The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism

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THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL AND THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN: STUDIES IN JUDICIAL ACTIVISM

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I. THE COMMONWEALTH CARIBBEAN

The term “the Commonwealth Caribbean” describes that group of countries bounded by the Caribbean Sea, from the Bahamas in the north to Guyana in the south, including a sole Central American outpost in Belize in the west, which are bounded by the Caribbean Sea, and all of which were, at some point in their rich and colourful history, colonies of Great Britain.¹ In this regard, they all share with the United States some aspects of a common history, such as a common language.² With the exceptions of Belize and Guyana, which are geographically parts of the continents of Central and South America, they are all island countries whose names are well known to...
throughout the world for the exploits of their nationals in the arts, culture, sports, and for their reputation for physical beauty and an incredibly hospitable climate. 3

Prior to these territories gaining independence from the United Kingdom, the apex of their judicial and legal system was the Judicial Committee of the Privy Council, which was an English institution that had been established by the Judicial Committee Act 1833. 4 The Privy Council accordingly functioned as the final court of appeal for all of the colonies of Britain (including, at various stages of their history: Canada, Australia, New Zealand, Hong Kong, and much of Africa) and, by that role, provided a unifying force in the common law of England as it applied in the colonies. 5

The independence movement in the Commonwealth Caribbean began in the early 1960s (with Jamaica and Trinidad and Tobago being the forerunners in 1962) and continued well into the 1980s. 6 By the end of the independent movement, there remained in the region only five dependencies of the United Kingdom. 7 Upon achieving independence, each of the former colonies had a choice “of either allowing appeals to an external court to continue or of abolishing them.” 8 All of them, in fact, opted to preserve appeals to the Privy Council (an external court) and, with the single exception of Guyana, 9 this has remained the situation up until quite recently. 10

3. Id. at 5, 41.
5. See ANTOINE, supra note 4, at 230.
10. See ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY, supra note 1, passim.
sertion of their independence in, as some have argued, "an exercise of sovereignty, not a derogation from it," the territories of the Commonwealth Caribbean chose to retain the Privy Council as their final court of appeal.

However, this state of affairs has not enjoyed complete approbation from significant parts of the body of informed opinion throughout the region, and as one distinguished Caribbean jurist observed, "it is offensive to the sovereignty of independent nations and therefore, politically unacceptable, to have a foreign tribunal permanently entrenched in their [C]onstitutions as their final court." The arguments for and against are lucidly expounded by Professor Simeon McIntosh, the distinguished current Dean of the Faculty of Law of the University of the West Indies, in the concluding chapter, "Reading Text and Polity: The Case for a Caribbean Supreme Court," of his seminal work on constitutional reform in the Commonwealth Caribbean. Many in the region would find it difficult to question his conclusion that "the continuing presence of the . . . Judicial Committee in the post-independence Commonwealth Caribbean political order represents a vestigial incongruity, a contradiction in the constitutional symbolism of a politically independent sovereign order." This therefore provides the historical and theoretical background against which some of the governments in the region have entered into the international "Agreement Establishing the Caribbean Court of Justice, signed at Bridgetown, Barbados, on the 14th day of February, 2001." The recent successful challenge in Jamaica to the constitutionality of local legislation designed to give effect to the Agreement and the Protocol demonstrates that, despite the inauguration of the Caribbean Court of Justice, signed at Bridgetown, Barbados, on the 14th day of February, 2001, the governments and the people of the region may yet be some distance away from the complete achievement of abolition of appeals to the Privy Council and the removal of what the Chief Justice of Barbados

12. See ISLANDS OF THE COMMONWEALTH CARIBBEAN: A REGIONAL STUDY, supra note 1, passim.
15. Id. at 265.
has described as "an affront to sovereignty . . . inconsistent with independence."\textsuperscript{17}

