NOTES AND COMMENTS

THE CHALLENGE TO THE MANDATORY DEATH PENALTY IN THE COMMONWEALTH CARIBBEAN

The death penalty is a subject that, in the words of Justice Adrian Saunders of the Eastern Caribbean Court of Appeal, "invariably elicits passionate comment."[1] Such comment is particularly so within the states that make up the Commonwealth Caribbean,[2] where rising rates of violent crime[3] have led to strong public clamor for a swift and final response.[4] The involvement of foreign courts and quasi-judicial international tribunals in limiting the actual use of the death penalty in the Caribbean has made the issue even more politically charged, leading to a strongly held perception that the judgments of these foreign bodies are unacceptable challenges to the very exercise of Caribbean national sovereignty.[5]

Throughout the Commonwealth Caribbean, various legal challenges have been brought to the imposition of the death penalty, the most recent series of which deals with the mandatory nature of the penalty's imposition for crimes of murder (or in some states, certain categories of murder). Efforts undertaken since the mid-1990s to challenge the legality of a mandatory death sentence finally paid off in 2002, when the Judicial Committee of the Privy Council (Privy Council), acting as the highest appellate court for all but one of the Commonwealth Caribbean states,[6] held in a series of three cases that such a sentence was contrary to the prohibition on inhuman punishment and therefore unconstitutional.

These three appeals provide a timely case study through which the latest installment in the campaign waged by Caribbean and British lawyers[7] in both domestic courts and international

[1] Spence and Hughes v. The Queen, Crim. App. Nos. 20 of 1998 and 14 of 1997, para. 173, judgment rendered Apr. 2, 2001 (E. Carib.).

[2] The term "Commonwealth Caribbean" refers to a regional grouping of independent states that share political and historical links to the United Kingdom through their former colonial status and are currently members of the international organization now known simply as "The Commonwealth." The group includes Antigua and Barbuda, the Bahamas, Barbados, Dominica, Grenada, Jamaica, St. Kitts (also known as St. Christopher) and Nevis, St. Lucia, St. Vincent and the Grenadines, as well as Guyana and Belize, although these last two states are geographically part of South and Central America, respectively. *See generally* ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS (1999).

[3] Jamaica, for example, has one of the highest murder rates in the world. *See, e.g.*, David Adams, *Jamaica to Bring Back Hanging in Drug Crime Fight*, TIMES (London), Dec. 4, 2002, at 17.

[4] In its most recent report on the death penalty in the English-speaking Caribbean (ESC), Amnesty International acknowledged that "[i]t is undoubtedly true that the death penalty enjoys popular support across the ESC. Opinion polls show the majority of citizens favor the use of capital punishment." Amnesty International, *State Killing in the English Speaking Caribbean: A Legacy of Colonial Times*, AI Index: AMR 05/003/2002, Apr. 23, 2002, at 11 [hereinafter AI 2002 Report]. Amnesty International reports are available online at <http://web.amnesty.org/library/engindex>.

[5] *See* David A. C. Simmons, *Conflicts of Law and Policy in the Caribbean—Human Rights and Enforcement of the Death Penalty—Between a Rock and a Hard Place*, 9 J. OF TRANSNAT'L L. & POL'Y 263 (2000). The author was, at the time of writing, the attorney general and minister of home affairs of Barbados. He now serves as the chief justice of Barbados.

[6] The exception was Guyana.

[7] British-based lawyers have provided much assistance to Caribbean lawyers representing death row prisoners, with their efforts receiving judicial recognition in Higgs v. Minister of Nat'l Sec., [2000] 2 App. Cas. 228, para. 65 (P.C. 1999) (appeal taken from Barb.). In a self-described "Postscript" to his dissenting judgment, Lord Steyn wrote:

> [T]he Privy Council is crucially dependent on the services of firms of solicitors, organised in a group called The London Panel, as well as on a number of barristers, leading counsel and juniors, who act for applicants and appellants from the Caribbean. These lawyers investigate, research and prepare the cases. Often the

tribunals to restrict the use of the death penalty in the Commonwealth Caribbean can be reviewed. The discussion begins with an overview of the broader legal context within which the death penalty is applied throughout the Commonwealth Caribbean, followed by a review of the relevant jurisprudence on the legality of the mandatory nature of the Caribbean death penalty. It concludes with a review of the guidance that can be derived from these cases on the nature of constitutional interpretation and the role for the courts in states committed to retaining the death penalty.

I. THE LEGAL CONTEXT FOR THE LATEST CHALLENGE

For the nations of the Commonwealth Caribbean, death by hanging continues to be the punishment prescribed by law for murder and other offenses such as treason. While many of these nations have not carried out this punishment in recent years,[8] the punishment nevertheless continues to be imposed—and by law is required to be imposed—by judges upon a conviction of guilt. As a result, approximately two hundred to two hundred and fifty convicted prisoners[9] currently await execution in the Commonwealth Caribbean, a death row per capita population roughly four times higher than that of the United States.[10] Many of these prisoners have been on death row for several years, often held in overcrowded prison cells in conditions widely regarded as harsh.[11] In many cases, the fairness of their trials and the soundness of their convictions have been questioned, particularly in light of the unavailability of legal aid in the region[12] and the pressure on local police forces to secure results in times of rising violent crime.

Death by hanging is, however, constitutionally sanctioned (and for some, internationally sanctioned)[13] in the nations of the Commonwealth Caribbean. From the 1960s to the 1980s, many former British colonies, including those in the West Indies, marked their entrance into the world of independent states with the adoption of written constitutions containing a bill of rights or, at the very least, a list of constitutionally protected rights guarantees.[14] The content of these rights guarantees clearly drew inspiration from both domestic and international

> issues are complex. The service rendered by these lawyers to the Privy Council, and to the cause of justice, is invaluable. Indeed without it the petitions and appeals from Caribbean countries could not be considered properly.

Id., para. 73.

[8] The most recent executions in the region took place in the Bahamas in 2000 and in Trinidad and Tobago in 1999. *Two Executed in Bahamas Despite Appeal*, BBC NEWS, Oct. 15, 1998, *available at* <http://news.bbc.co.uk/1/hi/world/americas/194172.stm>; Amnesty International, *Trinidad and Tobago: Three Men Hanged Today*, AI Index: AMR 49/06/99, June 4, 1999. Four executions were scheduled to take place in Barbados in July 2002 (*see* Amnesty International, *Barbados: Proposed Executions Could Constitute Murder*, AI Index: AMR 15/002/2002, June 28, 2002), but were later stayed due to pending appeals.

[9] According to the BBC in late 2002, there were 100 inmates on death row in Trinidad and Tobago, 60 in Jamaica, 30 in the Bahamas, 23 in Guyana, 17 in Barbados, 9 in Antigua, 6 in Belize, and 1 in St. Lucia. *Seeking Justice Closer to Home*, BBC NEWS, Nov. 27, 2002, *available at* <http://news.bbc.co.uk/1/hi/world/americas/2478665.stm>. A more recent tally is unavailable, but a year later, the BBC did report that Trinidad and Tobago had 86 inmates on death row: *Fresh Hope for Death Row Inmates*, BBC NEWS, Nov. 21, 2003, *available at* <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/americas/3226324.stm>.

[10] January 2003 figures report over 3700 prisoners on death row in the United States. *See* Amnesty International, *Facts and Figures on the Death Penalty*, AI Index: ACT 50/005/2003, Apr. 11, 2003.

[11] Amnesty International reports that "[t]iny, airless cells, with no natural light, thin mattresses or no bed at all, appalling food and almost no medical care are the norm for death row inmates across the region." AI 2002 Report, *supra* note 4, at 28.

