IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT C.L. P049/1991

BETWEEN	EARL PRATT	PLAINTIFF
AND	THE ATTORNEY GENERAL FOR JAMAICA	FIRST DEFENDANT
AND	THE SUPERINTENDENT OF PRISONS, ST. CATHERINE DISTRICT PRISON	SECOND DEFENDANT

SUIT C.L. M132/1991

BETWEEN	IVAN MORGAN	PLAINTIFF
AND	THE ATTORNEY GENERAL FOR JAMAICA	FIRST DEFENDANT
AND	THE SUPERINTENDENT OF PRISONS, ST. CATHERINE DISTRICT PRISON	SECOND DEFENDANT

Dr. Lloyd Barnett, Richard Small and Mrs. Sandra Minott Phillips for Earl Pratt

Noel Edwards Q.C., Dennis Daly Q.C. and Jack Hines for Ivan Morgan

Lennox Campbell, Miss Denier Lyttle and Lackston Robinson for the Defendants

CORAM: WOLFE, PATTERSON AND HARRISON JJ.

HEARD: APRIL 29, 30, MAY 1, 2, 3, 6, 7 and JUNE 14, 1991.

JUDGMENT

WOLFE J.

Earl Pratt and Ivan Morgan have both invoked the Jurisdiction of the Court under Section 25 (1) of the Jamaica (Constitution) Order in Council 1962. Section 25 (1) states as follows:

> "Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress".

Section 25 (2)

> "The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".

Both Plaintiffs alleged that their rights under sections 17 (1) and 20 (1) of the Constitution have been breached.

Section 17 (1) states:

"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

Section 17 (2) states:

"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day".

Section 20 (1) states:

"Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

Dr. Barnett arguing for both Plaintiffs posited the following:

"Although the Applicants challenge the proposed imposition of the death penalty on them and seek a reduction of their sentence, the issue raised is not the constitutionality of capital punishment but the constitutionality of the infliction of the death penalty on them at this stage and in the circumstances of their case and the validity of the decision that they should in those circumstances be subjected to capital punishment."

The Applicants contention is two fold:

1. On a proper interpretation of the constitution the delays and repeated issuing of death warrants and their withdrawals at a time when Applicants had undergone agony of impending execution, coupled with the hope given them, from time to time, of reprieve constitute inhuman and degrading treatment.

2. The refusal of the Governor-General in Privy Council to commute the death sentence is an unreasonable exercise of the constitutional power within the Wednesbury principles and/or arrived at in breach of principles of natural justice and constitutional rights to a fair and proper hearing".

Delay being an element contributing to the inhuman and degrading treatment of which the Plaintiffs complain it is appropriate to set out the chronological

sequence of events since the date of the offence to the present time in respect of each Plaintiff.

EARL PRATT

1. Date of offence -- October16, 1977 .
2. Dates of trial -- January 10 - 15, 1979
3. Application for Leave To Appeal to Jamaican Court of Appeal filed -- January 1979,
4. Appeal heard -- On divers dates between September 30, 1979 and December 5, 1980.
5. Petition to Inter American Commission on Human rights -- June 12, 1981
6. Reasons for refusal of Application for Leave to Appeal Delivered -- September 24, 1984.
7. Inter-American Committee on Human Rights rejected Petition -- October 3, 1984
8. Appealed to the United Nations human Rights Committee under the International Covenant on Civil and Political Rights -- January 28, 1986
9. Notice of Intention to Petition for Special Leave to Appeal to Judicial Committee of the Privy Council -- Dated March 12, 1986 and lodged in the Court of Appeal on March 13, 1986
10. Application for Special Leave to Appeal to the Judicial Committee of the Privy Council Dismissed -- July 17, 1986.

11. United Nations Human Rights Committee requested stay of Execution -- July 21, 1986

12. First warrant issued -- February 13, 1987

Advising execution on -- February 24, 1987

13. Stay of execution -- February 21, 1987

14. Inter American Committee on Human Rights reviewed decision handed down October 3, 1984 -- July 9, 1987

Jamaica government advised as follows:

"The fact that the Jamaican Court of Appeal issued its decision on December 5, 1980 but did not issue the reasons for that decision until four (4) years later September 24, 1984 was tantamount to cruel inhuman and degrading treatment because during that four years delay the Petitioner could not appeal to the Privy Council and had to suffer four (4) years on death's row awaiting execution."

15. Second warrant issued -- February 21, 1988

Advising execution on -- March 8, 1988

16. Stay of execution granted -- March 1, 1988

17. View of United Nations Human Rights Committee handed down -- April 6, 1989

18. Third warrant issued -- February 21, 1991

Advising execution on -- March 7, 1991

19. Constitutional redress sought by Notice of Motion filed -- February 28, 1991

20. Stay of execution granted -- March 6, 1991.

<u>IVAN MORGAN</u>

1. Date of Offence -- October 16, 1977

2. Dates of Trial -- January 10 - 15, 1979

3. Application for Leave to Appeal to Jamaican Court of Appeal filed -- January, 1979

4. Appeal heard -- On divers dates between September 30, 1980 and December 5, 1980.

5. Reasons for refusal of Application for Leave to Appeal Delivered - September 24, 1984.

6. Notice of Intention to Petition for Special Leave to Appeal to the Judicial Committee of the Privy Council - Dated April 13, 1985 - lodged in the Court of Appeal on March 13, 1986.

7. Application for Special Leave to Appeal to the Judicial Committee of the Privy Council Dismissed - July 17, 1986

8. First warrant issued - February 13, 1987

Advising execution on - February 24, 1987

9. Stay of execution granted - February 21, 1987

10. Appealed to the United Nations Human Rights Committee under the International Covenant on Civil and Political Rights - March 12, 1987

11. Recommendation of Inter-American Committee on Human Rights - July 9, 1987

12. Second warrant issued - February 21, 1988

Advising execution on - March 8, 1988

13. Stay granted - march 1, 1988

14. Views of United Nations Committee on Human Rights handed down - April 6, 1989

15. Third warrant issued - February 21, 1991

Advising execution on - March 7, 1991

16. Constitutional Redress sought by Notice of Motion filed - February 28, 1991

17. Stay of Execution granted - March 6, 1991.

Both matters were commenced by Notice of Motion. The court brought to the attention of counsel appearing for the Plaintiffs, The Judicature (Constitutional Redress) Rules, 1963. The relevant portions of section 3 of the said rules state:

> 3(1) An application to the court pursuant to section 25 of the constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive, of the constitution has been or is being contravened in relation to him, may be made by motion to the court supported by affidavit.
>
> (ii) An application to the court pursuant to section 25 of the constitution for redress by any person who alleges that any of the provisions of sections 14 to 24 inclusive of the constitution has been, is being or is likely to be contravened in relation to him, may be made by filing a writ of summons claiming a declaration of rights and/or praying for an injunction or other appropriate order. (emphasis supplied)
>
> (vi) The provision of the Judicature (Civil Procedure Code) Law shall apply to all proceedings under these rules with such variations as circumstances may require.

The very question of whether or not matters of this nature should be commenced by writ of summons instead of by Notice of Motion was urged by the Solicitor General appearing on behalf of the Attorney General in Bell v Director of Public Prosecutions And Another [1985] 32 W.I.R. p. 317. Lord Templeman delivering the opinion of the Board at page 322 said:

> "The Solicitor-General who appeared on behalf of the Attorney General of Jamaica now submits that the application to the Supreme Court should have been made by writ and not by Notice of Motion. Without entering into a consideration of the rules of procedure which apply in Jamaica and are best determined by the courts of Jamaica, their Lordships reject this submission. The appellant fairly raised before the appropriate court his complaint that his fundamental right guaranteed by the constitution had been infringed."

In Mitchell v. United States Government S.C.M.A. No. 3/90 (unreported) Rowe P. said:

> "The Judicature (Constitutional Redress) Rules 1963 provide two methods by which applications may be made to the Supreme Court pursuant to section 25 of the Constitution. If the complaint is that any of the claimant's fundamental rights and freedoms 'has been, or is being' contravened in relation to him, then the application may be made by Motion. If on the other hand the complaint includes a claim in relation to future conduct, in addition to past and present wrongs, then the application must be by writ."

In deference to the ruling of the Court of Appeal the following order was made.

1. That Writ of Summons be filed in respect of each Plaintiff's case.
2. That the Affidavits filed be the pleadings in the Action.
3. That evidence be given by Affidavit.
4. That the Respondents be permitted to file notice of intention to cross-examine if such action be deemed necessary.

The order of the court was duly complied with. Each Plaintiff in his Statement of Claim sought the following Redress.

1. A declaration that the Plaintiff has been denied the right to a fair hearing within a reasonable time as required under section 20 (1) of the said constitution, by reason of the delay in the completion of the judicial proceedings respecting this case.
2. A declaration that the Plaintiff has been, and is being subjected to inhuman or degrading treatment in contravention of section 17(1) of the said constitution by reason of the following:-
   (i) A death warrant was first issued on the 13th day of February 1987 for the execution of the Plaintiff on the 24th day of February, 1987 after a delay of approximately eight years and one month after the sentence of death was passed on the Plaintiff on the 15th day of Janaury, 1979 which delay included three years and nine months during which the Jamaican Court of Appeal failed to give written reasons as aforesaid.

(ii) The said warrant was issued while an appeal by the Plaintiff was pending before the United Nations Human Rights Committee and after the said committee had by decision dated July 21, 1986 requested the Government of Jamaica to stay the execution of the Plaintiff pending the determination of his appeal to the said commission;

(iii) The stay of the first warrant aforesaid, granted by the Governor General of Jamaica on the 23rd day of February, 1987 was not communicated to the Plaintiff until the 24th day of February, 1987, and only 45 minutes before the scheduled execution;

(iv) A second warrant for the execution of the Plaintiff was issued on the 23rd day of February, 1988, some eight months after the Inter American Commission on Human Rights of the Organization of American States had recommended to the Government of Jamaica that the sentence of death passed on the Plaintiff be commuted to life imprisonment, and while the appeal to the United Nations Human Rights Committee was still pending before that body.

(v) A third death warrant was issued on or about the 21st of February, 1991 for the execution of the applicant on the 7th of March 1991 notwithstanding the fact that the United Nations Human Rights Committee had decided on the 6th April, 1989 that the Applicant was a victim of the violation of Articles 14 paragraph 3 (c) and of the International Convent (sic) on Civil and Political Rights, which covenant and Protocol thereto the Jamaican Government has signed and ratified and that accordingly the Plaintiff was entitled to the commutation of his death sentence, thereby raising the Plaintiff's legitimate expectation that he would not be executed.

(vi) That the said death warrant was issued after the death penalty had been "de facto" suspended for a period of almost two years since March 1989 and after the Plaintiff was led reasonably to believe and legitimately to expect that the Government's review and official statements made during this period of and concerning the application of the death penalty would have placed him in a category of inmate

whose sentence of death would be commuted to life imprisonment by virtue of the time which he had spent on Death Row.