But this article's main area of focus is not so much on the merits, or otherwise, of abolishing appeals to the Privy Council and the establishment of a Caribbean Court of Justice in its place; for despite the constitutional challenges, the actual setting up of the Court and the appointment of judges, both of which have now taken place, must surely set the stage for the kind of creative, but purposive, dialogue between the governments and the people of the region that will be required to secure a basis for consensus on its viability in the long run. Rather, my concern is to highlight the role of the Privy Council, as a final court of appeal for the region, in an area of critical importance to the every day life of all citizens of the region, that is, capital punishment. An analysis of that role will establish, I contend, that the Privy Council has demonstrated tremendous flexibility in response to changing norms in the area of international human rights, and it has done so in a manner that underscores the absolute desirability of an independent, responsible, and responsive final court of appeal. Far from being an argument in favor of preserving indefinitely, or for a time, appeals to the Privy Council, this is intended, rather, to provide a signpost to the quality of thought and adjudication that the citizenry must be entitled to expect, and to demand, from its higher judiciary, whether its seat is to be found in London, or in Port of Spain.

II. THE DEATH PENALTY

In the case of Boyce \textit{v. The Queen},\textsuperscript{18} an appeal from Barbados, Lord Hoffman (delivering the majority judgment), described the mandatory death penalty in this way:

Since the island of Barbados was colonised by the English in the seventeenth century, death has been the mandatory sentence for the crime of murder. That was the common law of England and it became the law of Barbados. In the nineteenth century it was codified in English statutes dealing with offences against the person: see section 3 of the Offences Against the Person Act 1828 and section 1 of the Offences Against the Person Act 1861. Each of these statutes was followed a few years later by a


\textsuperscript{18} [2004] UKPC 32, [2005] 1 A.C. 400 (appeal taken from Barb.).
similar statute in Barbados. Section 2 of the Barbados Offences Against
the Person Act 1868 provided, as section 1 of the English Act of 1861 had
done, "whosoever shall be convicted of murder shall suffer death as a
felon."

In the United Kingdom the death penalty was confined by Part II of
the Homicide Act 1957 to certain kinds of murder which the Act desig-
nated "capital". The Murder (Abolition of Death Penalty) Act 1965 abol-
ished altogether its imposition for murder and section 1 of the Offences
Against the Person Act 1861 was repealed. But no similar legislation was
enacted in Barbados and the old law remained in force when Barbados be-
came independent on 30 November 1966. Since then, section 2 of the
1868 Act has been replaced by section 2 of the Offences Against the Per-
son Act 1994: "Any person convicted of murder shall be sentenced to, and
suffer, death." 19

Apart from minor differences in wording (in Belize, for instance, the
law states that "[e]very person who commits murder shall suffer death"), 20
the Barbados provision is typical of that to be found in the Commonwealth
Caribbean. 21 However, the movement internationally towards the abolition
of the death penalty by statutory intervention has not borne fruit in the region
(save, of course, in the remaining British dependent territories, where the
United Kingdom reforms described by Lord Hoffman have applied as a mat-
ter of course). 22 Despite a strong and sustained human rights campaign, par-
ticularly in Jamaica and Trinidad and Tobago, in favour of abolition of the
death penalty, I think it is fair to say that this result remains a remote possi-
bility. The fact is that the rate of violent crime, particularly murder, in these
small countries continues to be such (and it is on the increase) that abolition
of the death penalty at this time is unlikely to attract the level of public sup-
port that governments will probably want to look to in order to promote such
a radical change in the status quo. 23 So the death penalty remains, and is
likely to remain for some time, the penalty for murder throughout the region.
However, there have been legislative attempts, notably in Jamaica and Be-

http://www.belizelaw.org/lawadmin/index2.htmil.
22. See id.
23. Take the case of Jamaica: In 2004 there were 1471 murders, and as of September 29,
2005, the total was already in excess of 1260 (out of a total population of approximately 2.5
http://www.jamaica-gleaner.com/gleaner/20051002/lead/lead6.html (last visited Mar. 20,
2006).
lize, to mitigate its application by providing for degrees of murder, with only the most serious ("capital") cases attracting the sentence of death.  

III. THE INTERNATIONAL BILL OF RIGHTS AND THE COMMONWEALTH CARIBBEAN

What has come to be known as the International Bill of Rights comprises the Universal Declaration of Human Rights,\(^24\) the International Covenant on Economic, Social, and Cultural Rights,\(^26\) the International Covenant on Civil and Political Rights,\(^27\) and the Optional Protocols to the International Covenant on Civil and Political Rights.\(^28\) To these may be added the American Declaration of the Rights and Duties of Man,\(^29\) which is similar in its terms to the Universal Declaration,\(^30\) and the American Convention on Human Rights (1979),\(^31\) both of which are products of the Organization of American States system,\(^32\) of which many countries of the region are members.\(^33\)

The right to life is a centrally enshrined feature of many international instruments. "Every person has the right to life, liberty and the security of


\(^{30}\) Universal Declaration of Human Rights, supra note 25.


