punishment. In commenting on the decision in the Tyrer case, the Zimbabwean Supreme Court in the Newube stated "In the exercise of a value judgment, this Court must remain uninfluenced by the fact that the demand for humane, civilised and physically painless punishment is made by those guilty of subjecting their victims to inhuman, degrading and violent acts involving mental anguish. Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea of the appellants for justice, on the ground that the enormity of their crimes had caused grave in justice, to their victims. Humanness and dignity of human beings is the hallmark of civilised laws, and justice must be done dispassionately and in accordance with constitutional mandates, no matter the occasion. The question is not whether this court condones the rapes committed by the Appellants, for certainly it does not. It is whether whipping remains a punishment consistent with one's self-respect." In the 1997 St. Vincent Supreme Court Case of Peters and The Attorney General and in another case which was described by the Namibian Supreme Court in 1991, it has also been held that corporal punishment inflicted as a consequence of a disciplinary and a criminal offence respectively, violated constitutional provisions which prohibit the infliction of cruel, inhuman or degrading treatment or punishment.

I can do no better than closing by recommending the words of the Constitutional Court of South Africa in its 1995 decision in the case of the *State v Henry Williams* which concerned the issue of juvenile whipping and which determined that such punishment was inconsistent with the South African Constitution and should be abolished. The Court deemed that,

"Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is the key feature distinguishing it from other punishments. The degree of pain inflicted is quite arbitrary, depending as it does on the person who is delegated to do the whipping The objective must be to penetrate the levels of tolerance to pain: the result must be a cringing fear, a terror of expectation ... and acute distress There is no dignity in the act itself: the recipient might struggle against himself to maintain a sentence of dignified suffering or even unconcern; there is no dignity even in the person delivering the punishment. It is a practice which debases everyone involved in it.... It offends contemporary concepts of decency and human dignity and precepts of civilisation which we profess to possess."

Savings clauses and the colonial death penalty regime

Edward Fitzgerald QC

Introduction

Savings clauses are the most dominant and distinctive features of the constitutions of the Commonwealth Caribbean. They operate in all jurisdictions of the Commonwealth Caribbean except Belize to preserve the colonial status quo from constitutional challenge. They do this by one of two mechanisms: Either they rule out altogether any constitutional attack on the laws in existence at the time of independence. Or they at least prohibit any attack on the specific colonial *penalties* or *punishments* in existence at the time of independence based on the alleged cruelty or inhumanity of those punishments, and therefore protect penalties such as the death penalty or flogging from direct attack on grounds of constitutionality. As such, savings clauses inhibit the sort of dynamic or evolutionary approach to the development of human rights protections that other constitutions, and international human rights conventions, have now adopted throughout the world (see *Weems v US* 217 US 349 at pp 372-5; *Trop v Dulles* 356 US 86 at p 101; *Tyrer v UK* (1981) 2 EHRR 1).

But savings clauses most especially operate to prevent such a dynamic approach in respect of the most extreme of the inherited colonial punishments - namely *corporal* and *capital* punishment. Under a system dominated by savings clauses, constitutional lawyers in the death row field have the role more of historians and archivists than of human rights activists helping to develop more civilised standards and a better future. And, when progress is made, it tends to be on the basis that the courts are preserving some humane aspect of the colonial system from alteration for the worst. Thus the right to be executed *speedily*, or *not at all*, that was upheld in *Pratt v Morgan* was only established by an appeal to an argument from history that the delays in execution which had developed post independence were alien to the Common Law and unheard of in colonial times. By contrast other more fundamental

attacks such as the challenge to the constitutionality of death by *hanging* as a cruel and unusual punishment in the Trinidadian case of *Dole Chadee* have foundered on the rocks of existing laws provisions (*Boodram v Baptiste* (1999) 1 WLR 1709).

But, despite these serious obstacles to the progressive development of civilised standards, all is not lost. There are three principal sources of hope:

- (i) Firstly, there is considerable scope to explore and *develop* the common law protections that did pre-exist the grant of independence. For example, the common law did at least operate to protect the insane from execution, and to safeguard those sentenced to death from exception from prolonged delay. And developments in the common law can be backdated to pre-independence times on the basis of the doctrine that such "*developments*" merely *clarify* the law as it always was.
- (ii) Secondly, there is considerable room for development in those jurisdictions where the protection of existing laws is only *partial*, and is confined to prohibiting a frontal attack on the inhumanity of the death penalty as inhuman, rather than protecting existing laws as a whole. Such jurisdictions include St Lucia, St Vincent, Antigua and St Kitts. And in those jurisdictions there is room for further progress in *restricting the use* of the death penalty, even if it cannot be outlawed altogether.
- (iii) Finally, there is the unique and inspiring example of Belize. there is neither a *partial* nor *complete* protection of existing laws and the constitution leaves the courts free to develop human rights protections under the constitution in accordance with those dynamic and developing norms of decency and humanity that guide other constitutional courts and human rights courts throughout the world.

Key constitutional provisions

The key constitutional provisions in play as a potential source of protection in death penalty cases are twofold:

- (i) Firstly, there is the prohibition of *either* "cruel and unusual" punishment or "inhuman or degrading treatment or punishment" contained in all the constitutions of the Caribbean Commonwealth (modelled, in turn, on the US's Eighth Amendment, and Article 3 of the European Convention on Human rights) - a prohibition which can be interpreted dynamically in accordance with "evolving standards of decency" (*Trop v Dulles*).
- (ii) Secondly, there is the protection from *arbitrary* punishment which can be derived from the general right to the "protection of the law" that is contained in most Caribbean constitutions read in conjunction with the "right to life" section. [Section 4(1) of the Belize Constitution]

Significance of specific qualifications to the right to life

It is true that the "right to life" is not left unqualified by any of the Caribbean Constitutions and is always subject to a specific exception when death follows from "execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted". The existence of this exception makes a frontal attack on the death penalty *per se* difficult, and certainly makes it impossible to rely on the "right to life" provision to outlaw *the death penalty itself* (as the South African Supreme Court did in *Makwanyane*). But the fact that this *express* qualification to the right to life is recognised in cases of court-ordered execution means no more than that the *death penalty* may in *some cases* be *legitimate* (and not infringe the specific "right to life" section). It does not render *any* execution ordered by *any* court for *any* murder offence in *any* circumstances lawful when such execution is judged by reference to other sections of the constitution (such as that prohibiting cruel or inhumane punishment). As the European Court of Human Rights recognised in *Soering v UK* (1989) 11 EHRR 439 (at paras 103-4), the existence of an identical qualification to the right to life contained in Article 2(1) of the European Convention in cases of court-ordered execution does not operate to protect the imposition of the death penalty in all circumstances from attack - and does not do so when its imposition or enforcement is inconsistent with other articles of the Convention (such as Article 3). And, *subject only to the special impediment posed by savings*

clauses, the recognition of a qualification to the "right to life", in the case of court-ordered execution does not prevent a challenge to the imposition of the death penalty where:

- (i) the *manner* of execution is unduly cruel or inhumane; or
- (ii) the imposition of the death penalty in an individual case (even for murder) is so disproportionate as to be inhuman (since disproportionality can render a sentence "inhuman"); or
- (iii) the infliction of the death penalty is arbitrary because it is mandatory and imposed irrespective of mitigating circumstances; or
- (iv) the *executive* will be violating some other norm of humanity by *carrying out* the death penalty in the particular case (for example, when there have been prolonged delays, insufficient notice, or the condemned man has become insane).