3. A declaration that the Plaintiff will be subjected to inhuman or degrading punishment and treatment in contravention of section 17 (1) if the sentence of death is carried out in the aforesaid circumstances leading up to and surrounding his planned execution.

4. A Declaration that Governor General in Privy Council is legally and/or constitutionally bound by the determination, recommendation and/or decision of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee.

5. A Declaration that the refusal of the Governor General in Privy Council to commute the sentence of death in the circumstances of the Plaintiff's case constitutes an unreasonable, arbitrary and/or invalid exercise of the constitutional power and is an un-constitutional denial of the Plaintiff's right to a proper consideration of his case.

6. An Order that the sentence of death passed on the Plaintiff be commuted to Life Imprisonment.

7. An injunction against the Second Respondent restraining the execution of the Plaintiff.

RELIEFS AND ARGUMENTS

1. A Declaration that the Plaintiff has been denied the right to a fair hearing within a reasonable time as required under section 20 (1) of the said Constitution by reason of the delay in the completion of the judicial proceedings respecting his case.

Section 20 (1) of The Jamaica (Constitution) Order in Council 1962 (supra) is enshrined in the Constitution to avoid the mischief of persons being arrested and held in custody without being heard within a reasonable time. The Common law has always recognized the right of a person charged with a criminal offence to have the matter heard as quickly as possible. In the instant case the delay complained of, is the time which elapsed between the Judgment of the Court of Appeal on December 5, 1980 and the date of the Reasons for Refusal of the Application for Leave to Appeal on September 24, 1984.

In what way did this delay infringe the Plaintiff's rights to "a fair hearing within a reasonable time."

In Barker v Wingo, Warden 407 US514 (1972) Powell J in dealing with the Sixth Amendment to the Constitution of the United States identified four factors which in his view a court should assess in determining whether a particular Defendant has been deprived of his right. The Sixth Amendment to the Constitution of the United States provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury." McDonald J sitting in the Alberta Queen's Bench Court in R v Cameron [1982] 6 W.W.R. 270 reproduced and adopted the four factors pointed out by Powell J in Barker v Wingo (supra) when considering section 11 of the Canadian Charter of Rights and Freedoms Constitution Act 1982. A provision similiar to section 20 (1) of the Jamaica (Constitution) Order in Council 1962.

In Bell v Director of Public Prosecutions (1985) 32 W.I.R. p. 317 at p. 326 Lord Templeman delivering the opinion of the Board in a section 20 (1) situation said:

> "Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in Barker v Wingo. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must, however, vary from jurisdiction to jurisdiction and from case to case".

The four factors identified by Powell J are:

1. Length of Delay

> "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of the delay that will provoke such inquiry is necessarily dependent upon the peculiar circumstances of the case". (407 U.S. 514 at page 530.)

Can the delay in delivering the reasons for judgment be regarded as presumptively prejudicial?

Lord Templeman in disposing of the Petition for Special Leave to Appeal

as a Poor Person by the Plaintiffs observed when dealing with the delay:

> "During the whole of that period the appellant had sentence of death hanging over him and, of course, no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when those reasons had been delivered".

Bearing in mind the observations of Lord Templeman and the decision which was arrived at I am of the view that "the long delay between the date of hearing of the appeal and the date of the reasons" does not qualify as presumptively prejudicial. It would have to be shown that the delay was likely to have affected the outcome of the Petition for Special Leave to Appeal. Their Lordships' "disquiet," which is undoubtedly justified in the circumstances, is no basis for holding the delay as presumptively prejudicial.

Having concluded that the delay is not presumptively prejudicial it becomes un-necessary to consider the other three factors. However in the event of my being wrong in so holding let me examine the other factors.

2. <u>The Reason given by the Court of Appeal for the delay.</u>

> "A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the Defendant. Finally a valid reason, such as a missing witness, should serve to justify appropriate delay".
> (407 U.S. 514 at page 331).

The Records are silent as to the reasons for the delay in the handing down of the Reasons for Judgment. However there has been no allegation of any deliberate attempt on the part of the Court of Appeal to hamper the Plaintiffs petitioning Her Majesty in Privy Council. The delay would appear to fall under the heading "more neutral reason".

Did this in any way affect the hearing of the Plaintiffs' Petitions save and except the time they had to wait to know the eventual outcome of the matter.

While it is not being contended that delay of the nature being considered cannot be prejudicial yet I am of the view that a distinction must be drawn between pre-trial delay and delay which occurs after conviction. Post trial

delay which may be described as inimical to our whole system of Jurisprudence does not really affect the substance of the arguments which are likely to be presented before an Appellate Court. The convicted person is thus not deprived of the real possibility of a fair hearing by any such delay.

3. The responsibility of the accused for asserting his rights:

> "Whether and how a Defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily indentifiable, that he experiences. The more serious the deprivation, the more likely a Defendant is to complain". (407 U.S. 514 at page 531).

What did the Plaintiffs do to assert their rights arising from the delay?

On January 7, 1981 or there about both Plaintiffs wrote to the Registrar of the Court of Appeal requesting:

> "To set my case in a position, so that when my attorney Mr. Noel Edwards wishes to further his argument of appeal to the Privy Council of England he can do so".

On August 16, 1984 Earl Pratt wrote to the Registrar of the Court of Appeal requesting the reasons. The letter was received by the Registrar on September 3, 1984. The reasons were delivered by the Court on September 24, 1984. Significantly Notice of Intention to Petition for Special Leave to Appeal to the Judicial Committee of the Privy Council was not filed in the Court of Appeal until March 13, 1986.

The Plaintiffs contend that they were unable to pursue their appeals to the Judicial Committee of the Privy Council due to the failure of the Court of Appeal to supply the Reasons for the decision handed down on December 5, 1980. Lord Templeman also made an observation to that effect in dealing with the Applications of the Plaintiffs.

Upon reading the Judicial Committee Rules 1957, which came into effect on February 1, 1958, I am not persuaded that the Plaintiffs could not have pursued a Petition to the Judicial Committee of the Privy Council without the reasons of the Court of Appeal. Rule 3 whichdeals with special leave to appeal

states:

> "A Petition for special leave to appeal to Her Majesty in Council shall state succintly and clearly all such facts as it may be necessary to state in order to enable the Judicial Committee to advise Her Majesty whether such leave ought to be granted and shall be signed by Counsel who attends at the hearing or by the party himself if he appears in person. The petition shall deal with the merits of the case only so far as is necessary for the purpose of explaining and supporting the particular grounds upon which special leave to appeal is sought".

RULE 4

> "The Petitioner shall lodge at least six copies of his Petition for special leave to appeal together with the Affidavit in support thereof presecribed by Rule 50 hereinafter contained, and also six copies of the Judgment from which leave to appeal is sought ....."

Rule 1 defines Judgment as including decree, order, sentence, or decision of any Court, Judge or Judicial Officer.

RULE 16

"The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall be included in the Record".

It must be noted that Record is not required to be transmitted to the Registrar until the Appeal has been admitted - see Rule 11.

Rule 11 does not impose a duty on the tribunal from whose decision the appeal arises to give reasons, but merely enjoins that where reasons are given they shall be communicated to the Registrar. See Nana Osei Assibey III Kokofuhene v Nana Kwasi Agyemen, Boagyashene [1952] All E.R. 1084.

I am fortified in my view by virtue of section 10 of Chapter LXIX of "The Judicial Committee Act 1844" which states:

> "It shall be lawful for the said judicial committee to make an order or orders on any court in any colony or foreign settlement, or foreign dominion of the crown, requiring the judge or judges of such court to transmit to the clerk of the Privy Council a copy of the notes of evidence in any cause tried before such court, and of the reasons given by the judge or judges for the judgment pronounced in any case brought by appeal or by writ of error before the said judicial committee".

The underlined portion of section 10 clearly indicates that a petition may be commenced without the notes of evidence or reasons being available at the time the petitioon is filed.

It is patently clear that the Plaintiff Earl Pratt was not interested in asserting his right of appeal to the Judicial Committee of the Privy Council. He was using the delay to invoke the jurisdiction of Human Rights bodies such as the Inter-American Commission on Human Rights - which he petitioned on June 12, 1981 and the United Nations Human Rights Committee which he petitioned on January 28, 1986. Further having received the Reasons for Judgment in 1984 the petition to the Privy Council was not filed until 1986.

In any event both Plaintiffs have only raised the complaint about delay since February 28 , 1991 after the issuing of the third warrant for execution. So after a period of eleven years and for the first time the Plaintiffs have complained that the delay have denied them the right to a fair hearing within a reasonable time.

4. Prejudice to the accused.

> "Prejudice, of course, should be assessed in the light of interest of Defendants which the speedy trial right was designed to protect. This court has identified three such interest: (i) to prevent oppressive pre-trial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last .... If witnesses die or disappear during a delay the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant pass. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown". (407 U.S. 514 at p. 532).

Having reviewed the four factors I conclude that the constitutional right of the Plaintiffs to a fair hearing within a reasonable time has not been infringed. I would therefore deny the declaration sought.

2. A declaration that the Plaintiff has been, and is being subjected to inhuman or degrading treatment in contravention of section 17(1) of the said constitution.

3. A declaration that the Plaintiff will be subjected to inhuman or degrading punishment and treatment in contravention of section 17(1) if the sentence of death is carried out in the aforesaid circumstances leading up to and surrounding his planned execution.

The declarations sought at (2) and (3) can conveniently be dealt with together.

The arguments in support of these two declarations are summarized as follows:

1. Section 14 (1) of the Jamaica (Constitution) Order in Council permits the imposition of the death penalty in execution of the sentence of a court.
2. Section 17 (1) provides that no person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
3. Section 17 (1) prohibits imposition not only of a punishment which amounts to torture or is inhuman and degrading but any other treatment which amounts to torture or is inhuman or degrading treatment to be added to its prescribed punishment.

In light of the above -

> "The long delays arising from no fault of the Plaintiffs or any insuperable administrative or legal problems, the late communication to the Plaintiffs of the grant of a stay of execution and having to encounter on repeated occasions imminent executions coupled with the tantalizing insinuation by officials of hope and its withdrawal caused the Plaintiffs acute suffering thereby altering the character of the punishment and the treatment which the reasonable contemplation of the law permitted for persons under sentence of death thereby rendering the imposition of the death penalty in the particular circumstances of their case cruel and inhuman treatment and therefore an infringement of section 17 (1) of the Constitution".

Citing and relying upon Kakis v Government of the Republic of Cyprus 1978 1 W.L.R. p. 779 it was contended that the constitution expressed a fundamental notion that there is a right to be protected against unreasonable delay in the administration of justice. It was further contended that English cases have always recognized and affirmed that delay constitutes oppression.

Kakis' case arose under section 8 (3) of the Fugitive Offenders Act 1967.

