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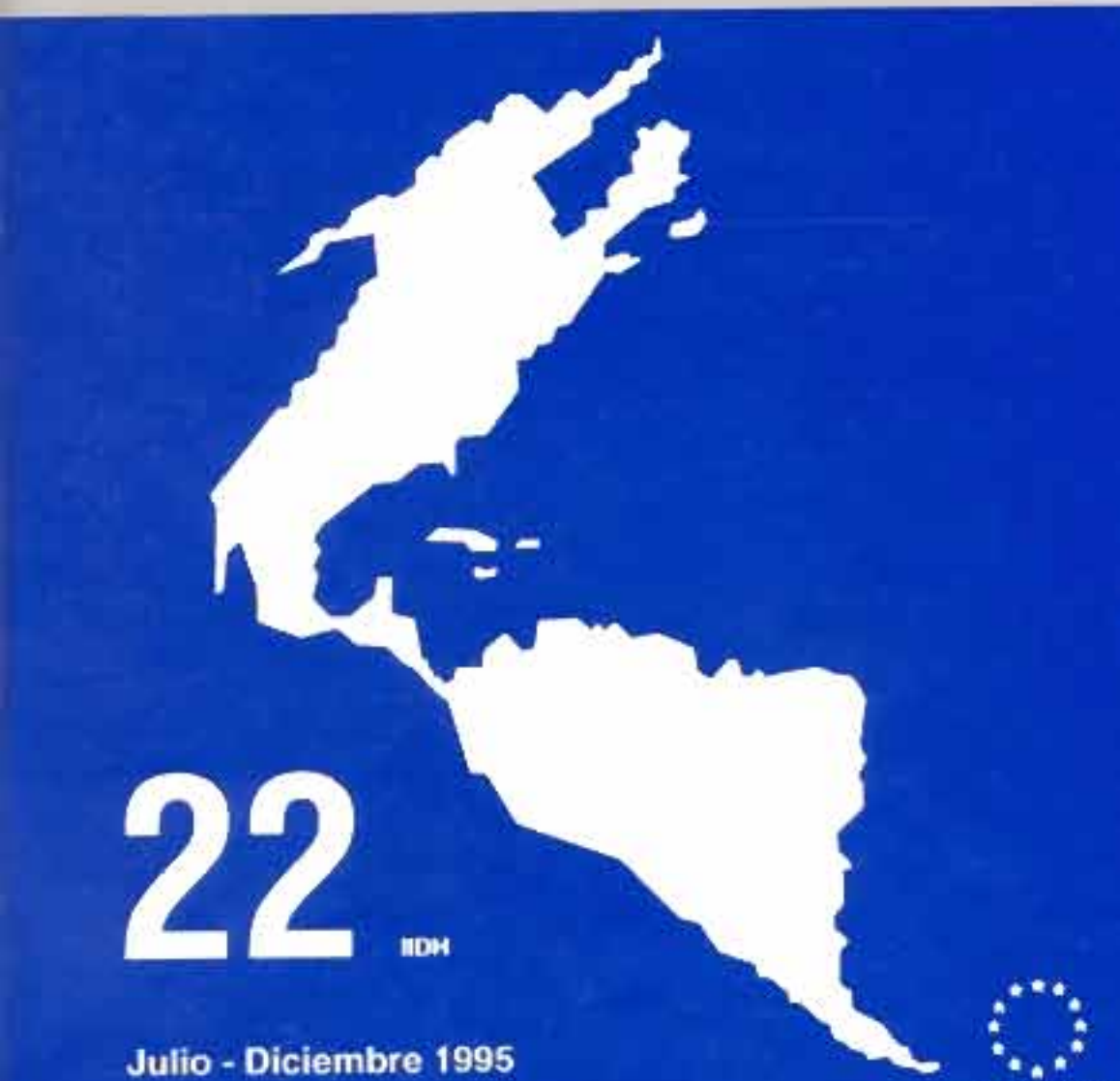

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DOCTRINA

CORTE INTERAMERICANA DE DERECHOS HUMANOS

PRESENTACIÓN

Nos es grato presentar la edición Número 22 de la Revista del Instituto Interamericano de Derechos Humanos, la cual surgió como primer número para el semestre enero-junio del año 1985 y, desde entonces, con periodicidad a la fecha.

Después de más de una década de editarse la Revista IIDH, como se le conoce en el ámbito de académicos y lectores, hay que hacer una reflexión y el merecido reconocimiento a las entidades que han apoyado la publicación ininterrumpidamente para este período, así como a los distinguidos colaboradores de su Capítulo de Doctrina.

Para los primeros veinte números se ha contado con el valioso apoyo de la Agencia para el Desarrollo Internacional de los Estados Unidos de América, USAID, cuyo aporte ha sido incondicional.

Asimismo, agradecemos a los órganos de supervisión internacional de los derechos humanos, por el envío de los contenidos específicos que acompañan a la Revista. Y, más recientemente, nos ha copatrocinado la Comisión de la Unión Europea, CUE.

Los Editores

DOCTRINA

COMMONWEALTH CARIBBEAN JURISPRUDENCE AND THE PRIVY COUNCIL

*Michael de la Bastide**

It is almost impossible to win an argument on whether or not the Privy Council should be replaced by a regional Court as the final Court of Appeal for the Commonwealth Caribbean. The problem is that so many of the points that are made for and against are matters of perception or impression, and are incapable of being proved to the satisfaction of the determined disbeliever. For example, is the retention of a right of appeal to a Court in a foreign land incompatible with Independence, or is it an exercise of sovereignty? Is the remoteness of the Judges in the Privy Council, both culturally and geographically, an asset or a handicap? Will the cost to the taxpayer of having to pay for our own final Court of Appeal be effectively offset by the saving to the litigant who will no longer have to pay fees, at London rates and in pounds sterling, to English solicitors and counsel, or alternatively meet the expense (irrecoverable as costs according to a Privy Council ruling) of transporting his own attorney to England and putting him up in a London hotel? Are there or are there not enough lawyers in the region of the right calibre, willing to serve on a regional court of appeal? Like most of you, I am sure, I have strong views on these matters and I have never been reluctant to share them with those prepared to listen. It did occur to me, however, that it might better illuminate the debate on this important issue to adopt a more inductive approach and look at what has been happening in the Judicial Committee recently and consider whether that has any message for us. I propose to consider first how the jurisdiction of the Judicial

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* Q.C., M.A., B.C.L., (Oxon) was appointed Chief Justice of Trinidad and Tobago in May, 1995, after an outstanding career at the private Bar. He received First Class Honours in Law at Oxford University in 1959 and 1960, and is only the second jurist (the late Sir Hugh Wooding was the first) to be appointed to his country's highest judicial office directly from the Bar. The Anthony J. Bland Memorial Lecture is an annual tribute to the former Reader in Equity in the Faculty of Law at the University of the West Indies.