\(^{32}\) See Boyce v. The Queen [2004] UKPC 32 ¶ 16, [2005] 1 A.C. 400 (appeal taken from Barb.).

person,” proclaims the Universal Declaration,34 while the equivalent provision of the American Declaration is very similar.35 More detailed provisions are to be found in the International Covenant on Civil and Political Rights.36 Article six, paragraph one states, “[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”37 Article seven states, “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”38

And the American Convention on Human Rights deals with the death penalty in even greater detail than the earlier instruments.39

1. Every person has the right to have his life respected. This right shall be protected by law . . . No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . .

. . .

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.40

IV. THE INDEPENDENCE CONSTITUTIONS

By the time the Independence Constitutions came to be drafted in the beginning of the 1960s, the basic outline of what was to become the International Bill of Rights had already began to take shape and all of the new Constitutions incorporated Bills of Rights patterned on the Universal Declaration and the European Convention on Human Rights.41 As I have previously argued elsewhere, with reference to the case of Jamaica, “the international provenance of the Bill of Rights has had the salutary effect of locating those

34. Universal Declaration of Human Rights, supra note 25, art. 3.
35. American Declaration of the Rights and Duties of Man, supra note 29, art. 1. “Every human being has the right to life, liberty and the security of his person.” Id.
36. See International Covenant on Civil and Political Rights, supra note 27, art. 6.
37. Id.
38. Id. art. 7.
40. Id.
clauses within an international context."42 The rights protected by section 13 of the Jamaican Constitution are a fair sample of what appears in the other Constitutions and are as follows: "(a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life."43

The enshrinement of these rights in the Constitutions has "had the effect of providing an authoritative, normative statement of the standards of conduct expected by the society of the state in its relationship with its citizens,"44 and has also served to promote what Dr. Rose-Marie Belle Antoine has described as the "norm-building and evolutionary character of a constitution."45 Their importance for the discussion which follows has to do mainly with the extent to which it will be seen that they have prescribed norms of state behavior which have come over time, through the way in which they have been interpreted, to mirror contemporary international standards.

V. THE PRIVY COUNCIL AND THE DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN—THREE CASE STUDIES

It has tended to be a feature of supreme courts or courts of last resort in common law systems that only a small selection of cases of significant and general public importance are chosen for hearing and final adjudication.46 In this way, the dockets of these courts are not overburdened, therefore allowing the judges the kind of space and time that is necessary to make meaningful contributions to the interpretation of existing rules of law and to the development of case law.47 One practical consequence of this is that decisions of courts of last resort tend to endure and to be difficult to change even where clearly justified by changed or changing circumstances.48 No less so with the Privy Council, though the Privy Council has never been, in the strict sense, bound by its own decisions.49 Against this background, one highly unusual feature of the decisions of the Privy Council on death penalty cases from the Commonwealth Caribbean over the past twenty-five to thirty years

43. THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 13(a)-(c).
44. MORRISON, supra note 42, at 3.
45. ANTOINE, supra note 4, at 81.
47. Id. at 305.
is that it has felt able to explicitly reverse its own previous decisions on at least three occasions, a phenomenon which represents a recognition of the ferment of changing norms in the arena of international human rights, and no less of changing times.  

A. Case Study One: The Carrying Out of a Sentence of Death—The Impact of Delay

In Riley v. Attorney-General,  

[the appellants were sentenced to death in Jamaica on various dates in 1975 and 1976 for murder. Their appeals to the Court of Appeal were dismissed and petitions for leave to appeal to the Privy Council were either dismissed or abandoned in 1976 and 1978. Between 1976 and 1979, however, there had been acute controversy in Jamaica regarding capital punishment. During that period, the execution of sentences of death was held in abeyance. In 1979, the House of Representatives resolved that capital punishment should be retained. Warrants for the execution of the appellants were issued in the same year. They then sought declarations from the Supreme Court that their executions would be contrary to section 17(1) of the Constitution, as being “inhuman or degrading punishment or other treatment” by reason of the length and circumstances of the delay in each case between the passing of the sentence and its execution. The Full Court refused the declarations and appeals to the Court of Appeal were dismissed.]

