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IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 2 of 2005
BB Civil Appeal No 29 of 2004

BETWEEN

THE ATTORNEY GENERAL	**FIRST APPELLANT**
SUPERINTENDENT OF PRISONS	**SECOND APPELLANT**
CHIEF MARSHAL	**THIRD APPELLANT**

AND

JEFFREY JOSEPH	**FIRST RESPONDENT**
LENNOX RICARDO BOYCE	**SECOND RESPONDENT**

Before The Rt Honourable **Mr Justice de la Bastide, President**
And the Honourables **Mr Justice Nelson**
Mr Justice Pollard
Mr Justice Saunders
Mme Justice Bernard
Mr Justice Wit
Mr Justice Hayton

Appearances
Mr Roger Forde QC and Mr Brian L St.Clair Barrow for the Appellants

Mr Maurice Adrian King and Ms Wendy Maraj for the First Respondent

Mr Alair Shepherd QC, Mr Douglas Mendes SC, Mrs Peta Gay Lee-Brace and Mr Philip McWatt for the Second Respondent

20th and 21st June 2006

JOINT JUDGMENT
of
The Rt Honourable Mr Justice de la Bastide
and The Honourable Mr Justice Saunders

Delivered the 8th day of November 2006

The factual background

[1] On the 10th April, 1999, Marquelle Hippolyte, a lad 22 years old, was brutally beaten to death with pieces of wood. Four men, all in their early twenties, were charged with his murder. At their trial, the Prosecution offered to accept pleas of guilty of manslaughter from the accused. Two of the men accepted that offer and pleaded guilty to the lesser offence. They were each sentenced to 12 years' imprisonment. The other two, the respondents Jeffrey Joseph ("Joseph") and Lennox Ricardo Boyce ("Boyce"), rejected the offer. They entered pleas of not guilty and were accordingly tried. On 2nd February, 2001 they were both found guilty of murder. Joseph had one previous conviction for robbery in 1995 for which he had been placed on two years' probation. Boyce had no criminal record. The mandatory sentence of death by hanging was imposed on each of them.

[2] Joseph and Boyce appealed their convictions to the Court of Appeal. On the 27th March, 2002, those appeals were dismissed. The men then began to make arrangements to appeal to the Judicial Committee of the Privy Council ("the JCPC"). This was indicated to His Excellency the Governor-General. While these arrangements were being made, the Barbados Privy Council ("the BPC") notified counsel for the men that it intended to meet to advise the Governor-General in relation to the exercise by him of his powers under section 78 of the Constitution. Section 78, which we will later set out, deals with the prerogative of mercy. Copies of certain documents which had been requested by the BPC were also sent to counsel. These included the antecedents of the convicted men, the respective reports of the trial judge, the Chaplain and the Prisons Superintendent, and a medical report.

[3] Correspondence then ensued between counsel and the Attorney-General with respect to whether the men had a right to be heard before the BPC and what level of funding should be made available to them for their legal representation before that body. Counsel were repeatedly invited to make written submissions to the BPC but they chose not to do so. Counsel's position was that unless a

commutation of the sentence was being recommended, it was inappropriate for the BPC to meet given that the men intended, and were actively preparing, to prosecute an appeal to the JCPC.

[4] The BPC met on the 24th June, 2002 and advised against commutation of the death sentences. Two days later, death warrants were read to the men. An order was obtained from the High Court staying their executions, and the appeal to the JCPC was eventually heard. That appeal addressed a single issue namely, whether the mandatory nature of the death penalty rendered that punishment unlawful and unconstitutional. On 7th July, 2004, by a 5-4 majority, the JCPC upheld the mandatory death penalty in Barbados and the respective appeals of Joseph and Boyce were dismissed[1].

[5] Shortly after the JCPC's dismissal of the appeal, lawyers for the condemned men informed the State's solicitors that the men intended to file an application before the Inter-American Commission on Human Rights ("the Commission"). On 3rd September, 2004, the men filed applications before that body seeking declarations that their rights under the American Convention on Human Rights ("ACHR") had been violated. The BPC was duly informed that these applications were pending. On the 13th September, 2004 the BPC met again, but merely to consider the Order in Council emanating from the conclusion of the proceedings before the JCPC. Upon the conclusion of its meeting, the BPC tendered its advice to the Governor-General that the death sentences should be carried out. On the 15th September, 2004, death warrants were again read to the men for their execution to be carried out on 21st September, 2004.

[6] On the 16th September, 2004 the men filed a motion before the High Court seeking declarations that their rights to life, security of the person, the protection of the law and their right not to be subjected to inhuman and degrading treatment were being infringed. They sought a commutation of the sentence of death

[1] *See: Boyce v The Queen [2005] 1 AC 400; (2004) 64 WIR 37*

imposed upon them. This motion was subsequently amended to add the complaint that they were treated unfairly and/or in a manner that was in breach of the principles of natural justice. The motion was consolidated with motions filed earlier in 2002 that had not been heard. Execution of the men was again stayed pending the determination of the motions. The Inter-American Court also issued provisional measures requiring Barbados to preserve the lives of the two men until the outcome of the petitions before the Inter-American system.

[7] The constitutional motions in the High Court were heard by Mr. Justice Greenidge. The most crucial of the issues argued was whether the BPC was obliged to await the outcome of the Commission's proceedings before advising the Governor-General in relation to the exercise by him of the prerogative of mercy. Greenidge, J. dismissed the motions in a judgment delivered by him on 22nd December, 2004. Joseph and Boyce successfully appealed this judgment to the Barbados Court of Appeal. The Attorney General now appeals the Court of Appeal's decision to this Court.

The judgments of the Courts below

[8] Greenidge, J. in dismissing the motions, held that the BPC was not required to await the conclusion of the Commission's proceedings before tendering its advice to the Governor-General. The learned judge also held that the BPC was an advisory and not a judicial entity and, noting that in 2002 the men had been afforded but had not availed themselves of an opportunity to make written representations to the BPC, he stated that there was no right for an applicant to make oral representations to that body. The judge also held that the men had no right to have their legal representation before the BPC funded at public expense and that the BPC had acted constitutionally on the occasions it had met as no appellate process had commenced before the first reading of the death warrant and, at the time of the second reading, the men had already exhausted their domestic appeals.

[9] The Court of Appeal (C. Williams, L. Waterman and P. Williams, JJA) first examined the question whether it was a breach of the men's rights to execute them prior to the receipt by the BPC of reports from the Inter-American Commission. The Court held that the Executive, as the treaty-making organ of government, could not ignore treaties which gave rights to citizens and to which the Executive had bound the State. The Court of Appeal agreed with the trial judge that the men had no right to an oral hearing before the BPC but held nonetheless that circumstances might arise where an oral hearing might be desirable. The Court saw no reason why the BPC should have held an oral hearing in this particular case and it rejected the contention that the men had been deprived of an opportunity to place representations before the BPC. The Court relied heavily on *Neville Lewis v The Attorney-General*[2] and on *R. (West) v Parole Board*[3]. The Court commented on the ouster clause contained in section 77(4) of the Constitution (set out later in this judgment at [23]). The Court held that the BPC was an independent quasi-judicial decision-making body and not just an advisory body having a consultative role. Section 24 of the Constitution - which provides for a right to apply to the High Court for redress for the contravention of the fundamental rights and freedoms - was not ousted by section 77(4) and it was for the Court to determine, on a true construction of the Constitution, whether there had been an error of jurisdiction or breach of natural justice or some misdirection which made the ouster clause inapplicable. The Court could in appropriate proceedings, it was said, either set aside the decision of the BPC or declare it to be a nullity. The Court of Appeal expressly refrained from giving a considered opinion on whether the men were entitled to adequate funding to facilitate their representation before the BPC. In determining the order that should be made, the Court reasoned that since in all the circumstances it was not realistic to expect that the men would conclude the international proceedings available to them within the time-table outlined in *Pratt and Morgan v The*

[2] *[2001] 2 AC 50; (1999) 57 WIR 275*
[3] *[2005] 1 WLR 350*

Attorney-General,[4] the proper order to make was to commute the death sentences and to substitute terms of imprisonment for life.

[10] The Court alluded to three other circumstances in arriving at its decision. Firstly, the undesirability of having the death warrants read to the men for a third time; secondly, the disproportion between the sentence imposed on the other two original co-accused on the one hand and the mandatory death sentences imposed on Joseph and Boyce on the other, and thirdly, the fact that the men had no access to funding to pursue effectively any further rights they might have, but instead were dependent on lawyers who acted *pro bono.*

The broad issues raised by this appeal and the approach of this Court

[11] Prior to the hearing of this appeal, the parties agreed that the broad issues raised in this appeal could be formulated in the following way:

> 1 Whether the exercise by the Governor-General of his powers under section 78 of the Constitution of Barbados is justiciable and if so, to what extent.
>
> 2 In what manner, if at all, may unincorporated international human rights treaties which give a right of access to international tribunals affect the rights and status of a person convicted of murder and sentenced to the mandatory punishment of death by hanging.
>
> 3 Whether section 24 of the Constitution authorises the Court to commute a death sentence and, if so, whether in all the circumstances it was appropriate for the Court of Appeal to take into account the matters that it did in deciding whether to commute or give other relief.

[12] Essentially, the court must determine whether the exercise of the prerogative of mercy is reviewable and whether the State is under an obligation to defer execution of a condemned man until the determination of any petition filed by him with an international body pursuant to the provisions of a human rights treaty

[4] *[1994] 2 AC 1; (1993) 43 WIR 340*

entered into and ratified by the State but not incorporated in domestic law by the legislature.

[13] After the respondents were convicted and sentenced, the Parliament of Barbados, on 5th September, 2002, passed the Constitution Amendment Act, No. 14 of 2002. This Act amended three sections of the Barbados Constitution. Two of these sections are germane to the issues involved in this judgment. Section 15 of the Constitution, which protects citizens from being subjected to torture or to inhuman or degrading punishment or other treatment, was amended by the insertion of a provision that none of the following can be held inconsistent with or in contravention of the section, namely, a)the imposition or execution of a mandatory sentence of death; b)any delay in carrying out a death sentence, and c)the holding of an incarcerated person in conditions prescribed by the Prisons Act or "otherwise practised in Barbados" before or at the date of the amendment. It was specifically provided that these amendments of section 15 of the Constitution did not apply to a person convicted and sentenced to death before 5th September, 2002. The respondents are therefore unaffected by these amendments.

[14] Section 78 of the Constitution was also amended to add three new sub-sections, (5), (6) and (7). These amendments concern the prerogative of mercy and, along with the original provisions dealing with the exercise of the prerogative will be set out in full later in this judgment.

[15] At the end of his submissions, when pressed, Mr. Roger Forde QC, counsel for the Crown, conceded that, even if this appeal by the Crown were successful, it would not be appropriate for this Court to re-impose the death penalty on Joseph and Boyce. This concession was in our view rightly made. Over five years had elapsed since their conviction and sentence and the Crown made no attempt to challenge the applicability to them of the time-limit for carrying out the death penalty laid down in *Pratt and Morgan*. Further, as we have noted, the amendments to section 15 of the Constitution do not apply in this case.

[16] It is therefore possible to dispose of this appeal without deciding whether it was lawful for the respondents to be executed before the BPC received and considered the decision of the Inter-American body. This issue was however dealt with in the courts below and was answered differently by Greenidge, J. and the Court of Appeal in their respective judgments. Moreover, it was identified by the parties as one of the major issues raised by the appeal to this court. Accordingly, we believe that the parties are entitled to receive our views on it. Moreover, the Court of Appeal relied for its decision on the JCPC's judgment in *Lewis*. It was right so to do because it was bound by that decision. We, on the other hand, can determine whether *Lewis* should or should not continue to be the law of Barbados. Although it will add considerably to the length of this judgment, we think it important to give a considered judgment on this issue.

[17] A determination of the questions in issue requires a re-examination also of other judgments of the JCPC now that this Court has replaced it as the final appellate court for Barbados. We are mindful of the fact that the establishment of the Caribbean Court of Justice has been accompanied by much speculation as to the approach we might take to JCPC judgments and in particular to those rendered in death penalty cases. It is just as well therefore that we begin by outlining some basic features of the approach we adopt in addressing these issues.

[18] The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference

between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly we reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados. *See: Bradshaw v The Attorney General*[5] .

[19] With the exception of the British Dependent territories, the laws of all the countries of the Commonwealth Caribbean make provision for capital punishment. We recognise that the death penalty is a constitutionally sanctioned punishment for murder and falls within internationally accepted conduct on the part of civilised States. The death penalty, however, should not be carried out without scrupulous care being taken to ensure that there is procedural propriety and that in the process fundamental human rights are not violated. Death is a punishment which is irrevocable. Amidst deep and continuing controversy over the death penalty, it must be acknowledged that several court decisions in the Caribbean over the last two or three decades have done much to humanise the law and to improve the administration of justice in this area.

