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Cover Page Footnote

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CONFLICTS OF LAW AND POLICY IN THE CARIBBEAN -HUMAN RIGHTS AND THE ENFORCEMENT OF THE DEATH PENALTY-- BETWEEN A ROCK AND A HARD PLACE

DAVID A. C. SIMMONS, Q.C.*

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I. INTRODUCTION

On January 20, 1999, there was a general election in Barbados. The Barbados Labour Party won twenty-six of the twenty-eight seats in the House of Assembly and formed the Government. In keeping with the Westminster system of parliamentary democracy, the Governor-General,[1] as the representative of the Queen of England, delivered the "Speech from the Throne" on February 16, 1999, in

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1. Sir Clifford Husbands G.C.MG., K.A.

which he outlined the Government's programme for the new session of Parliament. Near the end of the Speech, the Governor-General said the following words, the purport of which made the headlines of the next day's newspapers:

> Ever since November 1993, the will of the Government and people of Barbados - indeed the will of the Governments and people of the Caribbean generally - has been frustrated by decisions of the Judicial Committee of the Privy Council which have had the effect of preventing the use of the death penalty as a punishment legally and constitutionally imposed by the State. The rule of law which is the foundation upon which civil society is organised and regulated is being imperiled by judicial decisions in England. It cannot continue.
>
> Having regard to the composition of this Parliament and with a view to giving fullest expression to the will of the Government and people of Barbados, my Government without prejudice to the future enactment of constitutional amendments recommended by the Constitution Review Commission, will shortly seek to amend the existing Constitution to reverse the effects of the *Pratt and Morgan* line of cases.[2]

The Governor-General was announcing the intention of the Government of Barbados to use the method of constitutional amendment to reduce the tension that has existed between the executive and judicial arms of the State over the last five years. The purpose of this Article is to explain to North Americans the origins and context of this tension which has spawned a great and continuing debate in the Commonwealth Caribbean concerning the death penalty and its collision with concepts of human rights.

II. LEGAL BASIS OF THE RIGHT TO LIFE AND THE DEATH PENALTY

The right to life is guaranteed in Section 11 of Chapter III of the Constitution of Barbados, which is devoted to provisions for the

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2. Sir Clifford S. Husbands, Speech from the Throne, 22 (February 16, 1999)

protection of fundamental rights and freedoms of the individual.[3] This right to life is, however, subject to limitations. Section 11 specifically provides that the limitations are "designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."[4] In other words, the right to life must yield to a competing public interest in certain circumstances. Chapter III was greatly influenced by the *European Convention for the Protection of Human Rights and Fundamental Freedoms (1953).*[5] That Convention was in turn influenced by the *United Nations Universal Declaration of Human Rights of 1948.*[6]

In the same way the right to life is statute-based, so too is the death penalty. Section 2 of the Offences Against The Person Act provides that "[a]ny person convicted of murder shall be sentenced to, and suffer, death."[7] This provision predated Independence and a written Constitution that came into force on November 30, 1966. The Constitution of Barbados itself contemplates the death penalty. Section 12(1) states: "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted."[8]

Notwithstanding Barbados' independence and sovereignty as a nation, the Judicial Committee of the Privy Council, consisting essentially of judges of the House of Lords in London, is the final appellate court of Barbados. In pre-Independence Barbados, there was no written Constitution. A person convicted of murder could appeal his conviction to the local Court of Appeal and thereafter to the Judicial Committee of the Privy Council. Execution followed if the final appeal against conviction was dismissed.

However, in post-Independence Barbados, the very Constitution enacts an important human rights provision in Section 15(1): "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."[9] Similar language is, of course, to be found in the *European Convention on Human Rights,* the

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3. BARB. CONST. ch. III, § 11.

4. *Id.*

5. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

6. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948).

7. Offences Against The Person Act, 1994, 5 L.R.O. 1995, ch. 141, § 2 (Barb.).

8. BARB. CONST. ch. III, § 12(1).

9. *Id.* at § 15(1).

International Covenant On Civil And Political Rights, and in the Constitutions of all Commonwealth Caribbean States. All of these documents set out the statement of high moral principle in positive law. Yet, in Section 15(2), the Constitution derogates from the strict imperative by impliedly providing that capital punishment is not to be held inconsistent with Section 15(1)[10]. Section 15(2) provides:

> 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 punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.[11]

It is the constitutional imperative in Section 15(1) that has led to the present debate in the Commonwealth Caribbean. A condemned person, having exhausted his rights of appeal against *conviction*, has been given another right by way of constitutional challenge to argue that, in certain circumstances, to execute him would be to subject him to inhuman or degrading punishment or treatment contrary to Section 15(1).

In the last six years, a spate of constitutional motions has been adjudicated in the Judicial Committee of the Privy Council in which that Court has been called upon to interpret the nature and extent of the constitutional imperative. The consequence of the decisions of the Judicial Committee of the Privy Council has been that many Caribbean governments have been unable to carry out the death penalty. The people of the Caribbean have become frustrated at the inability of their governments to carry out penalties existing under law. The people have also begun to lose faith in, and respect for, the criminal justice system. To be sure, the vast majority of the people of the Caribbean wish to retain the death penalty and carry it out in appropriate cases. Recent surveys in Barbados and Trinidad and Tobago show that well over 80% of the populations in those two States support the death penalty.[12]

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10. *Id.* at § 15(2).