[12] The provision of legal aid to those charged with serious offenses in the Commonwealth Caribbean is not guaranteed, although changes may come about as a result of the Privy Council's decision in Hinds v. Attorney Gen. of Barbados, [2002] 1 App. Cas. 854 (P.C. 2001). On this decision, see Derek O'Brien, *The Right to Free Representation in the Commonwealth Caribbean*, 2 OXFORD U. COMMONWEALTH L.J. 197 (2002). *See also* Rose-Marie Belle Antoine, *International Law and the Right to Legal Representation in Capital Offence Cases—A Comparative Approach*, 12 OXFORD J. LEGAL STUD. 284 (1992) (noting that the UN Human Rights Committee has long recognized the problem of inadequate and unavailable representation for Caribbean death row prisoners).

[13] Ramesh Lawrence Maharaj, *The Death Penalty: Legal and Constitutional Issues*, 9 CARIB. L.R. 137 (1999). At the time of writing, the author was the attorney general for the Republic of Trinidad and Tobago.

[14] *See* S. A. DE SMITH, THE NEW COMMONWEALTH AND ITS CONSTITUTIONS (1964).

sources of law, with the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR)[15] being an obvious international source since it had applied to these states when they were colonies of Britain. For some states, inspiration was also found in the domestic bills of rights of other countries.[16] The constitution of Trinidad and Tobago[17] and its 1962 predecessor, for example, are nearly exact copies of the 1960 Canadian *Bill of Rights*.[18]

The right to life was included within these constitutional tabulations confirming that individuals had certain rights and freedoms to be protected under supreme law. However, like the right to life provision in the ECHR which provides that "[n]o one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law,"[19] the constitutions of the Commonwealth Caribbean all contain an express proviso that plainly sanctions the continued use of the death penalty, thereby precluding in no uncertain terms a constitutional challenge to the lawfulness of the death penalty per se. Moreover, there is in almost all[20] Commonwealth Caribbean constitutions a "savings clause," or what is sometimes termed a "saving law clause," that is expressly designed to preserve the lawfulness of the preindependence method of execution of hanging by the neck, rendering virtually impossible a constitutional challenge to this aspect of the death penalty's imposition.[21]

Dismayed by both the length of time Caribbean prisoners spent on death row and the conditions in which they spent that time, lawyers nevertheless saw some scope for mounting a legal challenge provided the challenge limited itself to the manner in which a lawful sentence of death was being put into effect. Thus, a legal strategy was developed that mounted collateral attacks against the consequences that flowed from the death penalty's imposition in the Caribbean, rather than a full frontal assault on the penalty itself. Such attacks were launched on the basis of the human rights guarantees that had been included in postindependence constitutions, such as the prohibition on inhuman and degrading punishment, and the right to a fair trial.

Initially, in the late 1970s and early 1980s, the strategy failed. The courts rejected the argument that carrying out a death sentence many years after the passage of that sentence amounted to inhuman or degrading treatment and was thus an unconstitutional execution.[22] But, over time, the argument won greater support, particularly as dissenting judges in later cases used their speeches to sow the seeds of change.[23] The breakthrough came in November 1993 when a special seven-member panel of the Privy Council, acting at the behest of Caribbean states as their highest constitutional court, held that hanging a man after he has been imprisoned under a sentence of death for many years was a cruel and inhuman act. According to the unanimous view of the Privy Council in its now famous (or to some, infamous) decision in *Pratt and Morgan v. Attorney-General for Jamaica*,[24] a delay in excess of five years from sentence

[15] Nov. 4, 1950, 213 UNTS 222, Eur. T.S. No. 5 (in force Sept. 3, 1953) [hereinafter ECHR]. The same provisions appear in many of these constitutions, starting with the Nigerian Constitution of 1959, which was then used as a model for other states such as Jamaica. DE SMITH, *supra* note 14, at 177–85.

[16] *See* ANTOINE, *supra* note 2, at 75–77.

[17] TRIN. & TOBAGO CONST. Act 4 of 1976, *reprinted in* 18 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1988).

[18] S.C. 1960, c. 44, Part I, *reprinted in* R.S.C. 1985, App. III.

[19] ECHR, *supra* note 15, Art. 2, para. 1.

[20] The exception being Belize, which had a five-year transitional savings clause that is now spent. *See infra* note 59.

[21] *See* MARGARET DEMERIEUX, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS 53–58 (1992). *See also* ANTOINE, *supra* note 2, at 78.

[22] *See* de Freitas v. Benny, [1976] App. Cas. 239 (P.C.) (appeal taken from Trin. & Tobago); Abbott v. Attorney Gen. of Trinidad and Tobago, [1979] 1 W.L.R. 1342 (P.C.); and Riley v. Attorney Gen. of Jamaica, [1983] 1 App. Cas. 719 (P.C.).

[23] *See* the speeches of Lords Scarman and Brightman in Riley, *supra* note 22. For Caribbean recognition of the significance of these dissents, see Maharaj, *supra* note 13, at 150.

[24] [1994] 2 App. Cas. 1 (P.C. 1993). For commentary, see John Hatchard, *A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts*, 20 COMMONWEALTH L. BULL. 309 (1994); Simeon C. R. McIntosh, *Cruel, Inhuman and Degrading Punishment: A Re-Reading of Pratt and Morgan*, 8 CARIB. L. REV. 1 (1998); Barry Phillips, *Jamaica—*

to execution will likely render that execution unconstitutional on the ground of inhuman treatment, although the Privy Council tried to avoid the impression that its five-year guideline was a rigid timetable.[25] In any event, the message to the governments of the Commonwealth Caribbean was clear: If you wish to retain the death penalty, then execution must follow as swiftly as possible after sentence, allowing a reasonable time for appeal and the consideration of reprieve.

This was a dramatic turnabout in the jurisprudence of the Privy Council and equally dramatic was the immediate result. Given the similar wording of most Commonwealth Caribbean constitutions, as well as the similarities in their death row practices, the *Pratt and Morgan* decision was followed by a mass commutation of more than two hundred death sentences in the region, as prisoners who had been awaiting execution for more than five years had their sentences commuted to lengthy prison terms.[26] A public outcry ensued, as to be expected in a region where belief in the death penalty as a deterrent to violent crime remains high,[27] while Caribbean governments scurried to reallocate their scarce resources toward developing better procedures that would speed up the handling of appeals and requests for pardons from prisoners on death row.[28]

Pratt and Morgan also bolstered the campaign to whittle away at the death penalty in the courts. Encouraged by the landmark ruling, lawyers employed other arguments by which a collateral attack on the death penalty could be mounted, bringing these additional challenges before both domestic Caribbean courts and the Privy Council, and on exhausting those options, before international bodies such as the UN Human Rights Committee, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.[29] As a result, an extensive body of Caribbean death penalty jurisprudence has developed, consisting of domestic, quasi-domestic, regional, and international decisions—some (but not all) having the binding force of law. Many of these decisions have also placed on public record the need for Commonwealth Caribbean states to improve their standards of fair trial and fair prison treatment in capital cases; and it is this jurisprudence that forms the backdrop for recent challenges to the mandatory nature of the death penalty throughout the Commonwealth Caribbean. It is also the mixed nature of this jurisprudence, involving a technically "domestic"

Death Penalty—Definition of Torture and Inhuman or Degrading Treatment or Punishment, 88 AJIL 775 (1994); and William A. Schabas, *Execution Delayed, Execution Denied*, 5 CRIM. L. FORUM 180 (1994). *See also* William A. Schabas, *Soering's Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row*, 43 INT'L & COMP. L.Q. 913 (1994) (contrasting the judgment of the Privy Council in *Pratt and Morgan* with that of the Human Rights Committee in a comparable case).

