

**PRIVY COUNCIL AND THE INTER-AMERICAN
SYSTEM ON HUMAN RIGHTS AND
CARIBBEAN CONSTITUTIONAL PROVISIONS**

**DELIVERED AT RADISSON FORT GEORGE HOTEL
ON THE 20TH JULY, 2001
BY THE HON. ABDULAI O. CONTEH
CHIEF JUSTICE OF BELIZE**

1. The historic role of the Privy Council before and after independence - the court of last resort for almost all Caribbean Commonwealth countries.

This provision is so reflected in their respective Constitutions - **s.104** of Belize Constitution.

2. In the course of time constitutional cases concerning fundamental human rights provisions in these Constitutions found their way for ultimate decision to the Privy Council.
3. In a very recent case decided by the Privy Council, it upheld the primacy of the Constitution and affirmed the fundamental right to property and the remedy of prompt and adequate compensation for its expropriation.

- **Gairy v The Attorney General of Grenada** delivered on 19th June 2001

4. In another recent case this time from Antigua and Barbuda, the Privy Council upheld **sec. 12** of that country's Constitution guaranteeing freedom to disseminate information and ideas by broadcasts and found the denial of a broadcasting licence through administrative procrastination to be unjustified.

- **Observer Publications Ltd. v Campbell Mathews, the Commissioner of Police and the Attorney General**

Judgment delivered on **19 March 2001**

5. As long ago as 1979, a dictum by Lord Wilberforce in the Privy Council has consistently provided a useful guide to the interpretation of Bills of Rights or fundamental human rights provisions. He stated that the antecedents and forms of fundamental rights provisions called for:

“A generous interpretation avoiding what has been called ‘the austerity of tabulated legalism’ suitable to give to individuals the

full measure of the fundamental rights and freedoms referred to.”

This, it may be recalled was in an appeal from the colony of Bermuda in

Minister of Home Affairs v Fisher (1979) 3 All E.R. 21, at 25.

6. Since independence, nearly all Commonwealth Caribbean countries have acceded to membership of the Organization of American States.
7. However, of the seven (7) principal instruments and mechanisms on human rights not every one of them has been adhered to by the twelve (12) Commonwealth Caribbean countries. Indeed, the principal instrument, the American Convention on Human Rights, the Pact of San Jose, only five (5) Commonwealth Caribbean States acceded to it and of these, Trinidad & Tobago, as a direct result of the fall out from **Pratt v Morgan**, denounced it on 26 April 1999.
8. However, the interlocking web of human rights instruments make most of the members of the Organization of American States, if not all, amenable to some human rights jurisdiction or oversight, of one kind of the other.
9. Thus membership of the Organization of American States makes every

state susceptible to the oversight jurisdiction of the Inter-American Commission on Human Rights which is charged with the principal function of promoting the observance and protection of human rights by the charter of the Organization of American States.

10. The principal effect of this today is that this mechanism affords individuals the right to petition the Commission in cases of alleged breaches of human rights provisions in the Constitutions of Commonwealth Caribbean countries.
11. It is this right to petition and the resolution of the petition by the Inter-American Commission on Human Rights that have given rise to acute controversy stemming from some recent decisions of the Privy Council concerning capital cases.
12. This issue should be seen in the context of the time frames set down by the Privy Council in its decision in **Pratt v Morgan**, relating to execution in capital cases.

That is to say, to execute someone sentenced to death after the lapse of **five years**, or in cases where there is no resort to human rights bodies, **three and a half years** would, the Privy Council has ruled, be

cruel and inhuman, thereby infringing the constitutional guarantee against such treatment.

13. The Privy Council held that the relevant period of delay includes the time required not only for domestic appeals but for decisions of international bodies like the United Nations Human Rights Committee or the Inter-American Commission or Court of Human Rights on petitions submitted by condemned persons: such petitions, the Board held A. ...do not fall within the category of frivolous procedures disentitling them to ask the Board to look at the whole period of delay . . .”
14. It must be stated that all the provisions of Caribbean constitutional human rights law are in one form or the other reflected in the various human rights instruments of the Inter-American system.
15. However, two recent decisions by the Privy Council involving capital cases in which the issue of breaches of human rights was prominent have given rise to some perplexity and the cases may be seem to be at odds with each other.
16. The first case is the decision of the Board in **Darrin Roger Thomas and Hanif Hilaire v Ciprian Baptiste et at**, delivered on 17 March 1999,

and the other case is that of **Neville Lewis et al v The Attorney General of Jamaica and the Superintendent of St. Catherine's District Prison** - delivered on 12th September 2000.