11. *Id.*

12. Leonard Shorey, THE BARBADOS ADVOCATE, 1996 (commenting on results of a survey conducted by Systems Caribbean Limited).

III. THE NEW JURISPRUDENCE - DELAY

A new human rights jurisprudence has been developing since 1993. But to understand how the new jurisprudence is developing, we need first to go to the year 1975. In that year, one of the Caribbean's worst criminals, the notorious *Michael de Freitas a.k.a. Michael Abdul Malik*, challenged the carrying out of the death penalty on two alternative grounds.[13] First, he argued that capital punishment was per se a cruel and unusual punishment.[14] Alternatively, he contended that the lapse of time between sentence and execution rendered it unconstitutional to carry out the death sentence.[15] Their Lordships rejected both arguments and de Freitas was duly executed.[16]

The Privy Council in *de Freitas* was headed by the great English judge Lord Diplock[17] who also presided in the next case of importance, *Abbott v. Attorney- General of Trinidad and Tobago*.[18] By the time of the court's decision in *Abbott*, nearly six years had elapsed since the conviction.[19] Although their Lordships greatly deplored the length of time between the sentence and its being carried out on the ground that "[i]t brings the administration of criminal justice into disrepute among law-abiding citizens,"[20] they dismissed the appeal which was based on the ground that to execute after such a long delay was unconstitutional.[21] They determined that execution of the sentence after six years did not amount to infringement of Abbott's right to life.[22]

The next case for consideration is the Jamaican case of *Riley v. Attorney-General of Jamaica*.[23] The Privy Council, presided over this time by Lord Bridge of Harwich, but including also Lord Diplock, held by a majority (3-2) that delay could afford no ground for holding the execution to be a contravention of the relevant Section

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13. *See* de Freitas v. Benny, [1976] App. Cas. 239 (P.C. 1975) (appeal taken from Trin. & Tobago).

14. *See id.* at 241.

15. *See id.*

16. *See id.* at 245-47.

17. *Id.* at 243.

18. Abbott v. Attorney Gen. of Trinidad & Tobago, [1979] 1 W.L.R. 1342 (P.C. 1979) (appeal taken from Trin. & Tobago).

19. *Id.* at 1344.

20. *Id.* at 1345.

21. *See id.* at 1349.

22. *See id.* at 1348.

23. Riley v. Attorney Gen. of Jamaica, [1983] 1 App. Cas. 719 (P.C. 1982) (appeal taken from Jam.).

(17) of the Jamaican Constitution.[24] Five to six years had elapsed between the date of the convictions of the five applicants and the decisions of the Privy Council.[25]

Lord Bridge of Harwich explained that:

> In Jamaica sentence of death is the mandatory sentence for murder under section 3 (1) of the Offences against the Person Act which has not been amended in any respect material to the issue under consideration since its enactment in 1864. The manner of execution of the sentence authorised by law is by hanging, and the passing of the sentence also provides lawful authority for the detention of the condemned man in prison until such time as the sentence is executed. Quite apart from section 17 of the Constitution the continuing constitutional validity of the death sentence is put beyond all doubt by the provision of section 14 (1):
>
> > No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
>
> The question, therefore, is whether the delayed execution of a sentence of death by hanging, assuming it could otherwise be described as "inhuman or degrading punishment or other treatment" - a question on which their Lordships need express no opinion - can escape the unambiguous prohibition imposed by the words in section 17 (2) emphasised as follows:
>
> > *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

24. *See id.* at 726.
25. *See id.* at 724.

> punishment which was lawful in Jamaica immediately before the appointed day.
>
> An act will fall within this prohibition if it satisfies three related conditions, viz.: (*a*) it must be an act done under the authority of law; (*b*) it must be an act involving the infliction of punishment of a description authorised by the law in question, being a description of punishment which was lawful in Jamaica immediately before [Independence]; (*c*) it must not exceed in extent the description of punishment so authorised.[26]

Lord Bridge of Harwich went on to hold that a delayed execution would satisfy all three of these conditions.[27]

Up to this point, the judicial opinion in *Riley* that delay did not contravene the Constitution appeared reasonably solid. However, in *Riley*, the two dissenting judges, Lord Scarman and Lord Brightman, dented the solidity of the judicial opinion.[28] In the concluding words of their dissent, Lords Scarman and Brightman said, "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment."[29]

A. Pratt

The dissenting voices in *Riley* opened the way for *Pratt v. Attorney-General of Jamaica*[30] and the frustration to which the Governor-General alluded in his Speech from the Throne. *Pratt* was decided in November of 1993 and the Judicial Committee of the Privy Council revisited the question of delay. A full court of seven Law Lords decided this case.[31] Such a full complement of judges implied that the law was about to be changed.