Committee has been attenuated. Next I will look at the statistics relating to appeals from the Commonwealth Caribbean, and finally I will turn to the real meat of the matter, which is a consideration of a few of the more important decisions recently made by their Lordships in appeals from the Caribbean.

The Dwindling Jurisdiction of the Privy Council

The number of independent countries who retain appeals to the Privy Council has been greatly reduced in recent years. If one excludes the Caribbean, there would appear to be only four, namely Brunei, Zambia, Mauritius and New Zealand. Moreover, appeals from Brunei are now to be limited to civil cases, and the authorities in New Zealand are at the moment in the process of considering whether or not to retain or abolish the right of appeal to the Privy Council. The right of appeal from Singapore was greatly curtailed in 1989 and was finally abolished very recently. Within the last ten years, appeals which used to go to the Privy Council from Fiji, Malaysia, and the States of Australia have been discontinued (in the case of Fiji when it left the Commonwealth). The only non-independent 'clients' of the Privy Council outside the Caribbean are Hong Kong and the Channel Islands and appeals from Hong Kong will perforce cease in 1997. Soon the Commonwealth Caribbean countries may find themselves the only countries (apart from the Channel Islands) who retain appeals to the Privy Council. It may be of course that our circumstances are unique, or that we unlike others, have not sacrificed our best interests to blind nationalism. The fact, however, that we still cling to the skirts of the Privy Council when so many others have let go, must give rise to the disturbing thought that maybe what distinguishes us from the others is a profound lack of self-confidence.

A Statistical Review of Caribbean Appeals

Let us look now at the number of cases which have gone from this region to the Privy Council during the last ten years, that is from 1985 to 1994, both inclusive. I have included in my figures all the Commonwealth Caribbean countries including Belize and the Bahamas, as well as the islands which are still dependencies of the United Kingdom, including Bermuda. The total number of appeals to the Privy Council entered during the last 10 years from the region so defined, was 214 and the number of appeals determined after a hearing was 163, with 68 appeals having been dismissed without a hearing. Of the appeals determined, the decision of the local Court of Appeal was upheld in 102 cases, and in 61 cases it was reversed, the percentages being 63% upheld and 37% reversed. During the same period there were 292 petitions for special leave to appeal, of which only 87, or roughly 30%, were granted. By far the most prolific source of appeals in the

region was Jamaica with 89 appeals entered during the period under review. The next highest was Trinidad and Tobago with 51 appeals entered, and then the Bahamas with 16. There were only 11 appeals entered from Barbados during this ten-year period. No wonder I had difficulty a couple years ago in finding a precedent in Bridgetown for an application for leave to appeal to the Privy Council! If you are interested in how Barbados did in relation to those appeals, the answer is pretty well. Of the 8 appeals from Barbados that were determined, the Barbados Court of Appeal was upheld in 6 cases and only twice reversed. The comparable figures for Jamaica, are 69 appeals determined, 39 dismissed and 30 allowed. For Trinidad and Tobago 44 appeals determined, 26 dismissed and 18 allowed and for the Bahamas 15 appeals determined, 9 dismissed and 6 allowed. The success rate therefore, of those who appealed to the Judicial Committee from the Appeal Courts of these four countries during this period was about 41%, though in the case of Barbados, it was only 25%. You may be surprised that the Privy Council is so lightly used, relatively speaking, by litigants in the area, more so as the right of appeal exists in civil matters whenever the amount involved exceeds a very minimal figure, in Trinidad and Tobago TT$1,500.00. Presumably, a more effective barrier is the high cost of pursuing appeals to the Judicial Committee. The vast majority of the petitions for special leave to appeal are on behalf of persons sentenced to death, and if capital punishment were abolished in the region, the flow of these petitions would virtually dry up. At the end of 1994 the number of appeals pending was 12 from Jamaica, 1 from Trinidad and Tobago, 3 from the Bahamas and 3 from Barbados. These figures make it clear that one criticism which cannot be levelled at the Judicial Committee, is that it has allowed a backlog of cases to build up. This admittedly is in stark contrast to what obtains in some of the Courts of Appeal in the region.

Pratt and Morgan

Indeed delay provides the link to my consideration of some of the more notable recent decisions of the Privy Council. Probably the most important, and certainly the most controversial, of these decisions is the Jamaican case of *Pratt and Another v. Attorney-General of Jamaica* (1993) 43 W.I.R. 340 in which the Board held that prolonged delay in carrying out a sentence of death could amount to "inhuman and degrading punishment or other treatment" within the meaning of the prohibition against such punishment or treatment contained in the Jamaican Constitution. The Board held that in the case of the two appellants (Pratt and Morgan) the delay was of that order and commuted their death sentences to sentences of life imprisonment. In doing so the Board consisting of seven Judges instead of the usual five, overruled the decision of the majority comprising Lords Hailsham, Diplock and Bridge in *Riley and Ors. v. Attorney-General of Jamaica* (1983) 1 A.C. 719.

The facts in *Pratt and Morgan* were particularly bad. The murder of which the appellants were convicted was committed in 1977 and their appeal against conviction was dismissed by the Jamaican Court of Appeal in December, 1980. Their petition for special leave to appeal to the Privy Council was dismissed in July 1986. The Jamaican Court of Appeal had, through an oversight, omitted to give reasons for its dismissal of the appellants' appeal for nearly 4 years. This was wrongly stated by Lord Templeman when refusing special leave to appeal to the Privy Council, to have made it impossible for the appellants to petition the Privy Council in the meantime, and it was on the basis of this mis-statement that the United Nations Human Rights Committee held that the failure of the Jamaican Court of Appeal to give reasons was a breach of the International Covenant on Civil and Political Rights. The Jamaican Privy Council which advises on the exercise of the prerogative of mercy, did not consider the appellants' case until November, 1986. The death warrant was read to the appellants on no less than 3 occasions. The impact of all these circumstances was described by the Judicial Committee in this way (at page 343 a):

> The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years they have been in prison facing the gallows.

The majority in *Riley* held that delay could never render the hanging unconstitutional. That decision was based not on a finding that delay could never render the carrying out of a sentence of death "inhuman or degrading" but rather on the majority's interpretation of Section 17 (2) of the Jamaican Constitution. That sub-section preserved from challenge under the Constitution any description of punishment which was lawful in Jamaica before Independence and the majority held that it operated to save from challenge the carrying out of a death sentence regardless of the extent of the delay that occurred between sentence and execution. The Judicial Committee in *Pratt and Morgan* held that the majority decision in *Riley* was based on a wrong premise, namely that there could have been no challenge prior to Independence to a long delayed execution. The seven-man Board in *Pratt and Morgan* preferred the interpretation of Section 17 (2) adopted by the minority in *Riley*, and held that while it rendered hanging per se immune from attack on the ground that it was "inhuman or degrading" punishment, it did not save it from attack if because of long delay, it took on the dimension of something that was inhuman or degrading.