[20] At the same time, courts have an obligation to respect constitutions and laws that retain capital punishment. Judges, like everyone else, are entitled to their personal views on the death penalty. But if a judge is so uncomfortable with imposing or sanctioning the imposition of a constitutionally permitted punishment that the judge cannot be dispassionate in resolving legal issues that bear on the subject, then the judicial function is compromised and public confidence in the administration of justice is undermined.

[5] *Appeals Nos. 31 and 36 of 1992 (Barbados) unreported at page 28 and [1995] 1 WLR 936 (PC); (1995) 46 WIR 62 (PC)*

Issue One
To what extent, if at all, is the exercise of the powers conferred under section 78 justiciable

[21] In the courts below, the condemned men challenged the fairness of the procedures adopted by the BPC in relation to them. They raised questions as to their right to an oral hearing before that body and complained of the failure of the BPC to await and consider the report of the Commission. The Crown on the other hand contended inter alia, that the prerogative of mercy was not justiciable.

[22] Sections 76 to 78 of the Constitution establish the Barbados Privy Council, prescribe its composition, define the ambit of its powers, and address broadly the prerogative of mercy. The following are relevant extracts from these sections:

> **76.** (1) There shall be a Privy Council for Barbados which shall consist of such persons as the Governor-General, after consultation with the Prime Minister, may appoint by instrument under the Public Seal.
>
> (2) The Privy Council shall have such powers and duties as may be conferred or imposed upon it by this Constitution or any other law.
>
> (3) ….
>
> **77.** (1) The Privy Council shall not be summoned except by the authority of the Governor-General acting in his discretion.
>
> (2) The Governor-General shall, so far as is practicable, attend and preside at all meetings of the Privy Council.
>
> (3) Subject to the provisions of this Constitution, the Privy Council may regulate its own procedure.
>
> (4) The question whether the Privy Council has validly performed any function vested in it by this Constitution shall not be inquired into by any court.
>
> **78.** (1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf—
>
> *(a)* grant to any person convicted of any offence against the law of Barbados a pardon, either free or subject to lawful conditions;
>
> *(b)* grant to any person a respite, either indefinite or for a specified period, from the execution of any punishment imposed on that person for such an offence;
>
> *(c)* substitute a less severe form of punishment for that imposed on any person for such an offence; or
>
> *(d)* remit the whole or part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.
>
> (2) The Governor-General shall, in the exercise of the powers conferred on him by subsection (1) or of any power conferred on him by any other law to remit any penalty or forfeiture due to any person

other than the Crown, act in accordance with the advice of the Privy Council.

(3) Where any person has been sentenced to death for an offence against the law of Barbados, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him on the exercise of the powers conferred on him by subsection (1) in relation to that person.

(4) The power of requiring information conferred upon the Governor-General by subsection (3) shall be exercised by him on the recommendation of the Privy Council or, in any case in which in his judgment the matter is too urgent to admit of such recommendation being obtained by the time within which it may be necessary for him to act, in his discretion.

(5) A person has a right to submit directly or through a legal or other representative written representation in relation to the exercise by the Governor-General or the Privy Council of any of their respective functions under this section, but is not entitled to an oral hearing.

(6) The Governor-General, acting in accordance with the advice of the Privy Council, may by instrument under the Public Seal direct that there shall be time-limits within which persons referred to in subsection (1) may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question; and, where a time-limit that applies in the case of a person by reason of such a direction has expired, the Governor-General and the Privy Council may exercise their respective functions under this section in relation to that person, notwithstanding that such an appeal or consultation as aforesaid relating to that person has not been concluded.

(7) Nothing contained in subsection (6) shall be construed as being inconsistent with the right referred to in paragraph *(c)* of section 11[ie the right to the protection of the law].

[23] Sub-sections 5, 6 and 7 of section 78 were introduced by the Constitution Amendment Act No. 14 of 2002. Our perusal of the relevant Hansard, produced by the respondents' counsel without objection from the other side, confirms that these amendments were prompted by dissatisfaction on the part of the people of Barbados with certain decisions of the JCPC and the resolve of the Barbados Parliament to restrict at least, if not negate, the effects of these decisions. The respondents were convicted and sentenced before the amendments came into force but it was submitted in writing on their behalf that the new sub-sections applied to them. It has not however proved necessary for us to rule on this point and accordingly we decline to do so.

Reviewability of the prerogative of mercy

[24] Mr. Forde argued, on behalf of the Crown, that section 78 had codified, preserved and institutionalised the prerogative of mercy. He submitted that the section ought not to be regarded as a mere statutory power subject to judicial review. There is of course authority for the proposition that placing a prerogative power in a statute renders the body exercising the power subject to judicial review. In *C. O. Williams Co. Ltd. v. Blackman and another*[6], Lord Bridge of Harwich stated:

> "It is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function may have previously been exercised is superseded and, so long as that statute remains in force, the function can only be exercised in accordance with its provisions".

[25] More recently, in *Mowit vs. The DPP of Mauritius*[7], their Lordships accepted as the "ordinary if not the invariable rule", the observation of Lloyd LJ in *R v Panel on Take-overs and Mergers, Ex p Datafin PLC*[8], that "If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review".

[26] The decision of the House of Lords in *Re Council of Civil Service Unions*[9] ("the CCSU case") marked a defining point in the approach of the courts to the judicial reviewability of prerogative powers. In the distant past, courts and text-book writers regarded the acts of the sovereign as 'irresistible and absolute'. On this basis courts confined themselves merely to an inquiry into the existence and extent of prerogative powers. Their Lordships' speeches in the CCSU case emphatically endorsed the break with this approach. The modern view is that courts today will review a prerogative power once the nature of its subject-matter renders it justiciable. What is now pivotal to a determination of the reviewability of a prerogative power is not so much the source of the power but rather its subject-matter. In the CCSU case, Lord Fraser stated at *page 399E* :

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[6] *(1994) 45 WIR 94 at page 99J; [1995] 1 WLR 102 @ 108*
[7] *[2006] UKPC 20*
[8] *[1987] QB 815 at page 847*
[9] *[1985] AC 374*

> "…whatever their source, powers which are defined, either by reference to their object or by reference to procedures for their exercise, or in some other way, and whether the definition is expressed or implied, are in my opinion normally subject to judicial control to ensure that they are not exceeded. By "normally" I mean provided that considerations of national security do not require otherwise".

[27] Lord Diplock's opinion was that procedural impropriety could well be a ground for judicial review of a decision made under powers of which the ultimate source was the prerogative. At *page 410C-D,* after noting that prerogative powers derive their source from the common law, Lord Diplock saw:

> "… no reason why simply because a decision-making power is derived from a common law and not a statutory source it should *for that reason only* be immune from judicial review." (his emphasis)

[28] In *Regina v Secretary for the Home Dept, ex parte Fire Brigades Union*[10], Lord Browne-Wilkinson, in the House of Lords, reaffirmed that:

> "judicial review is as applicable to decisions taken under prerogative powers as to decisions taken under statutory powers save to the extent that the legality of the exercise of certain prerogative powers [e.g. treaty making] may not be justiciable".

[29] Lord Roskill, in the *CCSU* case, expressed the view that the prerogative of mercy, like treaty-making, fell into a special class of prerogative powers that were unreviewable. Ten years before that, Lord Diplock, delivering the advice of the JCPC in *de Freitas v Benny*[11] had rejected submissions that a condemned man was entitled to be shown the material that was to be placed before the Advisory Committee on the prerogative of mercy and to be heard by that committee. The JCPC held then that "a convicted person has no legal right even to have his case considered…"

[30] Citing *de Freitas v Benny* and the speech of Lord Roskill in the *CCSU* case, Mr. Forde argued forcefully that mercy was not the subject of legal rights and that the

[10] *(1995) 2 AC 553* at *page 553C-D;*
[11] *(1976) AC 239; (1975) 27 WIR 318*

prerogative of mercy was therefore not subject to review by the courts. The decision in *de Freitas v Benny* was followed by the JCPC as recently as 1996 in *Reckley v Minister of Public Safety and Immigration*[12]. It must be borne in mind however that, as Lord Diplock himself acknowledged in the *CCSU* case, the law relating to judicial control of administrative action is a developing one. Indeed, Lord Diplock prefaced his judgment in the *CCSU* case by noting that this area of the law had been "virtually transformed" in the three decades immediately preceding. It should come as no surprise that, in the thirty years since *de Freitas v Benny*, ongoing development of this area of the law should have cast a different light upon Lord Diplock's famous aphorism in *de Freitas* that mercy begins where legal rights end. In particular, the modern approach to human rights with its emphasis on procedural fairness was obviously capable of impacting upon the reviewability of the prerogative of mercy.

[31] In light of these developments, the exercise of the prerogative of mercy has fallen under greater scrutiny, especially in those states whose Constitutions permit, or specifically sanction, retention of the mandatory death penalty for the crime of murder. The occasion on which the prerogative of mercy is exercised is the final, and in mandatory death penalty regimes, the only, opportunity a convicted murderer has to point to the particular circumstances of his case and to argue by reference to them that he should not be executed. Whether he is or is not ultimately put to death by the State depends not just on the substantive exercise of the prerogative of mercy but also on the procedures governing and leading up to its exercise. The quality and nature of the advice given to the Governor-General bear a direct relationship to the quality and nature of the process followed by the BPC in coming to its decision.

[32] In spite of *de Freitas v Benny*, the JCPC has over the years handed down decisions that are inconsistent with the supposed immunity of the exercise of the

[12] *(1996) AC 527; (1996) 47 WIR 9*

prerogative of mercy from judicial scrutiny. The broad view contended for by Mr. Forde QC, that a condemned man has no legal rights, does not, for example, sit well with the decisions in *Abbott v The Attorney-General*[13], where the JCPC observed that due process of law must continue to be observed in the case of a condemned man, and *Guerra v Baptiste*[13] where the Board held that justice and humanity dictate that to execute a man without giving him reasonable notice of the time of his execution, would constitute cruel and unusual punishment contrary to section 5(2)b of the Trinidad & Tobago Constitution.

[33] In *Burt v Governor-General*[14], Cooke P, delivering the judgment of the New Zealand Court of Appeal, did not regard as contrary to principle the claim that courts should be prepared to review the exercise of the prerogative of mercy. After a review of the relevant authorities, including the House of Lords decision in the *CCSU* case, Cooke P concluded at *page 9A-B* that "… it would be inconsistent with the contemporary approach to say that merely because it is a pure and strict prerogative power, its exercise or non-exercise must be immune from curial challenge".

[34] Closer to home, Fitzpatrick JA, in *Yassin v Attorney-General of Guyana*[15], with respect to the prerogative of mercy, held at *page 117A* that:

> "In this case justiciability concerning the exercise of the prerogative of mercy applies not to the decision itself but to the manner in which it is reached. It does not involve telling the Head of State whether or not to commute. And where the principles of natural justice are not observed in the course of the processes leading to its exercise, which processes are laid down by the Constitution, surely the court has a duty to intervene, as the manner in which it is exercised may pollute the decision itself".

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[13] *(1979)32 WIR 347; [1979] 1 WLR 1342*
[14] *[1996] AC 397; (1995) 47 WIR 439*
[15] *[1993] 4 LRC 1*
[15] *(1996) 62 WIR 98*

[35] In *R v Secretary of State for the Home Department, Ex parte Bentley*[16] the Divisional Court, undeterred by the view expressed by Lord Roskill in the *CCSU* case that the exercise of the prerogative of mercy was not reviewable, stated:

> "If, for example, it was clear that the Home Secretary had refused to pardon someone solely on the grounds of their sex, race or religion, the courts would be expected to interfere and, in our judgment, would be entitled to do so".

[36] In *Lewis v The Attorney General of Jamaica,* where provisions of the Jamaica Constitution similar to those of Barbados were construed, the JCPC finally put the matter to rest. Their Lordships decided that *de Freitas v Benny* and *Reckley* should be overruled. Lord Hoffmann, a member of the *Reckley* panel, dissented but his dissent on this subject addressed itself more to the principle that the Board should not overrule a considered decision of its own so recently given. In *Lewis*, the JCPC held that the processes involved in the exercise of mercy were not beyond review by the courts. The judgment stated at *page 76C* that*:*

> "On the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body. This is the last chance and insofar as it is possible to ensure that proper procedural standards are maintained that should be done. Material may be put before the body by persons palpably biased against the convicted man or which is demonstrably false or which is genuinely mistaken but capable of correction. Information may be available which by error of counsel or honest forgetfulness by the condemned man has not been brought out before. Similarly, if it is said that the opinion of the Jamaican Privy Council is taken in an arbitrary or perverse way … or is otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate".

