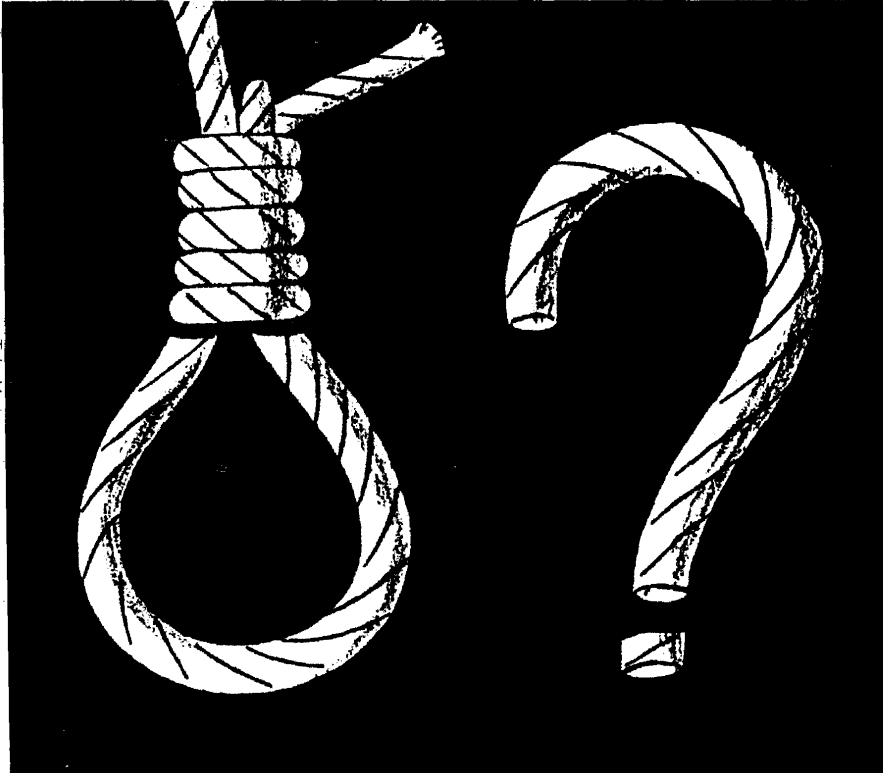


copy 1

The death penalty and the continuing role of the Privy Council

Saul Lehrfreund is concerned that the abolition of the Privy Council's criminal jurisdiction may be effected without informed debate and reasoned argument



Toby Morrison

In recent weeks, there has been much debate about the future of appeals to the Judicial Committee of the Privy Council from independent Caribbean countries. All of these countries have retained the mandatory death penalty by hanging for the crime of murder. The Privy Council is seen locally as an obstacle in the desire to execute those on death row, and the issue of capital punishment is constantly referred to by governments, when advocating the ending of appeals to the Privy Council.

Whether or not it is time to end the role of the Privy Council as a final court of appeal for the Commonwealth Caribbean, is a complex issue. The emphasis on the death penalty is, however, of great concern. The Privy Council is characterised in the Caribbean as a liberal tribunal firmly

opposed to the application of capital punishment. In spite of the fact that the majority of applications for leave to appeal are dismissed in criminal matters and a large number of constitutional motions have been turned down, whenever the Privy Council do allow an appeal, their continued role is called into question. The attitude therefore appears to be one of—"if you do not like the verdict, abolish the court!"

It is clear that under both national law and regional international human rights instruments, Caribbean states are at liberty (and have a sovereign right) to retain the death penalty for the most serious crimes, should they so decide. Nevertheless, a major concern is that international human rights standards, let alone fundamental human rights provisions en-

shrined in each Caribbean constitution, indicates that there is a proportionate price to be paid for the application of the death penalty.

Unfortunately, past experience and present practice indicates that many cases do not address or reach these constitutionally and internationally relevant standards. The common law as applied in the 19th century is not an adequate instrument for control of poorly paid, lightly disciplined police forces who are under pressure to secure results in the face of rising crime rates and criminal violence. The law as it stands does not provide an adequate basis for the exclusion of unreliable confessions, identifications and other aspects of a defective investigation. The right of access to a lawyer while in custody remains on the whole theoretical rather than practical, and trial lawyers are too frequently ill-equipped and insufficiently experienced to ensure that a fair trial is afforded.

Several years ago, a distinguished Trinidadian lawyer told a BBC television programme that, "... You have situations where if people are just suspected, they are arrested. They are kept in police stations. They are made to sign confessions. Then you go before a jury in an environment in which you have a high crime rate, which is a lot of pressure on a jury system in a small country—and you have lawyers who are very inexperienced having to defend these people. You have a situation where the dice is firmly loaded against the accused person."