> "On April 5, 1973, P was shot dead in Cyprus by three members of KOKAV, a militant political organization of which K was a member. A warrant was issued for his arrest but he joined other members in the mountains till July 15, 1974, when he participated in a coup which ousted the government. In September he left to settle in England with his wife, under a permit from the new government. In December the old government resumed power but proclaimed an amnesty in which he regarded himself as included. In January 1975 he returned to Cyprus for a short time to wind up his affairs,

> having been granted an entry visa and an exit permit. In August one A, who had also supported the coup, left Cyprus tosettle in England. In October the House of Representives rejected the amnesty and reversed the policy of not prosecuting opponents of the government for crimes committed before the coup.
>
> On February 11, 1976 the Attorney General of Cyprus directed extradition proceedings against K in respect of his alleged participation in the murder. In the magistrate's court be denied any part in it and his wife and A gave evidence supporting his alibi that he was at home at the time, but they stated that they could not go to Cyprus to testify at any trial there for fear of ill treatment or arrest. The court having committed K to custody, he applied for habeas corpus but the Divisional Court of the Queen's Bench Division dismissed his application".

Held, allowing the appeal (Lord Keith of Kinkel dissenting), that by reason of the passage of time, it would be unjust or oppressive to return K, since it would detract significantly from the fairness of his trial if he were deprived of the evidence supporting his alibi.

The decision of the House of Lords clearly indicates that delay per se was not the reason for the decision but the prejudice which the delay would cause in that K would be deprived of the witnesses to support his alibi. It is also useful to examine the wording of the particular legislation which the Court had to consider. By section 8 (3) of the Fugitive Offenders Act 1967:

> "..... The High Court .... may .... order the person committed to be discharged from custody if it appears to the court that ... (b) by reason of the passage of time since he is alleged to have committed [the offence] ... it would, having regard to all the circumstances, be unjust or oppressive to return him."

The section is designed to ensure that the accused be given a fair hearing with a reasonable time. The section is somewhat like section 20 (1) of the Jamaica (Constitution) order in Council 1962. Lord Diplock opined "Unjust" I regard as directed primarily to the risk of prejudice to the accused in the conduct of the trial itself:

> "Oppressive as directed to hardship to the accused reculting from changes in his circumstances that have occurred during the period to be taken into consideration."

On pointing out that the decision in Kakis' case, supra, was not based on delay per se I am not to be understood as saying that delay cannot amount to

inhuman and degrading treatment.

In Riley and Others v Attorney General of Jamaica and Another [1982] 3 A.E.R. p. 469 the very issue came up for decision. Riley and others contended that the prolonged delay in the execution of their sentences, which was entirely due to factors outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading. Lord Bridge delivering the majority opinion of the Board said at page 471:

> "Their Lordships fully accept that long delay in the execution of a death sentence especially delay for which the condemned man is himself in no way responsible must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But it is not for this Board to usurp the function allocated by s. 90 of the Constitution to the Governor General acting on the recommendations of the Privy Council of Jamaica. The sole question for their Lordships' decision is whether the execution of sentence of death on any of the appellants would contravene s. 17 of the Constitution." (emphasis supplied).

Continuing at p. 473 Lord Bridge said:

> "Accordingly, whatever the reasons for, or length of delay in executing a sentence of death lawfully imposed the delay can afford no ground for holding the execution to be a contravention of s. 17 (1). Their Lordships would have felt impelled to this conclusion by the language of s. 17 alone, but are reinforced by the consideration that their decision accords fully with the general principles stated in D.P.P. v Nasralla [1967] 2 A.E.R. 161, [1967] 2 AC. 238 and de Freitas v Benny [1967] AC. 239."

Dr. Barnett submitted that the ratio of the majority opinion is to be found in the three conditions enunciated at pp. 372 and 373 ibid. The reasoning, he contends, proceeded on the textual interpretation of the paraphrase of section 17 (1). Such reasoning, says Dr. Barnett, is deficient in that it did not take into consideration the words "or other treatment" included by the Constitution. Further the majority proceeded on the basis that prior to independence there could be no legal challenge to delayed execution consequently upon independence there still could be no valid challenge to delayed execution.

The Board's reasoning is easy to follow. Section 14 (1) of the Constitution validates the death penalty by providing:

> "No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted".

Section 3 (1) of the Offences against the Person Act prescribes hanging as the manner of the execution of the sentence of death and provides lawful authority for the detention of the condemned man in prison until such time as the sentence is executed. If the law does not stipulate any fixed time in which the sentence is to be carried out then delay per se cannot be regarded as an infringement of section 17 (1) since section 17 (2) provides that:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day".

Delay per se does not change the character of the punishment and does not make it inhuman or degrading nor can it be regarded as torture or other treatment which is inhuman and degrading.

Lord Scarman delivering the minority opinion in Riley's case (supra) observed at p. 480:

> "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment. It is of course, for the applicant for constitutional protection to show that the delay was inordinate, arose from no act of his and was likely to cause such acute suffering that the infliction of the death penalty would be in the circumstances which had arisen inhuman or degrading".

Except for the delay by the Court of Appeal in delivering the Reasons for its Judgment, the delay in executing the sentence has been occasioned by the efforts on behalf of the Plaintiffs by way of stay of executions and by Government's review of the whole question of the death penalty in keeping with current world trend.

It cannot be that when the government suspends execution for a period of time to consider whether or not that type of punishment should continue that such a delay can be considered as an infringement of section 17 (1) of the Constitution.

I would therefore refuse these declarations.

4. <u>A declaration that the Governor-General in Privy Council is and/or constitutionally bound by the determination, recommendation and/or decision of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee.</u>

Section 90 of the Constitution states as follows:

(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 Jamaica 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 servere 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) In exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council.

Section 91 (1) states:

> "Where any person has been sentenced to death for an offence against the law of Jamaica, 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 in accordance with the provisions of section 90 of this Constitution."

Section 90 has enshrined the Royal Prerogative and section 91 recites the mechanism of the relationship between the Governor-General and the Privy Council.

For the Plaintiff it was submitted that:

> "Jamaica's participation in the International Covenant on civil and political rights and its optional Protocol was a lawful exercise of the Executive Power under section 68 of the Constitution. The intention of the Jamaican Government in assuming these treaty obligations must have been to give further protection to fundamental rights to the Jamaica people. Failure to have due regard to its International obligations would be inconsistent with that purpose, particularly as there is a close correlation between internationally protected rights and those protected under the Constitution".

In exercising the Prerogative of Mercy is the Governor-General bound by the decisions of any body including the Privy Council? Section 90 (2) of the

Constitution states:

> "In the exercise of the powers conferred on him by this section the Governor-General shall act on the recommendation of the Privy Council."

Are the recommendations of these International bodies enforceable in a Court of Law? To be enforceable there would have to be some Statutory Provision which makes them enforceable. There are no Statutory Provisions making the decisions of these International bodies enforceable in Jamaica. If they are not enforceable in the Courts of the land a fortiori they are not binding on the Governor General in Privy Council.

Blackburn v. Attorney General [1971] 2 A.E.R. p. 1380 gives support to the above view:

> "The Plaintiff brought two actions against the Attorney General seeking declarations to the effect that on entry into the Common Market, signature of the Treaty of Rome by Her Majesty's government would be in breach of the law because the government would thereby be surrendering in part the sovereignty of the Crown in Parliament for ever. No agreement had yet been reached to sign the treaty but it was accepted by the court that signature of the treaty would be irreversible and would limit the sovereignty of the United Kingdom. Further it was assumed by the court that on signing the treaty many regulations made by the European Economic Community would automacically become binding on the United Kingdom and that the courts would have to follow decisions of the European Court in certain defined respects such as the construction of the treaty".

Lord Denning MR. said:

> "Negotiations are still in progress for us to join the Common Market. No agreement has been reached. No treaty has been signed. It is elementary that these courts take no notice of treaties as such. We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us".

The decision of these International bodies have no more than persuasive effect in Jamaica. The sought after declaration is therefore denied.

5. A declaration that the refusal of the Governor-General in Privy Council to commute the sentence of death in the circumstances of the Plaintiff's case constitutes an unreasonable, arbitrary and/or invalid exercise of the constitutional power and is an unconstitutional denial of the Plaintiff's right to a proper consideration of his case.

The declaration sought invites the court to undertake a judicial review of the Exercise of the Prerogative of Mercy by the Governor-General. The question raised, by the declaration sought, is whether or not the Exercise of the Prerogative of Mercy can be the subject of Judicial Review.

Dr. Barnett submitted that section 32 (6) of the Constitution which states:

> "Any reference in this Constitution to the functions of the Governor-General shall be construed as a reference to his powers and duties in exercise of the executive authority of Jamaica and to any other powers and duties conferred or imposed on him as Governor-General by or under this Constitution or any other law"

makes it abundantly clear that the Privy council and the Governor-General and the Governor General acting in the Privy Council are all part of the Executive Government of Jamaica and they exercise executive powers by virtue of Constitutional grant of those powers. Further section 32(4) of the Constitution which is an exemptive provision prohibits judicial review only as to whether or not the Governor General has exercised his functions in accordance with section 32 of the Constitution.

The argument continues, that section 32 having expressly excluded from Judicial Review whether or not the Governor General has exercised his functions in accordance with the said section, then Judicial Review of the exercise of the Prerogative is permissible in every other respect. This proposition, says Dr. Barnett, finds support in the well known rule of interpretation "Expressio unius est exclusio alterius".

Section 32 (4) states:

> "Where the Governor-General is directed to exercise any function in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into in any court".

The opening words of section 32 (4) "Where the Governor-General is directed" prima facie suggest that there are functions which the Governor-General exercise free of any directions. He exercises these functions suo motu as the fountain of honour and in the name of Her Majesty. These functions have never been the subject of Judicial Review. The Framers of the Constitution have in their wisdom directed that certain functions exercisable by the Governor-General should be exercised

in accordance with certain provisions of the Constitution. Notwithstanding that the Constitution has directed the manner in which those functions are to be exercised the COnstitution by section 32 (4) has exluded judicial Review in respect of the exercise of these functions. In my view it cannot therefore be successfully argued that the exemptive provisions of section 32 (4) opens up to Judicial Review the functions which are exerciseable by the Governor General suo motu and which functions were never the subject of Judicial Review.

The approach suggested by Dr. Barnett seeks to place a very limited interpretation on the word exercise. He seeks to limit the word exercise in relation to whether or not the consultation was made or the recommendation or advice received and acted upon or whether or not the required representation was made.

The maxim "Expressio unius est exclusio alterius" has no place in the interpretation of section 32 (4) of the Constitution VIS A VIS the functions which are exerciseable outside of the Constitution namely the Common Law Prerogative.

On the question of the Royal Prerogative it was urged that since section 90 of the Constitution deals comprehensively with the Prerogative of Mercy and Pardon the Common Law Prerogative was now superseded by the Constitutional Provisions. There is no longer any residue of Prerogative Power in the Crown and the Queen. No person other than the Governor General in Privy Council, as set out in the Constitution, has any executive authority in respect of the Prerogative of Mercy and Pardon.