They held as follows: first, that the execution of the death sentence after unconscionable delay would constitute a contravention of a constitutional provision against cruel and inhuman punishment except where the delay had been the result of

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26. *Id.* at 726.
27. *See id.*
28. *See id.* at 727-36.
29. Riley, [1983] 1 App. Cas. at 736.
30. Pratt v. Attorney Gen. of Jamaica, 43 W.I.R. 340 (P.C. 1993).
31. *See id.* at 340.

fault on the part of the accused.[32] However, delay attributable to the accused's exploring legitimate avenues of appeal did not fall within that exception.[33] Second, 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) of the Jamaican Constitution.[34] Consequently, the sentences of death should be commuted to life imprisonment.[35] Finally, *Pratt* held that *if capital punishment is to be retained it must be carried out with all* possible expedition.[36] Capital appeals must be expedited and legal aid allocated at an early stage. Although no attempt is made to set a rigid timetable, the entire domestic appeal process should be completed within approximately two years.[37] If, in any case, 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 and degrading punishment or other treatment.[38] The court in *Pratt* therefore sided with the minority view in *Riley* and, in effect, overruled *Abbott* and *Riley*.[39] For where the *Riley* bench had held that delay could not defeat execution, the *Pratt* bench now decreed completion of the domestic appeal process (including resort to the Judicial Committee of the Privy Council) in two years and the whole process (including subsequent petitions to international human rights bodies) in five years.[40] As *Pratt* involved a consideration of the period of delay in issuing a legal aid certificate, the period of delay in having the local Mercy Committee[41] act on the matter, the period of delay in delivering the reasons of the Jamaican Court of Appeal, and the period of delay in petitioning the Judicial Committee of the Privy Council itself, it is submitted that the Judicial Committee of the Privy Council for the first time introduced the concept of *Systemic Delay* as affording a basis of unconstitutionality.

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32. *See id.* at 356.
33. *See id.* at 359.
34. *See id.* at 360.
35. *See id.* at 360-61.
36. 43 W.I.R. at 361.
37. *See id.*
38. *See id.* at 361-62.
39. *Id.* at 341.
40. *Id.* at 362.
41. The Constitutions of most Commonwealth Caribbean countries provide for a Committee (variously styled 'Privy Council' or 'Advisory Committee') to advise the Head of State on the exercise of the prerogative of mercy.

The Board of the Privy Council placed the onus on a state wishing to retain the death penalty to organise its criminal justice system in such a way to ensure that:

> [E]xecution 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.[42]

Governments were therefore mandated to improve their criminal justice systems or face the prospects of murderers escaping the hangman's noose.

The immediate result of the decision in *Pratt* was that all Caribbean jurisdictions, which had prisoners on death row in excess of five years, had to commute their sentences to life imprisonment.[43] In reaching their decision and promulgating the five-year rule, the Judicial Committee of the Privy Council in *Pratt* considered a range of Commonwealth and American cases.[44]

The Lordships in *Pratt* opined that:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.[45]

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42. Pratt, 43 W.I.R. at 359.

43. Jamaica commuted in excess of 150, Trinidad and Tobago 53, and Barbados 9.

44. The cases include: Soering v. U.K. [1989] 11 EHRR 439; Smt Treveniben v. Gujarat [1989] 1 SCJ 383; Kindler v. Canada (1991) 67 Can. CC (3d)1; Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General [1993] (unreported); Richmond v. Lewis 948 F.2d 1473 (1990). *See id.* at 356, 358-60.

45. *Id.* at 356.

In that passage their Lordships were clearly giving weight to the human rights of a prisoner by the invocation of moral precepts. More particularly, they seemed to place undue emphasis on psychological torture. Thus, one may legitimately ask whether the mental agony which an individual must necessarily experience before execution could, without more, be inhuman and degrading.

B. Criticisms of Pratt

Pratt has been criticised on many grounds. First, it is argued that the Board was purporting to abolish the death penalty in the Caribbean by judicial legislation. This attempt was the usurpation of the legislative function under the guise of constitutional interpretation. Only Caribbean Parliaments are empowered to repeal the statutory provisions for the death penalty. To that extent, the decision of the Judicial Committee of the Privy Council was a policy decision. In fact, it is my view that in *Fisher v. Minister of Public Safety and Immigration (No. 1)*, the Judicial Committee of the Privy Council in essence acknowledged that *Pratt* was a policy decision. [46] Lord Goff gave it away where he observed, "In truth, as the Court of Appeal recognised, the principle in *Pratt's* case was established in response to the fact that, in some Caribbean countries, men sentenced to death were being held on death row for wholly unacceptable periods of time, and *was specially fashioned to meet that problem.*"[47]

Second, Lord Griffiths in *Pratt* dwelt upon English or European attitudes and notions about the death penalty as a basis for arriving at the five-year rule.[48] It is contended that it was wrong to import Eurocentric notions and values applicable to a highly developed and sophisticated legal system and require developing countries with underdeveloped systems to obtain an equal standard. Indeed, Lord Griffiths did say, "Their lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at its disposal to administer the legal system."[49]

While it is accepted that the total period of delay in *Pratt* – fourteen years – was unacceptable by any standard, the Judicial

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46. Fisher v. Minister of Public Safety and Immigration (No. 1) [1998] App. Cas. 673 (P.C. 1997) (appeal taken from Bah.).

47. *Id.* at 680 (emphasis added).

48. Pratt, 43 W.I.R. at 357-62.

49. *Id.* at 361.