Restricting death penalty by constitutional challenge

My theme, then, is the various ways in which constitutional lawyers in the Caribbean can successfully and progressively seek to restrict the use of the death penalty by constitutional challenge, despite the difficulties posed by the general existence of savings clauses protecting existing laws and existing punishments. To focus it, I will take the following course:

- (i) Firstly, I will take as my starting point the nature and defects of the colonial death penalty regime that was inherited upon independence by the countries of the Commonwealth Caribbean.
- (ii) Secondly, I will examine the different types of saving clauses, and the way in which they operate to protect to a greater or lesser degree the colonial status quo in the different jurisdictions of the Caribbean.
- (iii) And finally, I will examine the prospects of successful challenge and development in three particular ways: *firstly*, by appeal to dynamic developments in the common law since the common law was part of the existing laws; *secondly*, by litigation in those jurisdictions which provide only a partial form of protection to the colonial status quo; and *finally* by

litigation in Belize where the issue is at large, and it is possible to make a more direct appeal to the developing international norms for the progressive restriction of the death penalty.

The colonial death penalty regime

The key features of the colonial death penalty system can be summarised as follows:

- (i) Firstly, the colonial death penalty regime provided that the sole manner of execution should be death by hanging ? a medieval, degrading and unnecessarily painful method of execution that was retained under the colonial rule on the basis of a myth that it resulted in a swift death. (Recent scientific studies have shown this to be untrue). And hanging as the method of execution is protected from constitutional challenge in all jurisdictions save Belize by the operation of savings clauses - despite the general recognition that more humane methods of execution now exist.
- (ii) Secondly, the colonial death penalty system provided the death penalty as the *mandatory* penalty for all those convicted of murder irrespective of the particular nature of their offence and their individual mitigating circumstances. This is an aspect of the death penalty regime which no longer accords with international standards because of its denial of scope for individual mitigation prior to the imposition of the death penalty. This defect has been found to be fatal by the US Supreme Court in *Woodson v North Carolina* 428 US 280, and by the Inter-American Commission of Human Rights in cases such as *Downer* and *Tracey v Jamaica* and *Hillaire v Trinidad*.
- (iii) Thirdly, the colonial death penalty system was founded on a wide definition of the offence of murder that attracted the death penalty ? wide enough to include even offences committed without an intent to kill, and participants convicted on the basis of the joint enterprise doctrine, whilst affording only a limited defence of provocation, no excuse based on

drunkenness and no defence of duress. With few exceptions the Caribbean jurisdictions continue to impose the death penalty on all those caught within this wide definition of murder save in the two jurisdictions which have introduced limited exemptions for non-capital murder. But again the imposition of the same extreme penalty of death on all those convicted of offences of such widely differing gravity, and with such different levels of culpability, no longer accords with international norms, and may be regarded as both *disproportionate* and *arbitrary*.

- (iv) Fourthly, the real individualisation under the colonial system comes at the 'Mercy Stage'. The 'Mercy Stage' is *either* entrusted to the *executive* as in Trinidad and most Caribbean jurisdictions, *or* to a *semi-independent* body as in the case of Belize and Jamaica. But, until and unless the *Reckley* decision is overturned, the dispensation of mercy is not subject to the rules of natural justice. And mercy after the death sentence can never be a substitute for a *judicial* determination of whether the death sentence should be *imposed* in the first place. This system of executive sentencing again fails to accord with international norms.

Thus, every one of the key features of the colonial system fails to accord with international human rights norms. But the savings clauses have operated to restrict the scope for constitutional challenge to this system. It is therefore worth examining what can be achieved within the existing system to restrict the imposition of the death penalty. - It is not a merely theoretical complaint that the death penalty is liable to be arbitrarily and excessively used under the present system. After all, convicted persons who were either young, mentally disordered or involved in crimes of passion *have been executed*, or come within days or hours of execution, within several jurisdictions of the Caribbean in the last few years. And the prerogative of mercy is routinely refused by ministers and mercy committees throughout the Caribbean. - What then is the exact nature and effect of the savings clauses? And what scope is there for progress despite the restrictive influence of these savings clauses?

The two main types of savings clauses

There are two main types of savings clauses - the comprehensive and the partial.

Comprehensive or total savings clauses

To take first the comprehensive, or *total* type, of savings clause, this typically provides that "nothing contained, or done under the authority of any existing law ... shall be held to constitute a contravention" of the core human rights provisions of the constitution. Examples of this type of clause can be found in Section 26(1) of the Constitution of Barbados, Section 6(1) of the Trinidadian Constitution, and Section 26(8) of the Jamaican Constitution. Thus Section 6(1) the Trinidadian Constitution rendered it impossible to challenge the constitutionality of death by hanging in Trinidad on the basis that it violated the prohibition on cruel and unusual punishments in Section 5 of the Trinidadian Constitution (*Dole Chadee*); and Section 26(8) of the Jamaican Constitution operated to protect the existing penalty of detention during the Governor-General's Pleasure for juveniles convicted of murder despite the fact that such a penalty was held to violate the principle of the separation of powers enshrined in the constitution (see *Hinds v The Queen* (1977) AC 195 at 228)

Partial savings clauses

The second type of savings clause is more limited in nature and more specific. It merely operates to protect existing pre-independence punishments from challenge as either cruel or inhuman. Thus the Jamaican Constitution contains such a *specific* provision in Section 17(2) *as well as* the *general* provision protecting existing laws under Section 34(8). Section 17(1) of the Jamaican Constitution provides that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment". But Section 17(2) prevents the section from operating in a dynamic and evolutionary manner so as to be interpreted to outlaw death by hanging or corporal punishment by stating:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica before the appointed day."

The position in St Lucia, St Kitts, St Vincent, Antigua

This more limited and specific form of protection of existing penalties from attack on *grounds of inhumanity* contained in Section 17(2) of the Jamaican Constitution is the only form of protection of existing laws that is provided for in a number of Caribbean constitutions - such as St Lucia, St Kitts, St Vincent and Antigua. Under all these constitutions you cannot attack a penalty such as death by hanging directly *on the grounds* that its imposition violates the prohibition on "inhuman or degrading treatment or punishment" that is provided for in Section 7 of the St Kitts Constitution, Section 7 of the Antiguan Constitution and similar provisions in the St Lucian and St Vincent constitutions. *But* it is open to a prisoner sentenced to death to challenge the imposition of the death penalty or some other penalty on him on the basis that its imposition violates the protections in some other provision of the constitution. Thus in the case of *Greene Browne v The Queen* (2000) 1 AC 45, at 49 D-E, the Privy Council upheld a constitutional challenge to the imposition of the sentence *to detention during the Governor-General's pleasure* that was laid down in statute for juveniles convicted of murder. That was on the basis that its imposition violated Article 5(1) of Constitution and the general principle of the Division of Powers enshrined in the Constitution (because the sentence gave to the executive the power to determine the actual length of punitive detention).

The logic and reasoning of the *Greene Browne* decision can equally be applied to justify a challenge to the *mandatory* penalty of death imposed on all those convicted of murder in those jurisdictions governed only by a *partial* savings clause of the St Kitts variety. Thus in those jurisdictions:

- (i) It will not be possible to challenge the penalty of death by hanging as an inhuman form of penalty because of the existence of provisions equivalent to Section 17(2) of the Jamaican Constitution.
- (ii) But it is possible to challenge the indiscriminate imposition of the same penalty of death on all those convicted of murder irrespective of the individual mitigation as arbitrary and therefore contrary to those provisions of the constitution that protect either expressly or impliedly from the arbitrary

deprivation of life. This argument is further strengthened by the reasoning of the Inter-American Commission in cases such as *Downer and Tracey v Jamaica* because in those cases the Commission found that imposition of the mandatory death penalty for murder violated both the prohibition on inhuman punishment contained in Article 5(2) of the Inter-American Convention, and, more significantly, the protection from arbitrary deprivation of life in Article 4(1) of the Convention because it failed to differentiate between individual cases on the basis of individual mitigation.