[37] It is instructive to note that their Lordships regarded the act of clemency as part of the whole constitutional process of conviction, sentence and the carrying out of the death sentence. This mirrored the view of Telford Georges, P. in *Lauriano v*

[16] *[1994] QB 349*

Attorney-General of Belize[17] where, in response to counsel's submissions on the constitutionality of the mandatory death penalty, the learned President, at page 91C-D noted, in reference to the section of the Belize Constitution establishing the Belize Advisory Council, that:

> "It is artificial to attempt to view the mandatory sentence which the courts must impose separate and apart from the constitutional provisions for its review enshrined in section 54 of the Constitution. This process can supply the necessary flexibility. The character and record of the offender and the circumstances of the particular offence are open to consideration by the council".

[38] This notion that clemency may be regarded as linked to the sentencing process was advanced before the JCPC decided in *Reyes v The Queen*[18] that the mandatory death penalty infringed the constitutional guarantee against inhuman treatment. One of the central planks upon which the decision in *Reyes* rested was that the individualisation of a sentence is a matter for the judicial branch of Government and not for an Executive body. It is debatable therefore whether some of the ideas expressed in *Lauriano* and in *Lewis* with regard to the grant of clemency would retain the same force in those states in which the mandatory death penalty has been ruled unconstitutional and judges now have a discretion as to whether or not to impose a death sentence on a convicted murderer. There certainly is a good basis for arguing that the courts should be more willing to review the exercise of the prerogative of mercy in a system in which the death penalty is mandatory than in one in which it is discretionary.

[39] Mr. Forde argued that this Court should decline to follow this aspect of the decision in *Lewis* and should instead, in effect, reinstate as the law of Barbados the decisions in *de Freitas* and *Reckley*. Mr. Mendes SC submitted on behalf of the respondents that, even if we thought that *Lewis* was wrong on this or any of the other points it decided, we should nevertheless not differ from it in all the circumstances, even though it was open to us to do so. He proceeded to outline in

[17] *(1995) 47 WIR 74*
[18] *[2002] 2 AC 235; (2002) 60 WIR 42*

great detail what those circumstances were. It is unnecessary for us to treat here with these very carefully prepared submissions of Mr. Mendes because we are firmly of the view that the decision in *Lewis* on this point is correct. We agree with those who regard the power to confirm or commute a death sentence, particularly a mandatory one, as far too important to permit those in whom it is vested freedom to exercise that power without any possibility of judicial review even if they commit breaches of basic rules of procedural fairness. Rooted though they be in language and literature, conceptual differences between mercy and justice cannot justify denying to a man under sentence of death, an enforceable right to have the decision whether he is to live or die arrived at by a procedure which is fair.

[40] Mr. Forde also urged us, in his written submissions, to give effect to the ouster clause contained in section 77(4) of the Constitution. That clause, in our view, provides no comfort to the Crown. Ever since the House of Lords decision in *Anisminic v Foreign Compensation Commission*[19], courts have made it clear that they will not be deterred by the presence of such ouster clauses from inquiring into whether a body has performed its functions in contravention of fundamental rights guaranteed by the Constitution, and in particular the right to procedural fairness. See: *Thomas v Attorney-General*[20], *Attorney-General v Ryan*[21], *Lauriano v Attorney-General*[22] and *Ulufa'alu v Attorney-General*[23].

[41] The Barbados Court of Appeal held, correctly in our view, that the BPC was a decision-making body and that the Court may, in appropriate proceedings, either set aside a decision of that body or declare it to be a nullity. There was nothing to prevent the Court from examining the procedure adopted by the BPC and testing it for procedural fairness by reference to the rules of natural justice, and, for compliance with the fundamental rights and freedoms recognised in the

[19] *[1969] 2 AC 147*
[20] *(1981) 32 WIR 375 at 393-394; [1982] AC 113*
[21] *[1980] AC 718 at 730*
[22] (*supra) at 80F, 90-91*
[23] *[2005] 1 LRC 698 at 708, para 33*

Constitution. If the procedure adopted failed that test, then there was a breach of the respondents' right to the protection of the law, one of the fundamental human rights enumerated and recognised in section 11 of the Constitution. The right of an aggrieved person to approach the Court for redress and the power of the Court to grant such redress, are expressly conferred by section 24 of the Barbados Constitution, but only in respect of breaches that run foul of the provisions of sections 12 to 23 of the Constitution. We do not, however, accept Mr. Forde's submission that the Court is powerless to remedy a breach of the constitutionally recognised right to the protection of the law if that breach does not involve a contravention of any of the sections numbered 12 to 23. While this issue is discussed more fully later in this judgment at [57] – [66], it is our view that the Court quite independently of section 24, has an implied or inherent power to give redress for such a violation.[24] The question, therefore, is whether there was such a breach in this case and this leads us to a consideration of the second issue.

Issue Two
The effect of unincorporated international human rights treaties on the carrying out of a death sentence

[42] The treaties being referred to under this issue are treaties that have been ratified by the Executive but not implemented by Parliament. It was pursuant to a treaty of this type that the respondents, having completed all their domestic appeals, were at liberty to petition international human rights bodies and complain to them about alleged violations by Barbados of its treaty obligations. They both opted to file such petitions. After judgment was reserved in this appeal, we were informed by the respondents' counsel that their petitions lodged with the Inter-American Commission for Human Rights, had been referred to the Inter-American Court for adjudication.

[43] The question which confronted the Court of Appeal was whether there was an obligation on the part of the BPC to await the processing of those petitions so that

[24] *See: Maharaj v A.G. of Trinidad & Tobago (No. 2) [1979] AC 385; (1978) 2 AC 228 and Gairy v A.G. of Grenada (1999) 59 WIR 174; [2002] 1 AC 167*

it could take into account the report of the Commission as part of its deliberative process. Put another way, is a State required to defer execution of a convicted murderer until the man has completed any application he has made to an international body pursuant to a ratified treaty? The Crown took the position that the Executive was under no obligation to wait; that, on this point, *Lewis* was wrongly decided and that this Court should overturn *Lewis*. The respondents submitted that the Executive was under an obligation to wait; that before the BPC tendered its advice to the Governor-General, it was obliged to consider any report made by the international body and that, on this point as well, *Lewis* was rightly decided.

[44] These questions bring into focus a wide range of matters which we feel we should address. We propose therefore:

a) to discuss the JCPC decision in *Pratt* and outline how, taken together with the decision in *Lewis,* an unsatisfactory dilemma has been created;
b) to consider the relationship between domestic law and unincorporated treaties;
c) to consider the enforcement of the right of a condemned man to the protection of the law, and
d) to explore a body of Commonwealth case law with a view to ascertaining how Courts have approached the foregoing issues, and, in particular, to examine the judgments of the JCPC that specifically address the position of a condemned man seeking to take advantage of provisions in a ratified but unincorporated human rights treaty.

The dilemma created by the decisions in Pratt & Morgan and Lewis

[45] *Pratt v The Attorney General of Jamaica*[25], a decision of the JCPC, delivered in 1993, had a seismic effect on capital punishment jurisprudence in the Commonwealth Caribbean. The judgment consolidated the appeals of two convicted murderers from Jamaica, Earl Pratt and Ivan Morgan. The case concerned delay in the execution of persons on death row and the constitutional consequences of such delay. In overruling its own decision given ten years before

[25] *[1994] AC 1; (1993) 43 WIR 340*

in *Riley v The Attorney General of Jamaica*[26], an expanded seven-member panel of the JCPC unanimously held that, where execution was delayed for more than five years after sentence, there would be strong grounds for believing that execution after such delay infringed the Constitution's prohibition against inhuman or degrading punishment. In other words, if a convicted murderer were to be executed, he should be executed as soon as lawfully possible after sentence. To have him linger on death row indefinitely, not knowing what his ultimate fate would be, was constitutionally impermissible. A period of five years following sentence was established as a reasonable, though not by any means inflexible, time-limit within which the entire post-sentence legal process should be completed and the execution carried out. If execution was not carried out within that time-frame, there was a strong likelihood that the court would regard the delay as amounting to inhuman treatment and commute the death sentence to one of life imprisonment. The JCPC arrived at the five-year standard by reasoning that an efficient justice system must be able to complete its entire domestic appellate process within two years and that eighteen months could safely be set aside for applications to international bodies to which condemned prisoners might have rights of access.

[46] The radical nature of the decision in *Pratt*, the suddenness with which it was sprung, the apparent stringency of the time-period stipulated, the unpreparedness of the authorities to cope in an orderly manner with the far-reaching consequences of the decision, all of these factors raised tremendous concern on the part of Governments and members of the public in the Caribbean. The decision caused disruption in national and regional justice systems. Its effect was that, in one fell swoop, all persons on death row for longer than five years were automatically entitled to have, and had, their sentences commuted to life imprisonment. In Jamaica there were 105 such prisoners, in Trinidad & Tobago 53, and in Barbados 9. Justice systems were required to make sharp adjustments to their routines. Some countries were compelled to place on indefinite hold the hearing of all other

[26] *[1983] 1 AC 719;*

appeals, both civil and criminal, in order to concentrate on those appeals that were in danger of running foul of the *Pratt & Morgan* guidelines.

[47] Now that the initial dislocation has generally abated, it must be acknowledged that prior to *Pratt* some States countenanced an unacceptably lax approach to the processing of their criminal appeals and a valuable consequence of the *Pratt & Morgan* decision is that it has forced justice systems in the Commonwealth Caribbean to deal with criminal appeals more efficiently and expeditiously. We respectfully endorse without reservation the proposition that the practice of keeping persons on death row for inordinate periods of time, is unacceptable and infringes constitutional provisions that guarantee humane treatment. In this respect, *Pratt* has served as an important reminder to all that the Constitution affords even to persons under sentence of death, rights that must be respected and that the true measure of the value of those rights is not just how well they serve the law-abiding section of the community, but also, how they are applied to those for whom society feels little or no sympathy.

[48] We have previously in this judgment referred several times to *Neville Lewis v The Attorney General.* In *Lewis*, the JCPC decided *inter alia*, that, where a State has ratified a treaty conferring on individuals the right to petition an international human rights body, a person sentenced to death by a court of that State is entitled by virtue of his constitutional right to the protection of the law, to require that the sentence of death passed on him be not carried out until his petition to the human rights body has been finally disposed of and the report of that body is available for consideration by the State authority charged with exercising the prerogative of mercy .

[49] We shall comment further in due course on the reasoning underpinning this aspect of the *Lewis* decision. It is sufficient to state here that *Pratt* and *Lewis* have the combined effect of creating a dilemma since a State Party to a human rights treaty like the ACHR has no control over the pace of proceedings before the relevant

international human rights body and the standard prescribed in *Pratt* has come to be applied with guillotine-like finality. A State, for example, desirous of making good its pledge under Article 4(6) of the ACHR not to execute a prisoner while his petition is pending, may find that when the period of five years after conviction elapses, the international proceedings before the Commission or the Inter-American Court have not yet been completed. The result is that the State may ultimately through no fault of its own be unable to carry out the constitutionally sanctioned death penalty because of the conjoint effect of the decisions in *Pratt and Morgan* and *Lewis*. The sense of frustration on the part of regional governments in this Catch–22 situation is well illustrated in the following exchange between the Attorney-General of Barbados and the President of the Court of Appeal during the hearing of this case before that court:

ATTORNEY-GENERAL: My Lords, the Government of Barbados does not disregard its international treaty obligations. The Executive of Barbados does not take lightly its international treaty obligations. But what confronts the State of Barbados and what confronts Your Lordships today is a dilemma that is one perhaps that can be described appropriately in other jurisdictions as Hobson's choice; in our colloquial terms as being between the devil and the deep blue sea. That is the truth of the matter. That, were we as an Executive, to willingly agree that we should wait until the Inter-American system deliberates, knowing full well that even now the State of Barbados is involved in a matter since October 2002 and only in March 2004 was it referred to the Inter-American Court…. Knowing full well that even a year later, not much more has happened, and I say to Your Lordships that what allowing them - - -

WILLIAMS, P. JA: So the five years will run out.

ATTORNEY-GENERAL: Thank you, My Lord. So that is the problem. That we face coming into breach, into

> collision with the very same Barbados Constitution that we are bound to uphold…

[50] This "impossible position" of the Government, as Lord Goff described it in *Thomas v Baptiste*[27], gives a certain poignancy to this second issue. Of course, for the respondents, the issue has now become moot because the time permitted by *Pratt* for their execution has already expired and the commutation of their death sentences is no longer challenged. However, the matter is too important and too contentious to shelve on that basis. It was fully argued in the courts below and before us and the parties are entitled to have our ruling on it. Save to the extent that any recent statute may have affected its operation, *Lewis* currently represents the law of Barbados and the consequences and implications of that decision are important for Barbados. The law here is still evolving and there is every likelihood that this broad area of the law, namely, the legal impact of unincorporated international treaties upon the domestic body politic, will assume increasing importance given the tendency towards globalisation in the regulation of matters such as crime, trade, human rights and the protection of the environment, to mention but a few.