[25] For a detailed study of the evolution of the Privy Council's case law on capital punishment, see Sir Louis Blom-Cooper & Christopher Gelber, *The Privy Council and the Death Penalty in the Caribbean: A Study in Constitutional Change*, 3 EUR. HUM. RTS. L.R. 386 (1998) and Nicholas Roberts, *The Law Lords and Human Rights: The Experience of the Privy Council in Interpreting Bills of Rights*, 5 EUR. HUM. RTS. L.R. 147, 153–60 (2000). For an alternative perspective, see Simmons, *supra* note 5.

[26] According to the attorney general of Barbados at the time, Jamaica commuted at least 150 sentences, Trinidad and Tobago commuted 53, while Barbados commuted 9. Simmons, *supra* note 5, at 271 n.43. In Trinidad, the death sentence is commuted to one of seventy-five years imprisonment with hard labor. *Trinidad: Government Yet to Decide on What to Do with Convicted Murderers*, BBC WORLDWIDE MONITORING, Feb. 19, 2003, *available in* LEXIS, News Library, Individual Reports File.

[27] AI 2002 Report, *supra* note 4.

[28] *See* Simmons, *supra* note 5, at 284. For litigation concerning the new procedures introduced in Trinidad and Tobago, see Thomas v. Baptiste, [2000] 2 App. Cas. 1 (P.C. 1999).

[29] Not all Commonwealth Caribbean states are subject to the jurisdiction of each of these three international bodies. Only states that have ratified the Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 302 (entered into force Mar. 23, 1976), are subject to the jurisdiction of the UN Human Rights Committee for individual communications, while only states that have ratified the American Convention on Human Rights, Nov. 22, 1969, 1144 UNTS 123, OASTS. No. 36 (entered into force July 18, 1978) are subject to the jurisdiction of the Inter-American Court of Human Rights. However, all states that are members of the Organization of American States (OAS), including those in the Commonwealth Caribbean, are subject to the jurisdiction of the Inter-American Commission on Human Rights for individual petitions through their ratification of the Charter of the Organization of American States (*opened for signature* Apr. 30, 1948), 119 UNTS 3, 2 UST 2394, OASTS Nos. 1-C and 61 (entered into force Dec. 13, 1951) and the normative effect of the oft-forgotten American Declaration of the Rights and Duties of Man, May 2, 1948, OEA/Ser.L/V/II.23, doc. 21 rev. 6, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 665 (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002).

constitutional court based in a faraway land as well as three international bodies, that leads some within the Commonwealth Caribbean to view this jurisprudence as the imposition of an abolitionist policy from abroad.[30]

II. CHALLENGING THE CARIBBEAN MANDATORY DEATH PENALTY

The Colonial Legacy

The mandatory death penalty is a colonial legacy. Under the common law of England, death was the only sentence that could be pronounced by a judge upon a defendant who was convicted of murder, regardless of the nature of the offense or the particular circumstances of the offender.[31] Through colonialism, this simple and undiscriminating rule was applied to many of Britain's colonies, and upon independence, the nations of the Commonwealth Caribbean preserved the rule that was in place as part of their colonial inheritance.

It is generally accepted, however, that the crime of murder embraces a range of offenses of widely varying degrees of criminal culpability.[32] Many would agree that there is a difference in kind between a mercy killing, a crime of passion, a serial killing, and a murder for profit. It follows that having one form of punishment, automatically imposed without any consideration of the particular circumstances of the case, cannot address the problem of differential culpability. To state the argument at its plainest, not everyone who is convicted of murder should suffer death.

To counter such concerns, a distinction has typically developed between "capital" or "first degree" murders, which carry a death sentence, and "noncapital" or "second degree" murders, which do not. Even within the United Kingdom prior to abolition such a distinction was made,[33] although possibly not soon enough to be passed along to the states of the Commonwealth Caribbean. Not until 1992 was such a distinction enacted into the law of a Caribbean state, with Jamaica being the first to restrict the death penalty to certain categories of murder.[34] Jamaica's lead was followed by some,[35] but not all, Commonwealth Caribbean states, although all retained the mandatory or automatic nature of the death penalty in the category to which it was applied, thereby barring any presentencing consideration of mitigating factors.[36]

Initiating the Challenge in International Fora

Viewed from an American legal perspective, where the Supreme Court has held since 1976 that a mandatory death penalty without consideration of the nature of the offense or the circumstances of the offender constitutes cruel and unusual punishment,[37] one would have

[30] Simmons, *supra* note 5, at 284.

[31] *See* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 512–18 (4th ed. 2002).

[32] According to the Report of the Royal Commission on Capital Punishment (1949–1953), Cmnd. 8932, as cited in Reyes v. The Queen, [2002] 2 App. Cas. 235, 242B, para. 11 (P.C.) (appeal taken from Belize): "[T]here is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder."

[33] This was accomplished in the United Kingdom by the passage of the Homicide Act 1957, 5 & 6 Eliz. 2, ch. 11. The death penalty was subsequently abolished in 1965 by the Murder (Abolition of Death Penalty) Act 1965, ch. 71, although it remained on the statute book for treason and piracy with violence until 1998. *See* Crime and Disorder Act, 1998, ch. 37, para. 36. It was similarly abolished in the British territories of Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands in 1991 by The Caribbean Territories (Abolition of Death Penalty for Murder) Order 1991, S.I. 1991 No. 988, with its last remaining vestiges in Bermuda and the Turks and Caicos Islands abolished in 1999 and 2002, respectively. *See* Anthony Browne, *Death Penalty Abolished on All British Territory*, TIMES (London), Oct. 23, 2002, at 15.

[34] *See* Saul Lehrfreund, *International Legal Trends and the "Mandatory" Death Penalty in the Commonwealth Caribbean*, 1 OXFORD U. COMMONWEALTH L.J. 171, 172 (2001).

[35] Belize, for example, adopted a distinction between capital (Class A) and noncapital (Class B) murders in 1994.

[36] Commonwealth Caribbean governments have argued that mitigating factors are considered postsentencing by mercy committees and other executive bodies responsible for hearing applications for pardon.

[37] Woodson v. North Carolina, 428 U.S. 280, 300–04 (1976).

thought this situation was ripe for a successful challenge. But the prevailing view among lawyers representing death row clients was that the mandatory nature of the death penalty in the Commonwealth Caribbean should be upheld.[38] After all, the postindependence constitutions had expressly preserved the death penalty as it was practiced prior to independence, which in its preindependence form clearly had no judicial consideration of mitigating factors and, in any event, the savings clauses provided an additional immunity.

Nevertheless, challenges were launched, with initial successes achieved before the international bodies responsible for interpreting the international human rights instruments to which the challenged state had given its consent.[39] These bodies were the UN Human Rights Committee, established by states under the *International Covenant on Civil and Political Rights* (ICCPR),[40] and the Inter-American Commission on Human Rights, established by states as an organ of the Organization of American States (OAS) by way of the organization's charter.[41] As readers are aware, the UN Human Rights Committee handles complaints from individuals alleging violations by states of the rights contained in the ICCPR, while the Inter-American Commission on Human Rights has responsibility for handling cases and petitions under the 1969 *American Convention on Human Rights*[42] and the 1948 *American Declaration on the Rights and Duties of Man.*[43] Neither body, however, is competent to issue a binding decision in the nature of a judgment from a court.