The actual decision in *Pratt and Morgan* is not all that controversial, if confined to the facts of that case. Only 6 months before the judgment in *Pratt and Morgan*, the Trinidad and Tobago Court of Appeal in the case of

Jurisingh (Civil Appeal No. 151 of 1992) while following as they were bound to do the majority decision in *Riley*, and rejecting the argument that delay had rendered the carrying out of a death sentence unconstitutional, made it quite clear that they were attracted by the approach of the minority in *Riley*, and predicted quite accurately that another Board might prefer theirs to the majority opinion. But their Lordships in *Pratt and Morgan* went much further than simply deciding that on the facts of this case, hanging the appellants would be a breach of their constitutional rights. Firstly, they addressed the question whether or not the time which elapsed while the convicted person is exercising his right of appeal to the local Court of Appeal and thereafter in pursuing an appeal to the Privy Council, should be taken into account in determining whether the delay was so great as to render the carrying out of the sentence unconstitutional. The Judicial Committee held that the time taken in such appeals should be taken into account. Their Lordships expressed their position in these words (at page 359 g-j):

> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearing over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with the capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

If this had been in a pleading, one would have sought further and better particulars of that word "our"!

A little later in the judgment it is said (at page 360 g):

> Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition.

The Board then went on to set targets of 12 months to hear a capital appeal after conviction, and a further 12 months for the determination of the further appeal to the Privy Council.

The second controversial ruling made by the Privy Council, which must be read in conjunction with the first, is the prescription of a 5-year deadline between sentence and execution after which "there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'" (page 363 e). The effect of these rulings was immediate and far-reaching. In Trinidad and Tobago, 53 persons who were under sentence of death had their sentence commuted because more than 5 years had elapsed since sentence was imposed. I do not know what the comparable figure was in Jamaica, but I would expect that the number of commutations would have been even greater. In Trinidad and Tobago the other work of the Court of Appeal has very largely been put aside, so that the Court can concentrate almost exclusively on the hearing of appeals in capital cases. The inevitable result is that all other appellants apart from convicted murderers have to accept yet a further addition to the already horrendous delays in having their appeals determined. Those in Barbados who thought that *Pratt and Morgan* had nothing to do with them, received a rude awakening recently when the Judicial Committee applied that decision in an appeal from Barbados and commuted the death sentences imposed on two appellants in *Bradshaw and Roberts*, (unreported) on the ground of delay in carrying out the death sentence.

These rulings by the Privy Council come perilously close to achieving that which would normally be achieved by the legislature, that is, a partial abolition of the death penalty. That is not to say that these are not decisions which the Judiciary is entitled, and indeed obliged, to take as part of its function of guardian of the Constitution. The question, however, is whether these are the sort of decisions that should be taken in London by judges who have no contact at first hand with the societies to whom the decisions apply. What the judges are about here is not a search for some uniquely correct common law solution to a problem, but rather the balancing of important interests and considerations that are in competition. On the one hand, the interest of the condemned person who has to face the dreadful prospect of death by hanging over a protracted period, and the importance of maintaining in the society proper standards of humaneness and compassion. On the other hand, there is the interest of the relatives of the victim and of the community as a whole, in having the punishment mandated by law applied to the offender, not only so that the retributive element of the punishment should not be foregone but also so that its deterrent effect should not be diluted. These considerations must also be weighted in the context of a frightening increase in the incidence of murder and other violent crimes. The irony is that it is the very increase in criminal activity which is responsible to some extent for the clogging of the judicial system and the resultant delays in processing criminal trials and appeals. The Court of Appeal in Trinidad and Tobago has already expressed the view that a time-

limit of 5 years is inappropriate, while recognizing that compliance with it is mandatory (see *Wallen and Guerra v. Baptiste & Ors.* Civil Appeal Nos. 65 and 66 of 1994). But it is not so much whether the Privy Council gave the right answer to these questions, but whether they ought to be answering them at all. One wonders whether their Lordships have a proper appreciation of the extent of the delays in the determination of other non-capital cases and civil matters generally. Given that capital cases are entitled to priority, surely the delays suffered by other claimants on the judicial system must have some relevance. Evidence provided to the Court in a recent constitutional motion in Trinidad and Tobago (*Tookai v. D.P.P. and A.G.* Civil Appeal No. 116 of 1994) indicates that it is not unusual for a preliminary enquiry in Trinidad to take 4 to 5 years, and that the normal lapse of time between committal in a non-capital case and the first listing of the matter before the Assizes is in the region of 8 years. It is difficult to resist the impression from some of their Lordships' language in *Pratt and Morgan* that they regard capital punishment with some distaste, and that would hardly be surprising given that the death penalty has been abolished in England for many years. There are no doubt judges in the Caribbean who share that distaste, but when one is making a decision as arbitrary as fixing the maximum period of time which may be allowed to elapse between a sentence of death and its execution, it is probably easier for a judge to weigh the different factors appropriately if he has experienced them at first hand.

The decision in *Pratt and Morgan* gives rise to one or two other random thoughts. Firstly it is something of a shock to have a constitutional law decision in which Lord Diplock participated, overruled. Even the most insightful of judges apparently can err, and when that happens it is important that there should be the possibility of correction. This case demonstrates that the Privy Council is prepared to correct its own mistakes, and that same right has been claimed for itself by the House of Lords. Regrettably, however, some members of the Judicial Committee have taken the view that when sitting as members of the Judicial Committee they are not entitled to differ from decisions of the House of Lords. See *Hart v. O'Connor* (1985) A.C. 1000 and *Tai Hing Cotton Mills Ltd. v. Sui Chong Hing Bank Ltd.* (1986) A.C. 80. Of course so far as our own Courts are concerned, not only are they bound by decisions of the Privy Council in appeals from the jurisdiction in which they sit, but by all decisions of the Privy Council, even those made in appeals emanating from some other jurisdiction. Secondly, one appreciates the desire to establish some time-limit of general application for carrying out a death sentence, given the large number of persons in Jamaica and in Trinidad and Tobago in particular, who have been under sentence of death for long periods. Nevertheless, it does seem a pity that in the interest of avoiding a multiplicity of constitutional cases, it was decided to forego the advantage of considering each case individually on its

merits. Such a case by case approach has been endorsed by the Supreme Court of India in the case of *Sher Singh v. State of Punjab* (1983) 2 S.C.R. 582 and in *Triveniben v. State of Gujarat* (1989) 1.S.C.J. 383, both of which were cited in *Pratt and Morgan*. In the earlier of those two cases, the Supreme Court of India expressed the opinion that no "absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of death sentence, the sentence must be substituted by the sentence of life imprisonment". The Court identified some of the factors besides delay which had to be taken into account as follows:

> Why the delay was caused and who was responsible, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime were such as were likely to lead to its repetition.