The Constitution created no new Prerogative. All the provisions of the Constitution did was to enshrine the Common Law Prerogative. The character of the Prerogative was not changed. It may be said that the Prerogative Powers were enshrined in the Constitution abundante cautela, so that in an independent Jamaica there could be no doubt as to who would be responsible for exercising the Prerogative.

In C.S.S.U. v Minister for Civil Service [1985] 1 A.C. p. 374 (H.L.(E)) the House of Lords explored extensively the whole question of Judicial Review of Crown Prerogative power.

In this case the Minister for Civil Service made an order altering the terms and conditions of service of workers at the Government Communications Headquarters ("GCHQ") who had the responsibility to ensure the security of military

and official communications and to provide the Government with signals intelligence; they involved the handling of secret information vital to national security. Since 1947 Staff employed at "GCHQ" were permitted to belong to national trade unions and most had done so. There was a well established practice of consultation between the official and trade union sides about important alterations in the terms and conditions of service of the Staff. On 22nd December 1983 the Minister for the Civil Service gave an instruction, purportedly under article 4 of the Civil Service Order in Council 1982 for the immediate variation of the terms and conditions of service of the Staff with the effect that they would no longer be permitted to belong to national trade unions. There was no consultation with the trade unions prior to this decision. Action was commenced seeking Judicial Review of the Minister's decision.

Glidwell J. granted a declaration that the instruction of the Minister was invalid. The Minister appealed and the Court of Appeal allowed the appeal and gave the Unions leave to appeal to the House of Lords.

Bloom-Cooper Q.C. for the unions submitted inter alia

> "In general terms, all prerogative powers are reviewable. Some may not be; the nature of the prerogative determines whether they are or not. Where the sovereign has given instructions to a specific Minister the court will say that it will construe it as if it had been statutory ("Any Minister would do but it makes the point stronger if it is to a specific Minister) Something like the death penalty would be totally unreviewable in any circumstances. (emphasis supplied)

By way of comment the submission deals primary with delegated authority.

Lord Fraser of Tully belton summarizing the submissions of Robert Alexander Q.C. for the Minister, said:

> "This submission involves two propositions:
>
> (1) That prerogative powers are discretionary, that is to say they may be exercised at the discretion of the sovereign (acting on advice in accordance with modern constitutional practice) and the way in which they are exercised is not open to review by the Courts;
>
> (2) That an instruction given in the exercise of a delegated power conferred by the sovereign under the prerogative enjoys the same immunity from review as if it were itself a direct exercise of prerogative power".

Lord Fraser dealing with the first of the two propositions said at p. 398.

> "the first of these propositions is vouched by an impressive array of authority ....."

He then continues:

> "As Dekeyser's case shows the courts will inquire into whether a particular prerogative power exists or not, and if it does exist, into its extent. But once the existence and the extent of a power are established to the satisfaction of the court, the court cannot inquire into the propriety of its exercise. That is undoubtedly the position as laid down in the authorities to which I have briefly referred and it is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts".

Unfortunately the noble and Learned Lord,

> "Assumed, without deciding, that his first proposition is correct and that all powers exercised directly under the prerogative are immune from challenge in the courts".

Lord Scarman, at p. 407, treating the reviewability of the exercise of the Royal Prerogative said:

> "I believe that the law relating to Judicial Review has now reached the stage where it can be said with confidence that if the subject matter in respect of which prerogative power is exercised is justiciable that is to say if it is a matter upon which the court can adjudicate the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.....Today, therefore, the controlling factor in determining whether the exercise of prerogative power is subject to Judicial Review is not the source but is subject matter".

Lord Roskill whilst accepting the existence of the right to challenge the exercise of the prerogative power by way of Judicial Review said at p. 419:

> "But I do not think that the right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made subject of Judicial Review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of Ministers as well as others are not, I think, susceptible to Judicial Review because their nature and subject matter are such as not to be amenable to the judicial process".

I am confirmed in the view that the Governor-General's exercise of his discretion whether or not to commute the sentence of death imposed on a person convicted of murder is not a matter which is justiciable. The nature and subject matter of the prerogative is such as not to be amenable to the judicial process.

LEGITIMATE EXPECTATIONS

The proposition was advanced that the exercise of the power of commutation in the instant case was subject to review, in that the conduct of the executive raised in the Applicants a legitimate expectation that the sentence of death imposed on each of them would be commuted. The conduct referred to may be summarized as follows:

1. The decision to suspend execution pending an investigation into the whole question of the death penalty.
2. The recommendations of the Fraser Report.
3. The utterances of Ministers of Government on the question of the death penalty.

Lord Diplock, on the question of Judicial Review, in C.S.S.U. v. Minister for Civil Service (supra) at p. 408 said:

> "To qualify as a subject of Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision maker, although it may affect him too.
>
> It must affect such other person either;
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been giving an opportunity to comment; or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".

Lord Diplock labelled decisions which fall into class (b) as "legitimate expectation".

Clearly category (a) does not apply in the instant case as the decision by the Governor-General cannot be said to alter any rights or obligations of the Plaintiffs which are enforceable by or against them in private law whether at Common Law or by Statute. Under Section 90 (1) of the Constitution the Prerogative of Mercy

is not a matter of right but of indulgence.

In respect of category (b) (i) it cannot be successfully contended that the Governor General's decision, not to exercise the prerogative of mercy in favour of the Plaintiffs is to deprive them of a benefit or advantage which they had been permitted by him to enjoy in the past and which they could legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been giving an opportunity to comment. Once the judicial process is exhausted the passage of time between the completion of the judicial process and the actual execution does not qualify as a benefit or advantage. Secondly there has never been any practice of the Governor General communicating to a condemned person rational grounds as to why the sentence of death is to be executed. Once the Privy Council has reviewed the case and has advised the Governor General it is open to him to issue the warrant for execution. Category (b) (ii) has no application in the present case.

In A.G. of Hong Kong v Ng Yuen Shiu [1983] 2 All E. R. 346 at p. 350 Lord Fraser of Tully bolton opined:

> "The expectation may be based on some statement or undertaking by or on behalf of the public authority which has the duty of making the decision if the authority has through its officers acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an injury."

The Plaintiffs have alleged that the conduct of the Executive has created in them a legitimate expectation of commutation. It must be borne in mind that the discretion whether or not to commute a sentence of death does not reside in Parliament. Parliament may legislate to abolish the death penalty. No pronouncements by Ministers of Government can provide any basis for saying that the Plaintiffs had a legitimate expectation that the sentence of death would be commuted.

For these reasons the declaration sought ought to be denied.

6. An order that the sentence of death passed on the Plaintiffs be commuted to life imprisonment.

The prerogative of mercy resides in the sovereign. It is not justiciable. Having ruled that the exercise of the prerogative is not amenable to judicial process. The Court has no power to direct the Governor General how to exercise his discretion.

7. An Injunction against the Second Respondent restraining the execution of the Plaintiff.

To grant the injunction prayed would be tantamount to interfering with the exercise of the Governor-General's discretion which is not subject to judicial review. The injunction must therefore be denied.

Patterson, J.

Both plaintiffs in these actions allege that the provisions of S.17(1) and S.20(1) of the Constitution of Jamaica ("the Constitution") have been, are being and are likely to be contravened in relation to each of them, and accordingly, they seek redress pursuant to S.25(1) of the said Constitution.

Each plaintiff was convicted on the 15th January, 1979 of the offence of murder, and sentenced to the mandatory penalty authorised by law, to suffer death. They are not complaining about the constitutionality of the death penalty but each contends that the proposed imposition of such penalty at this stage and in the circumstances of his case, and the validity of the decision that he should in these circumstances be subjected to the death penalty, are in contravention of his constitution rights.

Basically, they contend that: (a) "On a proper interpretation of the Constitution, the delay and the repeated issues of death warrants and their withdrawals at a time when the applicants had undergone the agony of impending execution, coupled with the hope given from time to time of reprieve, constitute inhuman and degrading treatment", and (b) "the refusal of the Governor-General in Privy Council to commute the sentence of death is an unreasonable exercise of the constitutional power within the "Wednesbury Principles" and/or has been arrived at in breach of the principles of natural justice and the applicants' constitutional rights to a fair and proper hearing". There is no complaint about the pre-trial delay in their cases but they do contend that they have been denied a fair hearing within a reasonable time, and so it is convenient to trace the history of events since conviction up to the present time. The plaintiffs' evidence, to a large extent, is uncontroverted.

Both plaintiffs were convicted and sentenced on the 15th January, 1979. Each made an application to the Court of Appeal for leave to appeal. The applications were heard by the Court on divers days between the 30th September, 1980 and the 5th December, 1980. Both applications were refused. The time lapse between conviction and the refusal of leave to appeal is approximately 1 year and 11 months.

On the 5th December, 1980 the Court of Appeal promised to put in writing the reasons for refusing the applications, but those reasons were not handed down until the 24th September, 1984. The lapse of time is about 3 years and 9 months. The plaintiffs contend that during that period and because no written reasons had been delivered by the Court of Appeal as promised, they were unable to "appeal further" to the Judicial Committee of the Privy Council against conviction and sentence by reason of which delay they were deprived of their constitutional right to a fair hearing within a reasonable time. Further, by reason of the delay and the consequential inability to pursue their said appeals they suffered "mental anxiety, anguish and torture" of having the sentence of death hanging over them.

Noel Edwards, Esq., Q.C., Eric Frater, Esq., and Miss D. Lightbourne represented the plaintiffs at the hearing of their applications for leave to appeal, and by a joint letter dated 7th January, 1981, addressed to the Registrar of the Court of Appeal, the plaintiffs asked that the necessary papers be made available to their attorneys-at-law so that whenever they wished to further "argument of Appeal" to the Privy Council of England, they would be able to do so.

On the 30th January, 1981, the Registrar of the Court of Appeal replied to the letter of Pratt and Morgan, and for completeness, I quote the body of that reply:-

> "I am in receipt of your recent correspondence, and have since spoken to your Attorney-at-law, Mr. Eric Frater. Mr. Frater advised me that he is endeavouring to take your matter to the Privy Council in England.
>
> Enclosed please find two copies of Criminal Forms 17".

It appears that for the next 3 years and 7 months, no further steps were taken by the plaintiffs or their attorneys-at-law towards perfecting the petitions for special leave to appeal to Her Majesty in Council.

Pratt made a first application to the Inter-American Commission on Human Rights of the Organization of American States, ("the Commission") on the 12th June, 1981, 6 months after his application for leave to appeal had been refused by the Court of Appeal. On the 17th February, 1983, the Commission applied to the Jamaican Government for a copy of the record of proceedings,

and it was supplied on the 15th July, 1983. The Commission, by note of October 14, 1983, reiterated its request for "the notes of the Appeal" and the Criminal Form 17 advising of the result of the application to the Court of Appeal, was forwarded on the 6th March, 1984.

The Commission considered Pratt's application and by Resolution dated October 3, 1984, "declared that there exists no evidence of the alleged violations of the American Convention on Human Rights as claimed by the plaintiff". The declaration was communicated to the Government of Jamaica and to Pratt. Morgan did not apply to the Commission.