Still, in a groundbreaking case concerning St. Vincent and the Grenadines,[44] the UN Human Rights Committee held that a mandatory death sentence violated the "most fundamental of rights, the right to life"[45] as guaranteed in the ICCPR. According to the committee majority, the implementation of a mandatory death sentence with no judicial consideration of the particular circumstances of either the offender or the offense was an arbitrary (and therefore illegal) deprivation of the right to life.[46] A minority of five of the sixteen committee members disagreed,[47] taking issue with the suggestion that the category of murder could include crimes that were not the most serious, as required for the lawful application of the death penalty, and noting that the committee had for years dealt with cases submitted by persons sentenced to death under legislation that made such a sentence mandatory without ever hinting that the legality of such a penalty was even questionable.

Litigation before the Inter-American Commission on Human Rights had a similar result. In cases concerning the compatibility of the mandatory death sentence with the obligations in the applicable inter-American human rights instrument against Trinidad and Tobago,[48] Jamaica,[49] Grenada,[50] and the Bahamas,[51] the Commission considered that it could not reconcile the required respect for the dignity of the individual with a system that deprives an individual of the most fundamental of rights without considering whether a death sentence,

[38] *See* Lehrfreund, *supra* note 34, at 171.

[39] *See id.* at 177–79.

[40] Optional Protocol to the International Covenant on Civil and Political Rights, *supra* note 29.

[41] Charter of the Organization of American States, *supra* note 29.

[42] American Convention on Human Rights, *supra* note 29.

[43] American Declaration of the Rights and Duties of Man, *supra* note 29.

[44] (Eversley) Thompson v. St. Vincent and the Grenadines, Communication No. 806/1998, UN Doc. CCPR/C/70/D/806/1998.

[45] *Id.*, para. 8.2.

[46] *Id.*

[47] They were Lord Colville (U.K.), David Kretzmer (Isr.), Abdelfattah Amor (Tunis.), Maxwell Yalden (Can.) and Abdallah Zahkia (Leb.).

[48] Hilaire v. Trinidad and Tobago, Case 11.816, Report No. 66/99 (Inter-Am. C.H.R., Apr. 21, 1999) (unreported). *See also* Lehrfreund, *supra* note 34, at 177.

[49] McKenzie et al. v. Jamaica, Cases 12.023, 12.044, 12.107, 12.126, 12.146, Report No. 41/00 (Inter-Am. C.H.R., Apr. 13, 2000) OEA/Ser.L/V/II.106, doc. 3 rev., 918 (2000).

[50] Baptiste v. Grenada, Case 11.743, Report No. 38/00 (Inter-Am. C.H.R., Apr. 13, 2000) OEA/Ser.L/V/II.106 doc. 3 rev., 721.

[51] Edwards et al v. The Bahamas, Cases 12.067, 12.068, 12.086, Report No. 48/01 (Inter-Am. C.H.R., Apr. 4, 2001) OEA/Ser.L/V/II.111 doc. 20 rev., 603.

as an exceptional form of punishment, is appropriate in the particular circumstances of an individual's case.[52] The Inter-American Commission on Human Rights was also of the view that the imposition of a mandatory death sentence subjected the prisoner to cruel, inhuman, or degrading treatment.[53]

The Contribution of the Eastern Caribbean Court of Appeal

Yet, despite these successes before international tribunals of long standing, the real breakthrough came in April 2001, before the Caribbean's own Eastern Caribbean Court of Appeal in the consolidated cases of *Spence v. The Queen* and *Hughes v. The Queen*;[54] two appeals that were concerned solely and squarely with the constitutionality of the mandatory nature of the death penalty in the Eastern Caribbean island states of St. Vincent and St. Lucia, respectively. In a lengthy judgment, a majority of that Court held that the mandatory nature of the imposition of the death penalty was unconstitutional on the grounds that it amounted to an inhuman and degrading punishment expressly prohibited by the constitutions of St. Vincent and St. Lucia. Moreover, the Court of Appeal gave a narrow interpretation to the savings clauses found in the applicable constitutions, drawing a "subtle but definite distinction between the punishment" of death by hanging and its mandatory imposition on all persons convicted of murder. It then concluded that the latter could not be saved by the clause.[55]

Hughes was appealed by the government of St. Lucia to the Privy Council,[56] triggering interest among the attorneys general of St. Vincent and the Grenadines, Antigua and Barbuda, and Grenada, all of whom intervened in the appeal, although no separate submissions were made on their behalf. At the same time, legal challenges to the mandatory nature of the death penalty in Belize and St. Christopher (also known as St. Kitts) and Nevis were also making their way to the Privy Council, with all three cases being heard together in late January 2002. Although the Privy Council had heard previous Caribbean death penalty cases, this was the first time in a Caribbean context in which the legality of the mandatory death sentence was being placed squarely before the Privy Council for adjudication. In March 2002, the Privy Council responded with three separate judgments.[57]

The Privy Council's Contribution

It is best to begin the discussion of the Privy Council's contribution concerning the mandatory nature of the death penalty in the Caribbean with the case of *Reyes v. The Queen*,[58] a case from Belize concerning the shooting of a neighbor following a dispute over a fence. Under the Belize Criminal Code, as amended in 1994, all murders "by shooting" are Class A offenses, conviction for which results in a mandatory sentence of death. Belize, however, is unique among the Commonwealth Caribbean countries in that the savings clause enacted to protect

[52] *Id.*, para. 147.

[53] *Id.*, para. 178.

[54] Spence and Hughes v. The Queen, Crim. App. Nos. 20 of 1998 and 14 of 1997, judgment rendered Apr. 2, 2001 (E. Carib.). For commentary, see Lehrfreund, *supra* note 34.

[55] *Id.*, para. 19.

[56] *Spence* was not appealed with respect to the mandatory nature of the death penalty because in the months following the decision of the Eastern Caribbean Court of Appeal concerning his appeal as to sentence, his appeal as to his conviction was allowed by the Privy Council, resulting in the matter being remitted to the St. Vincent courts for a possible retrial. [2001] U.K.P.C. 35. Spence was not therefore under a sentence of death at the time of the *Hughes* appeal because he was not convicted of any crime.

[57] For commentary, see Alex Bailin, *The Inhumanity of Mandatory Sentences*, 2002 CRIM. L.R. 641; Derek O'Brien, *The Death Penalty and the Constitutions of the Commonwealth Caribbean*, 2002 PUB. L. 678; and Thomas Roe, *Human Rights and the Mandatory Death Penalty in the Privy Council*, 61 CAMBRIDGE L.J. 505 (2002).

[58] Reyes v. The Queen [2002] 2 App. Cas. 235 (P.C.) (appeal taken from Belize).

the legality of its preindependence laws is now spent.[59] As a result, the prospects for a successful challenge to the mandatory nature of the death penalty were thought to be strongest with a case from Belize. Fortunately for the strategists, the Privy Council did not disappoint.

On March 11, 2002, the Privy Council held unanimously that to deny a man convicted of murder by shooting the opportunity "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."[60] Since humanity was at the core of the right to be free from inhuman and degrading treatment in the Belize constitution, the classification of murder by shooting as a Class A offense was found to be inconsistent with the supreme law and therefore void. As a result, death by shooting could no longer be a Class A offense since that entailed a mandatory death penalty. It was thus reclassified by the Privy Council as a Class B offense, although this did not rule out the possibility that the death sentence could be imposed for a murder by shooting once a full judicial consideration of the circumstances had taken place. Nor did the judgment rule out the possibility of a mandatory death penalty being the prescribed punishment for a more limited category of offenses than "murder by shooting."