Alternative routes to restriction of death penalty

Development of common law and pre-existing law safeguards

In jurisdictions where a total immunity is extended to existing law, the only scope for the limitation of the application of the death penalty, or the introduction of fresh safeguards, lies in the development of basic common law or colonial protections. It is worth giving some key examples of this methodology below.

Execution after delay

In *Pratt v Morgan* (1994) 2 AC 1 at 29 the earlier decision in *Riley* (1983) 1 AC 719 was reversed. This was because the *Pratt v Morgan* Board both interpreted Section 17(2) restrictively and re-evaluated the protections available in the pre-independence situation so as to include a protection from execution after delay. Thus the Privy Council held firstly that Section 17(2) expressly authorised only the continuation of the "descriptions of punishments" applicable prior to independence; and therefore "did not prevent the appellant from arguing that the circumstances that the executive intended to carry out a sentence are in breach of Section 17(1)". This was a crucial development. Secondly, the Privy Council found, as a matter of historical fact, that "before independence the law would have protected a Jamaican citizen from being executed after an unconscionable delay" (at page 29B) and, thereby the Board disposed of any residual reliance by the government on the more general protections of Section 34(8). Thus this historical finding has once and for all cleared the way in this field for a development of human rights norms unencumbered by further reference back to history and savings

clauses. And this dynamic development may be ongoing and extend to other areas where the complaint relates to "the circumstances in which the executive intends to carry out the sentence of death".

Execution of the insane

Another area where the infliction of the death penalty can be restricted by appeal to common law principle is to prevent the execution of the insane. There is ample authority dating back to the legal commentaries of Hale and Blackstone that the execution of the insane was unlawful at common law (*Ford v. Wainwright* 477 US 399 at 406). But in colonial times it seems that the principle could only be given effect by the uncertain mechanism of an appeal to the prerogative of mercy where a prisoner had failed to raise insanity at trial but was clearly insane, or where evidence of insanity had only come to light subsequently, or where insanity had developed after conviction, as not infrequently happens. Now the Common law principle that an insane person should not be executed can be given effect by the mechanism of a constitutional motion directed against the executive to prohibit execution; and the existing laws provisions cannot operate to bar such a motion. And the Privy Council has recognised in the course of argument in cases such as Bahamian case of *Cyril Darville* that convicted murderers who are insane at the time of execution have the right to challenge their execution *by way of constitutional motion injuncting the executive from the carrying out the execution*.

But one can go further: the common law definition of insanity was a limited one but it has evolved with time. Arguably the restrictive M'Naghten definition of insanity should be seen as only one stage in that continuing evolution to take account of scientific developments. On that basis it is arguable that nowadays execution is barred by law wherever the condemned man suffers from any recognised form of mental illness or disability that seriously reduces his capacity to understand the full nature and implications of the sentence he is to undergo. And that *evolving* common law principle can now be given effect by constitutional motion.

Other Restrictions on Executive

There are other areas where the saving clauses do not operate to *bar challenges* to the executive carrying out executions because recourse can be

had to pre-existing common law principle to back up the challenge. Thus, execution *without sufficient notice* was held to be unconstitutional in *Guerra v Baptiste* (1996) 1 AC 597 on the basis of an appeal to the pre-independence practice of allowing five clear days notice in Trinidad and similar arguments are sustainable elsewhere in the Caribbean. Moreover, it is strongly arguable that execution whilst an application is pending before an international human rights body offends against fundamental common law notions and is not therefore protected from challenge by any saving clauses. (This issue is shortly to be resolved in the case of *Neville Lewis and others*).

Constitutional challenges in jurisdictions with partial saving clauses

The second route is the more radical constitutional challenge to the *mandatory* death penalty in those jurisdictions which only partially immunise the colonial death penalty regime from constitutional challenge. The context has been summarised above. This is the nature of the challenge being taken in a number of the jurisdictions of the Eastern Caribbean to the mandatory nature of the death penalty. The St Kitts case of *Berthill Fox* was the first of these to be initiated and provides the best example. Berthill Fox is a body-builder who killed his lover and her mother in a jealous fit of rage. His forthcoming appeal against the mandatory death sentence imposed on him goes as follows:

- (i) The mandatory imposition of the death penalty on the appellant irrespective of the individual mitigation in his case is *arbitrary* and hence contrary to Section 3(a) of 4(1) of the constitution. Support for this proposition is derived from the recent decision of Inter-American Commission that the *mandatory* imposition of the death penalty in Jamaica is *arbitrary* as well as *inhuman*.
- (ii) It is true that the argument based on Section 7 of the St Kitts Constitution which prohibits inhuman punishments is barred by the *partial* protection of existing laws in paragraph 9 of schedule 2 of the St Kitts constitution (the counterpart of the Jamaican Section 17(2)). But the appellant is not relying on Section 7 but on other sections of the constitution so the immunity conferred by Paragraph 9 does not apply (see *Greene Browne*).
- (iii) Therefore the Privy Council will have to address the actual

merits of the argument of whether in the case of *Berthill Fox* a system which imposes the death sentence on all murderers irrespective of individual mitigation is *arbitrary* given that the provision for differentiation of cases on an individual basis is the very essence of a civilised and non-arbitrary sentencing system. (There are dicta in Lord Diplock's speech in *Ong Ah Chuan* (1981) AC 648 at 674E that suggest that a mandatory death penalty is constitutionally acceptable even where not protected by a savings clause. But these dicta will have to be reconsidered in the specific context of murder in the light of the recent decisions of the Inter-American Commission, and the numerous authorities relied on by the Commission from jurisdictions throughout the world.)

The more radical challenges justiciable in the Belize courts

In Belize a far more radical approach is possible because there is *neither* a *total*, *nor* a *partial* protection for existing laws and punishments such as applies elsewhere in the Commonwealth Caribbean. Thus it was that in the case of *Bull, Maheia and Guevara v The Attorney-General*, the condemned men challenged two key aspects of the colonial death penalty regime:- namely, the constitutionality of death by hanging, and the constitutionality of the *mandatory* death sentence imposed on them.

Thus they firstly challenged the *constitutionality of death by hanging* as an inhuman and degrading method of execution contrary to Section 7 of the Belize Constitution. No savings clause operates in Belize to bar this argument. Therefore, they were *free* to present legal arguments and scientific evidence on the *merits* of this issue. Detailed evidence from pathologists was deployed to destroy the myth of instantaneous death and to show that the exercise of execution by hanging did expose the condemned men to *unnecessary* suffering over and above that necessary to extinguish life, and therefore violated the international norm that execution should not expose to unnecessary suffering. (The UNHRC's decision in *Ng v Canada* laid down this basic principle. There was also powerful support for the Applicant's argument in the dissenting judgments in the Washington State case of *Campbell v Wood* (1994) 18 F 3d 662.)

Secondly, they challenged the *imposition of the mandatory death penalty* on them *both as disproportionate* in their individual circumstances (because it failed to take account of individual mitigation) and therefore *inhuman* and contrary to Section 7; *and as arbitrary* and contrary to Section 4(1) of the Constitution. Again no savings clause operated to bar this argument.

These arguments remain open in Belize although the particular case of *Bull, Maheia and Guevara* was eventually discontinued because all the applicants had their sentences of death commuted on the grounds of the delay in execution. It is important that the Belize Court of Appeal had earlier emphatically rejected the Solicitor-General's argument that these novel and radical challenges were frivolous and vexatious. [In doing so, the Court accepted that, in its earlier decision in the case of *Lauriano*, it had *ruled against* a similar challenge to the mandatory death penalty without sufficiently detailed consideration of the arguments. Subsequently the trial of the merits of the *Bull* challenge resulted in an adverse ruling by Meerabux J. This judgement and the Court of Appeal's earlier decision that the points were arguable require careful analysis. But the main challenges still remain open to argument both in the Court of Appeal of Belize and in the Privy Council.]