Pratt wrote another letter to the Registrar of the Court of Appeal on the 16th August 1984, requesting the filing of the reasons for refusing their applications for leave to appeal. The letter was received by the Registrar on the 16th September, 1984 and the reasons were handed down on the 24th September 1984. It appears that Pratt also wrote Mr. Michael Fallon, M.P. in London, on the 23rd March 1984. I gather that this was an enquiry as to his right to petition Her Majesty in Council, and accordingly, by letter dated 17th May, 1984, the necessary advice was forwarded. What is surprising about this, is that the attorneys-at-law representing the plaintiffs seem to have been quite dormant since the applications for leave to appeal had been refused. It was not until the 13th August, 1985 that Morgan gave notice of his intention to petition for special leave to appeal to the Judicial Committee of the Privy Council and Pratt did likewise on the 12th March, 1986. It appears that the said notices were served on various Government officers in March 1986, and that the relevant documents for presentation to Her Majesty in Council were forwarded to the London solicitor about that time. Both petitions for special leave to appeal were heard on the 17th July, 1986, and dismissed.

The time lapse between the refusal of leave to appeal to the Court of Appeal and the dismissal of the petitions to Her Majesty in Council for special leave to appeal is almost 6 years, and between the rendering of the reasons for judgment and the dismissal of the petitions to Her Majesty in Council is approximately 1 year and 10 months.

The plaintiffs exhausted their appellate remedies in so far as their conviction and sentences were concerned, with the dismissal of the petitions for special leave to appeal to the Judicial Committee of the Privy Council.

Both men then proceeded to appeal to the Commission, the second appeal by Pratt to that body, but the first by Morgan. The evidence does not disclose when it was that the plaintiffs appealed to the Commission, and whether or not the Government had been notified of the appeals. On June 30, 1987 the Commission decided that both men had "suffered a denial of justice during the period 1980 - 1984 violative of Article 5(2) of the American Convention on Human Rights", and the Commission requested of the Jamaican Government "that the execution of Messrs. Pratt and Morgan be commuted for humanitarian reasons." The decision and request were communicated to the Government of Jamaica by a cable message on July 7 followed by letter dated July 9, 1987.

It appears that by communications dated 28th January, 1986 and 12th March, 1987, each plaintiff appealed to the Human Rights Committee of the United Nations International Covenant on Civil and Political Rights ("the Committee") and again, the evidence does not disclose whether or not the Government had been notified of those communications. In the case of Earl Pratt, by interim decision dated 21st July, 1986, the Committee requested the Government to stay his execution while they considered the question of the admissibility of his communication, and asked that they be provided with further information. The information was supplied on the 18th November, 1986. In the case of Morgan, by interim decision dated 24th March, 1986, the Committee requested the Government to stay his execution pending their final decision, and asked to be provided with further information. The information was supplied.

The plaintiffs' petitions for special leave to appeal to the Privy Council having been dismissed on the 17th July, 1986, the sentence of death remained to be carried out by the executive subject only to the exercise of the prerogative of mercy by the Governor-General acting on the recommendation of the local Privy Council. The prerogative of mercy was not exercised in favour of the plaintiffs and on the 13th February 1987 warrants were issued for their execution on the 24th February, 1987. A stay of execution

was granted on the 23rd February, 1987, at the request of the plaintiffs' representatives. It was after the stay was granted that the Commission communicated its decision to the executive and its request that the sentence of death "be commuted for humanitarian reasons".

A second set of death warrants were issued on the 23rd February 1988, for both men to be executed on the 8th March, 1988 and again, a stay was granted on the 1st March, 1988 at the request of the Committee contained in a telegram dated 24th February, 1988. The request was based on the fact that the Committee was, in consultation with the Government, in the process of considering the admissibility of the plaintiffs' communications under the Optional Protocol to the Covenant.

The Committee, by its decision of the 24th March, 1988, admitted the communications of the plaintiffs and made certain requests of the Government, including a request not to carry out the death sentences against the plaintiffs. At its meeting on the 6th April, 1989, the Committee adopted its views after consideration of the communications submitted by the plaintiffs, acting under provisions of the Optional Protocol to the International Covenant on Civil and Political Rights. In the Committee's view, the facts disclosed violations of the Covenant in two respects, namely:-

"(a) Article 7, because Mr. Pratt and Mr. Morgan were not notified of a stay of execution granted them on 23rd February 1987 until 45 minutes before their scheduled execution on 24th February, 1987,

(b) Article 14, para.3(1) in conjunction with para.5, because the authors were not tried without undue delay".

The Committee expressed the view that the plaintiffs were entitled to a remedy for the violations, and that the remedy should be, in the particular circumstances, the commutation of their sentences of death.

The views of the Committee were communicated to the executive under cover of a memorandum dated 7th April, 1989, but the evidence does not disclose when it was received. However, a third set of warrants were issued on the 21st February, 1991 for the execution of the plaintiffs on the 7th March, 1991, and it was after the issue of these warrants that these

proceedings were commenced. In the event, a further stay of execution was granted the plaintiffs on the 6th March, 1991.

So it is against that background that the plaintiffs are contending that their constitutional rights have been, are being and are likely to be contravened, and accordingly, they seek redress in the form of a commutation of their sentences of death to that of life imprisonment.

I do not think it necessary for me to recount in my judgment the arguments presented by counsel for the plaintiffs and the defendants which have been so fully stated in the judgments of my learned brothers. I have read their draft judgments and agree with the conclusions arrived at. However, I will proceed to express my views on the salient parts of the evidence and the arguments.

Section 25(1) of the Constitution gives the Supreme Court original jurisdiction to hear and determine applications from any person who alleges that any of the fundamental rights and privileges protected and guaranteed to him by the Constitution, has been, is being or is likely to be contravened, and power to give redress, in appropriate cases. The powers of redress are in broad terms, and the jurisdiction of the court in this regard is not circumscribed.

The first issue that I shall consider is the complaint of the plaintiffs that the provisions of Sec.20(1) of the Constitution has been contravened. That section provides as follows:-

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

I am of the view that this fundamental right was recognized by the courts before Jamaica gained its independence on 6th August, 1962, and that the Constitution conferred no new right or protection on the individual in this regard. The courtshave always been vigilant in ensuring that charges are heard with as little delay as the system affords, and as Lord Templeman pointed out in delivering the opinion of the Board in Bell v. Director of Public Prosecutions and Another (1985) 32 WIR 317 at 324:-

> "::::" the Courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary dismissing the charges for want of prosecution."

It is plain that in such cases, the delay that the Constitution protects and which the court seeks to guard against is what I shall refer to as "pre-trial delay". The authorities referred to in the instant actions are those in which the question of the effect of delay in bringing charges to trial is considered; they do not consider "post-conviction delay", i.e. delay between conviction and the time when the convict exhausts all rights of appeal. One possible reason for this is that the right to a speedy hearing that is protected both prior to and under the constitution relates to a person charged with a criminal offence, and that such protection becomes otiose on conviction. Pre-trial delay is likely to result in great injustice. It militates against the innocent as well as the guilty; it may wreak havoc upon the innocent, but favour the guilty. Witnesses for either the prosecution or the defence may become unavailable for numerous reasons, or the passage of time may so dim their memory as to render their evidence nugatory. These are some of the reasons why the Constitution, in my view, continues to protect this right of the individual who is charged with a criminal offence. The presumption of innocence is another right in favour of such a person protected by S.20(5) of the Constitution, and while it operates, the Crown must take all necessary steps to either withdraw the charge or to afford a hearing within a reasonable time, a hearing that may result in a conviction or an acquittal.

Whenever a person is convicted of a criminal offence, it does not appear to me that notwithstanding the conviction, he may still be referred to as a person who is charged with a criminal offence, and thus be afforded the protection of Sec.20(1) of the Constitution. In other words, in considering the question of delay I do not think that the provisions of S.20(1) should be construed in so wide a sense as to include the entire period from formal accusation of a crime to the exhaustion of all appeals, or the implementing of the sentence. In my view, the delay that is redressable under the

Constitution must fall within the pre-trial period, and the redress would most likely be a dismissal of the charge. The individual need not file a writ or motion to seek such redress. Any such question under the Constitution may be taken at the trial of a charge. (See S.3 (iii) of the Judicature (Constitutional Redress) Rules, 1963).

In the instant cases, there are no complaints of a pre-trial delay, and for the reasons that I have stated, I hold that the plaintiffs' claims in this regard must fail.

However, the delay complained of by the plaintiffs stems from the fact that the Court of Appeal did not deliver written reasons for refusing their applications for leave to appeal until some 3 years and 9 months after the decisions had been pronounced. It was argued that because of the delay, the plaintiffs were unable to "appeal further" against conviction and sentence, and consequently, they were deprived of their Constitutional rights to a fair hearing within a reasonable time. I shall assume that S.20(1) of the Constitution ought to be interpreted in its widest sense, and that consequently, the individual can be said to be charged with an offence after conviction and up to the time of the carrying out of his sentence. If that is so, then there was an inordinate delay in the "hearing of the charges", and the plaintiffs' Constitutional right to a fair hearing within a reasonable time must be examined in that light.

In Bell v. Director of Public Prosecutions (supra) the Board, in determining whether the applicant had been deprived of his right to a fair hearing within a reasonable time, identified four factors which the court should assess, namely, (1) the length of the delay, (2) the reasons given by the prosecution to justify the delay, (3) the responsibility of the accused for asserting his rights, and (4) prejudice to the accused. Those four conditions fulfill the test in pre-trial delays, but in my view, such a test is not altogether applicable to post-conviction delays. In the first place, a convicted person must initiate proceedings if he wishes to appeal against his conviction and/or sentence, be it to the Court of Appeal in Jamaica or to the Judicial Committee of the Privy Council in England. In the instant cases, the plaintiffs did not delay in making their applications for leave to appeal to the Court of Appeal, possibly because of the time limit for

such applications, and there is no complainant that the court delayed in hearing the applications and pronouncing its decision. The inexcusable delay that the Court of Appeal is said to be guilty of is the time it took to put in writing the reasons for refusing leave to appeal.