The Indian Court rejected the deadline of 2 years for carrying out of the death sentence which had been laid down in an earlier case, as that time-limit was 'inconsistent with common experience' as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities. This decision was upheld by five Judges of the Supreme Court of India in *Triveniben*, the second case referred to above. It was also held in *Triveniben* that the only delay which would be material for consideration would be the delay from the date the judgment by the apex Court was pronounced, and so the time consumed in the hearing of appeals was to be left out of the reckoning. The rationale was that as long as a condemned man's case was subject to appeal, he had a ray of hope, and therefore did not suffer the same mental torture as a person who had exhausted all his appeals. While as stated above, it is accepted that a single arbitrary limit was obviously desirable so that it could be applied to those already on death row, it would have been preferable if for the future the less arbitrary and more flexible approach adopted by the Supreme Court of India could be adopted by our Courts as well, but as things stand we would have to wait before that happens on another change of heart by the Judicial Committee. And that is probably too much to hope for, if *Bradshaw and Roberts* is any guide.

Delay in Non-Capital Cases

The effect of delay in a non-capital case on a convicted person's constitutional rights was considered by the Privy Council in *Bell v. D.P.P.* (1985) 32 W.I.R. 317 an appeal from Jamaica. It was a case in which a retrial was ordered by the Jamaican Court of Appeal and there was a delay of 32 months between that order and the retrial itself.

The Privy Council overruling the Court of Appeal held that the appellant was entitled to a declaration that his right under the Jamaican Constitution to a fair hearing within a reasonable time had been infringed. The Board accepted that the average delay in the hearing of a case in the Court was 2 years and that the delay of that order did not by itself infringe the rights of an accused to a fair hearing within a reasonable time. The Board also recognized that in general the Courts of Jamaica are best equipped to decide whether in any particular case a delay for whatever cause contravenes the fundamental right granted by the Constitution. In dealing specifically with delays caused by witnesses not being available, the Board recognized that the Courts had to weigh the right of the accused to be tried promptly against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused could fairly be established by all the relevant evidence. The Board indicated that it would normally defer to the view of the local Court of Appeal as to whether or not the right of an accused to a fair hearing within a reasonable time had been infringed, but on the facts of this particular case, they felt able to intervene because of an error of principle committed by the Court of Appeal when it failed to take into account that the delay in this case had occurred after an order for a retrial and could not be assessed by reference to the average delay in cases which did not involve a retrial. The Board in *Pratt and Morgan* does not appear to have shown the same concern to relate the deadline which the Board fixed for carrying out a death sentence, to the average time actually and currently taken in Jamaica over the judicial and executive processes involved, nor to receive the views of the Jamaican Courts as to what was reasonable in terms of a deadline. The decision in *Bradshaw and Roberts* would seem to suggest that the 5 year deadline fixed by their Lordships may not be subject to variation because of differences (if any) in local conditions as between one Caribbean country and another, but when the reasons in that case become available, one will be in a better position to judge.

It is likely that the Judicial Committee will have the opportunity soon of considering the effect of delay in a non-capital case as it is expected that the State will appeal from a recent majority decision of the Court of Appeal of Trinidad and Tobago in *Tookai v. D.P.P. and the A.G.* (Civil Appeal No. 116 of 1994) which was delivered on the 8th March, 1995. In that case the appellants applied by motion to quash an indictment that was preferred almost 8 years after they were committed for trial. The majority held that the preferring of the indictment at that point in time constituted a breach of the appellants constitutional rights and that the criminal prosecution should be terminated, and moreover made an order for compensation to be assessed. There was a very powerful dissenting judgment by Hamel-Smith J.A. in which he made a careful and thorough review of relevant authorities from different parts of the Commonwealth. The Judge in the Court below had

dismissed the plaintiffs' motion, so that the local Judges were split two-all. One imagines that the Judicial Committee is likely to uphold the view of the majority in the Court of Appeal, but it will be interesting to see how they support that result.

Guerra and Wallen

I turn now to a recent order made by the Privy Council in circumstances which produced an embarrassing confrontation between the Judicial Committee and the Trinidad and Tobago Court of Appeal. This was in the case of *Guerra and Wallen v. the State*. Guerra and Wallen had been convicted of murder and sentenced to death and had exhausted all their appeals. They were sentenced on the 18th May, 1989, and their petitions for special leave to appeal to the Privy Council were dismissed on the 21st March, 1994, just about 2 months short of the 5 year limit. Warrants for their execution were read to both men on the 24th March, 1994, and the executions were scheduled for the following day. On the 24th March, there was a flurry of activity. Constitutional motions were filed on their behalf claiming that the carrying out of the executions would constitute a violation of their constitutional rights because of the delay which had occurred. A summons was filed seeking a conservatory order to delay the executions, and was dismissed by Lucky J. at 10 p.m. that same night. Notice on Appeal was immediately filed and the matter came before Hosein J.A. at 1 a.m. on the 25th March. He dismissed the appeal, but gave leave to appeal to the Judicial Committee and granted a conservatory order for 48 hours pending an appeal to the Judicial Committee. Within a couple hours of that, the Judicial Committee granted a conservatory order staying execution for 4 days. On the 28th March, the Judicial Committee adjourned the petitioners' application for leave to appeal to the 25th April and extended the conservatory order until after the determination of the petition on that date. In the meantime the Attorney-General had moved the full Court of Appeal in Port of Spain on an application to set aside the 48 hours' stay of execution granted by Hosein J.A. On reading a faxed copy of the order of the Judicial Committee for the stay, the Court of Appeal adjourned the Attorney-General's application until the 28th March. On the 31st March the Court of Appeal gave judgment on the Attorney-General's application. They held that Hosein J.A. had erred in granting leave to the petitioners to appeal to the Judicial Committee without recourse to the full Court of Appeal, but decided that since the Judicial Committee was already seized of the matter, they would not set aside the order of Hosein J.A. On the 18th April, Jones J. dismissed the petitioners' constitutional motion and refused a stay of execution pending an appeal. On the 25th April, the stay granted by the Judicial Committee lapsed but the Attorney-General undertook that no execution would take place until the hearing of an application to the Court

of Appeal for a stay and on the 29th April, the Court of Appeal by consent granted a conservatory order directing that the sentence of death be not carried out until after the determination of the appeal to the Court of Appeal. The Court of Appeal gave their judgment on the 27th July, 1994, dismissing the appeal. Before their judgment was given, however, on the 25th July, Guerra and Wallen petitioned the Judicial Committee asking for a conservatory order directed to preventing their execution pending the determination of an appeal from the Court of Appeal in the event that the Court of Appeal dismissed their appeal and did not themselves grant a conservatory order. On the 25th July, two days before the Court of Appeal gave its decision, the Judicial Committee made what must surely be an unprecedented order. The Committee ordered that if the Court of Appeal dismissed the petitioners' appeal and did not immediately grant a conservatory order, the execution of the sentence of death should be deferred until after the determination of an appeal (which the petitioners' counsel undertook to file) to the Judicial Committee. When the Court of Appeal delivered its judgment on the 27th July, 1994, they were then told by counsel of the order which had been made by the Judicial Committee. The Court of Appeal after reading the order and the reasons of the Privy Council, expressed its reaction in this way:

> While their Lordships have expressed anxiety not to encroach on the Court's jurisdiction and have sought to found such jurisdiction by making a contingent order, the effect of same is to pre-empt this Court's exercise of its discretion in relation to this particular appplication. In other words, this Court has been mandated to exercise its discretion in a particular manner. That a Court should be compelled to so do is incomprehensible. This Court cannot in similar circumstances imagine itself assuming jurisdiction to order a Judge of the High Court to exercise its discretion in a particular way by directing him that if he does not do so, this Court will. A Judge or any Court for that matter must be trusted to act judicially and properly.

