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The Death Penalty: Developments in Caribbean Jurisprudence

LORD ANTHONY GIFFORD*

I thank the International Association of Law Libraries for your warm hospitality. I am glad to have had the chance to meet with you and learn about your work, and I wish you well as you meet the challenges of the technological era where law books are giving way to internet links.

You have asked me to discuss the death penalty in the Caribbean, a sombre subject. It is sombre because the discussion takes place in the context of a rising wave of brutal crime, in Jamaica in particular. It is also sombre because it is an awesome thing for a government to take a human life, deliberately and with premeditation. It is the only penalty which is irreversible. If there has been a miscarriage of justice, no restitution is possible. In that sense it is comparable to the cutting off of the hand of a thief under Islamic sharia law. Most Caribbean people would rightly call that barbaric and unchristian, yet they clamour for the death penalty to be executed. Recently in Jamaica a pastor put his name forward to fill the post of hangman; even advocates for the death penalty found that to be disturbing.

However I want you to have a balanced picture of human rights in the Caribbean. It is generally very positive, as one might expect from peoples who achieved their freedom through a bitter struggle against the cruelest exploitation which history has known. Caribbean people enjoy their freedom of speech vibrantly, whether through calypso or reggae music, talk shows or street corner arguments. We enjoy freedom of association in a myriad of forms, especially through trade unions which have been an effective balance

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against the economic power of the employer. And as for freedom of religion, we have churches of every kind, including Rastafarian. Some years ago I was proud to win a constitutional claim in Jamaica on behalf of Rastafarians who claimed the right to minister to inmates in the prisons. They now minister every month, with chants and incense, but not with marijuana. As for the right to a fair trial, our legal systems are under stress, but we have a tradition of having defence lawyers who will fight for their clients' rights in spite of delays and other difficulties. We do not go in for extraordinary rendition, or prisons located on offshore islands, or 28 day detention without charge.

I make this preface to say that I will defend what I love and admire about my adopted region as much as I will criticise the aspects which I do not agree with. One of these, I state to you frankly, is the desire throughout the English-speaking Caribbean to put to death those who have been convicted of the crime of murder. Last week in Jamaica, members of the House of Representatives voted 34 to 15 to retain the punishment of hanging. I am against it, so I am in the vocal minority, as I have been so often in my career as a human rights lawyer.

I am against it because I believe it to be wrong for the State to kill except in necessary and immediate self-defence. I am against it because it encourages people to believe that violence and vengeance are proper responses to crime. I am against it because I believe in the possibility of the redemption of the human soul, and I have met many ex death row inmates who have confirmed that belief. I am against it because in any system of justice, and especially in the under-resourced systems in our region, the innocent will be executed. The greater the outrage that society feels about a crime, the greater is the pressure on the police and the courts to produce results. This leads to the greater the likelihood of injustice. I have seen this in the UK, having represented Gerry Hunter of the Birmingham Six and Paul Hill of the Guildford Four. Convicted at a time of near hysteria in Britain about the IRA bombing campaign, they would all have been executed a few years before when Britain had the death penalty. They were all proved to be innocent after 15 to 17 years in jail.

Is the death penalty a deterrent to would-be criminals? I very much doubt it, and the statistics around the world do not show it. People commit crimes for a variety of reasons: greed, power, duress from their gang leaders; the belief that they will not be caught; as well as the lack of opportunities to make a living lawfully. I can imagine a case where the death penalty would be an *encouragement* to crime: a man who thinks that witnesses to his crime

could bring about his execution might well take care to ensure that no witnesses survive to tell the tale.

Looking around the region, it is only the English-speaking Caribbean that clings to the death penalty. In the French and Dutch Antilles it is unknown. It has been abolished in Haiti and the Dominican Republic. There have been no executions in Cuba since 2003. In South and Central America, only Guyana, Suriname and Belize retain it. The position in Puerto Rico is complex: the death penalty has been abolished by the Constitution of the Commonwealth of Puerto Rico, but under US Federal law the prosecution can demand it for federal capital offences. I am glad to hear that defence lawyers have been resolute and effective in their arguments, so that there have been no executions here to date.

In Africa, from where so many Caribbean people came, 33 out of 54 countries have abolished the death penalty, either by law or in practice, including Rwanda where thousands are being tried for genocide. In South Africa, the Constitutional Court in the case of *Makwanyane* ruled that the death penalty contravened the right to life, to dignity and to freedom from cruel and inhuman punishment.¹ Justice Sachs traced the history of the death penalty; it was rarely if ever used in traditional African justice, but introduced and brutally imposed by the Dutch and British invaders. He said that the traditional thinking was “why sacrifice a second life for one already lost?” Archbishop Tutu recently repeated the South African position in a plea to Jamaica, saying that the death penalty was “an irrevocable punishment, resulting inevitably in the execution of people innocent of any crime.”²

In the world as a whole, 135 countries, 69% of the world’s nations, have abolished the death penalty. In December 2007 the UN General Assembly passed a resolution by a majority of 104 to 54, with 29 abstentions, calling for a worldwide moratorium on executions.³ Of the countries that do regularly execute people, the following six countries account for over 90% of executions worldwide: China, Iran, Iraq, Sudan, Pakistan, and the United States. So it does look as if the English-speaking Caribbean is swimming

¹ *State v Makwanyane and Another* 1995 (3) SA 391.