The plaintiffs contend that because of the delay, they could not appeal further, and this issue must be considered. Bearing in mind that the Court of Appeal gave its decision refusing leave to appeal on the 5th December, 1980, it seems to me that thereafter, it was the responsibility of the plaintiffs to assert their right to petition Her Majesty for special leave to appeal to the Judicial Committee of the Privy Council, if they so desired. There is no evidence that they did anything that would lead the Court of Appeal to believe that they intend to petition for special leave. On the contrary, what they did was to write to the Registrar of the Court of Appeal on the 7th January, 1981 asking "to set my case in a position so that whenever my attorney Mr. Noel O. Edwards wishes to further his argument of appeal to the Privy Council of England, he can do so". (Emphasis added). There is no evidence that the attorney-at-law or either of the plaintiffs applied to the Court of Appeal for the written judgment or any other document necessary to accompany the petition, until Pratt made a request for the written judgment by letter which reached the Registrar of the Court of Appeal on the 16th September, 1984. The written judgment was delivered on the 24th September 1984. Despite this, Morgan did not give notice of his intention to petition for special leave until sometime in August, 1985 and Pratt in March, 1986. It is worthy of note that there is no specific time limit within which such petitions must be filed, and it appears that the plaintiffs were in no hurry to do so. In my view, the delay of some six years in filing the petitions rests squarely on the shoulders of the plaintiffs and possibly their legal representatives. The plaintiffs sat on their rights, and accordingly, I find it quite untenable that they should now be complaining about that delay. I am quite unable to discover any rules regulations or other authority that support the plaintiffs' contention that a petition for special leave to appeal to Her Majesty in Council could not be lodged until the reasons for refusing the application for leave

had been filed by the Court of Appeal. Counsel for the plaintiffs did not point the court to any such rules and regulations. I am of the view that the judgment of the Court, (as contained in Criminal Form 17 under Rule 62(1) of the Court of Appeal Rules) satisfies the particular requirements of the Judicial Committee Rules 1957 relating to the practice and procedure of petition for special leave to appeal to Her Majesty in Council. If the application for special leave to appeal is granted, then and only then would the appellant be required to lodge the Record of Appeal which must include the reasons for judgment of the judge or judges of the court from which the appeal arises. Thus a distinction must be made between the necessary documents to be filed in relation to a petition for special leave to appeal and the Record of Appeal when leave to appeal has been granted.

In the instant cases, the plaintiffs were refused leave to appeal and their petitions for special leave to appeal to the Privy Council were also dismissed. It seems that the delay in filing the reasons for judgment did not prejudice the plaintiffs and I so hold.

The prejudice that an individual may suffer as a result of a pre-trial delay is absent from a post-conviction delay to a great extent. It is true that a convicted man who is insisting on his innocence would be most anxious to have his final appeal considered with the least possible delay and that he would be prejudiced if he had to remain in custody as a convict for an unreasonably long time through no fault of his own. It is equally true that a man with only a slim chance of success may not be anxious to assert his right of appeal, and consequently, the delay may not prejudice him in any respect. I hold that in a post-conviction situation, the individual must lead some evidence in proof of prejudice, directly or inferentially. In the instant case, there is no such evidence or evidence from which prejudice can be inferred.

It is for the foregoing reasons that I hold that the plaintiffs have failed to satisfy me, on a balance of probabilities, that their constitutional right to a fair hearing within a reasonable time, protected by Sec. 20(1) of the Constitution has been or is being contravened.

I turn now to what I consider to be the main contention of the plaintiffs. They relate to Sec.17 of the Constitution, which reads as follows:-

> "17-(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."

Dr. Barnett submitted that "in the state of the evidence, it is clear that on the three occasions that warrants were issued for the applicants' execution, they were placed in the condemned cells, that is, the section reserved for persons about to be executed, and only removed within a proximate time of the scheduled execution". He further submitted that it is the uncontroverted evidence "that by reason of

(a) long delays arising from no fault of the applicants or any insuperable administration or legal problems;

(b) the late communication of the grant of stay of execution and/or their having to encounter on repeated occasions imminent execution;

(c) the tantalizing insinuation by officials of hope and its withdrawal;

caused them acute suffering, altered the character of the treatment which the reasonable contemplation of the law permitted for persons under sentence of death, and rendered the imposition of the death penalty in the particular circumstances of their case, cruel and inhuman treatment and therefore a contravention of the Constitution."

Mr. Daly in his submissions, sought to elaborate on the foregoing submissions by pointing to specific bits of evidence which he said constituted inhuman and degrading treatment. He referred to the evidence relating to the issue of the various warrants when appeals were pending before the Commission and/or the Committee, and after requests had been made for stay of execution. He referred to the stay of execution granted on the 23rd February, 1987, and argued that the plaintiffs were not informed of the

stay until 45 minutes before the appointed time for their execution on the following day, although the authorities knew from the day before.

I have already expressed my views on the question of the delay, and I need not repeat myself. However, the plaintiffs are here contending that the delay in carrying out the sentences of the court extending over the period from conviction to now, amounts to inhuman and degrading treatment, and therefore is in contravention of the Constitution.

The leading case in this regard is Riley and others v. Attorney General of Jamaica and another [1982] 3 All ER 469. The headnote to that case reads in part:-

> "The appellants contend that the prolonged delay in the execution of their sentences, which was substantially due to factors outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading. The Crown contended that, although delayed the actual sentences were authorised by the pre-existing law immediately before the Constitution came into force and therefore fell within S.17(2) of the Constitution." ....
>
> "Held (Lord Scarman and Lord Brightman dissenting)- A punishment fell within the exception contained in S.17(2) of the Constitution if it satisfied three related conditions, namely (a) that it was done by the authority of law, (b) that it involved the infliction of punishment which was authorised by that law and was lawful in Jamaica immediately before the coming into force of the Constitution on 6 August 1962, and (c) that it did not exceed in extent the description of the punishment so authorized. In regard to a delayed execution which satisfied the first two conditions the test to be applied was whether, if the same description of punishment had been inflicted in the same circumstances before 6 August 1962, that punishment would have been authorised by law. Since the legality of a delayed execution of a sentence lawfully imposed under S.3(1) of the 1864 Act could not have been questioned before 6 August 1962, the delay could afford no ground for holding the execution to be in contravention of S.17(1). Accordingly, the appeals would be dismissed (see p.472 j to p.473 d, post)."

Dr. Barnett, in a careful analysis of the judgment, submitted that "the ratio of the majority decision is to be found in the three conditions which were enunciated in the judgment at pp.472 & 473." These related conditions are stated in the headnote above. Continuing his submissions,

be said "the reasoning then proceeded on a textual interpretation of that paraphrase of S.17 which is entirely deficient in that it omits the words "or other treatment", which is a clear distinction laid down by the Constitution. (2), It proceeds on the basis that prior to Independence, there could be no legal challenge to delayed execution. Therefore, after Independence, there can be no such challenge and therefore ignored the fundamental difference which the Bill of Rights introduced into Jamaica law by giving the court a power of judicial review over executive acts which contravene the fundamental rights provisions, and the fact that there are many situations in which, prior to independence, there would be no right to challenge executive or legislative or judicial action; but post independence, the Constitution has given such a right and conferred on the courts a jurisdiction to grant redress." He drew a distinction between "punishment" and "other treatment" mentioned in S.17(1). Finally, he submitted that "in the face of the powerful reasoning by the minority judgment, the majority decision can be easily distinguished on the ground that what was hitherto regarded as unprecedented has in fact occurred in the instant case, in that the delay has been inordinately long; that a substantial part of the delay has been due to no fault or conduct of the applicant, that part of the delay has been due to inexcusable fault of the organs of state and that clear circumstances existed on which the applicants based a reasonable hope of reprieve from the sentence of death. Many of these factors were not present in the Riley case either at all or to the same extent."

The period of delay which the plaintiffs contend should be taken into account is the entire period from the date of the sentence up to the hearing of these actions, a total of 12 years and 3 months. As I have already pointed out, the period between sentence and the final decision of Her Majesty in Council dismissing the applications for special leave to appeal, amounts to seven years and six months, and that during that time, the plaintiffs were either pursuing their applications to the Court of Appeal and to the Judicial Committee of the Privy Council, or applying to the Commission. Certainly, any delay occasioned during that period cannot be said to be

attributable to the executive in any way.

Within days of the decision of the Privy Council, the Committee, by interim decision dated 21st July, 1986, requested the Government of Jamaica to stay the sentences of the court pending the consideration of communications from both men. I have already stated the various times thereafter that warrants were issued and stayed at the request of the plaintiffs, and because of their various communications to the Commission and the Committee. Again, I am of the view that any delay occasioned during that period is not attributable to the executive. Indeed, when the time became ripe, the executive acted with commendable alacrity in its several attempts to carry out the sentences of the court, only to have their attempts thwarted by the relentless efforts of the plaintiffs to secure lesser sentences.

The submissions of Dr. Barnett are attractive indeed, but in my view, they are not applicable to the facts of the present case. I consider myself bound by the opinion of the Board in Riley's case (supra), so aptly expressed in the speech of Lord Bridge of Harwich when he said (at pp. 471 & 472:-

> "Their Lordships fully accepts that long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But it is not for this Board to usurp the function allocated by S.90 of the Constitution to the Governor-General acting on the recommendation of the Privy Council of Jamaica."
>
> and at p.473:-
>
> "...., whatever the reasons for, or length of, delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of S.17(1)."

Accordingly, although I respect the dissenting opinion in Riley's case, I find that on a true construction of S.17(1) of the Constitution, the plaintiffs' claims for redress, based on delay, must fail.

The plaintiffs' claims under S.17(1) are not based on delay alone; they contend that they were subjected to other kinds of inhuman and degrading

treatment. There is evidence coming from the plaintiffs to the effect that the executive kept them confined to the condemned cells for a considerable time after they had been granted the first stay of execution, and up to 45 minutes before the appointed time for their execution. The defendants deny that to be so, and say that within a short time of being notified of the stay, and at least thirteen hours before the time appointed for their execution, the plaintiffs were removed from the condemned cells. I accept the evidence of the defendants in this regard and find that the plaintiffs were informed of the stay of execution and removed from the condemned cells within a reasonable time of the grant of the stay.

The plaintiffs are not complaining about being kept unnecessarily long in the condemned cells after the grant of stay on the other two occasions on which death warrants were issued, but they contend that by placing them in these cells and removing them repeatedly after prior requests from the Committee and the Commission for a stay of execution, caused them undue anguish and constituted inhuman and degrading treatment.

It is understandable that the knowledge of impending execution must cause in most condemned men great feelings of anguish and grief, despite the efforts of the pastors and others who seek to comfort them. The anguish will increase as the time for execution draws nearer and nearer. I agree that if a reprieve or a stay of execution of the death penalty is granted and that fact is withheld from a condemned man for an unreasonable length of time after the grant, then that may be considered to amount to inhuman punishment or treatment on the part of the executive. It may cause the condemned man to suffer anguish and grief to a greater degree and intensity over a longer period than was necessary. But the fact that a stay has been granted does not, in my view, by itself, dispell all kinds of anguish and grief. A stay has the effect of removing from the condemned man's mind the precise time fixed for his execution, it cannot and does not remove the knowledge of impending death. If it raises hope for a reprieve or commutation of the sentence of death, then such hope is self-induced and the executive cannot in those circumstances, be blameworthy. A stay that comes about at

the instance of the condemned man cannot enure to his benefit. Once the appellate processes have been exhausted, then in my view, only the exercise of the prerogative of mercy in favour of the condemned man can remove from his mind the knowledge of impending death and the natural resultant grief and anguish contained in the punishment. Such grief and anguish cannot be considered to be inhuman and degrading treatment. Anguish and grief and perhaps mental anxiety are, in my view, inextricably tied up with the sentence of death. It is not pronounced as a part of the sentence, but the one follows the other as the night the day -- it is a natural reaction to the sentence of death, and is nothing new. If the distinction is drawn between "punishment" and "treatment" then certainly, the anguish and grief that follows the sentence must be considered as part of the punishment and not as treatment meted out by the executive. That being so, it could not be said to be outside the exemption contained in S.17(2) of the Constitution.