In the circumstances the Court of Appeal found that it would be futile to purport to exercise any discretion with regard to the conservatory order in view of the subsisting order of the Privy Council and simply declined to make any further order apart from granting leave to appeal to the Privy Council. The reasons the Judicial Committee, gave on the 26th July for making its order, only served to make matters worse. They pointed out that to permit Wallen and Guerra to be executed before they had exhausted their right of appeal to the Privy Council would "plainly constitute the gravest breach of their constitutional rights and would frustrate the exercise by the Judicial Committee of its appellate jurisdiction". Yet despite protestations of great respect for the Judges of the Court of Appeal, their Lordships

obviously did not feel they could rely on the Court of Appeal to avoid these consequences by making the conservatory order which was so obviously called for. In order to justify this unflattering lack of confidence in the local Court, the Judicial Committee referred to what had happened in the case of *Glen Ashby* who was executed before the judicial process had taken its course, and to "recent decisions" of the Courts of Trinidad and Tobago, which it was claimed gave the impression that it was not normal practice for a Court in Trinidad and Tobago to grant a stay of execution pending an appeal to a higher court, even where the appellant was under sentence of death. I do not know what were the recent decisions which their Lordships had in mind but I venture to state quite categorically that there is no case in which the Court of Appeal of Trinidad and Tobago decided that a sentence of death should be carried out notwithstanding that the condemned person wished to exercise a right to appeal, or apply for leave to appeal, to the Privy Council for a reversal or commutation of that sentence, and I have the confidence which obviously the Judicial Committee lacked, that the Trinidad and Tobago Court of Appeal would never refuse a stay of execution in such circumstances.

Ashby

There remains the reference to what happened in the *Ashby* matter. Ashby was another person convicted of murder and sentenced to death who had exhausted all his appeals. A motion alleging that to execute him would be a breach of his constitutional rights was filed on the 13th July, 1994, the day before he was scheduled to be hanged. An application for a conservatory order staying execution was refused by Sealy J. at about 8.30 p.m. on the 13th July. Unknown to Sealy J. until after she had given her decision, an application for stay had been made earlier that day to the Judicial Committee, but no order had been made on that application in the light of a statement made by counsel for the Attorney-General, the effect of which was not altogether clear. An appeal was filed against the decision of Sealy J. shortly before midnight and the Court of Appeal convened to hear the appeal at about 12.25 a.m. The Court of Appeal did not proceed then to hear the matter on the merits because of the uncertainty which counsel were unable to remove, about what had taken place before the Judicial Committee the previous day. Accordingly, the matter was stood down until later that morning in order to enable counsel for Ashby to get clarification of what had happened in the Privy Council. The Court of Appeal resumed sitting at 6.20 a.m. The President of the Court had given instructions that the Registrar (whose presence is required at a hanging) should be present in Court when the Court resumed, but in fact he was not. It is obvious that the intention of the President in giving this directive was to ensure that no hanging took place until the Court had made its decision. It appears that at 6.45 a.m.

Trinidad and Tobago time the Privy Council made an order granting a stay of execution in the event that the Court of Appeal refused a stay of execution. This was communicated to the Court of Appeal at about 6.52 a.m. Before either of these things happened, however, Ashby, had in fact been hanged at about 6.40 a.m. and this was reported to the Court in person by the Registrar shortly after it received the news of the stay. It would seem unfair in these circumstances to blame the Court of Appeal for the fact that Ashby was executed, or to suggest that they had decided to refuse a stay of execution. The fact of the matter is that it was the premature intervention of the Privy Council which created the confusion which the parties were attempting to clear up when the execution took place. I have no doubt whatever that if there had been no application to the Privy Council, or if that application had been rejected out of hand by their Lordships as premature, the Court of Appeal would have considered the matter on its merits when it first convened shortly after midnight on the 14th July, and would have granted a stay of execution. Nothing I have said should be taken as in any way exonerating the executive for their role in causing or permitting the execution of Ashby to take place literally while the Court of Appeal was sitting to determine whether the carrying out of the death sentence should be deferred pending an appeal to the Privy Council. To my mind, one does not require the assistance of any Committee in order to recognise that the hanging of Ashby was a grave violation of due process and the rule of law, an aberration which hopefully will never be repeated in this region.

I have no doubt that in both these cases the Judicial Committee believed that it was necessary for it to make the orders that it made in fulfilment of its duty as the highest Court of the land to defend the Constitution. In my respectful view, in coming to this conclusion, it totally misjudged the situation and offered an unnecessary affront to the local Court of Appeal. I would respectfully suggest that the lack of confidence which their Lordships displayed in the Trinidad and Tobago Court of Appeal so far as the matter of staying execution of a death sentence is concerned, was totally unsupported by the evidence.

The reaction of the public to these strange goings-on was as usual best captured by their traditional spokesman, the calypsonian. One of the contestants in the 1995 Calypso Monarch competition in Port of Spain, 'Sugar Aloes', sang a song entitled '*Who's in Charge*' which contained the following lines:

> But if we still have to send quite up in London
> to get the O.K. to hang a criminal in we own land
> Then what's the use of having an Independence or Republic holiday?
> When them Q.C.'s in London don't respect what we say

And while we lockup tight in we home-made jail
Cause them criminals free at large
Between the Queen, Manning or Sat Maharaj
I wonder who is in charge.