The relationship between domestic law and unincorporated treaties

[51] The State of Barbados ratified the ACHR on 5th November, 1981. Barbados did so with reservations but those reservations are not material to this judgment. Article 4 of the ACHR recognises the right of States to impose capital punishment for the most serious crimes but the Convention, like most other human rights treaties[28], discourages use of the death penalty. The penalty is not to be extended to crimes to which it does not presently apply. *See*: Art. 4(2). It shall not be re-established in States that have abolished it. *See*: Art 4(3). In *Hilaire v Trinidad & Tobago*[29], the Inter-American Court ruled that mandatory death sentences fall foul of the right to life. The Court has also declared that "without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its

[27] *[2002] 2 A.C.1; (2002) 54 WIR 387*
[28] *See for example the International Covenant on Civil and Political Rights*
[29] *See*: *Case of Hilaire, Constantine and Benjamin et al. v Trinidad and Tobago*, *Judgment of June 21, 2002, Series C 94*

application and scope, in order to reduce the application of the penalty and to bring about its gradual disappearance".[30]

[52] Article 4(6) of the ACHR is relevant to the case for the respondents. It states that:

> "Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. ***Capital punishment shall not be imposed while such petition is pending decision by the competent authority***" (emphasis added).

[53] The ACHR establishes the Inter-American Commission ("the Commission") and the Inter-American Court on Human Rights. Any citizen of a State Party may lodge a petition with the Commission complaining of a violation of the Convention. *See: Art. 44.* Such a petition is not admissible unless, inter alia, the petitioner has exhausted all remedies under domestic law and the petition is lodged within six months from the date of dismissal of the petitioner's final domestic appeal. *See: Art. 46*. Either the Commission or a State Party may refer a petition to the Inter-American Court for adjudication. By Article 68, the States Parties undertake to comply with the judgment of the court in any case to which they are parties.

[54] Some Commonwealth Caribbean countries, including Barbados, have also ratified the International Covenant on Civil and Political Rights (ICCPR) and also the Optional Protocol to the ICCPR. Like the ACHR, the ICCPR defines the fundamental rights that should be enjoyed by nationals of the States Parties. These rights include "the inherent right to life". Anyone sentenced to death has the right to seek pardon or commutation of the sentence which may be granted in all cases. The Optional Protocol imposes upon States Parties the obligation to recognise the competence of the Committee, an organ of the treaty, to receive and consider communications from individuals subject to its jurisdiction, who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. *See: Art. 1*. Subject to the provisions of Article 1, individuals who

[30] *See*: *Advisory Opinion (OC-3/83) delivered on 8th September, 1983.*

claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration. *See: Art. 2.*

[55] In states that international lawyers refer to as 'dualist', and these include the United Kingdom, Barbados and other Commonwealth Caribbean states, the common law has over the centuries developed rules about the relationship between domestic and international law. The classic view is that, even if ratified by the Executive, international treaties form no part of domestic law unless they have been specifically incorporated by the legislature. In order to be binding in municipal law, the terms of a treaty must be enacted by the local Parliament. Ratification of a treaty cannot *ipso facto* add to or amend the Constitution and laws of a State because that is a function reserved strictly for the domestic Parliament. Treaty-making on the other hand is a power that lies in the hands of the Executive. *See*: *J H Rayner (Mincing Lane) Ltd v Dept of Trade & Industry*[31]. Municipal courts, therefore, will not interpret or enforce the terms of an unincorporated treaty. If domestic legislation conflicts with the treaty, the courts will ignore the treaty and apply the local law. *See*: *The Parlement Belge*[32].

[56] It does not at all follow that observance of these rules means that domestic courts are to have absolutely no regard for ratified but unincorporated treaties. The classic view is that the court will presume that the local Parliament intended to legislate in conformity with such a treaty where there is ambiguity or uncertainty in a subsequent Act of Parliament. In such a case, a municipal court will go only so far as to look at the treaty in order to try to resolve the ambiguity. *See*: *R v Home Secretary, ex parte Brind*[33] and *R v Chief Immigration Officer, ex parte Salamat Bibi*[34]

[31] *1990] 2 AC 418 at page 476; See also Thomas v Baptiste [2002] 2 A.C.1@ p 23 A-D per Lord Millett*
[32] *(1879) 4 PD 129*
[33] *[1991] 1 A.C. 696*
[34] *[1976] 1 W.L.R. 979 @ 984 per Lord Denning, MR*

Enforcement of a condemned man's right to the protection of the law

[57] Mr. Forde submitted that in accordance with *de Freitas v Benny*, no constitutional rights of the respondents were infringed or at risk; that any entitlements the men might have were neither rights that could be enforced by virtue of section 24 of the Constitution nor indeed, rights for which a court could give constitutional relief; that even if the BPC in advising on the prerogative of mercy while the international proceedings were still pending had adopted a procedure in relation to the condemned men that was deemed to be unfair, the Court of Appeal could not properly commute the death sentences.

[58] These submissions call into question the nature and extent of the rights to which a condemned man is entitled. The particular right of the condemned man most heavily relied on by the respondents, was the right to the protection of the law. That right is referred to in section 11 of the Barbados Constitution. Section 11 is part of Chapter 3, the Chapter in the Constitution devoted to the protection of fundamental rights and freedoms of the individual. Chapter 3 embraces sections 11 through 27. Section 11 which is in the nature of a preamble, states the rights in the following manner:

> "**11.** Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
> *(a)* life, liberty and security of the person;
> *(b)* protection for the privacy of his home and other property and from deprivation of property without compensation;
> (c) ***the protection of the law***; and
> *(d)* freedom of conscience, of expression and of assembly and association,
> the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest" (our emphasis).

[59] Sections 12 to 23 of the Constitution (which we will refer to as 'the detailed sections') contain specific provisions for the enforcement of rights which either correspond exactly with those enumerated in section 11 or may be regarded as

corollaries or components of them. By way of illustration, section 12 is expressly concerned with the right to life and section 16, with the right not to be deprived of property without compensation, both of which are referred to in section 11. On the other hand, the protection afforded by section 14 against slavery or forced labour, and by section 15 against torture or inhuman and degrading punishment or treatment, is not linked as a matter of language to any of the rights enumerated in section 11. But those rights are in substance connected with the liberty and security of the person, which are included in the rights listed in section 11 (a). In the case of the right to the protection of the law, the only express link between that right and any of the detailed sections is provided by the marginal note to section 18 which reads: 'Provisions to secure protection of law'. It is important to note that the pattern followed in these detailed sections is that each section normally begins with a prohibition against conduct which would violate the right or freedom that is being protected, followed by a fairly detailed exposition of the exceptions which the law may create to that prohibition. In other words, there is a broad statement of the right or freedom followed by a number of limitations on the protection afforded that right or freedom. Those exceptions or limitations serve to put into more specific and concrete terms the qualifications contained in section 11 to the effect that persons in Barbados are entitled to the fundamental rights and freedoms enumerated "subject to respect for the rights and freedoms of others and for the public interest". It is not unexpected, therefore, that the redress which section 24 of the Constitution provides for violation of these fundamental rights and freedoms, should be structured so as to take account of the exceptions and limitations contained in the detailed sections. Thus, the jurisdiction conferred by section 24 on the High Court to adjudicate allegations that any particular right has been, is being or is likely to be contravened and to fashion appropriate remedies for any contravention or likely contravention that it finds, is limited to cases which involve a contravention of one or other of the detailed sections. The question which arises is whether the court's power to enforce the right to protection of the law, and to grant a remedy for its breach, is limited to contraventions of section 18, that being the only one of the detailed sections

which by its subject matter and its marginal note is linked to the protection of the law.

[60] In a fundamental respect, section 18 is different from the other detailed sections. In each of the others, the Constitution deals comprehensively with the relevant right or freedom. Where the extent or content of the right requires elucidation, that is provided (see for example section 19), and in all cases, any limitations on the enjoyment of the right are set out quite fully. There is, therefore, no scope for enforcement of the relevant right outside the four corners of the detailed sections. In the case of the right to the protection of the law, however, it is clear that section 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that section 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.

[61] The Constitutions of both Jamaica and the Bahamas contain provisions which mirror exactly sections 11 to 24 of the Barbados Constitution though the numbering of these sections differs from one constitution to another. In the Jamaican case of *Lewis,* the right to protection of the law was held to be breached

by the intervention of the Executive before the international process was completed. There is nothing in section 18 nor in its Jamaica equivalent, which expressly prohibits such an intervention, though no one doubts that on the premise which the JCPC accepted, namely that access to the international body had been made part of the domestic justice system, the attempt by the State to hang Lewis before completion of the international process was rightly held to be a breach of his right to the protection of the law. Their Lordships in that case moreover do not appear to have thought that this was a breach for which there was no constitutional remedy even though it did not involve any contravention of section 20 of the Jamaican Constitution which corresponds with section 18 of the Barbados Constitution.

[62] The wide scope of the protection of the law can be demonstrated by reference to the authorities. In *Ong Ah Chuan v Public Prosecutor*[35] for example, Lord Diplock noted that:

> "…a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law," "equality before the law," "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution".

[63] More recently, in *Thomas v Baptiste*[36], Lord Millett, in reference to the expression "due process of law" found in the Trinidad & Tobago Constitution, stated at page 8:

> "In their Lordships' view, "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law; see the illuminating judgment of Phillips JA in

[35] *[1981] A.C. 648*
[36] *[2000] 2 AC 1 @ 22; (2002) 54 WIR 387 @ 421*

> *Lasalle v Attorney-General (1971) 18 WIR 379,* from which their Lordships have derived much assistance
>
> The clause thus gives constitutional protection to the concept of procedural fairness…".

[64] We are of the view that Lord Millett's observations on the meaning of the word "law" in the context of the phrase "due process of law" are equally applicable to the phrase "protection of the law". Procedural fairness is an elementary principle permeating both concepts and therefore, pursuant to section 11, a condemned man has a constitutional right to procedural fairness as part of his right to protection of the law. Correspondingly, the courts have an inherent jurisdiction, and a duty, to grant an appropriate remedy for any breach of that right.

[65] Given the similarities identified between the Constitutions of the Bahamas and Barbados, we would respectfully adopt the view of Lord Goff, speaking for the JCPC in *Reckley v Minister of Public Safety (No. 2)*[37], an appeal from the Bahamas, when he stated at page 19B that:

> "…After his rights of appeal are exhausted, he [i.e. a convicted murderer] may still be able to invoke his fundamental rights, and in particular his right to the protection of the law, even after he has been sentenced to death. If therefore it is proposed to execute him contrary to the law, … he can apply to the Supreme Court for redress under article 28 of the Constitution".

[66] If a court were of the view that a condemned man's right to the protection of the law was or was likely to be infringed by procedures of the BPC that were deemed unfair, the appropriate relief normally would be to quash the decision of the BPC to give the Governor-General the advice which it did and to stay any impending execution that was based on that advice. In the case of the respondents however, the Court of Appeal was entitled to commute the sentences because it rightly anticipated that, in the circumstances then existing, it would have been impossible for the international process to be completed before expiry of the five year deadline established by *Pratt*.

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[37] *(1996) 47 WIR 9 at 19B; [1996] 1 AC 527 at 540 C-D*

Exploring the case law

[67] The Barbados Court of Appeal was obliged to consider the current law regarding the position of a condemned man who has filed a petition with an international body as determined in *Lewis*. Since *Lewis* followed and extended *Thomas v Baptiste*, these two cases must be discussed together. In *Thomas*, the question arose in the following way. The Government of Trinidad & Tobago had issued a document entitled 'Instructions relating to applications from persons under sentence of death'. These Instructions established successive time-limits within which the petitions of condemned men to the Commission and to the UNHRC were required to be processed. The appellants, convicted murderers, having exhausted their domestic appeals, petitioned the Commission. Before the Commission's proceedings were concluded, death warrants were read to the appellants. The appellants filed constitutional motions. Before the Board, the main issue was whether the appellants had a constitutional right not to be executed while their petitions before the Commission were pending.

[68] Lord Millett, on behalf of a majority of 3 to 2, held that the Instructions were unlawful because they were disproportionate in that they "curtailed the petitioners' rights further than was necessary to deal with the mischief created by the delays in the international appellate processes". In his view, it would have been sufficient to provide an outside time-limit of say, eighteen months, but it was unnecessary and inappropriate to provide separate and successive time limits for each application and each stage of each application.

[69] Lord Millett then analysed and traced the history of the due process clause in the Constitution of Trinidad & Tobago and concluded that

> "…the clause extends to the appellate process as well as the trial itself. In particular, it includes the right of a condemned man to be allowed to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by executive action".

[70] After duly noting and accepting the arguments of counsel for the State that unincorporated international treaties cannot alter domestic law, Lord Millett continued that

> "…By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby, temporarily at least, extended the scope of the 'due process' clause in the Constitution.
> Their Lordships note that a similar argument was rejected in *Fisher (No. 2)*. They observe, however, that the Constitution of the Bahamas which was under consideration in that case does not include a 'due process' clause similar to that contained in article 4(a) of the Constitution of Trinidad & Tobago".