In the instant cases, the plaintiffs made representations to the international bodies who in turn, requested stays on their behalf, and those stays were granted by the executive. I find that on a balance of probabilities, the fact of the grant of the stay on each occasion was communicated to the plaintiffs within a reasonable time, and further, that the stays came about on the applications of the plaintiffs and any hope they may have brought were self-induced. In the event, the plaintiffs have failed to satisfy me that in this regard, they were subjected to inhuman and degrading treatment, and that their constitutional rights have been, are being or are likely to be contravened.

The plaintiffs contend that they were led reasonably to believe and legitimately to expect that they would not be subjected to the death penalty, and this arose "from the pronouncements of the executive; the circumstances of the delay; the nature of the international obligations; the decisions and recommendations of the international human rights bodies, whose review of the matter the executive government had accepted as part of the state's obligations under the International Covenants." They seek a declaration that if the death penalty is carried out in the circumstances, they will be subjected to inhuman and degrading punishment and treatment. The arguments in this regard were based on the evidence surrounding the

issuance of the first death warrants after eight years and one month had elapsed since sentence, and after a request for the stay by the Committee; the late notification of the stay of execution granted in respect of the said warrants; the issuance of the second death warrants despite the recommendations of the Commission that the sentences of death be commuted; the issuance of the third death warrants not withstanding the recommendation of the Committee that the death sentences be commuted; the "de facto" suspension of the death penalty for almost two years since March 1969, and the Government's review and official statements made during that period which would place the plaintiffs within a category of condemned men whose death sentences would be commuted.

The views that I have already expressed on the effect that delay has on the death penalty are applicable to this issue and I need not repeat them. The "pronouncements of the executive" are gleaned from a number of newspaper reports of (a) statements made by the Minister of Justice, (b) the Government's consideration of the death penalty, (c) statements made by the Governor-General's Secretary in his capacity as Secretary of the Privy Council. I do not deem it necessary to quote from those pronouncements. Suffice it to say that in my judgment, the reports could not and did not state any policy decided upon by the Government with respect to the abolition of the death penalty or the commutation thereof, nor did they state any amendment to the law in that regard. I find it impossible to accept Mr. Daly's submission that these "statements and their effect was to create in the minds of the applicants the reasonable belief and legitimate expectation that the decision of the United Nations Human Rights Committee that their rights had been violated and the recommendation that their sentences be commuted would be respected and effected by the executive." The question of "reasonable belief and legitimate expectation" does not appear to be relevant in this context. I accept the view that these phrases denote a principle that is now firmly entrenched in our administrative law. The speech of Lord Roskill makes this quite clear, as also the principles involved, when he said in Council of Civil Service Unions and Others v. Minister for the Civil Service [1985] 1 A.C. p.375 at 415

> "The particular manifestation of the duty to act fairly which is presently involved in that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled.
>
> "The introduction of the phrase "reasonable expectation "into this branch of our administrative law appears to owe its origin to Lord Denning M.R. in Schmidt v. Secretary of State for Home affairs [1969] 2 Ch. 149, 170 (when he used the phrase "legitimate expectation"). Its judicial evolution is traced in the opinion of the Judicial Committee delivered by my noble and learned friend, Lord Fraser of Tullybelton, in Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629, 636-638. Though the two phrases can, I think, now safely be treated as synonymous for the reasons there given by my noble and learned friend, I prefer the use of the adjective "reasonable" which was generally used. The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the principle is closely connected with "a right to be heard." Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations especially where the aggrieved party is seeking to persuade an authority to depart from a lawfully established policy adopted in connection with the exercise of a particular power because of some suggested exceptional reasons justifying such a departure."

This principle seems to arise where the consideration is focused on the court's jurisdiction to review executive action in certain cases where it could be said that the executive or other public authority had not acted fairly. As Lord Fraser of Tullybelton pointed out in his speech in the said C.C.S.U. case (supra) at 401:-

> "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law. ..... Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from

> the existence of a regular practice which the claimant can reasonably expect to continue."

In the instant cases, the plaintiffs are not contending that their legitimate expectations of commutation of the death penalty arose either from an express promise or from a regular practice. Mr. Daly in a summary of his submissions on this point had this to say:-

> "The proceedings before the United Nations Committee in which the Jamaica Government fully participated and the Committee's favourable decisions created in the applicants the legitimate expectation that the executive authority, the Government of Jamaica, would honour its obligations in International Law."

I have referred to two relevant human rights organizations which admitted communications from the plaintiffs and expressed their views and recommendations. These organisations were born out of treaties to which Jamaica is a party, and they are:-

(1) The Inter-American Commission on Human Rights of the Organization of American States.

(2) The Human Rights Committee of the United Nations International Covenant on Civil and Political Rights and the Optional Protocol thereunder.

The making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of existing domestic laws, requires legislative action. A treaty does not have the force of law. (See Attorney General for Canada v. Attorney General for Ontario (P.C.) [1937] A.C. 326.

Dr. Barnett submitted that:-

"(1) Jamaica, as a member of the International Community, has accepted international treaty obligations relating, inter alia, to the imposition of the death penalty.

(2) The burden and principle of the treaty provision is that the death penalty should be strictly limited and given no further extension by the member state in the area or manner of its application.

(3) The Government has undertaken an obligation, by virtue of these provisions, to give to

condemned prisoners a right to apply for clemency and commutation of their sentences, and impliedly to have their applications fairly considered.

(4) The State has also undertaken the international obligation to ensure that no person is subjected to cruel or inhuman treatment, and this is a national obligation applying to all the constitutional organs of the state. If, therefore, the circumstances are such that the imposition of the death penalty would involve cruel or inhuman treatment, it is the obligation of those responsible organs of state to avoid the conflict with the international obligations.

(5) The Privy Council, as part of the executive authority of Jamaica, has a duty, in the exercise of its constitutional powers, to have regard to those international obligations as well as the constitutional provisions contained in Cap. III of the Constitution.

(6) In the instant cases, there were legitimate expectations arising from the pronouncements of the executive, the circumstance of the delay, the nature of the international obligations, the decisions and recommendations of the Inter-American human rights bodies whose review of the matter the executive government had accepted as part of the states obligations under the international covenant.

(7) In the circumstances, the failure of the Privy Council to respond positively to the recommendations of the two international bodies, including delaying the issue of the third warrant for nearly two years after the second of those decisions, constitute an unreasonable exercise of its constitutional power and a breach of the principles which are outlined above."

The evidence discloses that reports of the views and recommendations of the Committee and the Commission were transmitted to the executive shortly after the plaintiffs' communications were determined. It is also the evidence that on two occasions a stay of execution had been granted pending the final determination of the communications, and that death warrants were issued after the reports were received by the executive. The inescapable inference, in my view, is that the Privy Council, before making its recommendation to the Governor-General on the exercise of the prerogative of mercy, had in its

purview the reports of the international human rights bodies and gave them due consideration, but nevertheless did not accede to the recommendations contained therein. The Privy Council is not bound to act on any such recommendations; the provisions of the treaty do not so provide, and it seems ludicrous to believe that a recommendation made under a treaty could have the force of being binding on the state to the extent of altering or suspending the provisions of the state's law.

Section 90 of the Constitution empowers the Governor-General to exercise the prerogative of mercy, "in Her Majesty's name and on Her Majesty's behalf". The Governor-General is obligated to exercise this power in accordance with the recommendation of the Privy Council. Sec.32(4) of the Constitution specifically provides that "the question whether he has so exercised that function shall not be enquired into in any court."

Dr. Barnett argued that the Constitution makes it clear that the Privy Council, and the Governor-General or the Governor-General acting in Privy Council, are all parts of the executive government of Jamaica, and they exercise executive powers by virtue of the constitutional grant of these powers. He further argued that the exemptive provision contained in S.32(4) of the Constitution prevents a judicial review of the recommendation or advisory process with specific reference to the question only of whether the relevant advice or recommendation was in. He said that the very provision makes it clear that, apart from the limitation, the power of judicial review of these executive powers are not excluded by the Constitution. He contended that S.32(4) of the Constitution only limits judicial review in one particular aspect, but even if there was ambiguity, the principle would be that the provision is to be construed strictly so as not to curtail the jurisdictionof the court. It is his contention that the Constitution is a controlling instrument of all the organs and functionaries operating under it, and the power of the court to review their exercise or constitutional powers granted them, must therefore be presumed. The constitutional provisions contained in S.90 of the Constitution has superseded the prerogative at common law in that field, and there is no residue of prerogative powers in the Crown and the Queen, so he argued.

He submitted that:-

"The Privy Council, in the exercise of the constitutional and executive power to decide on the question of commutation of sentences must:

(1) conform with the Wednesbury principles of reasonableness;

(2) give due weight to all relevant considerations;

(3) conform with the rules of natural justice.

Furthermore, the right of the Court to exercise the power of judicial review applied to the executive power of commutation in the instant case, because the conduct of the executive raised in the applicants a legitimate expectation that the death sentence would be commuted in their cases."

The jurisdiction of the court to review for defects the actions of statutory decision making bodies is well established. The Court will act within the "Wednesbury principles" in investigating such a body:

> "with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account."

(Associated Provincial Picture Houses Limited v. Wednesbury Corp. [1947] 2 ALL ER 680 at 685).

Her Majesty the Queen of England is the Queen of Jamaica. The Governor-General is Her Majesty's representative in Jamaica, and the Queen's prerogative powers have not been superseded by the Constitutional powers of the Governor-General. The functions that are exercisable by the Governor-General under the Constitution seem to fall into three board categories,

(1) those in which he acts in his discretion;

(2) those in which he acts in accordance with advice or on recommendation or after consultation or on representation;

(3) those in which he acts in Her Majesty's name and on Her Majesty's behalf, whether on advice, recommendation or not.

Examples of the third category of functions listed above are assents to Bills (Sec.60(1), and the exercise of the prerogative of mercy (Sec.90(1).

At common law, the exercise of the royal prerogative of mercy in capital sentences has never been subjected to review by the Courts; it is not subjected to prior authority of Parliament. The courts will inquire

as to whether a prerogative power exists, and the extent of such power, but the court has no jurisdiction to question the manner of its exercise. I agree that it is trite law that where a common law prerogative power has been enacted into a statute, then the prerogative power at common law is suspended, and the Crown must proceed under the statutory powers. (See Attorney-General vs. DeKeyser's Royal Hotel Limited,[1920] A.C.508 Dr. Barnett argued and I agree that S.90 of the Constitution has enacted all the common law prerogative powers of mercy, and has therefore suspended the common law prerogative powers, and so they are now governed by the provisions of the Constitution. Her Majesty has delegated the exercise of the powers to the Governor-General, but has made it quite clear that the Governor-General's exercise of such powers must be "in Her Majesty's name and on Her Majesty's behalf". Generally speaking, the exercise of the prerogative of mercy appears to be, in my view, no different after independence than what it was at common law, prior to independence. Lord Diplock, in his speech in DeFreitas v. Benny [1975] 27 WIR 318, pointed out the common law position when he said, (at 322):-

> "At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convenience exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy. In tendering his advice to the sovereign, the Home Secretary is doing something that is often cited as the exemplar of a purely quasi-judicial function. While capital punishment was still a lawful penalty for murder in England it was the practice of the Home Secretary in every capital case to call for a report of the case from the trial judge and for such other information from such other sources as he thought may help him to make up his mind as to the advice that he would tender to the sovereign in the particular case. But it never was the practice for the judge's report or any other information obtained by the Home Secretary to be

> disclosed to the condemned person or his legal representative."