Committee of the Privy Council impliedly seemed to suggest that a period of seven years was acceptable to the European Court of Human Rights. As Lord Griffiths stated in *Pratt*, "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 . . . ."[50] Yet they decided that five years were sufficient for the Caribbean! In concluding their advice to the Queen, their Lordships ruled 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.'"[51]

A third criticism of *Pratt* is that it ought not to have purported to impose a time limit of two years for completion of the domestic appeal process. In fact, in the Indian case of *Sher Singh v. State Of Punjab*, the Court held:

> Prolonged delay in the execution of a death sentence is unquestionably an important consideration for determining whether the sentence should be allowed to be executed. But no hard-and-fast rule that 'delay exceeding two years in the execution of a sentence of death should be considered sufficient to entitle the person under sentence of death to invoke article 21 and demand the quashing of the sentence of death' can be laid down . . . .[52]

C. After Pratt

After *Pratt* we all believed that the rule against delay was five years. But then followed the cases of *Guerra v. Baptiste*[53] and *Henfield v. Attorney-General of the Bahamas*,[54] casting doubt on that rule.

The Judicial Committee of the Privy Council held in *Guerra* that four years and ten months was a long enough delay to be

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50. *Id.* at 360.

51. *Id.*

52. *Id.* at 359 (quoting Sher Singh v. State of Punjab, [1983] 2 S.C.R. 582).

53. Guerra v. Baptiste, [1996] App. Cas. 397 (P.C. 1995) (appeal taken from Trin. & Tobago).

54. Henfield v. Attorney Gen. of the Bahamas, [1997] App. Cas. 413 (P.C. 1996) (appeal taken from Bah.).

unconstitutional.[55] To make matters worse, they ruled in *Henfield* that, with respect to the *Bahamas*, three and one-half years was the limit.[56] The five-year rule was being systematically whittled down. *Guerra* was an important case because whereas *delay* might lead to unconstitutionality, *speed* could also produce the same result and a sentence of death was liable to be commuted to life imprisonment. The Privy Council judges introduced a new rule in *Guerra*. The condemned person must be given reasonable notice of his execution, or otherwise an attempted execution might be inhuman punishment.[57] Lord Goff said in *Guerra*:

> Their Lordships are of the opinion that justice and humanity require that a man under sentence of death should be given reasonable notice of the time of his execution. Such notice is required to enable a man to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best he can, to face his ultimate ordeal . . . . [T]o execute a condemned man without first giving him such notice of his execution would constitute cruel and unusual punishment contrary to section 5(2)(b) of the Constitution.[58]

They therefore directed that a warrant of execution should be read on a Thursday for execution on the following Tuesday. And a weekend must intervene. An additional purpose of the five-day rule is "to provide [the prisoner] with a reasonable opportunity to obtain legal advice and to have resort to the courts for such relief as may at that time be open to him. The most important form which such relief may take in the circumstances is an order staying his execution."[59]

In *Guerra*, the Judicial Committee of the Privy Council took the opportunity to explain *Pratt*. Inter alia, they pointed out that in *Pratt*, they had set a target date of one year for the hearing of the local appeal in a capital case, with a further year being allowed for appeal to the Judicial Committee of the Privy Council.[60] They had in fact

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55. Guerra, [1996] App. Cas. at 415-16.
56. Henfield, [1997] App. Cas. at 428.
57. Guerra, [1996] App. Cas. at 418.
58. *Id.*
59. *Id.* at 420.
60. *See id.* at 414.

said in *Pratt* that "it should be possible to complete the entire domestic appeal process within approximately two years. Their lordships do not purport to set down any rigid timetable but to indicate what appear to them to be realistic targets . . . ."[61] In *Guerra*, Lord Goff observed that:

> [T]his period [five years] was not specified as a time limit. Its function was to enable the Jamaican authorities to deal expeditiously with the substantial number of prisoners who had spent many years on death row, without having to deal with all such prisoners individually following constitutional proceedings. It follows that the period of five years was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings.[62]

It is also not fanciful to interpret that passage as a policy decision on the part of the British judiciary to clear up the death row in Jamaican prisons.

The court in *Henfield* held that, in the context of the Bahamian legal system, where the target period for appeals against conviction for murder was two years, the lapse of an overall period of time of three and one-half years following sentence of death would be so prolonged as to render execution inhuman punishment contrary to the Constitution.[63] Such a period was a *NORM* from which the court might depart where it was appropriate in the circumstances of the case.[64]

In computing the five-year rule in *Pratt*, the Judicial Committee of the Privy Council had allowed eighteen months in which a condemned person could petition the United Nations Human Rights Committee (UNHRC) and/or the Inter-American Commission on Human Rights (IACHR).[65] It is the whole period in excess of five years which constitutes inordinate delay.