On further appeal to the Privy Council, it was held by a bare majority that the appeals should be dismissed as “whatever the reasons for or the length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1).”

The Privy Council thus rejected the argument on behalf of the appellants that “long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible,” could

51. [1983] 1 A.C. 719 (P.C.) (appeal taken from Jam.)
54. Id. at 725.
constitute "'inhuman or degrading punishment or other treatment'" contrary to section 17(1) of the Constitution. In so doing, the majority of their Lordships were content to apply the reasoning of their own previous decision on appeal from Trinidad and Tobago.

Ten years later, exactly the same question came before the Privy Council again in Pratt v. Attorney-General. "The appellants were convicted in 1979 of a murder committed in 1977 (since which [time] they had been detained in custody)," and were sentenced to death. After various unsuccessful appellate proceedings, in 1991 they instituted proceedings for redress under the Constitution of Jamaica "claiming that their continued detention under sentence of death" for nearly fourteen years constituted "inhuman or degrading punishment or other treatment" in contravention of section 17(1) of the Constitution. Not surprisingly, these proceedings were dismissed and the Supreme Court and the Court of Appeal of Jamaica correctly held themselves to be bound by the Privy Council's earlier decision in Riley.

But in a reversal of its own decision in Riley, the Privy Council in Pratt ruled:

That the execution of the death sentence after unconscionable delay would constitute a contravention of section 17(1), except where the delay had been the result of some fault of the accused, e.g. an escape from custody or the frivolous or time-wasting resort to legal procedures such as would amount to an abuse of process; but delay attributable to the accused exploring legitimate avenues of appeal did not fall within such exception.

The Privy Council ruled further that "to execute the appellants after holding them in custody and under sentence of death for nearly fourteen years would be inhuman and in breach of section 17(1) and [that] their sentence[s] should [accordingly] be commuted to life imprisonment." The factual background

55. Id. at 726 (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
56. Id. at 725–26 (citing de Freitas v. Benny [1976] A.C. 239 (P.C.) (appeal taken from Trin. & Tobago)). In a powerful dissent which foreshadowed events to come, Lord Scarman and Lord Brightman disagreed with the result. See id. at 727–36 (Scarman, L., & Brightman, L., dissenting).
59. Id. (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
60. Id. at 355–56.
61. Id. at 341.
62. Id.
and the context were stated briefly, but graphically, by Lord Griffiths as follows:

The appellants, Earl Pratt and Ivan Morgan, were arrested sixteen years ago for a murder committed on 6th October 1977 and have been held in custody ever since. On 15th January 1979 they were convicted of murder and sentenced to death. Since that date they have been in prison in that part of St. Catherine’s prison set aside to hold prisoners under sentence of death and commonly known as “death row”. On three occasions the death warrant has been read to them and they have been removed to the condemned cells immediately adjacent to the gallows. The last occasion was in February 1991 for execution on 7th March; a stay was granted on 6th March consequent upon the commencement of these proceedings. The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the fourteen years that they have been in prison facing the gallows. It is unnecessary to refer to the evidence describing the restrictive conditions of imprisonment and the emotional and psychological impact of this experience, for it only reveals that which it is to be expected. These men are not alone in their suffering for there are now twenty-three prisoners in death row who have been awaiting execution for more than ten years and eighty-two prisoners who have been awaiting execution for more than five years. It is against this disturbing background that their lordships must now determine this constitutional appeal and must in particular reexamine the correctness of the majority decision in Riley v. Attorney-General.63

After a full review of the authorities, Lord Griffiths expressed the unanimous conclusion of the seven member court in these terms:

In their lordships’ view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner.

who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

The application of the appellants to appeal to the Judicial Committee of the Privy Council and their petitions to the two human rights bodies do not fall within the category of frivolous procedures disenabling them to ask the Board to look at the whole period of delay in this case. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of article 3 of the European Convention on Human Rights and their lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution.