[71] Lords Goff and Hobhouse, in a powerful dissent, emphasised that in a liberal democracy such as Trinidad & Tobago, the Executive has no right or capacity to make law and that references to "law" in the Constitution refer only to municipal law. Due process of ***law*** could therefore relate only to domestic and not international law. The terms of the unincorporated treaties were incapable of conferring upon the condemned man any rights which the courts were at liberty to enforce. The treaties could not be invoked as a basis for alleging an infringement of the Constitution. Sensitive to the practical effect of their dissent, the minority stated that:

> "…An unincorporated treaty cannot make something due process; nor can such a treaty make something not due process, unless some separate principle of municipal law makes it so...
> …Whilst it is of course correct that the content of what is 'due process of law' may change from time to time (eg the reduction or the extension of the right to trial by jury), the change must derive from a change in the law of the Republic…
> …The applicants may be at *liberty* to complain to the human rights commissions but they have no right to do so. If the treaty purports to confer such a right, it has only done so for the purpose of international law and not for the purpose of the law of the Republic…"

[72] *Lewis and others v The Attorney-General*[38] was decided in September, 2000. It is a case from Jamaica. Each of the appellants had been convicted of murder, sentenced to death and had exhausted his domestic appeals. The Governor-General had earlier issued instructions published on 7th August 1997 laying down a six-month timetable for the conduct of applications to international human rights bodies. Significantly, while the Constitution of Jamaica confers a right to the protection of the law, it does not have a due process clause like the one in Trinidad & Tobago. The men brought constitutional motions challenging the validity of their death sentences on a variety of grounds. One of these was that they had a right not to be executed before the final reports on their petitions to the Commission had been received.

[73] The Board was divided 4 to 1 on that issue. In the course of the majority judgment delivered by Lord Slynn it was stated that:

> "Their Lordships do not consider that it is right to distinguish between a Constitution which does not have a reference to "due process of law" but does have a reference to "the protection of the law". They therefore consider that what is said in *Thomas v Baptiste* to which they have referred is to be applied *mutatis mutandis* to the Constitution like the one in Jamaica which provides for the protection of the law. In their Lordships' view when Jamaica acceded to the American Convention and to the International Covenant and allowed individual petitions the petitioner became entitled under the protection of the law provision in section 13 to complete the human rights petition procedure and to obtain the reports of the human rights bodies for the Jamaican Privy Council to consider before it dealt with the application for mercy and to the staying of execution until those reports had been received and considered".

[74] It is to be noted that in this judgment the right of the condemned man to complete the process he initiated before the human rights body was stated in absolute terms and, in contrast to the judgment in *Thomas*, nothing was said to suggest that the corresponding obligation of the Jamaican Privy Council to await the outcome of that process, was limited to waiting a reasonable time.

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[38] *[2001] 2 A.C. 50; (1999) 57 WIR 275*

[75] Lord Hoffmann, who had earlier, in *Higgs v Minister of National Security*[39], a case from the Bahamas, come to the opposite conclusion, issued a stinging dissent in these terms:

> "On the Inter-American Commission issue, the majority have found in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive action into the gold of legislative power. It does not however explain how the trick is done. *Fisher v Minister of Public Safety and Immigration (No. 2)* [2000] 1 A.C. 434 and *Higgs v Minister of National Security* [2000] 2 W.L.R. 1368 are overruled but the arguments stated succinctly in the former and more elaborately in the latter are brushed aside rather than confronted. In particular, there is no explanation of how, in the domestic law of Jamaica, the proceedings before the Commission constitute a legal process (as opposed to the proceedings of any other non-governmental body) which must be duly completed. Nor can there be any question of the prisoners having had a legitimate expectation (as the term is now understood in administrative law) that the State would await a response to their petitions. All the petitions were presented after the Government had issued the Instructions and a legitimate expectation can hardly arise in the face of a clear existing contrary statement of policy. In *Thomas v Baptiste* [1999] 3 W.L.R. 249, 262-263 an argument based upon legitimate expectation was summarily rejected".

[76] Mr. Shepherd QC urged us to accept the decisions in *Thomas* and *Lewis* as good law for the reasons given by their Lordships and to apply it to the decision of the BPC to advise the Governor-General on the exercise of the prerogative of mercy in this case. We would respectfully agree that it would not be right for the BPC, before tendering its advice to the Governor-General, wholly to ignore either the fact that a condemned man has a petition pending before an international body or that a report has been made by such a body. We are unable to accept however the reasoning which underpins the decisions in *Thomas* and *Lewis.* Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or

[39] *[2000] 2 A.C. 228; (1999) 55 WIR 10*

extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty. It seems to us that the effect which the majority gave to the treaty i.e. expansion of the domestic criminal justice system so as to include the proceedings before the Commission, was inconsistent with their protestations of support for the strict dualist doctrine of the unincorporated treaty. Nor did the judgments explain how, if ratification has that effect, the appropriate domestic authorities can be entitled to impose even reasonable time-limits for the disposal of the case in the absence of any such limitation on the State's obligation in the treaty itself. In the result, both the accretion to the domestic criminal justice system and its disappearance after the lapse of a reasonable time according to Lord Millett's judgment in *Thomas*, were unsupported by legal principle.

[77] We have examined a body of cases, including decisions of the JCPC, which we considered might assist us in arriving at the admittedly desirable result reached in *Thomas* by a route that appears to us to pose fewer problems. Several of the cases we have looked at have adverted to the doctrine of legitimate expectation. Unfortunately, the potential use of this doctrine was not really argued before us by either side. Accordingly, we were not specifically directed to the evidence on which any such expectation might be grounded. Nor were we addressed on the principles that would govern it. Surprisingly, the respondents made only passing reference to it in their written submissions although in the affidavit of Lennox Ricardo Boyce sworn on 16th September, 2004, he declares: "I have now and always had a legitimate expectation that I would be allowed to exhaust my rights of appeal to all of the relevant International Human Rights Commissions and that no execution of the sentence of death would be effected until those appeals had been exhausted". Notwithstanding the dearth of argument presented to us on this issue, there is a body of relevant material before us upon which we are able to draw.

Legitimate expectation and unincorporated treaties

[78] In dualist states there have been several strategies employed in an effort to finesse the rule that unincorporated treaties have no effect in domestic law, and these have met with varying degrees of success. The strategies include, but are not limited to, the invoking of the doctrine of legitimate expectation.

[79] The English courts dealt with the matter of the effect of unincorporated treaties in *Regina v Secretary of State for the Home Department, ex parte Brind*[40]. The Secretary of State had issued directives under a statute requiring journalists and media houses to refrain from broadcasting "any matter" consisting of direct statements by representatives of organisations proscribed in Northern Ireland and Great Britain. Britain had not yet incorporated the European Convention for the Protection of Human Rights but the directives were challenged on the basis, *inter alia*, that they interfered with the right to freedom of expression. Counsel submitted that when a statute conferred upon an administrative body a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may be presumed that the legislative intention was that the discretion should be exercised within the limitations imposed by the Convention. This argument found no favour with the English courts. The House of Lords, upholding a unanimous Court of Appeal, firmly set its face against any importation of unincorporated international law into the domestic field. Unincorporated treaties may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law but they could not be a source of rights and obligations on the domestic plane. In this context, it is useful to observe that in Britain parliament, and not a written Constitution, is supreme.

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[40] *supra*

[80] *Tavita v Minister of Immigration*[41] is a case from New Zealand. In that case, a man, whose application for residence in New Zealand had been declined, was ordered to be deported. Before execution of the warrant for his deportation he fathered a child in New Zealand and married the child's mother. When attempts were made to execute the deportation warrant he brought judicial review proceedings. He argued that the relevant Minister had not taken account of the International Covenant on Civil and Political Rights and the First Optional Protocol of the United Nations Convention on the Rights of the Child. These treaties enjoin States Parties to ensure that a child shall not be separated from his or her parents against their will, except when the competent authorities determine that such separation is necessary for the best interests of the child.

[81] The State submitted that the Minister and the relevant Department were entitled to ignore the unincorporated international treaties. Cooke P., delivering the judgment of the New Zealand Court of Appeal, found that submission "unattractive". Declaring that the law as to the bearing on domestic law of international rights and instruments declaring them is undergoing evolution, he noted that

> "…an aspect to be borne in mind may be one urged by counsel for the appellant: that since New Zealand's accession to the Optional Protocol, the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct recourse to it.".

[82] The stay against the man's deportation was continued and the appeal adjourned *sine die* so that the man's application could be reconsidered in light of the international treaties and the birth of his New Zealand child. *Brind* was considered by Cooke P. and regarded by him as a "controversial decision".

[83] In *Minister of State for Immigration and Ethnic Affairs v Teoh*[42], a decision of the High Court of Australia given in April, 1995, the facts were similar to those in *Tavita*. The question arose as to whether Australia's ratification of the Convention

[41] *[1994] 1 LRC 421*
[42] *[1995] 3 LRC 1*

on the Rights of the Child gave rise to any legitimate expectation on the part of a Malaysian man who had entered Australia and married an Australian woman with whom he had young children. In holding that the man's residence application had to be reviewed in light of the Convention, Chief Justice Mason and Deane J. in their joint judgment held that:

> "…ratification by Australia of an international Convention is not to be dismissed as a merely platitudinous or ineffectual act…, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a Convention is a positive statement by the Executive government of this country to the world and to the Australian people that the Executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention … It is not necessary that a person seeking to set up such a legitimate expectation should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it"[43].

McHugh J dissented, holding that no legitimate expectation arose.

[84] *Baker v Canada (Minister of Citizenship and Immigration)*[44] is a decision of the Supreme Court of Canada decided in 1999. The applicant was a Jamaican woman who had entered Canada in 1981 and had remained and given birth to four Canadian-born children. A deportation order was made against her. She unsuccessfully applied for judicial review. As Canada had ratified the International Convention on the Rights of the Child, a question was certified as to whether the immigration authorities ***must*** treat the best interests of a Canadian child as a primary consideration in assessing the applicant's status. The Court of Appeal had held firstly, that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation and secondly, that the Convention could not be interpreted to impose an obligation upon the

[43] *See page 17 @ [34]*
[44] *[1999] 2 SCR 817*

government to give primacy to the interests of the children in deportation proceedings.

[85] L'Heureux-Dubé J. writing for a majority of the Supreme Court, expressed the view that "the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her … application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied"[45]. The Convention was held not to be the equivalent of a government representation about how such applications would be decided. The Court nonetheless found in the fact of ratification of the Convention, "an indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision". The values and principles espoused by the Convention could not be ignored by the decision-maker. Failure to give serious consideration to the interests of the applicant's children would render unreasonable an exercise of the discretion. The Court left open the possibility that an international instrument ratified by Canada could in other circumstances give rise to a legitimate expectation.

[86] Two judges of the Court joined in issuing a strong dissent to the majority's views on the effect of unincorporated treaties. Iacobucci J., with Cory J. concurring, stated that:

> "It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation …"[46].

[87] The Indian courts adopt a robust approach to the matter of the direct enforcement in domestic law of the terms of human rights treaties but undoubtedly their boldness is encouraged, if not mandated, by Article 51(c) of the Indian Constitution which requires the State to "endeavour to foster respect for

[45] *Supra at [39]*
[46] *Ibid at [79]*

international law and treaty obligations in the dealings of organised peoples with one another". Thus, in *People's Union for Civil Liberties v Union of India*[47] the Indian Supreme Court, basing itself at length on *Teoh*, held that the provisions of the International Covenant on Civil and Political Rights "which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can be relied upon by courts as facets of those fundamental rights and, hence, enforceable as such".

[88] The question of the effect, if any, of the European Convention on the immigration policies of the United Kingdom has been the subject of several court decisions in England. In one such case, *R v Secretary for the Home Department ex parte Mohammed Hussain Ahmed*[48], the argument was made that when the Secretary of State exercised a prerogative power, he was obliged to do so in conformity with the treaty obligations of the State. This position was rejected by Lord Woolf MR who nevertheless stated that:

> "…the entering into a treaty by the Secretary of State could give rise to a legitimate expectation upon which the public in general are entitled to rely. Subject to any indication to the contrary, it could be a representation that the Secretary of State would act in accordance with any obligations which he accepted under the treaty. The legitimate expectation could give rise to a right to relief, as well as additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which this country has undertaken. This is very much the approach adopted by the High Court of Australia in the immigration case of *Minister of State for Immigration and Ethnic Affairs v Teoh*".