The Bahamas were not a signatory to the International Covenant on Civil and Political Rights and its optional Protocol,[66] so citizens of

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61. Pratt, 43 W.I.R. at 361.
62. Guerra, [1996] App. Cas. at 414.
63. Henfield, [1997] App. Cas. at 428.
64. *See id.* at 429.
65. Pratt, 43 W.I.R. at 362.
66. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

the Bahamas had no access to the UNHRC. It followed that, in ascertaining the length of time which constituted inordinate delay in relation to the Bahamas, no time for petitions to the Human Rights bodies should be allowed. Thus, their lordships in *Henfield* held that, "[T]aking all the relevant considerations into account, they are satisfied that, in the context of a legal system in which the target period for appeals is two years, the lapse of an overall period of time of 3½ years following sentence of death is indeed an inordinate time."[67] Having advised a commutation of the sentences their Lordships boldly admitted that they were "conscious that the conclusion which they [had] reached regarding the period of 3½ years applicable in the case of these two appeals may cause some concern among those responsible for the administration of justice in The Bahamas."[68]

If I may summarise, the legal position regarding the constitutionality of the death penalty up until *Henfield* in 1997 was as follows:

(1) Carrying out the death penalty is not inhuman or degrading treatment or punishment in breach of the relevant Constitutional provision.[69]

(2) Prolonged delay in carrying out an execution and delay beyond five years would be held to be unconstitutional.[70]

(3) In the case of the *Bahamas*, a special time limit of three and one-half years between sentence and execution applies.[71]

IV. OTHER CHALLENGES TO THE DEATH PENALTY

However, the ingenuity of lawyers is never static. It is always searching and striving for opportunities to make the common law dynamic and responsive to contemporary conditions. It is a defining feature of the common law that it develops case by case, fashioning old principles to accommodate new fact situations in the light of changing social conditions.

Thus, although the Judicial Committee of the Privy Council had decided in *de Freitas* that a condemned person had no right to sight of materials used by a Mercy Committee,[72] counsel in the case of

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67. Henfield, [1997] App. Cas. at 425.

68. *Id.* at 428-29.

69. *See* Jones v. Attorney Gen. of the Bahamas, [1995] 1 W.L.R. 891, 895 (P.C. 1995) (appeal taken from Bah.).

70. *See* Pratt, 43 W.I.R. at 362.

71. *See* Henfield, [1997] App. Cas. at 428.

72. de Freitas, [1976] App. Cas. at 248.

Reckley v. Minister of Public Safety and Immigration returned to the point.[73] In that case, the applicant who had been convicted and sentenced to death for murder was granted a stay of execution by the Judicial Committee of the Privy Council to enable him to pursue a claim that he was entitled to be heard by the local Mercy Committee and for that purpose to see material available to the Committee.[74] Ultimately, they held that there was no such entitlement.[75] Lord Diplock had indeed observed in *de Freitas* in a celebrated phrase, that "[m]ercy is not the subject of legal rights. It begins where legal rights end."[76]

If we thought that the main issues surrounding the death penalty had been settled in that series of cases, we were wrong. The Privy Council had other ideas. As lawyers sought to prevent execution of murderers by resorting to applications for stays of execution, they found a sympathetic ear among the British judiciary sitting in a geographical law district which had abolished the death penalty over thirty years ago.

In 1998, they entertained arguments by counsel on behalf of a Bahamian appellant, Trevor Fisher, concerning the validity of adding pre-trial delay to post-conviction delay in the computation of the time limit.[77] By a majority (3-2) they held that it is not permissible to add the two types of delay.[78] But Lord Steyn dissented and said, "[O]ur common sense tells us that the interaction of pre-sentence delay and prison conditions, with the brooding horror of an awareness of executions going on, may add greatly to sapping the will and increasing the torment of the condemned man."[79]

As a matter of human rights he went further and gave grist to the mill of those who argue that static prison conditions may amount to inhuman punishment or treatment. Lord Steyn proclaimed that "it must be permissible to take into account that the anguish of the condemned man has been greatly increased by his incarceration in appalling conditions."[80] He sent a clear message that he would be prepared to examine death row conditions in Caribbean prisons and

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73. Reckley v. Minister of Public Safety and Immigration, [1996] App. Cas. 527 (P.C. 1996) (appeal taken from Bah.).

74. *See id.* at 534.

75. *See id.* at 542-43.

76. de Freitas, [1976] App. Cas. at 247.

77. *See* Fisher (No. 1), [1998] App. Cas. at 680.

78. *See id.* at 680.

79. *Id.* at 692.

80. *Id.* at 691.

hold that some prison conditions may be so substandard as to amount to inhuman and degrading punishment.

He observed ominously that "in other countries in the Caribbean death row conditions may not meet the criterion of minimum civilised standards."[81] Though he was in the minority in *Fisher (No. 1)*, Lord Steyn observed pointedly that his minority view, like that of Lords Scarman and Brightman in *Riley*, might one day become the majority position. At the very start of his judgment, he said, "A dissenting judgment anchored in the circumstances of today sometimes appeals to the judges of tomorrow."[82]

Almost certainly, Lord Steyn's hints of his willingness to entertain arguments about prison conditions will encourage human rights lawyers to find a new string for their bows. Already lawyers are testing the sustainability of such arguments before international human rights organisations such as the IACHR.

A. Legitimate Expectation and International Human Rights Bodies

This brings me to the most recent arguments before the Judicial Committee of the Privy Council. The arguments concern the public law concept of legitimate expectation and the contention that it is unlawful to execute a person who has petitioned an international human rights body prior to that petition being determined. The matter arises as follows. For those countries which have acceded to the International Covenant on Civil and Political Rights and its Optional Protocol, and are members of the Organisation of American States (OAS), there are two human rights bodies to which citizens may petition for a review of a case. These two bodies are the previously noted UNHRC and the IACHR.