To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). In the last resort the courts have to accept the responsibility of saying whether the threshold has been passed in any given case and there may be difficult borderline decisions to be made. This, however, is not a borderline case. The delay in this case is wholly unacceptable and this appeal must be allowed.64

In the result, Riley was overruled,65 and the court concluded that, "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment."

64. Id. at 359-60.
65. Id. at 355.
66. Id. at 362 (quoting THE JAMAICA (CONSTITUTION) ORDER IN COUNCIL 1962 § 17(1)).
67. Id.
standards required a departure from its own earlier decision in Riley and Pratt.\(^{69}\) This was therefore a landmark decision, signaling the readiness and willingness of the Privy Council, as the Supreme Court of Jamaica, to mold the law of that country and the region in response to changing imperatives.

The wholly regrettable sequel to *Pratt* has, however, been the actions of the Governments of Jamaica and Trinidad and Tobago, both of which subsequently withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights.\(^{70}\) It is the Optional Protocol which provides an "international machinery for dealing with communications from individuals claiming to be victims of violations" of the rights enshrined in the Covenant.\(^{71}\) The reason given for the withdrawal was that, in light of the decision in *Pratt*, those states would be unable to carry out the death penalty, given the probability that the domestic appellate and the international process would not be completed within the five-year period.\(^{72}\) The comment of one learned observer on these developments has, in my view, irresistible force:

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 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.\(^{73}\)

B. *Case Study Two: Procedural Fairness and the Prerogative of Mercy*

"The phrase 'procedural fairness' has come to describe those rules . . . which are concerned with the procedures for administrative decision mak-

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69. See id at 355–62.


71. MORRISON, supra note 42, at 6.


The rules "therefore have more to do with ensuring the integrity of the decision making process, rather than with the decisions themselves." The core requirements of the concept of procedural fairness in the modern law are that administrative decision makers must adhere to the rules of natural justice" or, put another way, that "they must act fairly." The right to a hearing has, of course, traditionally been regarded as a key component of the duty to act fairly.

Virtually all of the Independence Constitutions in the Commonwealth Caribbean provide a procedure whereby convicted persons under sentence of death and who have exhausted all appellate procedures, may nevertheless seek commutation of their sentences to life imprisonment, by virtue of the exercise of "the [P]rerogative of [M]ercy." The question that arose for decision for the first time by the Privy Council in de Freitas (a 1975 decision) was whether, "before advice is tendered" by the designated body or person to the Head of State "as to the exercise of the prerogative of mercy," the convicted person is "entitled (1) to be shown the material which the [body or person] who tender[ed] th[e] advice has placed before the [Head of State] . . . and (2) to be heard by that [Head of State] in reply at a hearing at which he is legally represented." The Privy Council answered both questions in the negative, Lord Diplock observing memorably that "Mercy is not the subject of legal rights. It begins where legal rights end.”

The decision in de Freitas, which was concerned with the Constitution of Trinidad and Tobago, was twenty years later followed by the Privy Council in the case of Reckley v. Minister of Public Safety and Immigration (No. 2), an appeal from the Bahamas. Lord Goff, speaking for the Privy Council, dealt with the matter in this way:

74. MORRISON, supra note 42, at 15 (emphasis added).
75. Id.
76. Id.
77. Id. at 16.
78. See de Freitas v. Benny [1976] A.C. 239, 247 (P.C.) (appeal taken from Trin. & Tobago). It is so called because its exercise "has always been a matter which lies solely in the discretion of the sovereign." Id. The person or body on whose advice the Head State acts in this regard varies from country to country. In Trinidad and Tobago it is a Minister designated for this purpose. Id. at 248. In Jamaica it is the local Privy Council (not to be confused with the Judicial Committee). Riley v. A-G [1983] 1 A.C. 719, 725 (P.C.) (appeal taken from Jam.). In [t]he Bahamas it is the Advisory Committee on the Prerogative of Mercy. See Reckley v. Minister of Pub. Safety & Immigration (No. 2) [1996] 1 A.C. 527, 530 (P.C.) (appeal taken from Bah.).
80. Id.
81. Id. at 241.
82. [1996] 1 A.C. 527 (P.C.) (appeal taken from Bah.).
The point can be placed in a broader context. A man accused of a capital offence in the Bahamas has of course his legal rights. In particular he is entitled to the benefit of a trial before a judge and jury, with all the rights which that entails. After conviction and sentence, he has a right to appeal to the Court of Appeal and, if his appeal is unsuccessful, to petition for leave to appeal to the Privy Council. After his rights of appeal are exhausted, he may still be able to invoke his fundamental rights under the Constitution. For a man is still entitled to his fundamental rights, and in particular to his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, for example because there has been such delay that to execute him would constitute inhuman or degrading punishment, or because there has been a failure to consult the Advisory Committee on the Prerogative of Mercy as required by the Constitution, then he can apply to the Supreme Court for redress under article 28 of the Constitution. But the actual exercise by the designated minister of his discretion in death sentence cases is different. It is concerned with a regime, automatically applicable, under which the designated minister, having consulted with the advisory committee, decides, in the exercise of his own personal discretion, whether to advise the Governor-General that the law should or should not take its course. Of its very nature the minister's discretion, if exercised in favour of the condemned man, will involve a departure from the law. Such a decision is taken as an act of mercy or, as it used to be said, as an act of grace. As Lord Diplock said in _de Freitas v. Benny_: "Mercy is not the subject of legal rights. It begins where legal rights end." And the act of the advisory committee in advising the minister is of the same character as the act of the minister in advising the Governor-General.8

It might have been thought that the confirmation in _Reckley_ that _de Freitas_ "remains good law," would have put an end to the question whether, on a petition for mercy (after all other domestic attempts to set aside the convictions or to prevent execution have been exhausted), a convicted person is entitled to know what material the "Mercy Committee" had before it, and to make representations as to why mercy should be granted.85 But this is precisely the question that the Privy Council was again asked to determine a mere four years later in an appeal from Jamaica in _Lewis v. Attorney-

83. _Id._ at 527.
84. _Id._ at 540 (citation omitted).
85. _Id._ at 542.
In that case, there was some discussion of differences in procedure between Trinidad and Tobago, the Bahamas, and Jamaica with regard to the exercise of the prerogative of mercy, but the majority concluded that these differences did not justify a distinction in this regard being drawn between the three countries. Lord Slynn observed that "the position in each with respect to the right to make representations on a mercy petition should be the same." The task at hand and the proper approach were therefore summarized by Lord Slynn as follows:

Their lordships are accordingly compelled to consider whether they should follow these two cases. They should do so unless they are satisfied that the principle laid down was wrong—not least since the opinion in the Reckley (No 2) case was given as recently as 1996. The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man’s life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified.

While the Privy Council in Lewis reiterated that "the merits [of a petition for mercy] are not for the courts to review," it nevertheless observed that "the insistence of the courts on the observance of the rules of natural justice, of ‘fair play in action’, has in recent years been marked" and that, on the face of the matter:

there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body.

After a full and careful review of authorities throughout the common law world, as well as of Jamaica’s obligations under the American Convention on Human Rights, the Privy Council concluded in Lewis that de Freitas and Reckley should be overruled, and that a petitioner for mercy should have access to the material to be placed before the “Mercy Committee”, as well as

86. [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.).
87. Id. at 74–75.
88. Id. at 75.
89. Id. at 75–76.
the right to make representations to the Committee, whether in writing, (as would normally be the case) or orally. The Privy Council was obviously influenced by the dictum of Justice Holmes in Biddle v. Perovich, that "[a] pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme." In that case, the consideration of whether it should be granted or not must necessarily be open to judicial review in order to determine that the ordinary accepted principles of fairness have been applied. "This decision, as I have observed elsewhere, 'is accordingly not so much a 'death penalty' case as it is a case about the duty to demonstrate fairness in process, enhanced, albeit, by the finality of the consequences of failing to do so.'" It is at the same time another demonstration of the willingness of the Privy Council, as a court of last resort, to insist that old paradigms (mercy begins where legal rights end) be subject to fresh scrutiny in the light of developed concepts of what the requirements of fairness might demand in particular cases.