² THE GUARDIAN, Tuesday, 13 November 2007, available at <http://www.guardian.co.uk/commentisfree/2007/nov/13/comment.comment/print> (last visited October 30, 2009).

³ United Nations GA/10678; see www.un.org/news/press/docs/2007-ga10678.doc.htm.

against the tide of world opinion, alongside some big fish who would not be my role models for a humane justice system.

Happily, the actual number of executions in the Caribbean region is very few. In the last ten years only Trinidad & Tobago (nine executed in 1999) and the Bahamas (one in 2000) has carried out the death penalty. In Jamaica there have been no executions since 1988, when two men were executed. Father Richard Albert, a well known Catholic priest, went with them to the gallows, and he has written that he was convinced that one was an innocent man. When I came to work in Jamaica in 1991, there were over 300 people on death row. Now there are eight. Thus, there is a chasm between the popular rhetoric (which calls for an eye for an eye) and the reality of the judicial system (which hardly ever imposes this supposed deterrent). The reasons for this lie in some of the jurisprudential developments which we need to examine.

In Jamaica the first wave of commutations came in 1992 when the law was changed to introduce two categories of murder: capital and non-capital. Borrowing from a precedent introduced in the UK in 1957 before final abolition, the legislation provided that the murder of police officers, correctional officers, judges, witnesses, prosecution counsel (though not defence counsel) would be capital. So would murder committed in the course of committing robbery, rape, burglary or arson, and also acts of terrorism. But in these cases only the actual perpetrators would be considered a capital murderer, not the aiders and abettors. Contract murders were capital, both for the contracting party and the hit man. And two murders of any kind would qualify for a sentence of death.

After the passing of the amending Act, all death row cases had to be examined by a judge, and all non-capital cases were to be commuted to life imprisonment with a minimum term to be served before parole. The distinctions were intended to limit the death penalty to the gravest of crimes, although one may think they were crudely drawn. The truth is that this measure was a compromise between the death penalty abolitionists and those who advocated retention of the death penalty. It reduced the death row population to below 100 with a single stroke.

The following year, 1993, saw the famous decision in *Pratt and Morgan*.⁴ A panel of seven law lords in the Privy Council ruled that inordinate delay between sentence and execution, while holding the prisoners

⁴ *Pratt and Morgan v Attorney General* (1993) 43 WIR 430.

“in an agony of suspense” for over five years, would be inhuman punishment and therefore unconstitutional. They relied on authorities from India, Zimbabwe and Europe. They were appalled that the appellants had been in prison for 12 years between their conviction and the reading of death warrants. There was:

- two years before their appeal was heard;
- three years before the Court of Appeal gave its reasons for dismissing the appeal;
- two years before their further appeal to the Privy Council was heard;
- three years while the UN Human Rights Committee and the Interamerican Commission on Human Rights considered their cases; and
- two more years while the Jamaican Privy Council considered whether their executions should proceed.

These are appalling delays, and the Privy Council was right to impose on the State wishing to retain capital punishment “the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve.”⁵ They held that any period over five years would constitute strong grounds for constituting inhuman and degrading punishment. In the wake of *Pratt and Morgan*, another 50 death row prisoners were commuted to life imprisonment in Jamaica. Earl Pratt himself was released last year after serving 30 years, and he has devoted himself to trying to influence young people not to take up crime.

In the case of *Neville Lewis* the Privy Council introduced further safeguards before executions could be carried out.⁶ It held that a person on death row was entitled to know what material was being considered by the Jamaican Privy Council when it was advising the Governor General on the exercise of the prerogative of mercy, and to make representations to that body. Secondly, they held that when a prisoner had exercised his right to petition one of the international human rights bodies to which Jamaica was a party, the local Privy Council should wait for the report of those bodies before giving its advice. It was this decision which prompted the then Attorney General of Jamaica to say that it was impossible to complete all the appeals and other procedures within five years.⁷

⁵ Id.

⁶ *Neville Lewis and Others v Attorney General* (2000) 57 WIR 275.

⁷ Though I believe he was wrong.

Finally there have been a series of decisions on whether the provision for a mandatory death sentence in all cases of murder was a violation of the constitution. In a trilogy of decisions in 2002 from Belize⁸, St.Kitts-Nevis⁹ and St. Lucia,¹⁰ the Privy Council decided that the mandatory death sentence, irrespective of mitigating factors, was an inhuman punishment. In 2004 they applied the same reasoning to Jamaica in the case of *Lambert Watson*.¹¹ In a knife-edge decision, four out of nine judges would have also quashed the mandatory death sentence in Trinidad in Tobago¹² and Barbados¹³. The difference in those countries was that their Constitutions included a savings clause whereby nothing done under the authority of any law enacted before independence could be held to be inconsistent with fundamental rights.