In determining that a mandatory death penalty for murder by shooting contravened the prohibition on inhuman and degrading punishment in the Belize constitution, the Privy Council drew upon what it saw as two important developments that had occurred in the latter half of the twentieth century. These developments were the adoption since 1948 of a series of international declarations and treaties committing states to the protection of human rights and the subsequent adoption by Caribbean nations of constitutional rights guarantees based on the guarantees in these international instruments.[61] In light of this connection, the Privy Council had no difficulty taking into account international norms in interpreting the Belize constitution, holding that a court "will not be astute to find that a Constitution fails to conform with international standards of humanity and individual rights, unless it is clear, on a proper interpretation of the Constitution, that it does."[62]

The Privy Council also considered the wide range of opinions and decisions submitted by counsel for Reyes, including decisions from the highest courts in Canada,[63] the United States,[64] South Africa,[65] and India,[66] as well as the judgment below by the Eastern Caribbean Court of Appeal and the earlier decisions of the Inter-American Commission on Human Rights and the UN Human Rights Committee. These decisions were tendered to demonstrate a general acceptance of the need in capital cases for individualized sentencing and for a sense of proportionality between the severity of the punishment and the nature of the crime. They

[59] Section 21 of the Belize constitution provides that

> Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Part (referring to Part II of the Constitution entitled "Protection of Fundamental Rights and Freedoms").

Belize attained its independence on September 21, 1981.

[60] *Reyes*, para. 43.

[61] *Id.*, paras. 17–24.

[62] *Id.*, para. 28.

[63] R. v. Smith, [1987] 1 S.C.R. 1045 (Can.) (concerning the constitutionality of a seven-year minimum sentence for importing narcotics). The Privy Council also cited (at para. 30) the reference made in *Smith* to the earlier death penalty decision of Miller and Cockriell v. The Queen, [1977] 2 S.C.R. 680 (Can.) concerning the definition of cruel and unusual punishment as that which was "so excessive as to outrage standards of decency," but failed to note that the holding in that case was that a mandatory death sentence for the killing of a police officer or prison guard was *not* cruel and unusual punishment under the 1960 Canadian *Bill of Rights*.

[64] Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976), although in *Roberts*, the Court held that mandatory death penalties could under certain circumstances survive constitutional scrutiny.

[65] State v. Makwanyane, 1995 (3) S.A.L.R. 391 (C.C.).

[66] Mithu v. State of Punjab, [1983] 2 S.C.R. 690 (India), although in this case, the successful ground for challenging a mandatory death penalty was the right to life rather than the prohibition on cruel or inhuman treatment.

were also tendered to illustrate the "evolving standards of decency that mark the progress of a maturing society," to borrow that well-known phrase from the U.S. Supreme Court decision in *Trop v. Dulles*.[67] The Privy Council also discounted the value of its own earlier jurisprudence on the legality of the mandatory death sentence,[68] explaining that these decisions were "made at a time when international jurisprudence on human rights was rudimentary."[69] It also distinguished an earlier and negative precedent from the Belize Court of Appeal[70] on the ground that it "was based on far more limited material than is now before the [Privy Council]."[71]

The Privy Council also addressed the argument often raised by Commonwealth Caribbean governments that a postsentencing mercy committee or advisory council set up to consider applications for pardon was a suitable means for reviewing whether any extenuating circumstances weigh against an offender's execution. This argument found little favor with the Privy Council, which held that the opportunity to seek mercy *after* the imposition of a death sentence did not cure the constitutional defect *in* the sentencing process, particularly since the committee or council established to consider such requests did not have the requisite judicial qualities of independence and impartiality. In the Privy Council's view, the determination of the appropriate measure of punishment had to be a judicial rather than an executive function to survive constitutional scrutiny.

The holding in *Reyes* was confirmed by the Privy Council in *The Queen v. Hughes*,[72] where it was again held that the mandatory nature of the death penalty was to be regarded as inhuman or degrading treatment or punishment, and therefore unconstitutional. *Hughes*, however, was a case from St. Lucia where the criminal code makes it clear that "whoever commits murder is liable indictably to suffer death."[73] Moreover, in contrast to the Belize constitution, the constitution of St. Lucia contains what is best described as a "partial savings clause," ostensibly to protect its preindependence forms of punishment from constitutional challenge. This clause reads:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with the [Constitution's prohibition on inhuman treatment] to the extent that the law in question authorizes the infliction of any description of punishment that was lawful [prior to independence].[74]

This placed the force of such a clause clearly before the Privy Council within the context of a challenge to the mandatory nature of the death penalty.

The Privy Council responded by construing the savings clause in a manner akin to any other derogation from constitutionally protected rights, giving it a strict and narrow interpretation rather than a broad construction.[75] In taking this approach, the Privy Council was able to draw an important distinction between a law that *requires* a judge to impose the death penalty in all cases of murder and a law that merely *authorizes* him or her to do so.[76] The Privy Council concluded:

> [T]o the extent that [the punishment provision in the St. Lucia criminal code] is to be regarded as authorising the infliction of the death penalty in all cases of murder, it cannot be held to be inconsistent with [the ill treatment prohibition in the St. Lucia

[67] 356 U.S. 86, 101 (1958).

[68] *See* Runyowa v. The Queen, [1967] 1 App. Cas. 26 (P.C. 1966) (appeal taken from S. Rhodesia) and Ong Ah Chuan v. Public Prosecutor, [1981] App. Cas. 648 (P.C. 1980) (appeal taken from Sing.).

[69] Reyes v. The Queen, [2002] 2 App. Cas. 235, 242B, para. 45.

[70] Lauriano v. Attorney Gen., [1995] 3 Belize L.R. 77 (C.A.).

[71] *Reyes*, para. 47.

[72] [2002] 2 App. Cas. 259 (P.C.) (appeal taken from St. Lucia).

[73] *Criminal Code of St. Lucia*, §178 as cited in *id.*, para. 2.

[74] ST. LUCIA CONST. para. 10.

[75] *Hughes*, para. 35. *See* Pinder v. The Queen, [2002] U.K.P.C. 46, for subsequent judicial confirmation that derogations from constitutional guarantees should receive a narrow construction.

[76] *Hughes*, para. 47.

> constitution]. But, to the extent that it goes further and actually requires the infliction of the death penalty in all cases of murder, the exception in [the savings clause] does not apply.[77]

A strict and narrow construction thereby enabled the Privy Council to rule that the St. Lucia savings clause could not properly be regarded as authority for the proposition that the mandatory nature of the death sentence is immune from challenge.[78] Having circumvented the potential obstacle posed by the partial savings clause, the Privy Council went on to hold, as in *Reyes*, that the requirement for mandatory imposition of the death sentence in the St. Lucia criminal code was inconsistent with the prohibition on inhuman treatment and punishment in the St. Lucia constitution. St. Lucia's Criminal Code was then modified by the Privy Council to provide for a regime of individualized sentencing, as is done for offenses other than murder in St. Lucia.

The third case of *Fox v. The Queen*,[79] concerning the imposition of the mandatory death penalty in St. Kitts and Nevis simply served as further confirmation of the two other judgments. Like the constitution of St. Lucia, the constitution of St. Kitts and Nevis contained a partial savings clause as a means of immunizing from constitutional challenge any law authorizing the infliction of any description of punishment that was lawful prior to independence. Applying the analysis used in *Hughes*, the Privy Council held that the criminal law provision in the code of St. Kitts and Nevis was unconstitutional to the extent that it required, as opposed to merely authorized, a court to impose the death penalty whenever someone is convicted of murder. As with Hughes, Fox was remitted to the Caribbean courts for an individualized sentencing.