[89] The views of Woolf MR on the creation of a legitimate expectation were endorsed by Hobhouse LJ who noted that the expectation was "not based upon any actual state of knowledge of individual immigrants or would be immigrants…"

[90] The position contended for by Lord Woolf MR was briefly discussed in *Regina v Director of Public Prosecution ex parte Kebilene and others*[49]. Before the

[47] *[1999] 2 LRC 19*
[48] *[1999] Imm AR 22*
[49] *[2000] 2 A.C. 326*

Divisional Court (Lord Bingham CJ, Laws LJ and Sullivan J) a submission was made that applicants had a legitimate expectation founded on ratification of the unincorporated European Convention for the Protection of Human Rights. Lord Bingham held that no legitimate expectation could have thereby arisen because when the Convention had been ratified over fifty years previously it was never assumed that such ratification would have had any practical effect on British law and practice. Moreover, the terms of the Act that had since been passed to incorporate the Convention but which had not yet been brought into force, expressly contradicted any such expectation. Further, the relevant decision-maker (in this case the DPP) was a body independent of the Executive. Lord Justice Laws for his part sought to contain the scope of the remarks of Lord Woolf in *Ahmed* and to reaffirm the strictness of the ruling in *Brind*. The case went to the House of Lords[50] but the argument on legitimate expectation was not pressed there.

[91] *Ahani v Regina*[51] is a decision of the Court of Appeal for Ontario delivered in February, 2002. The appellant, an Iranian, was ordered deported from Canada on the basis that reasonable grounds existed to believe that he was a member of a terrorist organisation. He was notified of the case against him and given an opportunity to make written submissions. He submitted that there was a risk that he would be subjected to torture upon his return to Iran. He appealed to the Supreme Court the decision to have him deported. The Supreme Court upheld the decision of the Minister. Ahani then filed a communication with the United Nations under the Optional Protocol of the ICCPR. The Committee made an interim measures request that Canada stay the deportation order until it had considered the communication. The question before the Court was whether it was incumbent upon Canada to comply with the interim measures request. Among the authorities considered were *Baker* and the JCPC's judgments in *Thomas, Higgs* and *Lewis.*

[50] *[2000] 2 AC 326 @ 358 et seq.*
[51] *208 D.L.R. (4th) 66*

[92] The Appeal Court was divided 2 to 1. The majority held that the principles of fundamental justice espoused were not engaged as Ahani had not demonstrated that his rights to life, liberty or security of the person were threatened. Even if any of his rights were at stake, "no principle of fundamental justice entitled him to remain in Canada until his communication was considered by the Committee". The court held that, absent implementing legislation, neither the Covenant nor the Protocol had any legal effect in Canada although "Canada's international human rights commitments might still inform the content of the principles of fundamental justice under s. 7 of the *Charter*". Laskin JA writing for the court, held at [33]:

> [33] To give effect to Ahani's position…would convert a non-binding request in a Protocol, which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice. Respectfully, I find that an untenable result.

At [45], the court stated that Judges were not competent to assess whether Canada was acting in bad faith by rejecting the Committee's interim measures request.

[93] Laskin, JA distinguished the JCPC's decision in *Thomas v Baptiste* by noting that, unlike the appellants in *Thomas,* Ahani was not facing a death penalty and moreover, the *Thomas* appellants had already obtained the benefit of orders from the Inter-American Commission on Human Rights. Even so, at [56] of the judgment, the majority found Lord Millett's reasoning to be in conflict with well-established Canadian law where "mere ratification of a treaty, without incorporating legislation, cannot make the international process part of our domestic criminal justice system".

[94] The contention that Ahani had a legitimate expectation of not being deported to Iran pending the Committee's consideration was rejected on the grounds that there was no evidential basis to support any such reasonable expectation and that

Ahani was really seeking a substantive right to remain in Canada as distinct from a procedural right.

[95] Rosenberg JA dissented. He would have granted an injunction to prevent Ahani's removal from Canada. Although he found some of the JCPC's reasoning "strained", he was prepared to adopt *Thomas* and *Lewis* and to hold that due process required that individuals be given the opportunity to access the international bodies.

Legitimate expectation and the condemned man

[96] The crucial question in issue in this case is whether a condemned man in Barbados derives from the ACHR, an international treaty, any benefit enforceable on the municipal plane. If indeed the man relies on a legitimate expectation that the State will not, absent undue delay, execute him while his application is pending before the international body, is the State entitled, either after or without giving notice, to act on the municipal plane in a manner inconsistent with that expectation? Can the courts restrain the decision-making body from frustrating the expectation the State has created?

[97] Before the *Lewis* decision, the JCPC reversed itself on more than one occasion on this very issue. In *Fisher v Minister of Public Safety & Immigration (No. 2)*[52] a Bahamian convicted of murder in March 1994 had by May, 1996 exhausted his domestic appeals. In June 1996 he petitioned the Commission. The Bahamas had not ratified the Convention but regulations under that instrument enabled complaints to be made by petition to the Commission. While his petition to the Commission was pending, the death warrant was read to the appellant. A stay was obtained and a motion filed claiming constitutional relief. Those proceedings went all the way up to the JCPC[53]. Before the Board, counsel for the Government gave the assurance that the Government would respect the IACHR regulations. In

[52] *[2000] 1 AC 434; (1998) 52 WIR 27*
[53] *Fisher v Minister of Public Safety & Immigration (1997) 52 WIR 1; [1998] AC 673*

December, 1997 the Government wrote to the IACHR inviting it to conclude its inquiries into the case by 15th February 1998 and in January 1998 the Government sent the Commission a reminder. Counsel for the appellant was informed of these developments and was also told that the Government would not wait on the Commission beyond 15th February, 1998. On 26th March, 1998, after the petition had been with the IACHR for some 21 months, the death warrant was read for the second time to the appellant. A fresh constitutional motion was filed by the appellant in which he argued that he had a legitimate expectation that the Government would allow a reasonable time for the completion of the IACHR process and that such time had not expired. He submitted secondly, that based on his constitutional right to life, he had a right not to be executed until after the IACHR had completed its inquiries, however long that process took. The matter came up again before the JCPC.

[98] Their Lordships were divided 3 to 2. The majority held that it could not be implied, in assessing the man's right to life, that the Executive would wait a reasonable time for his international petition before the Commission to be completed, as that would mean that the Government had introduced rights into domestic law by entering into a treaty. The court relied on *Brind***.** On the issue of legitimate expectation, counsel for the condemned man relied on *Teoh*. The majority's view was that even if the appellant had a legitimate expectation that he would not be executed while his petition was pending, his expectation could not survive the Government's letters of January, 1998 and in any event, by March, 1998 the petition had been with the Commission for a reasonable length of time.

[99] Lord Slynn and Lord Hope, confessing at the commencement of their judgment that "the issue which lies at the heart of this constitutional motion is not an easy one to resolve", entered a joint dissent. They agreed that there could be no claim by the appellant that in the circumstances his right to life was being infringed since the proceedings before the Commission formed no part of the domestic appellate process. However, they found that by reason of the Government's

participation in the Inter-American proceedings, the appellant had derived a legitimate expectation that if the Commission were to recommend against the carrying out of the death sentence, its views would be considered before the final decision was taken as to whether or not he was to be executed. Against this background, executing the man before that recommendation was received, and after the man had spent many months in the condemned cell for no other purpose than to await the recommendation of the Commission, would constitute "inhuman treatment".

[100] In *Briggs v Baptiste*[54] Lord Millett had an opportunity to re-visit his decision in *Thomas.* He appeared to retreat somewhat from his former position. *Thomas,* he maintained:

> "…did not overturn the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. It did not decide that the recommendations of the Commission (which are not binding even in international law) or the orders of the Inter-American Court are directly enforceable in domestic law. It mediated the proceedings before the Inter-American system through the 'due process' clause in the Constitution. It confirmed the principle that the consideration of a reprieve is not a legal process and is not subject to the constitutional requirement of due process, and that the Advisory Committee is not bound to consider, let alone adopt, the recommendations of the Commission".

[101] Lord Nicholls dissented. He was for insisting upon the full breadth of *Thomas.* He was of the view that "under the 'due process' clause … an applicant is entitled to have the Inter-American system run its course. The appellant is not to be shut out from the possibility that … the Commission may yet make an order that the sentence of death be commuted".

[102] The issue came back before the JCPC in another appeal from the Bahamas in *Higgs & Mitchell v Minister of National Security*[55]. The JCPC now had another

[54] *(1999) 55 WIR 460; [2000] 2 AC 40*
[55] *(1999) 55 WIR 10; [2000] 2 AC 228*

opportunity to re-examine *Thomas v Baptiste* and settle the law by arriving at consensus. Once again however the court was divided 3 to 2. The majority judgment, delivered by Lord Hoffmann, took as its premise the well known principles of law expressed in *Rayner* [56] and *The Parlement Belge*[57]. Significantly, Lord Hoffmann was prepared to hold, following *Teoh,* that the existence of a ratified treaty may give rise to a legitimate expectation on the part of citizens that the Government, in its acts affecting them, will observe the terms of the treaty. But he regarded the benefit which such a legitimate expectation conferred as being purely procedural. The most the citizen could expect was that the Executive would not depart from the expected course of conduct unless it gave notice that it intended to do so and afforded the person affected an opportunity to make representations. Lord Hoffmann saw *Thomas v Baptiste* as being indistinguishable from *Fisher (No 2).* Confronted with the majority's reasoning in *Thomas,* it was open to Lord Hoffmann expressly to disapprove *Thomas* but, with some reluctance, he opted not to do so on the basis that the majority in *Thomas* had not overruled *Fisher No. 2,* but distinguished it on the ground that the Trinidad & Tobago Constitution had a "due process" clause which the Bahamian Constitution lacked.

Analysing and applying the case law

[103] Our view on the reasoning in *Thomas* and *Lewis* is framed by the line of cases referred to above. The frequency and force of the dissents and the high incidence of reversals by the JCPC of its own recent decisions demonstrate very forcefully the fact that this branch of the law is in an unsettled state and is still evolving. Novel and difficult questions of law are involved here. Judges all over the world are struggling to give form and coherence to ideas that only began to engage their attention in fairly recent times. In the judgments examined above there is a divergence of opinion and approach, not only as between different courts but as between judges of the same court. The range is from the very assertive and

[56] *[1990] 2 AC 418*
[57] *(1879) 4 PD 129*

activist positions of the Indian Supreme Court to the more conservative approach of the House of Lords.

[104] The differences reflect in part a variety of responses to underlying changes that have been taking place in the manner in which treaties, and human rights treaties in particular, are drawn. These changes affect the reach of such treaties and the entities that are accorded rights under them. Traditionally, individual citizens derived no entitlement under treaties concluded between States. Such instruments imposed obligations and conferred benefits upon States. The subject-matter of the treaties was not intimately bound up with rights of human beings now regarded as fundamental and inalienable.

[105] Over the last sixty or so years, however, it has become quite common for treaties to grant to individual human beings "rights" directly enforceable by them with the result that, far from being passive subjects, individuals can now become active players on the international plane pursuant to treaties entered into by their Governments. These treaties contain provisions that are legally complete under international law. They provide the process by which individuals may enforce the rights conferred by them and no refinement is required by a State Party in order for nationals to take advantage of such provisions. Pursuant to the ACHR for example, without formal incorporation by Parliament, individual citizens may initiate proceedings and obtain relief from an international body.

[106] This development has been accompanied by the promotion of universal standards of human rights, accepted both at the domestic and on the international level. Citizens are now at liberty to press for the observance of these rights at both levels. At the domestic level, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts may consider the judgments of international bodies. Likewise, on the international plane, the judgments of domestic courts assist in informing the manner in which international law is interpreted and applied. There is therefore a

distinct, irreversible tendency towards confluence of domestic and international jurisprudence.

[107] The Australian decision in *Minister of State for Immigration and Ethnic Affairs v Teoh* appears to have been received and approved throughout the common law world as an appropriate response to the evolving situation. The view seems to have emerged that, unless municipal law rules this out, a ratified but unincorporated treaty can give rise to a legitimate expectation of a procedural benefit. When a treaty evidences internationally accepted standards to be applied by administrative authorities in dealing with basic human rights, courts will be hesitant to regard the relevant terms of the treaty as mere "window-dressing" capable of being entirely ignored on the domestic plane.

[108] Turning our attention to the position of the respondents in this case, the punishment that faced them, the real detriment they sought to avoid, was death. True, death as *a punishment* for a very serious crime, but death nevertheless. Death is not to be treated as simply just another punishment. It is a punishment in a class of its own, warranting special procedures before it is carried out. The United States Supreme Court has consistently held that death is a unique punishment that differs from all other forms of criminal punishment, not in degree but in kind. *See: Furman v Georgia*[58]*; Gregg v Georgia*[59]*; Woodson v North Carolina*[60]*; Lockett v Ohio*[61].