On a more official level, there has recently been published in Trinidad and Tobago a Bill to amend the Constitution. This Bill seeks to do two things one is to deal with abuse of the constitutional motion by imposing a requirement that leave of the Court must be obtained before a person makes a claim for redress for breach of the Constitution and again before he appeals from the determination of the High Court in a constitutional matter. Secondly, the Bill would make the decision of the Court of Appeal final and unappealable in any constitutional matter arising out of criminal proceedings. The Bill reportedly seeks to implement one of the recommendations of a Committee headed by Sir Ellis Clarke which was appointed by the Prime Minister to advise the Government how to deal with the problem of escalating crime. In order to pass into law this Bill would require the support of a two-thirds majority in each House of Parliament. It would therefore require the support of the Opposition and it is doubtful at best whether such support will be forthcoming.[1]

The Muslimeen Case - Round 1

I go now to two decisions of the Privy Council in the proceedings arising out of the attempted coup by the Muslimeen in Trinidad on July 27, 1990. The first decision, *Lennox Phillip and Ors. v. the D.P.P.* in (1992) 1 A.C. 545, really concerns a procedural point. The question was whether the 114 persons who were charged with murder, treason and other offences arising out of their participation in the attempted coup, were entitled to challenge by means of a constitutional motion and an application for habeas corpus, the legality of their detention and prosecution on the ground that they had received a valid pardon in respect of the offences charged, or whether they were compelled to wait until they were arraigned upon indictment before raising a plea in bar based on that pardon. The local Courts held that they were obliged to wait until arraignment. The Judicial Committee held quite sensibly, if one may say so with respect, that they not have to wait, but were entitled to have the validity of the pardon determined in the two proceedings which they had brought for the purpose. The Board however, were not content simply to decide the procedural point. They succeeded in conveying the impression both by the interventions which they made during the oral arguments and from certain things said in their judgment that the State had little chance of successfully challenging the pardon. It was made clear

1 This Bill was subsequently withdrawn by the Government.

in the judgment which was written by Lord Ackner, that the Board regarded a pre-conviction pardon as a valuable tool for dealing with the sort of situation the Muslimeen created when they stormed and occupied the Parliamentary building and TV Station, and took and held members of Parliament and others hostage. Lord Ackner quoted in support of that view a statement made by Alexander Hamilton in 1788. The pardon which was held to have been given to the Muslimeen may well have saved the lives of the hostages on this occasion, but should it be the policy of the law to encourage the making of deals with terrorists? Ought the law to provide those who might be minded to take similar action in the future with an ironclad guarantee that if things go awry, any pardon which they can extract for themselves by bartering the lives of others will be valid and binding? This is not an issue on which I would imagine the common law can claim to provide any universally or uniquely correct answer, and I question the credentials of their Lordships to determine the policy which our law should adopt with regard to pardons given in such circumstances.

At the stage at which Lord Ackner wrote his judgment, no evidence had been filed on behalf of the State for it was relying on a preliminary objection. Nevertheless, in the course of his judgment Lord Ackner made certain statements of fact based on the evidence filed by the Muslimeen without any qualification or reservation, as though the facts so stated had either been found or conceded. In fact Lord Ackner later went on to say (at page 559 F) that the "factual allegations set out in the many affidavits in the constitutional appeal did not appear to be in dispute, although they may not provide the entire story...". At page 551 E of the report he said this:

> The applicants, relying upon the terms of the pardon, took the necessary steps open to them to fulfill its conditions. The release of the captives and the physical surrender of the applicants were planned for 29 July, but had to be delayed until 1 August, because of the danger to everyone posed by some members of the security forces, who initially refused to accept the terms of surrender.

Nearly all of these assertions were hotly contested by the State in evidence filed subsequently and the facts as they were ultimately found on the whole of the evidence, differed significantly from those stated by Lord Ackner in the passage just quoted.

Lord Ackner made the point very strongly that at no stage of the proceedings, either in the Court below or in the Court of Appeal, had there been any attack upon the validity of the pardon. He did not seem to treat that as explainable simply on the basis that the case had stalled on a preliminary objection taken successfully by the State in the Courts below. The inference

appeared to be that if the State had anything which they could reasonably put up in opposition to the pardon, they would already have done so. Indeed Lord Ackner described Mr. George Newman Q.C., Counsel for the State, as having "manfully sought to persuade their Lordships not to set aside the orders made in the Courts below because there was bound to be a challenge to the validity of the pardon".

In rejecting that submission Lord Ackner went on to suggest that even if the pardon was invalid, it must be a matter of policy as to whether it would be politic to take the point, and referred again to the same comment of Alexander Hamilton which he had earlier quoted with approval. It is to say the least surprising that in the face of the statement by Counsel for the State that the pardon was bound to be challenged, their Lordships should have speculated that it might not be considered 'politic' to make that challenge. It would not be far-fetched to construe such speculation as the giving of a hint to the Attorney-General and the D.P.P. as to the course they should adopt, and therefore an unsolicited venture into the realm of policy.

Lord Ackner also said rather ominously (at page 559 F) that:

> Their Lordships therefore envisage no great difficulty in Blackman, J. or whoever has the task of deciding the issue, determining whether or not the pardon was a valid one.

All of this served to strengthen the impression that in their Lordships' view there was little point in the State contesting the pardon. This first judgment of the Judicial Committee no doubt caused the accused persons and their lawyers to be greatly heartened, but it did very little for the morale of the public of Trinidad and Tobago. One advantage enjoyed by a Judge who lives in the jurisdiction is that he knows in advance pretty well what his fellow citizens will think of his judgment and how they will react to it. He may or may not let that knowledge affect his judgment but it must be of advantage to him to have it.

Finally, their Lordships' view of the delay predicted before arraignment was expressed by Lord Ackner in these rather uncompromising terms (at page 560 D):

> No civilised system of law should tolerate the years of delay contemplated by the Courts below, before the lawfulness of this imprisonment could be effectively challenged.

The Muslimeen Case - Round 2

The case therefore returned to Trinidad for a determination on the merits. Brooks J. and a majority of the Court of Appeal, Sharma and Ibrahim JJA., Hamel Smith J.A. dissenting, held that the pardon was valid and as a consequence not only were the Muslimeen immune from prosecution for the acts committed by them during the attempted coup and entitled to be set free forthwith, but the State was liable to pay them damages to be assessed for having wrongfully incarcerated them over a period of about 2 years in addition of course to their enormous bill of costs. To the population of Trinidad and Tobago this was a grotesque result and they were traumatised by it. There is no right of appeal in habeas corpus matters in Trinidad and Tobago but the State appealed on the constitutional motion first to the Court of Appeal and then to the Privy Council. Brooks J. and all three Judges of the Court of Appeal held that the pardon was not invalidated by duress and in this they were upheld by the Privy Council. The Privy Council held that it would only be in the most exceptional circumstances that a pardon could be invalidated for duress. To produce that result the duress would have to consist of direct physical violence or pressure or actual imprisonment to the person who had issued the pardon. No such direct action was established in the instant case. Hamel -Smith J.A. held the pardon invalid on the ground that when the Acting President issued it, he was not directing his mind to the exercise of his discretion under Section 87 (1) of the Constitution which confers the power of pardon, but was acting in accordance with a direction contained in an invalid agreement made at gun-point in the Red House with members of the Government who were being held hostage. From time to time those who argue for retaining appeals to the Privy Council have pointed to the risk that in small communities like ours Courts may be unwilling to make decisions that are unpopular with the Government. The trouble with this argument is that it is very rarely, if ever, supported by empirical evidence.