In October of 1998, the Judicial Committee of the Privy Council dealt with another appeal from Trevor Fisher in *Fisher v. Minister of Public Safety and Immigration (No. 2)*.[83] After he had exhausted his right of appeal to the Judicial Committee of the Privy Council against conviction, he petitioned the IACHR on June 7, 1996, stating that he had exhausted his domestic remedies and was at risk of being executed.[84] On May 5, 1998, his petition was declared admissible

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81. *Id.* at 687.

82. *Id.* at 686.

83. Fisher v. Minister of Public Safety and Immigration (No. 2), [1999] 2 W.L.R. 349 (P.C. 1999) (appeal taken from Bah.).

84. *See id.* at 352.

and the case was to have been considered in November 1998, i.e., two and one-half years after it was received.[85]

One of the grounds argued was that he had a legitimate expectation that he would not be executed while his petition to the IACHR was outstanding.[86] In other words, his right to life was protected by the Constitution, and the Government would be in breach of his constitutional rights if he were executed before the IACHR had reached a decision and sent a report to the Mercy Committee. The majority (3-2) held that execution while a petition is pending does not constitute a breach of the constitutional right not to be subjected to inhuman or degrading treatment or punishment.[87]

As to the public law ground that the appellant had a legitimate expectation that he would not be executed so long as his petition was outstanding, Lord Lloyd said:

> [L]egitimate expectations do not create binding rules of law . . . . [A] decision-maker can act inconsistently with a legitimate expectation which he has created, provided he gives adequate notice of his intention to do so, and provided he gives those who are affected an opportunity to state their case. Procedural fairness requires of him no more than that. Even if therefore the appellant had a legitimate expectation that he would not be executed while his petition was pending his expectation could not survive the government's letters . . . in which it informed the appellant's solicitors in unequivocal terms that it would wait no longer than 15 February 1998.[88]

The Bahamian Government had in fact given the IACHR a time limit within which to determine Fisher's petition.

Once again, the Judicial Committee of the Privy Council failed to find unanimity for their views, as two judges dissented. Lord Slynn disagreed that the Government had power to impose a time limit on the IACHR.[89] Moreover, per Lord Slynn,

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85. *See id.*
86. *See id.*
87. *See id.* at 355.
88. *Id.* at 356.
89. *See* Fisher (No. 2), [1999] 2 W.L.R. at 363.

> For the government to carry out the death sentence while still awaiting a recommendation which might, when considered, lead to its commutation to a sentence of life imprisonment would seem in itself to be an obvious violation of [Fisher's] right to life .... It is hard to imagine a more obvious denial of human rights than to execute a man, after many months of waiting for the result, while his case is still under legitimate consideration by an international human rights body.[90]

1. Thomas v. Baptiste[91]

On March 17, 1999, a differently constituted Judicial Committee of the Privy Council returned to the question of whether a condemned man had a constitutional right to have his petition to the IACHR considered and determined before the death sentence was carried out.[92] The Government of Trinidad and Tobago, on October 13, 1997, had published instructions prescribing strict time limits and procedures for applications to international human rights bodies in an attempt to comply with the time limits of *Pratt* and to promote cooperation with such bodies.[93] After publication of the instructions, the appellants petitioned the Commission alleging various violations of their human rights, including the physical conditions of the prison and breaches of the Prison Rules.[94]

By a majority (3-2), the Board advised that the instructions issued by the Cabinet of Trinidad and Tobago "were unlawful because they were disproportionate."[95] They had the effect of curtailing the petitioners' rights "further than was necessary to deal with the mischief created by the delays in the international appellate processes."[96] *Fisher (No. 2)* was, for all intents and purposes, overruled within six months of the publication of the *Thomas* judgment. Once again, a minority view had triumphed. The judges recommended, per Lord Millett, that:

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90. *Id.* at 361.
91. [1999] 3 W.L.R. 249 (P.C. 1999) (appeal taken from Trin. & Tobago).
92. *See id.* at 255.
93. *See id.* at 256.
94. *See id.* at 257.
95. *Id.* at 258.
96. *Id.* at 259.

> It would have been sufficient to prescribe an outside period of (say) 18 months for the completion of all such processes . . . . It was unnecessary and inappropriate to provide separate and successive time limits for each application and for each stage of each application. This had the effect of drastically and unnecessarily curtailing the time limits within which the first such body could complete its processes.[97]

Secondly, the majority advised that if the Government carried out the death sentences before the petitions had been heard, the appellants' constitutional right to due process would have been denied.[98] However, such action would not amount to cruel and unusual treatment or punishment as had indeed been held in *Fisher (No. 2)*.[99] Thus, having succeeded on the due process point it followed that the executions should be stayed until the petitions were finally disposed of by the IACHR and considered by the local Mercy Committee.