[109] Amidst scholarly discussion of legal theories, one must not lose sight of the situation of a condemned man, particularly in a state like Barbados where the mandatory death penalty has not been held to be unconstitutional as it has been in several other Caribbean states. The condemned man may have been convicted of murder, but even after his domestic appeals have been exhausted he is not

[58] *(1972) 408 U.S. 238*
[59] *(1976) 428 US 153*
[60] *(1976) 428 US 280*
[61] *(1978) 438 US 586*

altogether at the mercy of the Executive. He does still have, at a minimum, a right to the protection of the law. He understands that the Government has ratified an international treaty that entitles him, without more, liberty to petition an international tribunal. Before this international body he can perhaps advance new material, including matters that may have arisen since the conclusion of his domestic appeals, or matters which for one reason or another his counsel could not or did not raise in the domestic proceedings. He can attempt to show that his trial was not in accordance with internationally accepted standards. He can put forward reasons why, in all the circumstances, he ought not to be regarded as deserving of the penalty of death. If he does any of these things and manages to secure a favourable report from the international body, there is no guarantee that the relevant authority, when it considers the report, will be persuaded by it to recommend or grant commutation. That authority will certainly not be bound to accept any recommendation made in the report. But there *is* a chance, however small, that it may do so.

[110] Put in stark terms, by ratifying the treaty, the Executive has thrown to the condemned man, fighting for his life to be spared, a lifeline, albeit one that perhaps offers only a slim chance of rescue. The real issue facing judges is this: As the man is about to grasp this lifeline, is it fair for the Executive, which placed it there in the first place, to yank it away? Is it enough for the court then merely to explain to the man that unincorporated international treaties form no part of domestic law; that he has derived no "right" from the mere accession of his Government to the treaty; that the Executive does not have to await the determination of his petition by the international body before executing him, even though the report of that body, if it were available, would have to be considered by the authority responsible for exercising the prerogative of mercy and might persuade that authority to spare his life? Those are the haunting questions that cause judges much discomfort.

[111] As far as we have discerned, the case law has produced at least four different trends of thought. The first discernible approach is the one, lucidly expressed by the minority in *Thomas* that is grounded in the principles expressed in *Brind.* Under this approach, the questions posed in the preceding paragraph are all answered with a regretful "Yes!" One advantage of this approach is that its consequences are certain and predictable. Moreover, this approach has the backing of over a century of judicial authority. Its disadvantage is that the result that it produces seems oddly out of step with the modern trend of employing legal concepts for giving effect to, rather than frustrating, generally accepted notions of what is fair and humane.

[112] Secondly, there is the view which suggests that to execute a man while his petition is pending and after he has spent time on death row awaiting its outcome is to contravene guarantees against cruel or inhuman treatment. This was a view expressed by Lord Slynn and Lord Hope, the minority in *Fisher No. 2*, but it is a view which appears not to have received support from the authorities we have examined.

[113] Thirdly, there is the reasoning expressed by Lord Millett and adopted by the majority in *Thomas*, with which we have expressed our disagreement.

[114] We have spent some time exploring the fourth approach that invokes the doctrine of legitimate expectation. The obvious limitations inherent in the use of *procedural* legitimate expectation have been already noted. It is of little use to the condemned man who really desires a substantive benefit, namely to require the authorities to delay executing him until receipt of the report from the international body or, at least, to delay his execution so as to give the international body a reasonable time for completion of its procedures and submission of its report.

[115] As we saw earlier, the Attorney-General of Barbados represented to the Court of Appeal that her country does take seriously, and desires to abide by, its

international obligation not to execute a condemned man while his petition is pending before the international body. This is also reflected in the legislature's amendment of the Barbados Constitution to add section 78 (6) which authorises

> "[t]he Governor-General, acting in accordance with the advice of the Privy Council, … by instrument under the Public Seal [to] direct that there shall be time-limits within which persons … may appeal to, or consult, any person or body of persons (other than Her Majesty in Council) outside Barbados in relation to the offence in question".

[116] Parliament in making that amendment impliedly recognised that it was the practice and indeed the obligation of the State to await the Commission's process, at least for some period of time, and has therefore contributed to the creation of the legitimate expectation that the right to apply to the Commission will be respected. It seems as though it is not so much that the State wishes to deny the condemned man access to the international human rights bodies or to frustrate the petition process but it wants to avoid being caught by the *Pratt* timelines which so far have not been relaxed despite the growing recognition that the eighteen-month period allotted to the international process has proved insufficient through no fault of the Governments involved. In *Bradshaw v Attorney-General of Barbados*[62] for example, the JCPC appreciated this dilemma but rejected the suggestion that:-

> "… either the periods of time relating to applications to the human rights bodies should be excluded from the computation of delay or the period of five years should be increased to take account of delays normally involved in the disposal of such complaints."

[117] We disagree with the rejection of this suggestion. The refusal of the JCPC to sanction any relaxation of what has now become a five-year deadline clearly contributed in no small measure to the decision of the Barbados legislature to amend section 15 of the Constitution to rule out the possibility that any delay, however long, in the carrying out of a death sentence could ultimately render it unconstitutional. Something was obviously amiss when the State was being required, on the one hand to conform strictly to the *Pratt* five year time-limit, and on the other, to await the outcome of a condemned man's petition to the extra-

[62] *supra*

territorial body, however long it took. It was Lord Goff who, in *Thomas v Baptiste*[63], noted that these bodies:

> "espouse a policy of discouraging capital punishment wherever possible and, in accordance with that policy, appear to see postponement of an execution for as long as possible as an advantage since it may improve the chances of commuting the sentence or quashing the conviction: see also Johnson v Jamaica (1996) 1 B.H.R.C. 37. There is thus a direct conflict between the policy of the Commissions and the enforcement of the law of the Republic. The Commissions appear to be unable or unwilling to alter their practices to accommodate the countries' requests for more speedy procedures".

Addressing the respondents' legitimate expectation

[118] What are the facts and circumstances that could have given rise to the legitimate expectation claimed by the respondents? Quite apart from the fact that Barbados had ratified the ACHR, positive statements were made by representatives of the Executive authority evincing an intention or desire on the part of the Executive to abide by that treaty. Such statements were, for example, made in Parliament during the debate on the Constitution Amendment Act. Further, it appears that it was the practice of the Barbados Government to give an opportunity to condemned men to have their petitions to the international human rights body processed before proceeding to execution. In all these circumstances we would hold that the respondents had a legitimate expectation that the State would not execute them without first allowing them a reasonable time within which to complete the proceedings they had initiated under the ACHR by petition to the Commission.

[119] The issue to be resolved is whether, and if so to what extent, this legitimate expectation of the respondents should produce *a substantive* benefit. The circumstances in which the unusual step of granting to an applicant with a legitimate expectation, a substantive as distinct from a procedural benefit is still a matter of ongoing judicial debate. It was discussed by Sedley, J. (as he then was)

[63] *Supra @ [35]*

in *Regina v Ministry of Agriculture, Fisheries and Food*[64] where the learned judge stated the following with which we respectfully agree:

> "…the real question is one of fairness in public administration. It is difficult to see why it is any less unfair to frustrate a legitimate expectation that something will or will not be done by the decision maker than it is to frustrate a legitimate expectation that the applicant will be listened to before the decision maker decides whether to take a particular step. Such a doctrine does not risk fettering a public body in the discharge of public duties, because no individual can legitimately expect the discharge of public duties to stand still or be distorted because of that individual's peculiar position…[L]egitimacy is itself a relative concept, to be gauged proportionately to the legal and policy implications of the expectation. This, no doubt, is why it has proved easier to establish a legitimate expectation that an applicant will be listened to than that a particular outcome will be arrived at by the decision maker. But the same principle of fairness in my judgment governs both situations".[65]

[120] *R v North & East Devon Health Authority, ex parte Coughlan*[66] is a case in which a claimant was held to be entitled to a substantive benefit. According to Lord Woolf M.R., once the court finds that there was a legitimate expectation of a substantive benefit, "the court has, when necessary, to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised". The court's task, he said, is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate expectations of citizens who have relied, and have been justified in relying, on a current policy.

[121] The legitimate expectation in *Coughlan* was rooted in an express promise, repeatedly made to a select, identifiable group of persons, that had the character of a contract. The learned Master of the Rolls equated unwarranted frustration of the legitimate expectation with an abuse of power and the case was treated almost

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[64] *But see ex parte Hargreaves [1997] 1 WLR 906 where this approach of Sedley, J. was described as "heresy" by the English Court of Appeal.*
[65] *Regina v Ministry of Agriculture, Fisheries and Food ex parte Hamble Fisheries (Offshore) [1995] 2 AER 714 @544-545*
[66] *(2001) QB 213*

like an estoppel in private law, justifying a standard of review by the courts that was higher than would normally be the case.

[122] *Coughlan* was one of the cases discussed in the judgment of Sir David Simmons in *Pearson Leacock v The Attorney General*[67]. In that case the learned Chief Justice stopped just short of providing the applicant with a substantive benefit on the basis of a legitimate expectation and ordering the Barbados Commissioner of Police to grant to a police officer, who had attained his LLB degree with honours, while on study leave, further study leave to obtain his professional qualification at the Hugh Wooding Law School. Sir David thought that it was not open to him to declare that the applicant was entitled to study leave as "that would be an intrusion into the merits of the case". The merits, he said "will often involve policy considerations. Such considerations are not for the courts". Sir David nonetheless quashed the decision of the Police Commissioner to deny the grant of study leave and declared that decision to be an unreasonable and improper exercise of discretion.

[123] The English Court of Appeal in *Secretary of State for the Home Dept. v The Queen (on the application of Bakhtear Rashid)*[68], a matter involving a Kurdish asylum seeker, affirmed the view expressed in *R v Inland Revenue Commissioners, ex parte Unilever plc*[69] and other cases[70] that where the concept of legitimate expectation is invoked, implementation by a public authority of a decision to frustrate the expectation would be restrained by the court if the decision is so unfair that it amounts to an abuse (some judges say "misuse") of power in the absence of some overriding public interest. In *Rashid*, the court granted a declaration "the effect of which [was] expected to be a grant by the Secretary of State of permission to remain indefinitely in the United Kingdom".

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[67] *Barbados High Court Civil Division, No. 1712 of 2005, unreported*
[68] *[2005] EWCA Civ 744*
[69] *[1996] STC 681*
[70] *See: ex parte Begbie [2000] 1 WLR 1115; ex parte Unilever [1996] STC 681; SSHD v Zeqiri [2002] Imm AR 296; ex parte Ahmed & Patel [1998] INLR 570*

[124] In matters such as these, courts must carry out a balancing exercise. The court must weigh the competing interests of the individual, who has placed legitimate trust in the State consistently to adhere to its declared policy, and that of the public authority, which seeks to pursue its policy objectives through some new measure. The court must make an assessment of how to strike the balance or be prepared to review the fairness of any such assessment if it had been made previously by the public authority. As indicated by Dyson, LJ in *Rashid*, "…[W]here, for example, there are no wide-ranging policy issues, the court may be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found".

[125] In the case before us, there is on the one hand the legitimate expectation of the condemned men that they will be permitted a reasonable time to pursue their petitions with the Commission with the consequence that any report resulting from the Inter-American process will be available for consideration by the Barbados Privy Council. On the other hand, there is whatever the State may advance as an overriding interest in refusing to await completion of the international process before carrying out the death sentence. It appears from what was represented to the Court of Appeal in this case that, apart from the constraints of the *Pratt* time-limit, the State of Barbados claims no overriding interest in putting the condemned men to death without allowing their legitimate expectation to be fulfilled. The BPC remains under no legal obligation to accept the report or recommendations of the Commission or UNCHR although of course it must consider them. In our view, to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. The substantive benefit the condemned men legitimately expect is actually as to *the procedure* that should

be followed before their sentences are executed. It does not extend to requiring the BPC to abide by the recommendations in the report.

[126] By the amendment of section 15 of the Constitution, the State of Barbados no longer has the constraint of the *Pratt* five-year time-limit. Even without *Pratt* however, we expect the relevant authorities to strive for completion within a reasonable time of all the criminal justice processes including those that span the period between conviction and the carrying out of a death sentence. Where *Pratt* is applicable, as it was in Barbados for these respondents, we would have been inclined to the view, if the issue of the five-year time-limit was still a live one before us, that where the time taken in processing a condemned man's petition before an international body exceeded eighteen months, the excess should be disregarded in the computation of time for the purpose of applying the decision in *Pratt*. In any event, protracted delay on the part of the international body in disposing of the proceedings initiated before it by a condemned person, could justify the State, notwithstanding the existence of the condemned man's legitimate expectation, proceeding to carry out an execution before completion of the international process. This may be regarded either as a situation which is catered for by the terms of the legitimate expectation itself or as one which creates an overriding public interest in support of which the State may justifiably modify its policy of compliance with the treaty.