The judgments of the Trinidad and Tobago judges in the Muslimeen case suggest, as they did some 20 years earlier in the case of *Lasalle and Shah v. R.* (1973) 20 W.I.R. 361 in which two of the officers who led an army mutiny in 1970, successfully appealed their convictions by a court-martial, that our Courts are staffed by persons who are not afraid to make decisions that are unpopular both with the public and with the Government of the day. The Board in its judgment in this case (*Attorney-General v Phillips and Others* (1995) 1 A.E.R. 93 at page 97 H) paid tribute to the local Judges in these words:

> The Board are happy to acknowledge that their judgments disclose that the Court dealt with this extremely sensitive and difficult case with great care and objectivity.

The criticism that may be made of the local Courts in this case is not that they lacked independence, but rather that they were unable to find on a proper interpretation of the evidence and a legitimate application of legal doctrine and precedent, a way of achieving the result which was obviously demanded by reason and justice. To its credit the Board of the Judicial Committee which heard this case the second time around, was able to find a way to this result through the findings of fact available on the evidence and such authorities as could be found on the exercise of a power of pardon. The decision of the Board really turned on the failure of the Muslimeen to end the insurrection promptly after receipt of the pardon. Instead of doing so they had continued to negotiate for certain other objectives. The Board held that for the pardon to be valid, it would have had to be subject to a condition that the recipients would bring the insurrection to an end promptly after it was issued and this they failed to do. The Board also held that it would be an abuse of process to prosecute the Muslimeen further having regard to the fact that there was no right of appeal from the grant of habeas corpus by Brooks J. Given the lapse of time which had occurred, that ruling caused some disappointment but no great consternation in Trinidad and Tobago. The important victory that had been won was that damages (and most of the costs) would no longer have to be paid to the terrorists. While I think the whole of Trinidad and Tobago was grateful, and rightly so, to their Lordships for having been able to produce such a result, one is entitled at the same time, to wonder whether the judgment of the Board in the first appeal did not, albeit unconsciously, affect the approach of the local judges to the question of the validity of the pardon. In any event, the local judges would have been acutely aware that in this case the Judicial Committee was going to have the last word.

Before parting company with the Muslimeen case there are two points which I should like to make. Firstly, much of the reasoning of the Privy Council in this case turned on what may be described as their pro-pardon approach, that is their view that nothing should be done which would shake the confidence of any future recipient of a pardon in its validity, or to look at it from the other side, that the offer of a pardon is a card which should be available to the lawful authorities to play when dealing with insurrectionists in the future. This view coloured their approach to the question of what degree of duress was required before a pardon could be invalidated, and also prompted them to adopt a purposive construction of the pardon, that is a construction which tended to uphold its validity. As I have indicated above, this pro-pardon approach is really a matter of policy and not one dictated by any rule of the common law. So the case raises again the same question, that is, whether we should be abdicating to others the responsibility for determining our own policy.

Secondly, the whole of the Muslimeen case was argued and decided from beginning to end on the basis of a legal fiction. The legal fiction is that the discretion whether or not to issue a pre-conviction pardon under Section 87 (1) of the Constitution, is vested in the President. The point is a simple one. Section 87 provides:

> The President may grant to any person a pardon... respecting any offences that he may have committed. The power of the President under this sub-section may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

Section 80 (1) provides:

> In the exercise of his functions under the Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act-
>
> (a) in his discretion;
>
> (b) after consultation with any person or authority other than the Cabinet; or
>
> (c) in accordance with the advice of any person or authority other than the Cabinet.

The question which arises therefore, is whether Section 87 (1) either contains a requirement that the President should act in his discretion or makes some provision for the President to act otherwise than in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. In my view, it is clear that Section 87 (1) contains no such requirement and makes no such provision. The use of the word "may" and the reference to the power being exercised "by him" are quite colourless in this regard and simply reflect and repeat the language of many other statutory provisions which give powers to the President that are clearly not intended to be exercised by him in his own discretion. Both sides however, chose to interpret Section 87(1) as giving the President an unfettered discretion of his own and obviously both did so for tactical reasons.

Mr. Newman for the State was obviously afraid that if the President had to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, this would have brought into play Section 80 (2) which provides:

> where by this Constitution the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case so acted shall not be enquired into in any court.

For my part, I refuse to believe that any Court would have so construed this provision as to debar the State from asking the Court to note that the Muslimeen had by their own actions in taking the Primer Minister and most of the Cabinet prisoners and holding them hostage, made it impossible at the material time for the Cabinet or any Minister acting under the general authority of the Cabinet to give any advice to the Acting President on the grant of a pardon that was not fatally flawed by duress.

The point was purportedly reserved by Mr. Newman in the Courts below, and in the Privy Council an attempt was made by Mr. Ewart Thorne Q.C., Counsel for the D.P.P., to argue for the first time that the discretion was not the President's, but their Lordships, not surprisingly, refused to hear him. Anyone who is familiar with the constitutional role of the President in Trinidad and Tobago, and the way in which it evolved from that of the Governor-General, would be shocked by the suggestion that a power charged with such potentially grave political consequences as that of pardoning offences before they have even been charged, could be exercised by the President in his sole and absolute discretion, without even the need for consultation with the Prime Minister. On the face of it therefore, the *ratio decidendi* of the Muslimeen case would seem to have turned one of the most fundamental of our constitutional arrangements upon its head. It is a question whether the local Courts ought to have accepted such a palpably wrong interpretation even though it was put forward by both sides, given the important constitutional implications. One thing is sure, the next time that occasion arises for the exercise of this power of pardon, both the President and the Prime Minister and those advising them will be in a quandary to know who has the power to take the decision.

Rees v. Crane

I turn now to consider the decision of the Judicial Committee in *Rees v. Crane* (1994) 1 A.E.R. 833. The procedure for the removal of a Judge from office in Trinidad and Tobago is the same as that found in the Constitutions of other Commonwealth Caribbean countries and consists essentially of three stages. The first stage is a representation by the Judicial and Legal Service Commission to the President that the question of removing the Judge ought to be investigated. The second stage is an enquiry into the matter by a tribunal appointed by the President resulting in a report on the facts to the President, and a recommendation to the President as to whether he should refer the question of removal of the Judge to the Judicial Commit-

tee. The third stage, if it is reached, is the determination by the Judicial Committee whether the Judge ought to be removed from office or not. The major question of principle which arose for decision in this case was whether a Judge was entitled to be heard at the first stage, that is before the Commission represented to the President that the question of his removal ought to be investigated. There was a numerically even division of opinion on this question in the local Courts. The trial Judge, Mr. Justice Blackman and Mr. Justice Sharma in the Court of Appeal, thought that the Judge was not entitled to be heard at that stage. Two Judges comprising the majority of the Court of Appeal, that is Davis and Ibrahim JJA., held that he was so entitled. The Judicial Committee agreed with the majority of the Court of Appeal. Everyone accepted that the Judge was entitled to be treated fairly. The dispute was as to what fairness required given that the Commission was not required to make any findings or express any opinion, and that there were two subsequent stages at which the Judge would be entitled to be heard. Was the Commission required to hear him before it made its representation? There is little doubt that the weight of authority was against this being required. The Judicial Committee admitted as much when in the subsequent case of *Huntley v. The Attorney-General for Jamaica* (1995) 1 A.E.R 308 they conceded that the decision in Crane was "contrary to the general approach" (at page 318 B). Moreover, the case appeared to be covered by a dictum of Lord Reid in *Wiseman v. Borneman* (1969) 3 A.E.R. 275 at pages 277 to 278, when he said this:

> Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.