Further Issues

Interestingly, in not one of these three judgments did the Privy Council feel compelled to respond to the argument made by counsel on behalf of the prisoners that the mandatory nature of the death penalty infringed the right to life. Having declared a win on the ground of inhuman punishment, it is possible the Privy Council felt it unnecessary to address the right to life argument. The Inter-American Court of Human Rights, however, was not as reticent. Three months later, in a judgment concerning the consolidated claims of thirty-two death row prisoners from Trinidad and Tobago, the Inter-American Court held that a legislative scheme that submits all persons charged with murder to a judicial process that considers neither the individual circumstances of the accused nor the particular nature of the crime violates the prohibition against the "arbitrary" deprivation of life, found in Article 4(1) of the *American Convention on Human Rights*, as well as the requirement in Article 4(2) to limit death sentences to the most serious crimes.[80] This judgment, unlike the reports of the UN Human Rights Committee and the Inter-American Commission on Human Rights, is clearly of binding force under international law.[81] As for the remedy, the Court ordered Trinidad and Tobago to retry the remaining thirty-one prisoners,[82] but barred on grounds of equity their resentencing to death in the event that they were reconvicted.[83] It also ordered Trinidad and Tobago to adopt graduated categories of murder.

[77] *Id.*, para. 48.

[78] *Id.*, para. 46.

[79] [2002] 2 App. Cas. 284 (P.C.) (appeal taken from St. Kitts & Nevis).

[80] Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago, Judgment of June 21, 2002 (Inter-Am. Ct. H.R) Ser. C No. 94, paras. 103, 106, *available at* <http://www.corteidh.or.cr >.

[81] The cases were submitted to the inter-American system before Trinidad and Tobago's denunciation of the *American Convention on Human Rights* took effect in May 1999.

[82] One prisoner (Joey Ramiah) had been executed by Trinidad and Tobago while the case was pending.

[83] Two prisoners have since been resentenced for manslaughter. *See* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L.R. 651, 692 (2003).

In addition to being the first judgment by an international court to determine the legality of a mandatory penalty of death, the Inter-American Court decision is also important because the Republic of Trinidad and Tobago, unlike St. Lucia and St. Kitts, has a general savings clause in its constitution. This stands in contrast with the three cases decided by the Privy Council, which involved jurisdictions with either partial savings clauses, (i.e., those that bar review of particular issues on particular grounds, such as "descriptions of punishment" on grounds of "inhuman and degrading treatment"), or no savings clauses, such as the unique case of Belize. Cases concerning the application of a general savings clause, ostensibly precluding all challenges to the legality of all preindependence laws on any constitutional grounds, have only recently been argued before the Privy Council.

Such clauses are found in the constitutions of Jamaica, Trinidad and Tobago, and the Bahamas. According to local newspaper reports, Justice Henderson Downer of the Jamaican Court of Appeal ruled in dissent in December 2002 that the savings clause in the Jamaican constitution, when given a narrow interpretation, does not save from challenge the mandatory nature of the Jamaican death penalty for aggravated murder.[84] However, this decision was accompanied by another, released the same day and authored by Justice Ian Forte, the President of the Jamaican Court of Appeal, holding that the mandatory death penalty was constitutional.[85] Copies of the judgments are not generally available, but it appears likely that there will be one more round in the battle against the mandatory death penalty in the docket of the Privy Council.[86]

At the time of writing, a similar case from Trinidad and Tobago, known as *Roodal*, was also pending before the Privy Council, although in this case the Court of Appeal below had ruled that while a mandatory death sentence was cruel and unusual punishment, it was nevertheless immunized by the constitution's savings clause and was subject to removal only by Parliament.[87] On November 20, 2003, the Privy Council released its judgment in *Roodal*, holding by a vote of three to two, that the penalty need no longer be read as mandatory by virtue of a generous interpretation of the rights in the constitution that also took into account Trinidad and Tobago's international obligations as a member state of the OAS.[88] A strong dissent, however, disagreed "profoundly"[89] with the majority's reasoning, taking the view of the Trinidad and Tobago Court of Appeal that the penalty, while cruel and unusual, could not be declared invalid and rejecting as "far-fetched and indeed more than a little patronising" the implication that every one had operated for so many years on the mistaken belief that the death penalty for murder was mandatory.[90] Sentencing reviews will now have to be carried out in Trinidad and Tobago to ensure full consideration of any circumstances mitigating against the imposition of the ultimate penalty.

[84] Pat Roxborough-Wright, *Death Penalty Not Mandatory Says Judge*, JAM. OBSERVER, Dec. 17, 2002, *available at* <http://www.jamaicaobserver.com/> (archives). The judgment, concerning one Dale Boxx, is unreported. *See also How Unconstitutional Is the Death Penalty*, GLEANER (Jam.), Nov. 30, 2003, *available in* LEXIS, News Library, North/South America News File.

[85] This case concerned one Lambert Watson. Barbara Gayle, *Death Penalty Upheld—Appeal Court Rules Hanging as "Not Unconstitutional,"* GLEANER (Jam.), Dec. 17, 2002, *available in* LEXIS, News Library, North/South America News File.

[86] The Watson case has been appealed to the Privy Council. Barbara Gayle, *Death Penalty under Privy Council Review*, GLEANER (Jam.), Jan. 14, 2003; *also* Barbara Gayle, *Privy Council to Decide Death Penalty Review*, GLEANER (Jam.), Jan. 22, 2003, *available in* LEXIS, News Library, North/South America News File.

[87] Roodal v. Trinidad and Tobago, C.R.A. No. 64 of 99, July 17, 2002 (unreported). *See also Trinidad: Only Parliament Can Change Death Penalty—Chief Justice*, BBC WORLDWIDE MONITORING, July 19, 2002, *available in* LEXIS, News Library, Individual Reports File.

[88] Roodal v. Trinidad and Tobago, Privy Council Appeal No. 18 of 2003, Nov. 20, 2003, *available at* <http://www.privycouncil.co.uk/files/other/balkissoon%20roodal.rtf>.

[89] *Id.*, para. 36.

[90] *Id.*, para. 47.

III. Consequences for Constitutional Interpretation and the Role of the Courts

What guidance can be drawn from this recent case study on challenging the legal imposition of a penalty, the nature of which many felt was well beyond challenge? The first lesson concerns the proper approach to the interpretation of a constitution's guarantees for the protection of individual rights. Clearly, in interpreting a rights document, the task begins with careful consideration of the language of the text. But the task does not end there. According to the Privy Council, among others, the proper approach to interpretation must also "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."[91] This requires that a purposive interpretation be given to constitutional rights provisions, a principle long accepted by the Privy Council, the Supreme Court of Canada, and the South African Constitutional Court, among others. It also requires, at least in jurisdictions where adoption of a domestic bill of rights follows the adoption of international treaties for the protection of human rights, the consideration of the *international* norms of evolving standards of decency that are incorporated in the provisions of these treaties, and on which the decisions of the relevant international bodies provide further elaboration.[92]

As a result, in Commonwealth Caribbean litigation, research skill in international and comparative law is well rewarded since it is now clearly legitimate for counsel to rely on international treaties and international decisions, as well as the decisions of other domestic courts, in their submissions before the Privy Council and the Eastern Caribbean Court of Appeal. As aptly stated by Justice Saunders in the appeals of Spence and Hughes before the Eastern Caribbean Court of Appeal, "the collective experience and wisdom of courts and tribunals the world over ought fully to be considered."[93] He also warned against "the perilous path" a court would be embarking upon if it "began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions."[94]

This stands in stark contrast with the approach taken in the United States where citation to foreign law is rare, and even then, may have its critics. In the death penalty case of *Atkins v. Virginia*,[95] for example, citation to foreign law was made in a footnote by Justice John Paul Stevens that resulted in a stinging rebuke from Justice Antonin Scalia, who noted that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution."[96] Justice Scalia was equally scathing in his dissent in the recent gay rights case of *Lawrence v. Texas*,[97] where he wrote: "The Court's discussion of . . . foreign views . . . is . . . meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"[98] Ironically, in a much earlier challenge to the mandatory death penalty before the Privy Council, Lord Diplock had shown a similar reluctance to follow the decisions of a foreign jurisdiction, stating that the "decisions of the Supreme Court of the U.S. on that country's Bill of Rights, whose

[91] Reyes v. The Queen, [2002] 2 App. Cas. 235, 242B, para. 26, relying on Trop v. Dulles, 356 U.S. 86, 101 (1958), but extending *Trop* beyond its cruel and unusual punishment context.