The lawyer who made those remarks was Mr Ramesh Maharaj. He is now the Attorney-General of the Republic of Trinidad & Tobago, and is the person most responsible for ensuring that capital punishment has become a reality once again in that country. Nine men were executed within the space of three days in June of this year, and as recently as July 28, 1999, Mr Anthony Briggs was ex-

ecuted in Port of Spain. Mr Maharaj was once one of the leaders of the Caribbean human rights movement, and appears now to have sacrificed his principles on the basis that most politicians tend to support capital punishment because they understand public opinion.

Meanwhile, Mr Dickie Bradley, the Attorney-General of Belize (who was also a defender of human rights in a previous life) in a recent article advocating the ending of criminal appeals to the Privy Council, stated that, "because all citizens have a right to appeal ... every convicted murderer has used his right of appeal to escape the hangman's noose."

Is the Attorney-General suggesting that prisoners sentenced to death should have waived their right to appeal? The very fact that seven persons sentenced to death in Belize have succeeded on their criminal appeals to the Privy Council since 1994 (and scores of other prisoners have succeeded before the Court of Appeal of Belize since independence in 1981), confirms the importance of the right for everyone convicted of an offence carrying the death penalty to a review of their conviction by a higher tribunal. Moreover, it highlights the real risk that miscarriages of justice have occurred in a very high proportion of capital cases.

Would it have been preferable for these individuals to have forsaken their appeals and to have been executed? The very fact that in the past five years, more than 50% of those sentenced to death in Belize have succeeded on appeal is of the utmost concern. Not because they have successfully escaped the hangman's noose (to the Attorney-General's obvious displeasure), but rather because errors in the judicial system and the real risk that innocent people being executed has been shown to be simply too high.

There can be no doubt that there is far too much violence in Caribbean society and murder rates have dramatically increased over the last decade. Could the Attorneys-General who place so much emphasis on the death penalty confirm whether they consider it to be the solution to the ever increasing rate of violent crime?

In 1995, the Constitutional Court of South Africa in abolishing the death penalty, stated that, "We would be deluding ourselves if we were to believe that execution of ... a comparatively

few people each year ... will provide the solution to the unacceptably high rate of crime ... The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system."

One may ask what relevance the future of the Privy Council's jurisdiction has in the real debate of reducing the levels of crime and violence in society.

"At the time of independence, the framers of the Caribbean constitutions made a decision to retain the Privy Council, in London, as the final court of appeal. It was thought that the Privy Council provided the judicial expertise, which was not then available in the domestic legal systems. This arrangement was intended to be temporary as it was envisaged that there would come a time when Caribbean countries (as other Commonwealth countries have done) would form their own national or regional final court of appeal."

Contrary to popular opinion in the Caribbean, the Privy Council has never and cannot declare the death penalty unconstitutional. Regrettably, the status of the Privy Council as the final court of appeal for Commonwealth Caribbean countries and the desirability of capital punishment, have incorrectly been treated as one and the same issue. The Privy Council has not been responsible for the failure of Caribbean states to carry out the death penalty in the majority of cases. Rather, the failure to afford due respect to basic principles of justice and fundamental human rights has been the primary reason for the quashing of convictions and the commutation of death sentences.

At the time of independence, the framers of the Caribbean constitutions made a decision to retain the Privy Council, in London, as the final court of appeal. It was thought that the Privy Council provided the judicial expertise, which was not then available in the domestic legal systems. This arrangement was intended to be temporary as it was envisaged that there

would come a time when Caribbean countries (as other Commonwealth countries have done) would form their own national or regional final court of appeal.

The Constitutions all contain provisions whereby the legislature can abolish the jurisdiction of the Privy Council by amending the constitution. If there is now a desire to terminate the jurisdiction of the Privy Council, then all Caribbean countries have the legislative capacity to do so. The reality is that since independence, a Caribbean Court of Appeal could have been created at any time, had there been sufficient consensus.

A present proposal involves abolishing only the criminal jurisdiction of the Privy Council, which appears somewhat transparent and divisive. Surely, if the proposed Caribbean Court of Appeal is to provide sufficient expertise in criminal cases involving capital punishment, why cannot the same tribunal do so for civil appeals? The role of the Privy Council in the Caribbean is a sovereign question, concerning whether a colonial anachronism thousands of miles away has any place in Caribbean societies as we approach the millennium. Why cannot the proposed regional tribunal deal with all final appeals? It has been suggested that Caribbean governments are anxious to retain business with international companies which themselves favour the retention of the Privy Council because of its expertise in commercial matters. Have the governments therefore sought a device that will enable them to hang as many people as possible, with a minimum level of judicial interference, while preserving their commercial arrangements?

Commonwealth Caribbean countries may consider that it is time to reform their constitutional and legal affairs to create different arrangements for the resolution of their criminal and constitutional law than that bequeathed on independence. The motivation and timing of the present proposals is, however, of great concern. Such an important debate should be conducted on the basis of accurate information and reasoned argument. It is with deep regret that information emanating from a number of Caribbean governments meets neither of these criteria.

Saul Lehrfreund, Simons Muirhead and Burton