

‘Litigation initiated by capital defendants in Caribbean courts (including the Privy Council) over the last decade or so has produced significant developments in jurisprudence on fundamental rights in Commonwealth Caribbean constitutions. Paradoxically however, despite the intensity of litigation, we still know little about the scoop and ambit of the right to life under Caribbean constitutions.’

The policy of the Privy Council towards the death penalty in the Commonwealth Caribbean is distant. The policy of the Privy Council towards the death penalty in the Commonwealth Caribbean has changed within a period of twenty years from *de Freitas v Benny* [1976] AC 239 to *Pratt and Another v Attorney General of Jamaica* [1993] 43 WIR 340. The key issue that has led to a change in judicial opinion on the issue of the death penalty in the region has been delay in carrying out the sentence. This manifested itself in the 1970s and the 1980s in the context of two opinions of the Privy Council, but was fully accepted by them in the 1990s as the key to determining whether or not the sentence of death ought to be carried out¹.

One of the major legal and constitutional issues that the Judicial Committee has had to address is the constitutionality of the death penalty in the Commonwealth Caribbean. This has come about largely because the grant of independence to the former colonies of Great Britain in the Caribbean has included constitutional provision that have saved many laws enacted by the colonial legislatures as existing laws.

By the 1980s, it was clear that the Judicial Committee was beginning to start the process of rendering the death penalty unconstitutional where delay measured in terms of years was a factor. The first sign of such a change manifested itself in their judgment in the Jamaican case of *Riley and others v Attorney General of Jamaica and Another*².

In this case, the Judicial Committee divided three to two on the issue of what effect delay ought to have on the carrying out of the sentence of death. The majority (Lords Hailsham, Diplock and Bridge) held the view that delay could not override the effect of the meaning of section 17 of the Jamaican Constitution which reads as follows:

¹ Ghany, Hamid A., *International Journal of Human Rights*; Summer 2000, Vol. 4 Issue 2, p30, 14p

² See S. de Smith and R. Brazier, *Constitutional and Administrative Law*, (London Penguin 1994), p 169.

- (1) No person shall be subjected to torture or to inhumane 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 authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

The death penalty has been retained throughout the Commonwealth Caribbean as the mandatory punishment for murder³. The death sentence is carried out by hanging. Those convicted of murder and sentenced to death by judge and jury, can appeal to the local court of appeal and if unsuccessful then to the Judicial Committee of the Privy Council in London. All Commonwealth Caribbean countries, save for Guyana, have retained the Privy Council as the final court of appeal in all criminal and civil matters⁴.

The death penalty is a matter of continuing fascination. Critics of the death penalty in contemporary American jurisprudence have claimed the inevitability of caprice and mistake and have pointed to racial and other biases in the imposition of the death penalty. Currently, the death penalty in principle seems acceptable to the Supreme Court and to the general populace⁵.

A constitution must above all express fundamental principles of justice applicable to all persons. The faithful observe of these principles may sometimes be inconvenient or

³ See *Hughes and Spence* delivered on 2nd April 2001, where the Eastern Caribbean Court of Appeal held that the mandatory imposition of the death penalty was unconstitutional.

⁴ **Website:** http://www.penalreform.org/english/dp_overview.htm Saul Lehrfreund MBE Simons Muirhead and Burton .An overview of the Death Penalty in the Commonwealth Caribbean.

⁵ *R. George Wright*, The Death Penalty and the Way We Think Now, *Loyola of Los Angeles Law Review* [Vol. 33:533]

restrict action which in the short term appears to be desirable. It may even restrain action which is favoured by the majority. But there are inevitable features of constitutional governments which respect their country's Constitution as a very special instrument. For this reason amendments to achieve short term objectives are dangerous, particularly when it is intended to reverse the decisions of courts which seek to apply fundamental principles of justice⁶. Lloyd Barnett, also put forward that the hanging amendment proposed by the government is particularly dangerous because it would set a precedent for changing our Constitution to achieve short term objectives and reserve decisions based on the judicial application of principles of fundamental justice⁷.

⁶ Website: <http://www.ijchr.com/Constitution%20&%20Death%20Penalty.htm>. Barnett, Lloyd, Changing the Constitution and the Death Penalty.

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Amnesty International

Amnesty International calls on all governments to abolish the death penalty in law and practice. Pending abolition, the organisation calls on governments to respect international standards restricting the scope of the death penalty, to introduce a moratorium for executions, to commute death sentences and to introduce the most rigorous standards for fair trial in capital cases⁸.

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<http://www.amnesty.org.uk/deliver/document/12953>, Caribbean: A first step towards abolishing the death penalty?