[92] Contrast this with Stanford v. Kentucky, 492 U.S. 361, 369 (1989), where the Supreme Court "emphasized that it is *American* conceptions of decency that are dispositive" (emphasis added).

[93] Spence and Hughes v. The Queen, Crim. App. Nos. 20 of 1998 and 14 of 1997, para. 214, judgment rendered Apr. 2, 2001 (E. Carib.).

[94] *Id.*

[95] 536 U.S. 304 (2002).

[96] *Id.* at 348, reciting a remark he made in dissent in Thompson v. Oklahoma, 487 U.S. 815, 869 (1988).

[97] 539 U.S. ___, 123 S.Ct. 2472 (2003).

[98] *Id.* at 2495 (incorporating a quotation from a previous decision). For a more optimistic view on the future use of foreign law, see Justice Ruth Bader Ginsburg, Remarks for the American Constitution Society Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication (Aug. 2, 2003), *available at* <http://www.americanconstitutionsociety.org/pdf/Ginsburg%20transcript%20final.pdf>.

phraseology is now nearly 200 years old, are of little help in construing provisions of . . . modern Commonwealth constitutions which follow broadly the Westminster model."[99]

It is, however, equally clear from the recent Privy Council trilogy that the "collective wisdom" relied upon must be of a current vintage—a lesson learned most sharply (and perhaps unfairly) by the attorneys general of the Commonwealth Caribbean who must have thought that their reliance before the Privy Council, on its earlier mandatory death penalty case law, would carry the day. The explanation that this case law was decided "at a time when international jurisprudence on human rights was rudimentary"[100] likely provided no solace to the governments of the Commonwealth Caribbean, although it again confirms the link to be made between their constitutions, comparative constitutional law, and international human rights law.

As for the role of the court in states committed to retaining the death penalty as the ultimate form of punishment, this recent jurisprudence clearly endorses the approach of the South African Constitutional Court in affirming that it is the duty of the courts to uphold the provisions of a constitution "without fear or favour,"[101] even in cases involving the perpetrators of violent crime. Commonwealth Caribbean governments will no doubt argue that the judges are going against the "law of the land" by rendering rulings that make it virtually impossible to carry out an otherwise lawful sentence of death.[102] But clearly, a constitution is also the "law of the land" and it is the role of the courts—even in a jurisdiction where public opinion strongly favors the retention of the death penalty—to determine whether the constitution, as properly interpreted, allows the retention of such a sentence in its automatic form.

Such arguments, however, have not found favor in the Commonwealth Caribbean where the response to the trilogy has been telling. On September 5, 2002, constitutional amendments came into force in Barbados[103] with the clear intention of forestalling the trilogy's application to the island nation, even though Barbados has not carried out an execution in almost twenty years.[104] The amendments add a new subsection to the constitution of Barbados,[105] stating explicitly that "the imposition of a mandatory sentence of death," as well as "any delay in executing a sentence of death,"[106] will not be considered inconsistent with or in contravention

[99] Ong Ah Chuan v. Public Prosecutor, [1981] App. Cas. 648 (P.C. 1980) (appeal taken from Sing.), at 669. *See* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L.R. 537, 542 (1988).

[100] Reyes v. The Queen, [2002] 2 App. Cas. 235, 242B, para. 45.

[101] State v. Makwanyane, 1995 (3) S.A.L.R. 391 (C.C.), para. 88 *per* Chaskalson, P.; cited with approval in Spence and Hughes v. The Queen, Crim. App. Nos. 20 of 1998 and 14 of 1997, para. 13 *per* Byron, C. J., judgment rendered Apr. 2, 2001 (E. Carib.); and in *Reyes*, para. 26 *per* Lord Bingham of Cornhill.

[102] For example, as of February 2003, there were thirty-four prisoners on death row in Trinidad and Tobago for whom the five-year period had expired, and another fifty-two prisoners with matters pending before the local Court of Appeal, the Privy Council, and the international human rights bodies. *Trinidad: Government Yet to Decide on What to Do with Convicted Murderers*, BBC WORLDWIDE MONITORING, Feb. 19, 2003, *available in* LEXIS, News Library, Individual Reports File. There has not been an execution in Trinidad and Tobago since July 1999, although nine members of a drug gang were executed en masse in June 1999. *Trinidad Hangs Killer*, BBC NEWS, July 28, 1999, *available at* <http://news.bbc.co.uk/1/hi/world/americas/405494.stm>.

[103] BARB. CONST. (Amend.) Act, 2002-14, Supplement to Official Gazette No. 74 (Sept. 5, 2002), at 216–19. I am grateful to Dr. David Berry of the Faculty of Law at the University of the West Indies (Cave Hill) for providing a copy of this legislation.

[104] The last execution in Barbados took place in 1984. *See Hung Up on Getting Strung Up*, ECONOMIST, Oct. 5, 2002 (U.S. ed.), at 35; *Barbados Removes Restrictions to the Death Penalty; Ruling not Retroactive*, BBC WORLDWIDE MONITORING, Aug. 13, 2002, *available in* LEXIS, News Library, Individual Reports File; Peter Richards, *Rights: Barbados Acts to Prevent Delay in Executions*, INTER PRESS SERVICE, Aug. 5, 2002, *available in* LEXIS, Inter Press Service, North/South America Stories.

[105] The constitution of Barbados is found in the schedule to *The Barbados Independence Order 1966*, S.I. 1966 No. 1455, *available at* <http://www.barbados.gov.bb/bgis/government/barconstmain.htm>.

[106] Given the difficulty in obtaining recent Caribbean legislation, the revised section 15 is reproduced below:

1. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
2. 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 authorizes the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.
3. The following shall not be held to be inconsistent with or in contravention of this section:
   a. the imposition of a mandatory sentence of death or the execution of such a sentence;

of the prohibition on inhuman treatment already found in section 15(1) of the Barbados constitution. The amendments also bolster the existing savings clause found in section 15(2).[107]

Belize is also reported to be interested in passing a similar constitutional amendment,[108] notwithstanding its de facto moratorium on executions since 1985.[109] A bill to amend the Belize constitution was introduced in the Belize House of Representatives in September 2002, which, if passed, would have made the Belize Court of Appeal the country's final appellate court for all proceedings on behalf of persons convicted of Class A murders, thereby removing this class of offender from the Privy Council's docket.[110] The bill has since been withdrawn for further redrafting, but the legality of the proposed amendments, as well as those enacted in Barbados, has been challenged before the Inter-American Commission on Human Rights.[111]

Trinidad and Tobago are also said to be intent on drafting legislation in order to resume hangings after attempts in 2000 failed due to disagreement with the opposition party.[112] Jamaica, too, is equally intent, even though its last execution took place in 1988. Nevertheless, in a nationally televised address on December 1, 2002, the Jamaican prime minister announced his government's intention to amend the constitution to achieve the goal of resuming executions.[113] The nongovernmental organization Reprieve has since reported that a hearing into the legality of Jamaica's proposed amendments was held before the Inter-American Commission on Human Rights in February 2003.[114] As for St. Lucia and St. Kitts and Nevis, death by hanging remains on the books as the ultimate punishment for murder, albeit now ordered at the discretion of a judge.[115]

IV. A FINAL CONCLUSION

The final conclusion to be drawn from this review of recent challenges to the death penalty in the Commonwealth Caribbean relates to the charge that this jurisprudence represents the imposition of an abolitionist policy from abroad.[116] In the years since the decision in

> b. any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted;
> c. the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on that person, in conditions, or under arrangements, which immediately before the coming into operation of the *Constitution Amendment Act, 2002*
> i. were prescribed by or under the *Prisons Act*, as then in force; or
> ii. were otherwise practised in Barbados
> in relation to persons so in prison or so detained.