As to the merits of the two principal challenges raised in the *Bull* case, it is plain that there is an evolving international consensus that can be derived from the rulings of the Inter-American Commission and the UNHRC to support a dynamic interpretation of the prohibition on inhuman and degrading punishments in Section 7 of the Belize Constitution so as to outlaw both death by hanging and the mandatory imposition of the death penalty. Briefly the arguments can be summarized as follows:-

- (i) The inherited colonial death penalty system violates fundamental human rights by imposing a mandatory death penalty on all those convicted of murder. The principal vice is in the absence of provision for individual mitigation. Therefore the objection remains even where, as in Belize and Jamaica, a system of classification of murders into capital and non-capital murders is introduced (see *Downer and Tracey v Jamaica*) because there is still no scope for individualised mitigation in capital cases. The death penalty, if it is to

continue, should be reserved for those found by *judicial process* to be the worst individuals and convicted of the worst types of murder, in accordance with the very restrictive approach to the practice of the death penalty now adopted by the Indian Supreme Court (see *Bachan Singh v The State*).

- (ii) As for death by *hanging*, this is no longer a *manner of execution* consistent with international norms. Those norms require that, if there is to be a death penalty at all, execution must be by the *least inhumane* and the *least degrading* method, and not expose the condemned man to *unnecessary suffering* over and above that necessary to extinguish life.

That is not to say that it is likely that the Belize courts or Privy Council will ever interpret the Belize Constitution as prohibiting the death penalty *altogether* from ever being imposed in any case. Such a total ban is unlikely given that the lawfulness of execution in some circumstances is implicitly recognised in Section 4(1) of the Belize constitution. But there is clearly a momentum towards the progressive restriction of the imposition of the death penalty so as to confine it to the rarest and most extreme cases and to provide for a more humane means of execution. This is the position towards which the Inter-American Commission and Court may well be moving. And the imposition of such an exacting standard would require a substantial amendment of the existing death penalty laws. It would thereby afford the opportunity for a reconsideration by the legislature of the overall merits of retaining the death penalty.

Pardon and the commutation of the death penalty: Judicial review of executive clemency

Edward Fitzgerald QC

Introduction to “Mercy” system

In every Caribbean jurisdiction there is provision in the constitution for the grant of a pardon or the commutation of penalties, including the death penalty, by the executive (whether the executive is represented by the Governor-General or the President). In every Caribbean constitution there is also a *special procedure* whereby in *every capital case* an advisory committee either has to *advise* upon, or *determine*, how the power to commute, or the prerogative of mercy should be exercised in capital cases. Typically there is provision for a report by the trial judge and other relevant information about the condemned man and his case to be put before the advisory committee before they give advice. Thereafter there is provision in every capital case either for a *minister* to decide, or for the advisory council *itself* to decide, whether or not the death penalty should be commuted. (In Trinidad and Bahamas and most of the Caribbean jurisdictions, the decision is taken by a Minister, and the President or Governor-General then gives effect to his decision. In Jamaica and Belize, the decision-making body is the advisory council itself, which therefore acquires something of a quasi-judicial status.)

Colonial origins of mercy system

This special procedure has its historical origins in the colonial system under which the Governor (as the monarch's representative) considered whether, in capital cases, the death penalty imposed by the judge in every case of murder should actually be carried out and did so by reference to confidential reports from the trial judge. In reality this was the *true sentencing stage*, since the system of mandatory sentencing operated on the assumption that in any deserving case the prerogative of mercy would be favourably exercised. It is not clear what *actual* procedural rights were enjoyed by prisoners at this

mercy stage in colonial times. But it appears that many were at least given the *opportunity* to make written representations; but that the general rule was that prisoners and their lawyers were not afforded the opportunity to see, and comment on, the reports of the judges. This clearly was totally unfair. In cases in England under a similar system, prisoners like Derek Bentley - a nineteen year old mental defective - went to their deaths because of totally unfair and prejudicial reports written by trial judges - reports which neither they nor their lawyers had any chance to comment on, or to contradict. Moreover it is also clear that other material such as social reports were also placed before colonial governors which might contain additional prejudicial material not admissible at trial, and the condemned man was not shown these.

Defects of existing mercy system

The system has continued post-independence. Often no notice is given of the "hearing"; and no opportunity afforded to make effective written representation before the Mercy Committee. And it is clear that under the procedure followed generally throughout the Caribbean, the Mercy Committees see and take account of trial judges' reports, and other reports, which neither the prisoners nor their lawyers have any opportunity to comment on. There may also be political representations, for or against execution, made to the Mercy Committees by foreign governments and other bodies. The Committee then gives its advice which is either *decisive* (as in the case of Belize or Jamaica) or *persuasive* (as in the case of Trinidad and Bahamas). And in the latter cases, the Minister who takes the actual decision is equally free to base his decision on reports and information unseen by, and unknown to, the prisoner. Moreover no reasons are given for the subsequent decision.

The effect of Reckley

Until recently it was generally regarded as settled that decisions whether to grant or refuse pardon or commutation of the death sentence were unreviewable. This was as a result of the successive Privy Council decisions of *De Freitas v Bering* (1976) AC 239 and *Reckley v Minister of Public Safety* (No 2) (1996) 1 AC 527 to the effect that "mercy is not the subject of legal rights". The effect of these successive decisions was generally held to be as follows:

- (i) Firstly, the decision to refuse a pardon, or decline commutation of sentence, would only be reviewable if there was a failure to follow the procedures *expressly laid down* in the constitution. (In *Reckley*, it was expressly recognised that a failure of the Minister to consult the Advisory Committee on the prerogative of mercy, as required by the constitution, would be reviewable: at p 54D).
- (ii) But "the *actual exercise* by the designated minister of his discretion in death sentence cases" was different and was *unreviewable* both on the merits and on natural justice grounds.
- (iii) Therefore there was no room for a *Wednesbury* challenge to a refusal to exercise the power to pardon or commute favourably, however capriciously it was exercised.
- (iv) Moreover there was no natural justice right on the part of the prisoner either to "make representations to the [advisory] committee in a death sentence case" or to the Minister who took the final decision. Nor was there any basis on which the prisoner was entitled to be supplied with either the reports, or gist of the reports, that were presented to the committee or Minister (see *Reckley* at p 512B).

Wrongness of Reckley decision

The decision in *Reckley* has been much criticised. It was wrongly decided for the following reasons:-

- (i) Firstly, it fails to recognise the fact that the decision whether or not to commute a death penalty imposed under the present mandatory sentencing system is, in reality, a *sentencing decision* which should, for that reason, be subject to the principles of natural justice. This was a reality recognised in the Belize Court of Appeal in *Lauriano* (Civil Appeal No 15 of 1995) and in the Guyanese Court of Appeal in *Yassin v Attorney-General*.
- (ii) Secondly, it is inconsistent with the whole modern development of administrative law which is towards the

subjection of every significant state power affecting the lives or liberties of individuals to judicial review. This development extends even where the power in question is historically derived from the prerogative (see *Ex parte Bentley* 1993 4 LRC (Const) 159 and *Yassin*).

- (iii) Finally, it creates a situation where Caribbean law falls short of the standards set by the Inter-American Commission - which has held, in *Downer & Tracey*, that the denial of a proper opportunity to make representations before the JCPC violates Article 4(6) of the Inter-American Convention on Human Rights.