The judgment in the *Huntley* case, an appeal from Jamaica, was given by the Judicial Committee about 10 months after the decision in *Crane*. Again the question turned on the right to be heard, this time in the context of a new Act in Jamaica which made a distinction between capital and non-capital murder and provided for the murders committed by those already convicted and under sentence of death to be classified accordingly. Anyone convicted of a murder which was classified as non-capital would have his sentence commuted to one of life imprisonment. The classification was to be done initially by a Judge of the Court of Appeal, but if he classified the case as capital, the prisoner had a right to have that classification reviewed by three Judges of the Court of Appeal and to be represented by Counsel at that stage. The Judicial Committee held that the review was an exercise to which the principles of fairness had to be applied and acknowledged that the

outcome of that exercise was 'obviously of vital importance' to the appellant (at page 317 g). They thought it important, however, in considering what were the requirements of fairness, that the decision of the single Judge could be reviewed, and that at the stage of the review there was the right to be represented and to make representations. Reliance was also placed on the desirability of expedition. In the result the Judicial Committee held that the appellant was not entitled to be heard before the single Judge made his classification.

In an earlier decision of the Judicial Committee in January 1994 in *Brooks v. D.P.P.* 44 W.I.R. 332, the Board had held that a doctor was not entitled to be heard by the Judge who issued a voluntary bill of indictment charging him with an offence with which he had been previously charged. He had been discharged on the previous charge at the conclusion of the preliminary inquiry as the Magistrate held that no prima facie case had been made out.

I refer to these cases not for the purpose of criticizing their Lordships' decision in *Rees v. Crane*. It is to be noted that the Court of Appeal of Guyana came to the same conclusion in a case arising out of the attempted removal of Mr. Justice Barnwell from office. But the decision in *Crane* was a very important one, which affected the judiciary and involved an interpretation of the Constitution. On the state of the authorities, it was a finely balanced decision. It really turned on a very subjective assessment of what fairness demanded. In the later case of *Huntley*, it was held that fairness did not demand that the appellant be heard at the first decision-making stage, even though a favourable decision at that stage would have irrevocably removed the sentence of death which he was under. The assessment in Crane involved the balancing of a number of competing considerations, on the one hand the necessity to ensure that the independence of the judiciary is properly buttressed and the reputation of a Judge should not be vulnerable to unwarranted attack, on the other hand the importance of ensuring that the process of removing an unsuitable Judge from active duty is not rendered too cumbersome or protracted. In other words, this was another instance of what I would term a policy decision and the case raises yet again the question of the appropriateness of placing on the members of the Judicial Committee the responsibility for determining policy for the people of this region.

Conclusion

Our training as lawyers should enable us to look at these decisions coolly and objectively and without hysteria or emotion, assess their impact on the case for the establishment by the independent countries of the region of their own final Court of Appeal. That is not to say that if such a court were

set up, it should not be available to those islands in the region like Bermuda, Montserrat and the British Virgin Islands, which are still colonies or dependencies of the United Kingdom. I do not recommend that we retain or abolish appeals to the Privy Council depending on whether we like or dislike the decisions which their Lordships have been handing down. Given the level of expertise on the Judicial Committee, it is unlikely that any of their decisions will be open to criticism on what may be described as purely technical grounds. What I do think we should look at is the nature of the issues which a final Court of Appeal, whose jurisdiction is virtually unlimited, is called upon from time to time to decide, as illustrated by these recent cases. When we do that, we see that a number of these decisions which have extremely important consequences for the whole community, are really policy decisions, involving the weighing of competing interests and considerations. The competition is typically between the interests of the individual, whether it is to humaneness or fairness or some such consideration, and the interests of the rest of society to be protected and to have the law of the land enforced. Neither the common law, which consists really of the principles derived from decided cases, nor statute law can provide a clear and certain answer to every question, and the decisions which a final Court of Appeal is called upon to make in order to fill the interstices is sometimes not very different from those made by a democratically elected Parliament. The cases which I have reviewed are examples of decisions of that type. In making such decisions, one is not unearthing some universal verity but determining what is best for a particular society in the circumstances existing at a certain point in its history. I would have thought that it was essential for the decision-makers in such cases to have an intimate knowledge acquired at first hand of the society for whom the decision is made. Another aspect of the matter is that while no one suggests that judges should make their decisions by reference to public opinion, it is a salutary form of accountability (if not the only one in practice) for a judge to live in, or at least close to, the society for whom he makes decisions of this kind. In any event I would have thought that after all these years of Independence, we would be uncomfortable to say the least about sending the decisions of our Courts on these policy matters for review to London, a practice not altogether dissimilar from that which obtained in colonial times of appealing to the Secretary of State for the Colonies when the local Governor made decisions or took actions that were unacceptable to those whom he governed.

It is instructive to note how uncomfortable the British have become with the ability of the European Court of Human Rights in Strasbourg to review decisions taken by the executive or judiciary in Britain, even though the European Court's decisions are not formally binding in the U.K. When an American civil rights lawyer lodged an appeal to the European Court on

behalf of the two young boys who were convicted by the Preston Crown Court of the brutal murder of James Bulger, an even younger boy, the leader writer of 'the Times' (May 25, 1994) saw the appeal's objection that the court breached the boys' rights because it failed to give them a fixed penalty as 'an alarming hint of potential legal battles between Britain and the European Court' and gave the European Court this waring:

> It is important, therefore, that Strasbourg should not be tempted to meddle in a system of checks and balances which is more subtle and delicately balanced than may appear to continental eyes.

Again Sir Thomas Bingham, Master of the Rolls and a Privy Councillor, in delivering the Denning Lecture in March, 1993, argued powerfully for the incorporation into United Kingdom law of the European Convention on Human Rights and Fundamental Freedoms. One of the advantages of such incorporation according to Sir Thomas was that allegations of breaches of the Convention would be justiciable by courts in England and resort to the European Court would no longer be necessary. He described the effect of this in these words (109 LQR (1993) 390 at page 400):

> But the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice.... And it would enable the judges more effectively to honor their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.

Is it not time that we remove that same 'insidious and damaging belief' from the minds of our own people and give our own judges the opportunity to fulfill more effectively the obligation they assumed when they took their oath of office? Is it not time in other words to complete our Independence?

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