BARB. CONST. (Amend.) Act, 2002-14, Supplement to Official Gazette No. 74 (Sept. 5, 2002), at 216–19.

[107] *Id.*

[108] *Belize Seeks to Stop Murder Appeals Going to Britain's Privy Council*, BBC WORLDWIDE MONITORING, Sept. 5, 2002, *available in* LEXIS, News Library, Individual Reports File; *No Sway to the Death Penalty*, GLEANER (Jam.), Sept. 29, 2002, *available in* LEXIS, News Library, North/South America News File.

[109] Reyes v. The Queen, [2002] 2 App. Cas. 235, 242B, para. 15.

[110] Amnesty International, *Belize Proposal for Return to Practise of Death Penalty*, AI Index: AMR 16/003/2002, Sept. 11, 2002.

[111] *Attorney-General Defends Belize's Position on Death Penalty*, BBC WORLDWIDE MONITORING, Oct. 24, 2002, *available in* LEXIS, News Library, Individual Reports File and *Caribbean Justice Bulletin*, Mar. 2003, *available at* <http://www.reprieve.org.uk/cj/mar03.htm>.

[112] *Trinidad and Tobago Moving Towards Resumption of Hangings*, BBC WORLDWIDE MONITORING, Jan. 14, 2003, *available in* LEXIS, News Library, Individual Reports File.

[113] Adams, *supra* note 3, Oliver Burkeman, *Jamaica in Bid to End UK Veto on Death Penalty*, GUARDIAN (London), Dec. 23, 2002, at 14, and *Jamaica Begins Process Towards Resumption of Hangings*, BBC WORLDWIDE MONITORING, Dec. 10, 2002, *available in* LEXIS, News Library, Individual Reports File.

[114] *Caribbean Justice Bulletin*, *supra* note 111.

[115] Not long after the *Hughes* decision, the High Court of St. Lucia sentenced two men to death by hanging for the murder of a Catholic priest and nun. *St. Lucia: High Court Sentences Two Men to Death by Hanging*, BBC WORLDWIDE MONITORING, Apr. 30, 2003, *available in* LEXIS, News Library, Individual Reports File; *Rasta Prophets Facing Gallows over Murder of Nun and Priest*, IRISH INDEPENDENT, May 1, 2003, *available at* <http://www.unison.ie/irish_independent/> (archives).

[116] Simmons, *supra* note 5, at 284.

Pratt and Morgan v. Attorney-General for Jamaica, states such as Jamaica, Trinidad and Tobago, and Barbados have expressed much interest in abolishing appeals to the Privy Council and greater support for the proposed "Caribbean Court of Justice" as its replacement.[117] The proposal to create such a regional supreme court is of long standing[118] and is clearly linked to issues of national pride, sovereignty, and accessibility, as well as the desire to create a free trading "Caribbean Community" akin to that in Europe.[119] Some, however, also suspect that the renewed interest in the proposed court stems from a view that a court comprised mainly of British judges, presiding in Britain, is out of touch with the local needs and sentiments of the Caribbean population. Some might even suggest that the motivation for creating the court is to allow executions to take place.[120] In any event, whether motivated by the death penalty jurisprudence of the Privy Council or not, it is now clear that most, if not all, Commonwealth Caribbean states view the abolition of appeals to the Privy Council as a matter of course. At least eight have now ratified the treaty creating the Caribbean Court of Justice[121] and the court's inauguration is now scheduled for early 2004.[122]

But this article began with reference to the decision of the Eastern Caribbean Court of Appeal in the case of *Spence and Hughes* for a reason. Judgments, such as this, demonstrate that British judges are not the only ones moved to rule that the manner of the death penalty's imposition in the Commonwealth Caribbean is unconstitutional on grounds of rights now codified as supreme law. Moreover, as Kenny Anthony, the prime minister of St. Lucia and former general counsel to CARICOM, has pointed out, any argument that Caribbean judges will simply abandon the Privy Council's jurisprudence ignores the role of precedent in the legal systems of the Commonwealth Caribbean.[123] As a result, any notion that a Caribbean Court of Justice will become a "hanging court" is by no means a certain proposition, and given the evolution of the Privy Council's own jurisprudence to match that from elsewhere, there is no guarantee that such a court would counter this evolution with the reinstatement of the mandatory death penalty. Reinstatement by constitutional amendment is, however, another matter.

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[117] The proposed court, to be based in Trinidad and Tobago, will comprise two parts: a court of original jurisdiction to adjudicate trade disputes in the region and a court of appellate jurisdiction to serve as a final Court of Appeal for those states that wish this. *See* ANTOINE, *supra* note 2, at 227–49.

[118] *See* HUGH RAWLINS, THE CARIBBEAN COURT OF JUSTICE: THE HISTORY AND ANALYSIS OF THE DEBATE (2000), *available at* <http://www.caricom.org/archives/ccj_rawlins.pdf>.

[119] *See Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy*, July 5, 2001, *available at* <http://www.caricom.org/archives/revisedtreaty.pdf>. The CARICOM Single Market and Economy (CSME) is scheduled to come into effect in 2005. It is envisioned that the Caribbean Court of Justice will serve a similar role in the Caribbean Community as the European Court of Justice does within the European Community.

[120] AI 2002 Report, *supra* note 4, at 7. *But see* P. G. F. Shiel, *Remarks Outrage Caribbean Judges*, AGE (Melbourne), Apr. 15, 2003, at 4 (reporting Caribbean reaction to a remark by Geoffrey Robertson taken to mean that the court was being set up to carry out the death penalty).

[121] July 14, 2001 (in force July 23, 2002), *available at* <http://www.caricom.org/archives/agreement-ccj.htm>. The eight states are Barbados, Belize, Dominica, Guyana, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Jamaica. *See Caribbean Court of Justice One Step Closer*, GLEANER (Jam.), May 12, 2003, *available in* LEXIS, News Library, North/South America News File; *Jamaica Ratifies Agreement for Caribbean Court of Justice*, BBC WORLDWIDE MONITORING, May 21, 2003, *available in* LEXIS, News Library, Individual Reports File.

[122] Caribbean government leaders expect the requisite domestic legislation to be enacted by all Parliaments by January 2004. *CCJ A Step Closer to Implementation*, GLEANER (Jam.), Nov. 18, 2003, *available in* LEXIS, News Library, North/South America News File. Ads for recruiting the Court's president began circulation in all fifty-four Commonwealth states in December 2003. *Caribbean: Process of Advertising for President of CCJ Begins*, BBC WORLDWIDE MONITORING, Dec. 6, 2003, *available in* LEXIS, News Library, Individual Reports File.

[123] *Anthony Bats for Carib Court: CCJ Concerns Unfounded, Argues St. Lucia's PM*, JAM. OBSERVER, June 30, 2003, *available at* <http://www.jamaicaobserver.com/> (archives).

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