Likely reversal of Reckley

But it is not necessary here to engage in a lengthy criticism of the decision in *Reckley*. That is because that decision, and the whole area of law surrounding it, has been fully considered in the recent hearing of the Jamaican cases of *Neville Lewis & Others v Attorney-General*. It seems likely that the Privy Council will now reverse and/or decline to follow the Board's earlier decision in *Reckley*; and hold that *Reckley* was wrongly decided and/or that it is not binding in the context of Jamaica. The question that then arises is the effect of such a decision on other cases; and the *scope of review* of "mercy" decisions (or more accurately, pardon and commutation decisions) that is likely to be permitted in the future.

I will therefore try to deal in turn with the following:

- (i) The likely effects of a favourable ruling by the Privy Council that mercy decisions are, in principle, reviewable - where there has been no opportunity to make informed representations to the authority empowered to make the decision whether to commute or grant a pardon.
- (ii) The likely extent and scope of the requirements of natural justice that the Privy Council will imply into the mercy process.
- (iii) The future prospects for review of the *merits* of adverse decisions to refuse to grant pardon or commutation of sentence.

Effects of the reversal of *Reckley*

If *Reckley* is reversed or its reasoning disapproved, then it is likely to be on the basis that prisoners are entitled to make informed representations on the basis of disclosure of the materials before the mercy committees and/or decision-maker in the mercy process. All those who have not yet had that opportunity should then be afforded such an opportunity and not be executed until they have had the chance to make such representations. This should have the following consequences:

- (i) Lawyers will need to request disclosure and make representations.
- (ii) The time spent on death row to date should count towards the *Pratt & Morgan* five year period, since the prisoners on death row at present will not have been read valid death warrants until the opportunity to make informed representations has first been accorded them.

Extent of principles of natural justice

If the principles of natural justice or fairness do extend to the mercy process, what is the extent of the procedural rights needed to render the process fair?

Basic right to make informed representations

The basic right contended by the applicants in the cases of *Neville Lewis & Others* was for the right to make informed representations, based on disclosure of the trial judge's report and other materials placed before the JCPC. That minimal right is likely to be upheld. The consequence of such a ruling is that there should be full disclosure of the trial judge's report and any other reports to be placed before the Advisory Committee and, when the Minister takes the final decision, any additional materials placed before him. The prisoner should then have a full opportunity to comment on them. Arguably, legal aid should be available so that the trial lawyers may assist the prisoner in the formulation of his representations. Certainly this has been recognised to be necessary in England where prisoners have the right to make representations in response to the judicial recommendations as to the actual period they should serve under a life sentence following the decision in *Ex parte Doody* (1994) 1 AC 531 (see Lord Woolf MR's judgment in the Court of Appeal in *Ex parte Venables & Thompson* (1998) AC 407 at p 428E-428F).

Additional right to resources to put forward mitigating circumstances

The prisoner should be afforded a *full opportunity* to make effective representations by the public funding of psychiatric or other medical reports that may be necessary to ensure a fair and proper decision. Again this right has been recognised in England in relation to "tariff" representations following the decision in *Doody*. Legal aid should therefore be available to enable the commissioning of psychiatric reports, where appropriate.

Right to oral hearing

It was not argued in *Neville Lewis & Others* that the condemned man, and his lawyers, were entitled to an oral hearing. It is likely that the opportunity to make written representation will be held to suffice. But there *may* be cases when only an oral hearing will meet the requirements of fairness (as, for example, when a factual issue arises for resolution).

Right to reasons for adverse decision

The applicants in the case of *Neville Lewis & Others* did argue for a right to be told the reason for an adverse decision - particularly when it was reached in the face of positive recommendation for commutation by an international body. The right to reasons for an adverse decision would seem to follow from the general principles established in the case of *Ex parte Doody* for the giving of reasons in such situations. But it is not certain that the Privy Council will go this far.

Review of the merits of decisions

In the absence of reasons it will obviously be hard to mount a successful judicial review challenge to adverse decisions on the merits. Moreover, it may be that the Privy Council will limit review to case of procedural unfairness and exclude or severely limit (to cases of bad faith or palpable arbitrariness) the scope of review of the *merits* of adverse decisions. But in principle judicial review should at least be available in two circumstances:

- (i) Firstly where there is evidence of bad faith or extraneous factors being taken into account (such as a public clamour for execution).
- (ii) Secondly where all the facts of the case point irresistibly to the merits of granting commutation and it is refused. That

was, after all, the position in *Bentley* and the English Divisional Court felt able to declare its own view on the merits and invite the Home Secretary to reconsider his decision.

Miscarriage of justice cases

So far I have concentrated primarily on commutation cases. By 'commutation' cases, I mean the cases where the condemned prisoner accepts that he was properly convicted but seeks the commutation of the death penalty on the basis of some individual mitigating circumstance that makes it inappropriate to exact the full penalty laid down by law. Obvious examples are cases of comparative youth, borderline mental disease (insufficient to make out a defence of diminished responsibility or insanity), previous good character, limited participation (where the penalty is imposed on grounds of joint enterprise), or some form of duress or coercion. In all such cases, factual issues may arise, and there should be a mechanism for the fair resolution of them. But the essential question in those cases is whether to commute or mitigate the *punishment* which would otherwise be lawful.

Different considerations apply where the prisoner seeks a pardon, or at least a respite of execution, on the basis that he was, in fact, innocent and that there is some more evidence of his innocence. In such cases it is arguable that a higher standard of procedural fairness applies (because of the factual issues to be resolved), so that the courts should be more ready to review the refusal of a stay of execution, or the refusal of a pardon. Much depends on the exact nature of the power being exercised by the Advisory Committee or minister in such cases and whether there is any alternative mechanism for correcting injustice once the normal avenues of criminal appeal have been exhausted.

It is certainly arguable that, where the body entrusted with the power to pardon is the last resort of a person pleading his innocence, and the law provides no other avenue in a "new evidence case" (such as the "reference back" procedure available in some jurisdictions), the exercise of so significant a power should be reviewable both on grounds of procedural fairness and on grounds of *Wednesbury* irrationality.

Reviewability of "Reference Back" Decisions

Finally it should be pointed out that, where there is a formal procedure for

the Attorney-General, or Governor-General, to refer a case back to the Court of Appeal, in cases where new evidence emerges after the exhaustion of the normal appellate process, then this procedure will be subject to judicial review - following the reasoning of the English Divisional Court in *Ex parte Hickey (No 2)* (1995) 1 WLR 734.

Preventative detention and pre-trial rights

Keir Starmer

The right to liberty

The right to liberty is a fundamental right in international and domestic law. It is enshrined in all international human rights instruments (UDHR A3, ICCPR A9, ACHR A7 and ECHR A5) and guaranteed in all of the Commonwealth Caribbean Constitutions. There is no right not to be detained; the purpose of the right to liberty is to protect individuals from arbitrary detention. And in this context that the prohibition on arbitrary detention means that any detention must conform both to domestic and international standards. Hence the insistence of all the international human rights bodies that the final determination of whether detention is arbitrary is for the international body itself.

Voluntary surrender does not relieve the authorities of their duty to comply with domestic and international standards concerning detention. In *De Wilde, Ooms and Versyp v Belgium* ((1979-80) 1 EHRR 373), where the applicants had given themselves up to the police under Belgian vagrancy laws, the ECtHR held that:

“The right to liberty is too important in a democratic society... for a person to lose the benefit of the prohibition on arbitrary detention for the single reason that he gives himself up to be taken into detention.”