C. Case Study Three: The Mandatory Death Penalty

As recently as 1981, Lord Diplock in delivering the judgment of the Privy Council in Ong Ah Chuan v. Public Prosecutor had observed that there was nothing unconstitutional in a death sentence being mandatory and that its efficacy as a deterrent might to some extent be diminished if it were not. Furthermore, it had not been sought in either Pratt or Lewis, or in any of the earlier challenges to the manner of the administration of the death penalty, to argue that the mandatory nature of the penalty was in any way unconstitutional. Yet, by 2004, Lord Hope tersely described Lord Diplock's remark referred to above as "no longer acceptable." What is it that had happened in the interim?

90. See id. at 279–80.
91. 274 U.S. 480 (1927).
92. Id. at 486.
93. See id.
94. Morrison, supra note 42, at 19 (citation omitted).
95. See generally Biddle, 274 U.S. 480.
97. Id. at 674.
In *Reyes v. The Queen*, the defendant was convicted of a "class A" murder which by the Criminal Code of Belize was punishable by a mandatory sentence of death. The defendant challenged his sentence as unconstitutional in that it infringed upon his right not to be subjected to inhuman or degrading punishment or other treatment, under Section 7 of the Belize Constitution. In another landmark ruling, the Privy Council upheld this contention and set aside his sentence, holding that since the character of the offence of murder by shooting could vary widely, the imposition of the death penalty for some such offences "would be plainly excessive and disproportionate." Denying a person convicted of murder by shooting "the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity." The sentence of death was therefore quashed and the case remitted to the Supreme Court of Belize to pass an appropriate sentence after receiving or hearing any evidence and submissions on his behalf.

In arriving at this conclusion, the Privy Council referred with approval to the report of an independent enquiry into the mandatory life sentence for murder, which it obtained in the United Kingdom, in which it was stated that "[t]here is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder." Reference was also made to "international developments," some of which have already been described at paragraphs eight through ten above, as well as to the modern approach to the interpretation of constitutional provisions protecting human rights, which is to adopt a "generous and purposive interpretation" and to consider the substance of the fundamental right at issue and "ensure contemporary protection of that right in the light of 'evolving standards of decency that mark the progress of a maturing society.'" Against this broad backdrop of principle, the court had no difficulty in holding that the mandatory sentence of death for murder, without reference to any potentially mitigating factor in the person or in cir-

102. *Id.* at 237.
103. *Id.* at 242, 256.
104. *Id.* at 256.
105. *Id.* at 258.
107. *Id.* at 244.
108. *Id.* at 246 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
cumstances of the condemned man, constituted inhuman and degrading punishment.\textsuperscript{109}

To similar effect as \textit{Reyes} were the decisions of the Privy Council in \textit{Regina v. Hughes}\textsuperscript{110} and \textit{Fox v. The Queen}.\textsuperscript{111} And more recently, in \textit{Watson v. The Queen},\textsuperscript{112} the Privy Council came to the same conclusion, Lord Hope referring specifically to "[t]he march of international jurisprudence" on the death penalty issue which had driven the court to the conclusion that the mandatory sentence of death was unconstitutional.\textsuperscript{113} In this regard, two American cases, \textit{Woodson v. North Carolina}\textsuperscript{114} and \textit{Roberts v. Louisiana},\textsuperscript{115} influenced the thinking of the Privy Council, in particular around the notions that "[c]onsideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development"\textsuperscript{116} and that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."\textsuperscript{117}

In the companion cases to \textit{Watson} from Barbados and Trinidad and Tobago, it is clear that the decisions would have been the same were it not for the existence, in the constitutions of those countries, of effective provisions saving laws that pre-dated the constitution ("pre-existing laws") from challenge.\textsuperscript{118} Ultimately, in \textit{Matthew v. The State},\textsuperscript{119} the breathtaking progression that \textit{Reyes, Watson} and the other cases have described receives its most effective summary from the brief, but powerful, dissent of Lord Nicholls:

Years ago no one thought mandatory death sentences were an unusual or inhumane form of punishment. They existed in the United Kingdom until 1965. As recently as 1981 Lord Diplock was able to say there was nothing unusual in a capital sentence being mandatory.