[127] A fundamental rationale of the dualist approach to international law is that, should its violation be encouraged, there would be a risk of abuse by the Executive to the detriment of the citizenry[71]. Ensuring that the Executive does not, by its treaty-making power, usurp the legislative role of Parliament is a measure designed principally to protect the rights of the individual. The fulfillment of the legitimate expectation of the condemned men here results in the enhancement of the protection afforded those rights and minimises the risk that the Executive may have cause to regret the carrying out of a death sentence.

[71] *See: In re McKerr [2004] UKHL 12 per Lord Steyn at [50]*

[128] For all the foregoing reasons we are of the view that the BPC ought not to have decided to advise the Governor-General to proceed with the executions before allowing the respondents a reasonable time to complete the processing of their petitions. In giving this advice without waiting a reasonable time for the Commission's report, the BPC defeated the legitimate expectation of the respondents and deprived itself of any opportunity of considering the Commission's report or if the matter was referred to the Inter-American Court, that Court's judgment. The reading of the death warrants on the 15th September 2004 constituted an infringement of the respondents' right to the protection of the law.

[129] Save that we have qualified somewhat the scope of the relevant legitimate expectation and that we are prepared to ground our opinion on a breach of the right to the protection of the law as distinct from a breach of the right to life, our opinion is not at variance with views expressed by Lord Slynn and Lord Hope, the minority in the Bahamian case of *Fisher (No. 2)*[72], who were disposed to find that the acts of the Government of the Bahamas in that case had

> "…provided the appellant with a legitimate expectation that, if the IACHR were to recommend against the carrying out of the death sentence, its views would be considered before the final decision is taken as to whether or not he is to be executed. But any such recommendation would plainly be pointless if he were to be executed before the recommendation was made and communicated to the Government. For the Government to carry out the death sentence while still awaiting a recommendation which might, when considered, lead to its commutation to a sentence of life imprisonment would seem in itself to be an obvious violation of the appellant's right to life…"

[130] In our view the respondents' legitimate expectation can only be defeated by some overriding interest of the State. If, pursuant to section 78(6) of the Constitution, the Governor-General acting in accordance with the advice of the Privy Council, imposes reasonable time-limits within which a condemned man may "appeal to,

[72] *[2000] 1 AC 434 @ 452; (1998) 53 WIR 27 @ 42*

or consult" extra-territorial bodies, then it could not be said that such time-limits did not evince an intention on the part of the State to address its treaty obligations in good faith. The State cannot reasonably be expected to delay indefinitely the carrying out of a sentence, even a sentence of death, lawfully passed by its domestic courts pending the completion of the hearing of a petition by an international body even though the State has by treaty conferred on the person sentenced the right to pursue that petition.

[131] This decision should not be seen as opening up avenues for the wholesale domestic enforcement of unincorporated treaties. States, and small States in particular, enter into treaties for a host of different reasons and a Caribbean Court is acutely sensitive to such realities. Our application of the doctrine of legitimate expectation in this case is rooted in a number of considerations which are peculiar to the situation in which it has been invoked. These include: the desirability of giving the condemned man every opportunity to secure the commutation of his sentence, the direct access which the treaty affords him to the international law process and the disproportion between giving effect to the State's interest in avoiding delay even for a limited period in the carrying out of a death sentence and the finality of an execution. Our decision may be viewed as merely a further step in the development of the capital punishment jurisprudence which has been rapidly growing since the *Pratt* decision.

[132] Ultimately, with respect to the second of the broad issues before us, we have arrived at a result which is not dissimilar to that reached by their Lordships in *Lewis* (save that the obligation of the State to await the outcome of the international process is not in our judgment open-ended) but we have followed a somewhat different route. On this second issue as well therefore, we do not consider it necessary to comment upon the lucid submissions of Mr. Mendes (briefly referred to in paragraph 40 of this judgment) as to why we should not depart from *Lewis*.

Issue Three
Whether it was appropriate for the Court of Appeal to commute the death sentences

[133] Some of the matters that fall under this head were not fully argued before us. Others have become otiose as a consequence of our other findings. For the avoidance of doubt, we would affirm the decision of the Court of Appeal to commute the sentence of death imposed on the respondents. In our view, the Court of Appeal was right to do so. The exercise of the prerogative of mercy is indeed reviewable; the respondents were entitled by virtue of the legitimate expectation created by their Government's ratification of the ACHR and its subsequent conduct and statements, to a reasonable time to file and complete proceedings in the Inter-American system; and, to have permitted the respondents to make use of that entitlement would inevitably have taken the case over the five-year limit set in *Pratt*, as applied in *Lewis*, both of which were at the material time the law of Barbados.

[134] There is another reason, not argued before us, why the death sentences on the respondents would have had to be commuted even if we had held, reversing *Thomas v. Baptiste* and *Lewis,* that the State was entitled to proceed to execute the respondents without allowing them reasonable time to complete the proceedings they had started before the Commission. In *Matthew v. the State*[73] the JCPC by a 5 to 4 majority reversed its previous decision in *Roodal v. the State*[74] and held that the mandatory death penalty was not unconstitutional in Trinidad and Tobago. Despite doing so, however, the majority also held that all those who were under sentence of death at the time when *Matthew* was decided (including Matthew himself) should have their sentences commuted. The reason given was that as a result of the decision in *Roodal* these persons had been given the expectation that their sentences would be reviewed by a judge for the purpose of

[73] *[2005] 1 AC 433 @ 453; (2004) 64 WIR 412*
[74] *[2005] 1 AC 328; (2003) 64 WIR 270*

deciding whether a sentence of imprisonment should be substituted for the death sentence passed on them. To disappoint them in this expectation was considered so unfair as to render their execution cruel. In relation to the appellant Matthew himself, Lord Hoffmann, writing for the majority, put the matter in the following way:

> "On the other hand, simply to leave the sentence to be carried out, subject to the decision of the President, appears to their Lordships unfair to Mr. Matthew. He has been given the expectation of a review of a sentence, additional to the possibility of Presidential commutation, of which he is now deprived. Their Lordships think that it would be a cruel punishment for him to be executed when that possibility has been officially communicated to him and then been taken away".

[135] In this case, the expectation of the respondents with respect to their petitions to the Commission would have been shaped firstly by *Pratt* itself in which the JCPC allowed a period of eighteen months for proceedings before the international bodies. *Thomas* v. *Baptiste* and *Lewis* would have put firmly in place the expectation that the respondents would be allowed at least a reasonable time to complete proceedings before the Commission. If subsequently we were to have held that *Thomas* and *Lewis* were wrongly decided and that the State was under no obligation to allow any time for the completion of proceedings before international bodies, then it would have been at least as unfair and as cruel to execute the respondents as it would have been to execute Mr. Matthew and those who were similarly circumstanced. This was therefore another reason, though not one that was adverted to at the time, why Mr. Forde's decision not to challenge the commutation of the death sentence in this case, was rightly made.

[136] It is interesting to note the special features of the expectation relied on by the JCPC in *Matthew*. Firstly, it is the expectation of a person under sentence of death. Secondly, it is an expectation created not by the Executive, but by a court decision which is subsequently reversed. Thirdly, the expectation is that the condemned man will be given a chance (however slim) of avoiding being put to death. To deny the condemned man that chance was deemed so unfair as to

render the carrying out of the death sentence cruel and, therefore, unconstitutional. This decision of their Lordships has nothing to do with the doctrine of legitimate expectation which we have invoked as the basis of the State's obligation to afford the respondents a reasonable opportunity to have their case aired in the Inter- American system. It would seem, however, to justify giving special weight and effect to an expectation that has the same features as those mentioned above save that it is created by the Executive of the condemned man's country, rather than by its courts.

[137] As to our view on the successive readings of the death warrants and the issue of funding for the condemned men, we would prefer not at this time to pronounce on those matters as they were given no attention by counsel and they really are peripheral to a determination of the main issues in the appeal.

Disposing of the Appeal

[138] It follows that, while in principle we affirm the decision in *Pratt*, as previously intimated, we would have been inclined to take the view that where the relevant international human rights process initiated by a condemned man exceeds eighteen months, the time taken in excess of that period has to be disregarded in computing time for the purpose of determining compliance with *Pratt* or, alternatively, such excess must be added to the five-year limit prescribed by *Pratt.* This is all on the premise that the additional time taken is not attributable to delays in the process for which the Government concerned is responsible.

[139] In view of the terms of section 78(6) of the Constitution, the Governor-General of Barbados, acting in accordance with the advice of the Barbados Privy Council, may wish to stipulate reasonable time-limits in accordance with that sub-section. It is not for us in this judgment to indicate what is or is not a reasonable time-limit. We have neither been addressed on whether this is a matter within our purview nor have we been provided with sufficient evidence upon which to form a view on the substantive issue. Much may well turn on the experience the

Government has had with the international bodies. We would only note that the cases we have examined appears to suggest that eighteen months is in practice an insufficient period for the processing of a condemned man's petition before the Commission. Moreover, one needs to consider that in the case of the Commission, a petition may ultimately be referred to the Inter-American Court. In establishing reasonable time-limits therefore, we expect that the Governor-General would balance these matters with the circumstance that it is still eminently desirable that a prisoner on death row who has exhausted all appeals open to him domestically should have his sentence commuted or carried out with reasonable dispatch, notwithstanding the fact that by virtue of the amendment to section 15 of the Constitution no delay however long can have the effect of rendering the carrying out of a death sentence unconstitutional.

[140] We have considered carefully the steps that the BPC should take to assure procedural fairness to a person who has been sentenced to death. The Constitution of Barbados has mandated that the BPC may regulate its own procedure. We feel though that we should express some of our thoughts on this matter especially as the Court of Appeal at pages 43-44 of its judgment spent some time on the procedure that it considered should ensue after conviction. Moreover, the role of the BPC in a mandatory death penalty regime is critical to the individualising of the sentence, an essential feature of any civilised justice system. We have seen from time to time in relation to a refusal to exercise the prerogative of mercy in favour of a condemned man, the expression that one is "allowing the law to take its course". Somehow, mercy is in some quarters perceived as a deviation from the normal course of the law. This is a most unfortunate way of viewing the prerogative of mercy, especially in a mandatory death penalty regime. Mercy and justice are not mutually exclusive concepts and the "course" of the law includes the principled intervention of the BPC. We would respectfully adopt the view of Justice Holmes of the United States Supreme Court who, in reference to the power of the US President to grant pardons, noted that:

> "A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed". *See*: *Biddle v Perovich*[75]

[141] If we understood Mr. Shepherd QC for the condemned men, correctly, he contended that the BPC should meet as soon as possible after the dismissal of an appeal to the Court of Appeal by a person convicted of murder. The sole purpose of this meeting, he suggested, should be to determine whether the members of the BPC were disposed to commute the sentence. In the event that commutation was agreed, then that advice should forthwith be tendered to the Governor-General. Failing such agreement, the BPC should postpone further deliberations until the condemned man had exhausted his domestic appeals or, until all the statutory time-limits within which such appeals should have been launched, had expired. The BPC should then meet a second time for the same purpose as that for which their first meeting was held. If at that second meeting it is agreed to commute, then that advice should forthwith be tendered to the Governor-General. Otherwise, the BPC should postpone further deliberations until the processing of any application made to an international body is completed or the opportunity of making such application no longer exists. When the report of the international body has been received, the BPC should again meet. Before it does so, it should make available to the condemned man the material upon which it proposes to make its decision, give him reasonable notice of the date of the meeting and invite him, through his attorneys, to make written representations.

[142] There are some advantages in following this procedure. If at any stage, commutation is clearly warranted, then a decision to grant it can be made early and the condemned man informed as soon as practicable. That course of action might save the man and the State the expense and trouble of further unnecessary

[75] *274 US 480 (1927), 486*

legal process. The JCPC in *Pratt*[76] did suggest that the Jamaica Privy Council should "consider the case shortly after the Court of Appeal hearing and if an execution date is set and there is to be an application to the [JCPC] it must be made as soon as possible…"

[143] Notwithstanding these apparent advantages, we do not support this approach. It will often be quite unnecessary and unproductive for the BPC to sit on three separate occasions on the same case. Moreover, there is always a risk that if members of the BPC form an initial view against commutation, it may be more difficult to persuade them subsequently to change that stance when ultimately an opportunity is provided to the condemned man to make written representations. We would recommend that the BPC should meet only once and that they should do so at the very end of all the domestic and international processes. At that stage they should make available to the condemned man all the material upon which they propose to make their decision, give him reasonable notice of the date of the meeting and invite him to submit written representations. This does not of course preclude the Governor-General in his or her discretion from convening at any time a meeting of the BPC with a view to achieving a consensus on commutation if the Governor-General considers there is a strong case for a commutation. If there is no decision in favour of commutation, then further deliberation would have to be adjourned.

[144] This appeal is dismissed with costs certified fit for two attorneys-at-law for each respondent.

/s/M A de la Bastide

Michael A de la Bastide

/s/A Saunders

Adrian D Saunders

[76] *See [1994] 2 A.C. 1 @ 34G*