Similarly in *Walverens v Belgium* (5 March 1980), the ECmHR was prepared to overlook the fact that the applicant's attendance at a police station was technically voluntary where, in reality, he felt constrained from leaving.

Reasonable suspicion

In the criminal context, one of the permitted grounds for detention is reasonable suspicion that the individual in question has committed an arrestable offence. Broadly speaking the common law standards implied

into the Constitutions of the Commonwealth Caribbean comply with international standards in this respect. In *Fox, Campbell and Hartley v UK* ((1991) 13 EHRR 157) the ECtHR held that:

“Having a 'reasonable suspicion' presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question.” (para. 36)

And this reflects the position at common law: see *Shaaban Bin Hussein v Chong Fook Kam* [1970] AC 942.

Preventative detention

None of the international human rights instruments, and arguably none of the Commonwealth Caribbean Constitutions sanction preventative detention in the criminal context: i.e. where reasonable grounds do not exist. Clauses which appear to legitimise the detention of an individual who is 'about' to commit an offence are to be narrowly construed: they do no more than to afford a means of preventing a 'concrete and specific offence' (*Ireland v UK* (1979-80) 2 EHRR 25).

However, the detention of persons of unsound mind is permitted, even where no reasonable grounds that an offence has been committed exist. Clearly this has enormous potential for abuse - the provision in the Constitution of Trinidad and Tobago for example makes no provision for review, for access to the courts to challenge detention and does not require detention to be necessary or essential to achieve the goal set out, 'care or treatment'. For that reason, both the international human rights bodies and, to a lesser extent, domestic courts have read basic procedural safeguards into the right to liberty. So, for example, in *Winterwerp v Netherlands* (1979-80) 2 EHRR 387), the ECtHR laid down three basic pre-conditions for the detention of individuals of unsound mind, namely:

- the medical disorder relied upon to justify detention must be established by objective medical expertise;
- the nature or degree of the disorder must be sufficiently extreme to justify detention; and
- the detention should last only as long as the medical disorder (and its required severity) persist.

In *Ashingdane v UK* ((1985) 7 EHRR 528), the ECtHR added the requirement that the detention of a person of unsound mind is lawful only if it is in a hospital, clinic or other appropriate institution.

Reason for arrest

The requirement that an individual deprived of his/her liberty be given the reasons for his/her arrest is common to both international human rights instruments and the Constitutions of the Commonwealth Caribbean. What is required is that the individual is told, 'in simple, non-technical language' that s/he can understand 'the essential legal and factual grounds for his arrest' (*Fox, Campbell and Hartley* at para. 40). So, for example, the Constitution of Trinidad and Tobago refers to 'reasonable particularity'.

The sufficiency of the information given to a detainee is measured by the purpose of the provision: to enable anyone deprived of his/her liberty to challenge the lawfulness of his/her arrest. And this is the essential distinction between the requirement of reasons for arrest and the additional (but later) requirement that everyone charged with a criminal offence be notified of the 'charge' against him/her, which is intended to be an important aspect of the right to prepare an effective defence. In *Kelly v Jamaica* (8 April 1991, A/46/40), the UN HRC found a violation of ICCPR A9(2) where the applicant was only told that he had been arrested for murder and only found out the details some week later.

The time-frame within which reasons have to be given is more complicated. The common law requirement, now enshrined in the Police and Criminal Evidence Act 1984 in England and Wales (and applicable in some Caribbean countries), is that reasons be given at the time of arrest, or as soon as reasonably practicable thereafter. Some of the international human rights bodies have been a little more relaxed - so, for example, the ECtHR in *Fox, Campbell and Hartley* found no breach of the ECHR where the reasons for the applicants' arrest was brought to their attention several hours after their detention - and some of the Commonwealth Caribbean Constitutions are (on paper at least) more relaxed still, mentioning periods such as 24 or 48 hours, for example.

Access to a lawyer

Early access to a lawyer, in particular, access before questioning is an aspect of international human rights law where standards are tightening. Principle 1 of the UN Basic Principles on the Role of Lawyers establishes the right to assistance at all stages of criminal proceedings, including interrogation. And, in the context of the right to silence (or, more accurately, drawing adverse inferences from silence during questioning), the ECtHR has effectively ruled out questioning suspects in the absence of their lawyers (see *Murray v UK* (1996) 22 EHRR 29; recently affirmed in *Condron v UK*).

In a similar vein, the UN HRC has emphasised that 'all persons arrested must have immediate access to counsel' (Concluding Observations on the UN HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997). And the IACmHR has stated that the right to defend oneself requires that an accused persons be permitted to obtain legal assistance when first detained. It concluded that a law which prohibited a detainee from access to a lawyer during detention and investigation would seriously impinge upon defence rights (Annual Report 1985-86).

Some of the case law from the Commonwealth Caribbean, to the effect that, in the absence of an express provision in the Constitutions that detainees be notified of their right to a lawyer (for example, *Marshall* (1973) 8 Barb.L.R.37), no such right may be implied, may have to be revised in light of international developments - for example, Principle 5 of the UN *Basic Principles on the Role of the Lawyer*, which provides that every person who is arrested, detained or charged must be informed of his/her right to have the assistance of a lawyer - and case law from England and Wales construing Code C of the Police and Criminal Evidence Act 1984. In this respect, the Trinidad and Tobago case of *Whiteman* ([1997] 2 AC 240 is a useful starting point, particularly the first instance judgement which made it clear that the words 'without delay' in relation to access to a lawyer did not mean at the convenience of the authorities or 'some time before trial', or at a stage where definable rights could be won or lost; the right and its existence arose immediately after arrest.

Moreover, communications between a detainee and his/her lawyer must be confidential. In *S v Switzerland* ((1992) 14 EHRR 670, the ECtHR noted that, unlike some national laws the international instruments (including, notably

ACHR A.8(2)(d)), the ECHR did not expressly guarantee the right of a person charged with a criminal offence to communicate with his/her lawyer out of the hearing of third person. However, expressly drawing on A.93 of the *Standard Minimum Rules for the Treatment of Prisoners*, it held that:

“... an accused's right to communication with his advocate out of the hearing of a third person is one of the basic requirements of a fair trial in a democratic society... If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness...”

The ECtHR accepted that confidentiality could be restricted if, for example, there was a risk of collusion between a client and his/her lawyer. However, the mere risk of collaboration between defence counsel is not enough.

This is broadly reflected in the Constitutions of the Commonwealth Caribbean countries. Save in the cases of Trinidad and Tobago and Guyana, the clauses state that communications with lawyers should be confidential. And in *Thornhill* it was emphasised at first instance that communications between lawyers and clients are privileged. There could be no privilege where there was no confidentiality and, for this, privacy was essential.

The right to be brought promptly before a court

The length of permitted detention in police custody before a first appearance in court has practical implications for the effective enjoyment of other rights of the detainee. All international human rights instruments therefore provide that anyone arrested or detained must be brought promptly before a judge or other officer authorised by law to exercise judicial power, as do most Commonwealth Caribbean Constitutions. While no time limits are expressly stated within the standards, and they are to be decided on a case by case basis, the UN HRC has stated that ‘... delays should not exceed a few days’ (General Comment 8(2)). And in a death penalty case, the HRC ruled that a delay of one week from time of arrest before the detainee was brought before a judge was incompatible with A.9(3) of the ICCPR (*McLawrence v Jamaica*, CCPR/C/60/D/702/1996, 29 September 1997). The ECtHR has ruled that detaining a person for 4 days and 6 hours before bringing him before a judge was not prompt access (*Brogan and others v UK* (1988) 11 EHRR 117).

Bail

In accordance with the right to liberty and the presumption of innocence, individuals awaiting trial should not, as a general rule, be held in custody. But, of course, domestic law and international instruments recognise that there are exceptions - so long as pre-trial detention can be justified.