Times have changed. Human rights values set higher standards today. The common endeavour, to rid the world of man's

\textsuperscript{109} Id. at 248–50.
\textsuperscript{112} [2004] UKPC 34, [2005] 1 A.C. 472 (appeal taken from Jam.).
\textsuperscript{113} Watson [2004] UKPC 34 ¶ 30.
\textsuperscript{114} 428 U.S. 280 (1976).
\textsuperscript{115} 431 U.S. 633 (1977).
\textsuperscript{116} Woodson, 428 U.S. at 304.
\textsuperscript{117} Roberts, 431 U.S. at 637.
inhumanity to man, has not ceased. Conduct, once tolerated, is no longer acceptable. Murder can be committed in all manner of circumstances. In some the death penalty will plainly be excessive and disproportionate. As Lord Lane noted, there is "probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder." To condemn every person convicted of murder to death regardless of the circumstances is a form of inhuman punishment. A sentence of death which lacks proportionality lacks humanity.

The three countries with which these appeals are concerned have human rights values at the very forefront of their constitutions. Among the fundamental human rights expressly enshrined is prohibition of cruel and unusual punishment in section 5 of the Constitution of Trinidad and Tobago, inhuman punishment in section 17 of the Constitution of Jamaica, and inhuman punishment in section 15 of the Constitution of Barbados. Each country has also entered into international commitments of a like nature.

Despite these constitutional and international guarantees the governments of these countries insist on continuing to inflict on their citizens a form of punishment which, by today’s standards, is inhuman. Each government justifies its mandatory sentences of death for murder by pointing to a transitional savings clause in the country’s constitution in respect of laws in force when the constitution was adopted. Each government seeks thereby to clothe a form of inhuman punishment with continuing constitutional legitimacy and an appearance of human rights respectability.

I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country’s citizens of the protection afforded by rising standards set by human rights values. The savings clauses were intended to smooth the transition, not to freeze standards for ever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerised by their letter. A literal interpretation of these constitutions means that the law of Jamaica, a country which has taken steps to distinguish between different types of murders, is held to be unconstitutional, whereas the laws of Barbados and of Trinidad and Tobago, where no ameliorating steps have been taken, are held to be constitutional. This is bizarre.

Self-evidently, an interpretation of the constitutions which produces this outcome is unacceptable. A supreme court of a country which adopts such a literal approach is failing in its responsibilities to the citizens of the country. A constitution should be interpreted as an evolving statement of a country’s supreme law.
This is not to substitute the personal [predilections] of individual judges for the chosen language of the constitution. Rather, it is a recognition that the values underlying a constitution should be given due weight when the constitution [fails] to be interpreted in changed conditions. A supreme court which fails to do this is not fulfilling its proper role as guardian of the constitution. It is abdicating its responsibility to ensure that the people of a country, including those least able to protect themselves, have the full measure of protection against the executive which a constitution exists to provide. 120

The result of the decisions in *Reyes* and *Watson* is that the sentencing process, once perfunctory in capital murder cases, must now take on an importance second only to that of the trial itself, in the quest for proportionality and individualized sentences. This will pose a particular challenge for practitioners at the criminal bar in the affected parts of the region, as they seek to assist the judges "to develop judicially reasoned alternatives to death in convictions for capital murder." 121

VI. CONCLUSION

These three case studies demonstrate the response of the Privy Council to the challenge of change in the area of human rights norms in the context of death penalty cases. They underscore the fact that for the law to preserve its relevance in this area it must be constantly responsive to the "evolving standards of decency that mark the progress of a maturing society." 122

While this conclusion applies equally in relation to private law, its importance has an enhanced significance in relation to constitutions, which articulate and record the covenant between the state and its citizens and which must of necessity be capable of adaptation to changing circumstances. In this regard, the role of the judiciary, and in particular courts of last resort, attains the critical significance so well captured by Justice Dickson in the Supreme Court of Canada in *Hunter v. Southam, Inc.*: 123


123. [1984] 2 S.C.R. 145 (Can.).
The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. 124

The Caribbean Court of Justice was conceived and has been established with the highest of expectations, reflecting the confidence of the governments of the region in the ability of local institutions to secure for the future, the quality of adjudication that every citizen is entitled to expect. In discharging their duties, the new judges of that new court will do well to remember always, as the Privy Council has manifestly demonstrated that it has in recent years, their role as independent guardians of the constitution, particularly so in changing times.

124. Id. at 155 (emphasis in original).