On the legitimate expectation point, it had been argued that the Government's ratification of the Convention created a legitimate expectation on the part of the appellants that they would not be executed before their petitions were finally determined.[100] This argument failed because insofar as it was founded on the provisions of a treaty not forming part of the substantive domestic law of Trinidad and Tobago, its enforcement would be tantamount to the indirect enforcement of the treaty.[101]

Lords Goff and Hobhouse did not agree with their brethren to grant a stay of execution until after the IACHR had decided the petitions, but they agreed with Lords Millett and Browne-Wilkinson (two of the majority) that the prison conditions under which Thomas and Hilaire had been held did *not* render the carrying out of the death sentences unconstitutional.[102] They also agreed on the question of legitimate expectation. Lord Steyn disagreed and held that breaches of the Prison Rules, the conditions in prison, and the treatment of the men amounted to cruel and unusual treatment.[103]

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97. Thomas, [1999] 3 W.L.R. at 259.
98. *See id.* at 259-62.
99. [1999] 2 W.L.R. at 355.
100. *See* Thomas, [1999] 3 W.L.R. at 262.
101. *See id.* at 262-63.
102. *See id.* at 267.
103. *See id.* at 275.

The minority was of the view that the appeals should have been dismissed. The liberty to complain to international human rights bodies was *not a right* conferred on the petitioners under the domestic law of Trinidad and Tobago.[104] To the extent that the majority treated the international petition process as a right not to have that process preempted by executive action, they were wrong and could not obtain the support of the minority.

But that is not the end of the latest saga. Lord Steyn, an obvious human rights advocate, though agreeing with the majority, dissented from them in that he disagreed with the decision to stay the executions and would have preferred commutation of the sentences to life imprisonment.[105] As may be imagined, Lord Steyn cast a heavy burden on the State which must, he said, observe the "irreducible minimum standards of treatment of condemned men."[106]

From that survey of Commonwealth Caribbean human rights law and the death penalty you are well entitled to exclaim: "Confusion worse confounded!" And you will be right. The law is a mess! It has taken the Judicial Committee of the Privy Council, our highest court, almost six years to confess that their decisions and the attitude of the international human rights bodies have truly placed our countries "between a rock and a hard place." In *Thomas*, Lord Goff made the telling observation:

> The instructions of 13 October 1997 were an attempt by the Government of the Republic to address the consequences of the decision of their Lordships' Board in *Pratt* . . . having regard to the delays experienced when those sentenced to death sought to take advantage of the procedures of the two human rights commissions. *The Republic, in common with other Caribbean countries, found itself in an impossible position.*[107]

One thing is clear. If a person petitions the international bodies, the State has to wait until the determination of the petition before attempting execution and, in all the circumstances, the five-year

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104. *See id.* at 270.
105. *See id.* at 272.
106. Thomas, [1999] 3 W.L.R. at 273.
107. *Id.* at 271 (emphasis added).

norm of *Pratt* may well be extended beyond the very five years! The unwisdom in fixing a time limit is now exposed.

B. The Political and Legal Problems and the International Human Rights Bodies

The Caribbean's highest court has told us that the five-year norm was not an absolute limit. Similarly, the time frame for petitions to international human rights bodies – eighteen months more or less – is not a rigid rule. The difficulty, as was accepted by the Board in *Fisher (No. 2)*, is that the international human rights bodies meet infrequently.[108] The IACHR meets *only* twice a year and has a heavy caseload! They have refused to give guarantees that applications to them will be heard within the time frame set by our highest court. The Attorney-General of Trinidad and Tobago[109] has himself appeared before these bodies and explained that their dilatoriness may itself cause States to exceed the five-year norm set by the Judicial Committee of the Privy Council as the law for the region.

In *Fisher (No. 2)*, there is dictum by Lord Lloyd that "dilatoriness could not be justified on the ground that the Commission only meets twice a year, in February and October; and certainly not in the case of a [prisoner] who is under sentence of death."[110] This dictum is no longer good law in light of *Thomas*.

Unfortunately, the real truth about these bodies is only now being judicially acknowledged. In *Thomas*, Lord Goff was driven to concede that:

> The commissions espouse a policy of discouraging capital punishment wherever possible and, in accordance with that policy, appear to see postponement of an execution for as long as possible as an advantage since it may improve the chances of commuting the sentence or quashing the conviction . . . . The commissions appear to be unable or unwilling to alter their practices to accommodate the countries' requests for more speedy procedures.[111]

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108. Fisher (No. 2), [1999] 2 W.L.R. at 354.
109. Hon. R. L. Maharaj S. C.
110. Fisher (No. 2), [1999] 2 W.L.R. at 354.
111. Thomas, [1999] 3 W.L.R. at 272.

The cumulative effect of the decisions of the Judicial Committee of the Privy Council and the attitude of the international human rights bodies have engendered the greatest uncertainty in the region about the ability of Governments to carry out the death penalty in suitable cases. Thus exists the frustration felt by governments and the tension between the Executive and the Judiciary. Our people believe that British judges are making a mockery of the death penalty and, by policy decisions, are virtually abolishing the penalty for the Caribbean in order to make the region comply with a European movement for its universal abolition.