17. The first case, **Thomas and Hilaire**, in my view, registered what can only be described as a set back for the advancement of human rights. I believe the Board took a narrow view of the availability and applicability of human rights provisions in treaties and preferred instead the narrow doctrine of express incorporation of treaties in municipal law: absent such incorporation, they would not avail anyone wanting to rely on them.
18. The Board also, in my view, took a very narrow view of **delay** as amounting to a reason for commuting death sentence as it would otherwise be cruel and inhuman punishment, and tried to whittle down the **ratio** in **Pratt and Morgan** unnecessarily if not unjustifiably when it stated that it was

“ . . . appropriate to international legal processes which are beyond the control of the state involved. Prompt determination by human rights bodies of applications from men condemned to death is more likely to be achieved if delay in dealing with them does not

automatically lead to commutation of the sentence.”

19. This decision by the Board is also regrettable in my view and I suspect with respect, was a reaction to the swirling controversy and meant to assuage the feelings of governments who were being pressured by popular sentiment concerning the need for the application of the death penalty.
20. Thus the Board was even prepared to jettison the time-honoured and unobjectionable principle of the law that where there is a right there is a remedy for its breach (**ubi jus ibi remedium**) when it stated:

“Their Lordships are unwilling to adopt the approach of the IACHR which they understand holds that any breach of a condemned man’s constitutional rights makes it unlawful to carry out a sentence of death. In their Lordships’ view this fails to give sufficient recognition to the public interest in having a lawful sentence of the court carried out. They would also be slow to accept the proposition that a breach of a man’s constitutional rights must attract some remedy, and that if the only remedy which is available is commutation of the sentence then it must be

adopted even if it is inappropriate and disproportionate. The proposition would have little to commend it . . .”

21. Although in this case, the Board evidently grudgingly granted a stay of execution until the appellants’ petitions to the Inter-American Commission have been determined and any report of the Commission or ruling of the Inter-American Court of Human Right has been considered by the authorities (of Trinidad & Tobago), it dismissed the appeals.
22. But ominously and unnecessarily in my view the Board went on to conclude, “The Advisory Committee (on mercy) may, of course, take into account the delay occasioned by the slowness of the international bodies in dealing with such petitions. But in their Lordships’ view such delays should not prevent the death sentence from being carried out.”
23. However, fortunately for the cause of human rights, the second decision of the Privy Council in the **Neville Lewis** case seem somewhat to have restored a measure of confidence that the Board would as the final Court give a more purposive and generous interpretation of human rights provisions in the constitutions of Commonwealth Caribbean

countries so as to secure to their peoples the fullest protection and enjoyment of the panoply of rights provided.

24. Among other things, this decision affirms the reviewability by the courts of the process of mercy or commutation where there is a breach of the rules of natural justice, and that applicant for mercy has the right to disclosure of all materials placed before the Mercy Committee in order to enable it to arrive at a decision or recommendation.

25. More significantly for the inter-relationship between Caribbean Constitutional Human Right-Law and Human Right-provisions and processes in the Inter-American system, the Board held that:

“Execution consequent upon the Jamaican Privy Council’s decision without consideration of the Inter-American report would be unlawful.”

26. I must however, confess to some measure of unease in the light of these two recent decisions and others of the Privy Council concerning the interpretation of human right provisions in capital cases.

27. It may seem that the composition and possibly disposition of members of the Board towards the undoubtedly emotive issue of capital

punishment, may in any given case, determine the outcome, especially with the refinement and sophistication with which constitutional human rights issues are argued and presented before the Board.

28. This however, does not inspire confidence especially in the face of the necessity that the final interpretation of Constitutional provisions must be handled with care that would impart certainty.

Finally, I want to conclude by saying that I suspect there is some misapprehension of the functions and role of the Intern-American System of human rights. This has resulted in the rather negative view the Inter-American Commission taken for instance in the dissenting judgment in favour of dismissing the appeals in the **Thomas and Hilaire** case determined by Lords Goff and Hobhouse:

“The Commission 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 . . . There is

thus a direct conflict between the policy of the commissions and the enforcement of the law.”

What makes this apprehension inexplicable is that the Privy Council itself operates in a jurisdiction where the death penalty has been prohibited.

Insofar as the death penalty is part and parcel of the penal armory of the states concerned and the right of a condemned person to petition the International Human Rights bodies has been upheld by the Privy Council, I think that it is only salutary that the Inter-American Commission on Human Rights proceed with dispatch to hear and determine petitions submitted to it. This will not only uphold the constitutional provisions guaranteeing this aspect of due process but also disarm critics of the Commission.