The ECtHR has held that continued pre-trial detention can only be justified 'if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty' (*Van der Tang v Spain*, 13 July 1993). Similarly, the UN HRC has stated that pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances (*Van Alphen v Netherlands*, A/45/40 (1990)).

The ECtHR has identified four grounds for legitimately denying bail:

- fear of absconding
- interference with the course of justice
- the prevention of crime, and
- the preservation of public order

The mere fact that there are reasonable grounds for suspecting that a person has committed an offence is not enough (*Letellier v France* (1992) 14 EHRR 83; *Van Alphen v Netherlands*).

Perhaps more controversially, there is a growing recognition that bail proceedings will not be fair if relevant disclosure is not made to the defence at a very early stage: i.e. before first bail hearing. In *Lamy v Belgium* ((1989) 11 EHRR 529) the applicant had been arrested on fraud charges. His bail hearing was four days after his arrest, but his lawyers were not given access to documentation on the prosecution file relevant to the question of bail (the prosecution resisted bail on the basis that the applicant would interfere with other witnesses). The ECtHR found this to be a breach of the ECHR on the basis that:

Access to the documents was essential for the applicant at this crucial stage of the proceedings ... The appraisal of the need for a remand in custody and the subsequent assessment of guilt are

too closely linked for access to be refused in the former case when the law requires it in the latter case.

This approach also finds reflection in the common law (See: *R v DPP ex parte Lee* [1999] 2 All ER 237).

Trial within a reasonable period

All international human rights instruments and similarly all of the Constitutions of the Commonwealth Caribbean countries make provision for trial within a reasonable period. Delays in excess of about 2 years will breach this provision and a question that has been troubling the courts for some time now is what is the appropriate remedy.

Where delay overlaps with abuse of process, because prejudice is caused, the position is relatively straight-forward: proceedings should be stayed. But what where there is no discernable prejudice? This is a question largely unanswered either by international bodies or domestic courts. The Constitutional Court of South Africa - in *Wild -v- Hoffert* - did address the issue, and came to the conclusion that staying proceedings was only one of a number of remedies. As an alternative, suggested the Court, the sentence might be altered (i.e. reduced) to take account of prolonged pre-trial detention.

So far so good, but what where the sentence is death? Here, opinion divides. The UN HRC has consistently taken the view that the appropriate remedy for a finding of excessive pre-trial detention should be commutation. And, it appears, the IACmHR agrees. However, the Privy Council has, so far, resolutely taken the opposite view (see, most recently: *Thomas and Hilaire -v- Trinidad and Tobago*).

Fair trial and international standards

Keir Starmer

Introduction

All international human rights instruments and all the Constitutions of the Commonwealth Caribbean guarantee the right to a fair and public hearing in the determination of any criminal charge. In most countries in the Caribbean, equality before the law - sometimes expressed as equal protection of the law - is also guaranteed.

The object and purpose of these provisions is 'to enshrine the fundamental principle of the rule of law' (*Salabiaku v France* (1991) 13 EHRR 379). It is to be interpreted broadly. For the ECtHR:

... a restrictive interpretation of article 6(1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention (Delcourt v Belgium (1979-80) 1 EHRR 355)

Consistent with this approach, the evolution of the case-law of the international human rights bodies reflects 'the increased sensitivity of the public to the fair administration of justice' (*Borgers v Belgium* (1993) 15 EHRR 92).

Adequate time and facilities to prepare a defence

Before a trial starts, the central aspect of the right to a fair trial is the right to have adequate time and facilities to prepare a defence. This is the springboard for other fair trial rights such as legal representation and discovery.

The time needed to prepare a defence inevitably depends on the nature of the proceedings and the factual circumstances of each case. Relevant factors include the complexity of the case, the accused's access to evidence and to his/her lawyer.

Clearly there can be a tension between the right to adequate time and facilities to prepare a defence and the right to trial within a reasonable period. In *Douglas, Gentles and Kerr v Jamaica* (A/49/40, 1994), the UN HRC found that:

If an accused believes that the time allowed to prepare the defence (including speaking with legal counsel and reviewing documents) has been inadequate, it is clear from the jurisprudence that the accused should request the national court to adjourn the proceedings on the grounds of insufficient time to prepare.

Adjourning a murder trial and giving a newly appointed attorney (who replaced previous counsel) four hours to confer with the accused and prepare the case was deemed by the HRC in *Smith v Jamaica* (CCPR/C/47/D/282/1988; 31 March 1993) to be inadequate time to prepare the case. The HRC also found a violation of A.14(3) of the ICCPR in *Reid v Jamaica* (CCPR/C/51/D/1989; 8 July 1989) where newly appointed counsel met with the accused only 10 minutes before the start of a trial and previously appointed counsel failed to appear at many of the hearings during the preliminary stages.

This approach has recently found reflection in the Court of Appeal in Trinidad and Tobago. In *R v Bethel* (23 March 2000), the appellant's conviction was quashed and a retrial ordered where counsel had failed to take proper instructions from his client and failed to take any proper proof of evidence. Giving the judgment of the court, M.A. de la Bastide C.J stated that:

... we would like to make it clear that it is the duty of counsel who is retained to defend someone on a serious criminal charge, to take instructions well in advance of the trial date, and if his client is in custody to visit him in prison for that purpose. The inadequacy of his fee provides no excuse for counsel failing to do so, once he had accepted the brief...

In addition, the Court of Appeal emphasised that whatever the time spent taking instructions, in a murder case, the gravity of the charge required counsel to pursue with his client a 'full and searching inquiry into the facts'.

The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of independent experts in the course of preparing

and presenting a defence. In this respect the express provision to this effect in ACHR A.8(2)(f) is important to the proper interpretation of the law in the Commonwealth Caribbean.

Disclosure

Few international instruments expressly provide a right of disclosure, but it has consistently been read into the right to a fair trial generally and the right to adequate time and facilities to prepare a defence. The classic statement comes from the ECtHR in the case of *Edwards v UK* ((1993) 15 EHRR 417):

... it is a requirement of fairness [under Article 6] ... that the prosecution authorities disclose to the defence all material evidence for or against the accused and that failure to do so [can] give rise to a defect in the trial process.

This broadly reflects the common law position (but not necessarily, the position in England and Wales under the Criminal Procedure and Investigation Act 1996).

At common law, the position can be summarised as follows:

- The right to a fair disclosure is an inseparable part of the right to a fair trial (*R v Winston Brown* [1995] 1 Cr.App.R 191).
- The test of materiality requires disclosure of material (a) that is relevant or possibly relevant to an issue in the case; (b) that raises a new issue whose existence is not apparent from the evidence that the prosecution proposes to use; to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (a) or (b) (*R v Melvin and Dingle*, adopted in *R v Keane* (1994) 99 Cr.App.R 1).
- The authorities are obliged to pursue all reasonable lines of inquiry that point towards or away from the suspect.
- Other departments or branches of the police and/or the security services do not constitute third parties. Hence documents in the possession of one or other agency involved in an inter-agency consideration of a crime are to be regarded for the purpose of any case as in the possession of the prosecution (*R v Blackledge* [1996] 1 Cr.App.R 326).

- It is incompatible with a defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own cause in deciding what material ought to be disclosed (*R v Judith Ward* (1993) 96 Cr.App.R1).

While it is permissible to withhold material from the defence that does not have the potential to assist the defence on grounds of public interest immunity only such measures as are 'strictly necessary' are permissible (*Van Mechelen v Netherlands* 15 EHRR 647; *Rowe and Davis v UK* (2000)).