V. RESPONSES OF CARIBBEAN GOVERNMENTS

In this legal melee, some governments of the region have responded in similar ways to the roadblocks set by the Judicial Committee of the Privy Council. Barbados has taken five initiatives to speed up its system: (i) accepting the recommendation in *Pratt* that the local Mercy Committee should meet as soon as practicable after a murder appeal has been dismissed by the local Court of Appeal, the Governor-General now convenes frequent meetings of the Committee to advise whether an execution should proceed; (ii) a full time Secretary to the local Privy Council has been appointed to ensure a steady and speedy flow of work; (iii) additional High Courts have been constructed and more judges have been appointed to assist in the reduction of the backlog of criminal cases and with a view to reducing pre-trial delay; (iv) a cadre of persons is being trained in computer-aided transcription technology; and (v) murder cases are put on a fast track and a full time specialist court reporter is assigned to transcribe the proceedings by the use of computer-aided technology.

Trinidad and Tobago has moved similarly. It has (i) established a Case Management Unit within the Ministry of the Attorney General to monitor the progress of all capital cases; (ii) increased the allocation of resources to the Judiciary and appointed seven additional judges; (iii) established a Computer-aided Transcription Unit to remove delays in preparation of the appeal record; and (iv) promulgated the instructions referred to in *Thomas*. These have now been held to be *unlawful*.[112]

Additionally, both Trinidad and Tobago and Jamaica have decided to withdraw from the Optional Protocol to the International

112. *See id.* at 258.

Covenant on Civil and Political Rights but at the same time have re-acceded to the Protocol with a reservation in death penalty cases. Insofar as the IACHR is concerned, Trinidad and Tobago has withdrawn fully from the American Convention on Human Rights. That body will no longer have jurisdiction to consider applications from persons alleging violation of the rights in the American Convention on Human Rights.

Lest you be surprised at the decision of the Governments of Trinidad and Tobago and Jamaica, it should be remembered that Britain itself, the United States of America, and some states in the Caribbean are not signatories to the Optional Protocol.

VI. THE POLITICS OF HUMAN RIGHTS

I have indicated earlier in this paper that the Caribbean citizenry views the decisions of the Judicial Committee of the Privy Council as policy decisions aimed at abolishing the death penalty in the region by judicial legislation. There is no doubt in my mind that the majority of the judges in the Judicial Committee of the Privy Council are against the death penalty and are themselves influenced by the *European Convention* and Britain's place in the European Union. Lord Steyn, in particular, is clearly a Human Rights activist motivated by great concern for the welfare and rights of the murderer.[113]

We are fortified in that view because in 1991 by Order-in-Council, the British Government abolished the death penalty in its dependent territory of Montserrat. Moreover, last February in the Bahamas, senior Ministers of the British Government openly told Caribbean Ministers that the region must abolish the death penalty. Most recently on October 16, 1998, while addressing the Amnesty International Human Rights Festival, the British Foreign Secretary Robin Cook said:

> We are signing up to the death penalty protocol to the European Convention on Human Rights. For the first time, Britain is taking a clear, unequivocal stand against the death penalty. But we want to take this further. We need to use our diplomatic clout, our technical assistance and our human rights projects to persuade other countries not to use the death penalty .... We used our Presidency of the European Union

113. *See* Thomas, [1999] 3 W.L.R. at 275.

> to make sure that Europe speaks with a single voice about the death penalty.[114]

There can be no doubt that Britain intends to tie aid and technical assistance as a condition for abolition of the death penalty. Other questions and issues outside the scope of this paper immediately arise.

VII. ARE THERE WAYS OUT OF THE PROBLEMS?

The judicial minds in the Judicial Committee of the Privy Council appear to be in a constant state of indecisiveness, if not turmoil. Since *Pratt*, too many of the important judgments in this area of jurisprudence have been delivered on a majority basis. Uncertainty and instability have crept into our law at its highest level. There is an all-pervasive cynicism and disrespect for the reasoning of the Privy Council judges. All governments of the Caribbean have come under the heaviest pressure from an impatient citizenry. We have seen the responses of the Governments of Trinidad and Tobago and Jamaica to the international human rights bodies.

In order to counter the effects of *Pratt*, the Government of Barbados has determined that where the common law is deficient there must be legislative amendment to remedy the mischief. Thus applying *Kelsen's*[115] theory, it is proposed to go to the *Grundnorm* itself, viz. the *Constitution*, and so amend it as "to reverse the effects of the *Pratt and Morgan* line of cases."[116]

The Government is therefore preparing a bill to amend the Constitution to provide that delay in the execution of a death sentence imposed upon a person for a criminal offence of which he has been convicted shall not be held to be inhuman or degrading punishment or treatment. Nor shall the static physical conditions of a prison in which a condemned person is detained.

Having regard to the dicta in *Thomas*, it may be a counsel of prudence to legislate otherwise a provision to the effect that the cumulative period allowed for the determination of petitions to the UNHRC and the IACHR is eighteen months. The present Government of Barbados has ample numbers to seek to obtain the

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114. Foreign Secretary Robin Cook, Address to the Amnesty International Human Rights Festival (Oct. 16, 1998).

115. *See* generally HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1961).

116. Sir Clifford S. Hubbord, Speech from the Throne, 26. (February 16, 1999).

necessary two-thirds majority to enable it to make the appropriate constitutional amendment. We shall try.