I find these clauses – Jamaica also has one, but the Privy Council in the *Watson* case was able to get around it – to be most objectionable. They mean that the law is frozen in the mould of the 1960s, and nothing which was lawful then can be held to be unconstitutional now. Among other consequences it means that gay men cannot challenge the laws which criminalize homosexual acts, because they pre-date independence. A living constitution must be capable of interpretation according to the developing standards of the day.

These cases had a remarkable consequence. Judges, who in the past would sentence the convicted person to death without a qualm, now had the power of life or death vested in them. Procedures have been adopted which require the judge to consider the mental and social history of the convicted person, and to take into account all the mitigating circumstances. It is an awesome task to impose on a judge, and it may not be surprising to learn that in the majority of cases, life has been chosen over death. In Jamaica, only 10 out of 38 inmates were re-sentenced to death when their cases were reviewed. Eight now remain on death row, and all of these have appeals pending. So the pastor who wanted to tie the noose will have to wait for a while before a Jamaican can be legally hanged.

Some of you may be thinking that it is a pity that these decisions have had to come from a court sitting in London, and I agree. I have been a

⁸ *Reyes v R* (2002) 60 WIR 42.

⁹ *Fox v R* (2002) 61 WIR 169.

¹⁰ *R v Hughes* (2002) 60 WIR 16.

¹¹ *Watson v R* (2004) 64 WIR 241.

¹² *Matthew v the State* (2004) 64 WIR 412.

¹³ *Boyce and Joseph v R* (2004) WIR 37

passionate advocate of the Caribbean Court of Justice (CCJ) since it was created. It was to be the final court of appeal, replacing the Privy Council. It is high time for the Caribbean nations to have their own final court. The only people who can get to the Privy Council are the very rich or the death row inmates who benefit from a pro bono service from lawyers in London. The Caribbean court will be less costly, more accessible, and above all more credible as a final court of appeal. But many governments including Jamaica are playing politics on the issue, so that at present only Barbados and Guyana allow appeals to the CCJ.

But no one should imagine that the CCJ will reverse the decisions of the Privy Council. Those decisions were based on a consensus of authority from courts around the world, and the CCJ has already shown that it respects that consensus. In its first decision on a death penalty issue it was prepared to grapple with some of the contradictions in the Privy Council authorities and make a well reasoned decision. This was the decision in *Joseph and Boyce v Attorney General of Barbados*.¹⁴ The CCJ came to the same conclusion as had been reached in the *Neville Lewis* case, holding that death row inmates had a legitimate expectation that the Barbados Privy Council would consider the report of the international bodies to which Barbados had allowed a right of petition, before it decided that they should be executed. The CCJ also commented favourably on the *Pratt and Morgan* decision, though they would have extended the five year period if the international bodies delayed their reports for more than 18 months.

As for the decision that mandatory death sentences were unconstitutional, this principle was pioneered in the Caribbean by the judges of the Eastern Caribbean Court of Appeal in the case of *Hughes*.¹⁵ So there is no ideological conflict between the judges of the UK and the judges of the Caribbean. Both draw on the worldwide wisdom which has been developed in the human rights field. Both provide a check on governments who may wish to steamroll the judicial process into producing quick fix results to the intractable problems of crime.

Where do the countries of the English-speaking Caribbean stand today after all these changes? They retain the death penalty in theory, but in practice they may only impose it in the rarest of cases, after a judicial hearing, two appeals, references to international bodies, and a final decision by the

¹⁴ *Joseph and Boyce v Attorney General* (2006). See judgement at www.caribbeancourtsofjustice.org.

¹⁵ See note 10, supra.

local advisory body. The supporters of hanging cry out for the law to be observed, but the law prevents hanging unless all these steps are taken. To escape from this paradox, we can go in one of two directions: backwards or forwards.

Going backwards is what Barbados has done. In 2002 they passed constitutional amendments which overruled all the decisions which I have analysed. It was declared to be not unconstitutional to execute after a delay, however long; nor was it considered unconstitutional to impose a mandatory sentence of death, nor to execute a condemned prisoner while he is still waiting for a ruling from an international body. In other words, Barbados is saying that all the judges are wrong and their judgments can be ignored. I find this profoundly disturbing. It is like saying that torture is unconstitutional, but not if it is done by waterboarding. Jamaica is considering the same backward approach.

The alternative is to go forward and join the majority of the rest of the world in recognising that killing people, some of them innocent people, is not the answer to crime. This change, though, will happen in time. I remain an optimist, and I want to end on a positive note. Jamaica and the rest of the English-speaking Caribbean have developed vibrant communities of people who care. One of the positive aspects of the debate has been the input of civil society. There are organizations that campaign for human rights: the rights of victims as well as the rights of those accused. There are organizations that go into inner cities and foster peace initiatives. And there are organizations that mentor young people and support their education. There are private sector companies who invest in jobs for the unemployed, and there are church groups which work for the rehabilitation of prisoners. These are the unsung heroes in the war against crime. It is their patient work, and not the hangman's noose, which will lead to effective answers to the problems of criminality in the Caribbean.