Legal Aid

In the criminal context, the provision of legal aid is a requirement of fair trial, subject to two conditions:

- First, that the accused lacks 'sufficient means' to pay for legal assistance
- Second, that 'the interests of justice' require legal aid to be granted.

Few issues have arisen before the international human rights bodies concerning the first condition, although, it seems, the level of proof required from a defendant that s/he lacks resources should not be set too high.

As to the second condition, a number of factors are relevant. The complexity of the case is obviously important. In *Benham v UK* (1996) 22 EHRR 293 where the applicant was imprisoned for non-payment of the community charge, one of the reasons that influenced the ECtHR to hold that legal aid should have been granted was the fact that the proceedings were 'not straightforward'. The test for culpable negligence in particular was hard to understand.

Closely related to the complexity of the case, is the ability of the defendant to present the case adequately without assistance. In *Grainger v UK* (1990) 12 EHRR 469 the ECtHR, in finding a violation of article 6(3)(c) in relation to appeal proceedings in Scotland, noted that 'the applicant ... was not in a position fully to comprehend the pre-prepared speeches he read out'. And in *Hoang v France* (1993) 16 EHRR 53 the ECtHR took the view that where there are complex issues to be argued, the defendant does not have the legal

training essential to present and develop arguments and only an experienced counsel would have the ability to prepare the case, the interests of justice require that a lawyer be officially assigned to the case.

The UN HRC has repeatedly held that the interests of justice require that counsel be appointed at all stages of the proceedings for people charged with crimes punishable by death. (see, for example, *Henry and Douglas v Jamaica* CCPR/C/57/D/571, 26 July 1996).

Under A.8(2)(e) of the ACHR, appointed counsel is to be paid by the state only if domestic law so provides. However, the IACtHR has held that states must provide counsel free of charge for a person who cannot afford to pay, if counsel is necessary to ensure a fair hearing (Advisory Opinion, 10 August 1990, OC-11/90).

Principle 3 of the Basic Principles on the Role of Lawyers require states to provide sufficient funding and other resources to provide legal counsel to the poor and disadvantaged.

The right to participate effectively in criminal proceedings

On several occasions the ECtHR has recognised the right of a defendant to participate effectively in criminal proceedings. Fundamental to such effective participation is presence:

... it flows from the notion of a fair trial that a person charged with a criminal offence should, as a general principle, be entitled to be present at the trial hearing. (Ekbetani v Sweden (1991) 13 EHRR 504).

Consequently, the state is under a positive duty to take steps to ensure that defendants can exercise this right.

Effective notification of a hearing to both the defendant and his/her lawyer is one such step. In addition, it was implicitly recognised in *Goddi v Italy* ((1984) 6 EHRR 457) that where a defendant is held in custody and the authorities have notice that he wishes to be present at the hearing in criminal proceedings, they should take steps to get him there.

However, the right to be present at trial is not absolute. In *Ensslin and Others v Germany*, ((1978) 14 DR 64) the applicants were unable to attend some parts

of their trial because, as a result of their hunger strike, they were medically unfit to do so. The Commission recognised that 'under article 6(3)(c), a criminal trial may not take place without the defence having the opportunity to present its arguments adequately' but nonetheless held that: in the circumstances of the case, the judge was able to make use of the only means at his disposal for preventing the proceedings from grinding to a halt, without however placing the defence at any disadvantage, their lawyers being present and having practically unlimited opportunities for contact with their clients.

In addition, the right to be present at trial can be waived. But only where waiver is unequivocal. Therefore, it is for the state authorities to show that an absent defendant was aware of the proceedings against him/her and that adequate steps have been taken to trace him/her.

The right to participate effectively is a broad right extending beyond mere presence. To treat a defendant in a way which lowered his/her physical and mental resistance during the hearing would violate the requirement of a fair hearing. (*Barbera, Messegue and Jabardo v Spain* (1989) 11 EHRR 360; *T and V v UK* (1999)). And in the context of a complaint by an applicant with hearing difficulties, the ECtHR has recognised that:

... article 6, read as a whole, guarantees that right of an accused to participate effectively in a criminal trial. In general this includes, inter alia, not only his right to be present, but also to hear and follow the proceedings. (Stanford v UK (1994))

The ECtHR accepted that poor acoustics was 'undoubtedly a matter which could give rise to an issue under article 6 but in circumstances where the applicant had failed to raise the matter in the domestic proceedings found no violation on the facts.

Appendices



Conference Statement on *Neville Lewis & Others*

Human Rights Training Seminar for the Commonwealth Caribbean
Radisson Fort George Hotel, September 12-14, 2000

Belize City, September 14, 2000

The organisations and participants from the 14 countries attending the Human Rights Training Seminar for the Commonwealth Caribbean in Belize on September 12th - 14th acclaim the decision of the Privy Council in London in the *Neville Lewis Case*, delivered on Tuesday 12th September 2000: This decision clearly expresses, establishes and applies the fundamental principle that public authorities which make such important decisions as whether or not a person sentenced to death should be executed must observe basic rules of fairness.

The Jamaican Privy Council and the Mercy Committees in other Caribbean countries have in the past made the decisions as to whether sentences of death should or should not be commuted without giving any real opportunity to the condemned persons to make representation to them or even to know what material and recommendations were being considered in the making of the decisions. This opportunity will now have to be given.

Although the decision, directly concerns the six Jamaican appellants before the Board, it will have an impact on death row prisoners in other Caribbean countries, who will now be entitled to the observance of similarly fair procedures.

The decision, however, does not only affect persons on death row. It clearly applies to those persons such as police officers and public officers, whose appeals in disciplinary proceedings have been dealt with by such bodies without the observance of procedural fairness.

It should be pointed out that in this decision, the Privy Council has endorsed views previously expressed by the Jamaican Court of Appeal, the Court of

Appeal of Guyana, the Supreme Court of Belize and the Inter-American Commission.

It is now clear that the constitutions of the countries of the Commonwealth Caribbean require that our law and practice conform to fundamental principles of justice and international human rights standards.

This result can only provide protection for all citizens of our countries against the abuse or deprivation of their fundamental rights and freedoms in several areas.

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Human rights seminar for lawyers in Belize

Belize City, Belize

Human rights advocates and lawyers of the Caribbean will be among participants at a three-day Human Rights Training Seminar which begins in Belize on September 12.

It has been organised by Penal Reform International (PRI) and the British law firm of Simons Muirhead and Burton with assistance from Britain's Foreign and Commonwealth Office.

The purpose of the seminar, which is being hosted by the government of Belize, is to train and assist Commonwealth Caribbean lawyers in undertaking representation at trial and appeal level for prisoners charged with serious offences, and to help them to initiate human rights and prison litigation cases.

The organisers feel that in view of the recent trend of government's in the Caribbean withdrawing from hemispheric and international treaties, there is a need to initiate more constitutional proceedings to enforce the fundamental rights of death row prisoners and other poor and disadvantaged persons charged with committing serious offences, including murder.

Speakers will be drawn from the Caribbean, United Kingdom and the United States of America, and will address issues such as: the rights of convicted and remand prisoners, international remedies, rights to a fair trial under the European Convention on Human Rights, discretionary and mandatory sentences, the death sentence as cruel and inhumane punishment and constitutional remedies in capital cases.

The participants will consist of human rights lawyers and NGO representatives who work with prisoners in CARICOM countries.

Godfrey Smith, Attorney General of Belize, is scheduled to deliver the feature address at the opening session at which the British High Commissioner to Belize, Tim David, will speak on behalf of the Foreign and Commonwealth Office. The closing address will be given by the Chief Justice of Belize on September 14.

(St Vincent Herald, 7 September 2000)



Conference delegates - Belize, September 2000

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