These common law provisions are contained in S.90 and S.91 of the Constitution. The Governor-General exercises his powers on the recommendation of the Privy Council, an exective body provided for by the Constitution. In the case of a person sentenced to death, the Privy Council takes into account "a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere" when making a recommendation to the Governor-General. Lord Diplock, in his speech in the DeFreitas case, (supra) made it quite clear that the constitutional provision "serves to emphasise the personal nature of the discretion" exercised by the Privy Council in tendering its recommendation.

The tendering of the recommendation by the Privy Council in the case of persons condemned to death is not dependent on any application made by him for commutation of his death sentence; it follows from the constitutional provisions in all such cases. There is no consultation between the condemned man and the Privy Council, or indeed, the Governor-General; the constitution does not impose any such obligation. The discretion to commute such a sentence resides in the Governor-General and the way in which he exercises his discretion is not open to review by the courts. I am fortified in this conclusion by the speech of Lord Roskill when he said in the C.C.S.U. case (Supra) at 418:

> "Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amendable to the judicial process."

I do not find that the Governor-General's constitutional power in the exercise of the prerogative of mercy is amendable to judicial review, and accordingly, the declaration sought in that regard is denied.

Further, I am of the view that this court has no power to order that the sentences of death passed on the plaintiffs be commuted to life imprisonment

or indeed, to grant injunctions restraining the execution of the plaintiffs, and this is so even if I had concluded that the plaintiffs' constitutional rights had been infringed. It seems to me that the making of any such orders would be a direct exercise by the court of the constitutional powers entrusted to the Governor-General alone by S.90 of the Constitution. The power of redress given to the court by S.25 of the Constitution is not circumscribed, but surely it must be interpreted in such a way as not to be in conflict with the provisions of the very Constitution itself.

In the final analysis, I hold that the plaintiffs have failed to satisfy me that they are entitled to any of the declarations and redress sought in these actions, and accordingly, I would dismiss the actions.

Harrison, J.

By a writ of summons dated the 29th day of April 1991, filed in substitution for a notice of motion dated the 28th day of February 1991 and in accordance with rule 3(ii) of the Judicature (Constitutional Redress) Rules, 1963, each plaintiff applies for redress pursuant to Section 25 of the Constitution of Jamaica, against the defendants.

Each plaintiff claims:-

" 1. A declaration that the plaintiff has been denied the right to a fair hearing within a reasonable time as required by S.20(1) of the Constitution, by reason of the delay in the completion of the judicial proceedings respecting his case.

2. A declaration that the plaintiff has been, and is being subjected to inhuman and degrading treatment in contravention of S.17(1) of the said Constitution by reason of the following:-

(i) A death warrant was first issued on the 13th day of February 1987 for the execution of the plaintiffs on the 24th day of February 1987 after a delay of approximately eight years and one month after the sentence of death was passed on the plaintiff on the 15th January 1979, which delay included three years and nine months during which the Jamaica Court of Appeal failed to give written reasons as aforesaid.

(ii) The said warrant was issued while an appeal by the plaintiff was pending before the United Nations Human Rights Committee and after the said Committee had by decision dated July 21, 1986 requested the Government of Jamaica to stay the execution of the plaintiff pending the determination of his appeal to the said committee.

(iii) The stay of the first warrant aforesaid granted by the Governor-General of Jamaica on the 23rd day of February, 1987, was not communicated to the plaintiff until the 24th day of February, 1987, and only 45 minutes before

the scheduled execution.

(iv) A second warrant for the execution of the plaintiff was issued on the 23rd day of February 1988 some eight months after the Inter-American Commission on Human Rights of the Organization of American States had recommended to the Government of Jamaica that the sentence of death passed on the plaintiff be commuted to life imprisonment, and while the appeal to the United Nations Human Rights Committee was still pending before that body;

(v) A third death warrant was issued on or about the 21st day of February 1991 for the execution of the applicant on the 7th of March 1991 notwithstanding the fact that the United Nations Human Rights Committee had decided on the 6th of April 1989 that the applicant was a victim of the violation of Articles 14, paragraph 3(c) and 7 of the International Covenant on Civil and Political Rights, which Covenant and Protocol thereto the Jamaica Government had signed and ratified, and that accordingly the plaintiff was entitled to the commutation of his death sentence, thereby raising the plaintiff's legitimate expectation that he would not be executed.

(vi) That the said death warrant was issued after the death penalty had been "de facto" suspended for a period of almost two years since March 1989 and after the plaintiff was led reasonably to believe and legitimately to expect that the Government's view and official statements made during this period of and concerning the application of the death penalty would have placed him in a category of inmates whose sentence of death would be commuted to life imprisonment by virtue of the time which he had spent on death row.

3. A declaration that the plaintiff will be subjected to inhuman or degrading punishment and treatment in contravention of Section 17(1)

if the sentence of death is carried out in the aforesaid circumstances leading up to and surrounding his planned execution.

4. A declaration that the Governor General in Privy Council is legally and/or constitutionally bound by the determination, recommendation and/or decision of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee.

5. A declaration that the refusal of the Governor General in Privy Council to commute the sentence of death in the circumstances of the plaintiff's case constitutes an unreasonable, arbitrary and/or invalid exercise of the constitutional power and is an unconstitutional denial of the plaintiff's right to a proper consideration of his case.

6. An order that the sentence of death passed on the plaintiff be commuted to life imprisonment.

7. An injunction against the second defendant restraining the execution of the plaintiff."

The facts relevant to the case of each plaintiff are as follows:-

Each plaintiff was convicted on the 15th day of January 1979 of the offence of murder committed by him on the 16th day of October 1977, and sentenced to death. Each applied in January 1979 for leave to appeal against his conviction which applications were heard between September 1980 and December 1980 and refused on the 5th December 1980.

Thereafter the chronology continued in this way; on

(i) 7th January 1981 a letter was written to the Registrar of the Court of Appeal on behalf of both plaintiffs by the plaintiff Earl Pratt requesting the Registrar's assistance "... so that whenever my attorney Mr. Noel O. Edwards wishes to further this argument of appeal to the Privy Council of England he can do so."

(ii) 30th January 1981 the said Registrar replied to the plaintiffs that she has spoken to their attorney Mr. Eric Prater who advised that he was "endeavouring to take your matter to the Privy Council in England."

(iii) 12th June 1981 the plaintiff Prat made an application to the Inter-American Commission on Human Rights of the Organization of American States for a review of his said conviction.

(iv) 17th February, 1983 the said Commission requested a record of the proceedings from the Court of Appeal.

(v) March 1984 the record was sent by the Registrar of the Court of Appeal to the said Commission, but without the reasons for judgment.

(vi) 3rd September 1984 a letter was sent by both plaintiffs to the Registrar of the Court of Appeal requesting the reasons for its judgment.

(vii) 24th September, 1984 the said reasons were delivered by the Court of Appeal.

(viii) 13th August, 1985 plaintiff Morgan petitioned Her Majesty in Council - the Judicial Committee of the Privy Council.

(ix) 28th January , 1986 plaintiff Pratt appealed to the United Nations Human Rights Committee.

(x) 12th March, 1986 plaintiff Pratt petitioned Her Majesty in Council.

(xi) 17th July, 1986 the Judicial Committee of the Privy Council recommended to Her Majesty that the petition of each plaintiff should be dismissed.

(xii) 21st July 1986 the United Nation Human Rights Committee requested the Government of Jamaica to stay the execution of the plaintiff Earl Pratt while the Committee considered the admissibility of the communication and to provide information on the judicial remedies available to the said plaintiff.

(xiii) 18th November, 1986 the Government of Jamaica provided the information requested.

The first death warrant for each plaintiff was issued on the 13th February, 1987. A stay of execution for each plaintiff was granted on the 23rd day of February 1987 by the Governor General in Privy Council.

Each plaintiff claims that the fact of the grant of the stay of execution was not communicated to him until 45 minutes before the scheduled execution and on the 24th day of February 1987, with the result that, ".... the failure of the officials to advise me, I was made to suffer inhumanely

and degradingly, the excruciating mental torture of being drawn closer and closer to the time fixed for execution when, in fact, a stay was in effect." Father Brian Massie, a Jesuit Priest, with qualifications in psychology and counselling, and a visiting priest to the prisoners on "death row", stated by affidavit evidence that he visited the plaintiffs in the "condemned cells" to which they had been transferred. He stated that on the 23rd day of February 1987 when he visited them they "exhibited a marked degree of despair bordering on panic. Their faces acquired a sort of 'hunted' look and they were unable to maintain eye contact. Pratt's speech (Morgan hardly spoke) was almost incoherent at times". He deponed further that the stay of execution was known to him the evening of the 23rd February 1987 and therefore he did not visit the plaintiff on the 24th.

Under cross-examination Father Massie admitted that he did not go to the prison on the 23rd day of February 1987 and that "it was incorrect information I gave." He therefore negated the detailed description of the alleged mental condition of the plaintiffs on the 23rd day of February 1987, which he sought to highlight in his affidavit. His evidence is not easily relied on, to say the least.

Joslyn Dennis, the Superintendent in charge of the St. Catherine District Prison, where the plaintiffs were incarcerated stated that the plaintiffs were - advised on the 23rd day of February 1987 - in the evening - of the stay of execution and removed from the condemned cells on that said day. He denied that the plaintiffs were advised only 45 minutes before the scheduled execution.

A flurry of activity thereafter ensued. On the 12th day of March, 1987 the plaintiff Morgan appealed to the United Nations Human Rights Committee complaining of a violation by the Government of Jamaica of certain provisions of the International Covenant on Civil and Political Rights. On the 20th March, 1987 the plaintiffs made submissions to the Committee - complaining of delay in legal proceedings, confinement on death row and failure of the Jamaican Court of Appeal to give reasons as a breach of Section 20 of the Constitution of Jamaica. On the 24th day of March 1987 and the 8th April, 1987, the said Committee requested information from the Government of Jamaica and requested a stay of execution for the plaintiffs Morgan and Pratt respectively.

On the 4th June, 1987 and the 10th day of June 1987, the Government of Jamaica replied to the Committee rejecting the admissibility of the plaintiffs' claims.

By letter dated the 9th day of July 1987 the Organization of American States communicated the request of the Commission on Human Rights to the Government of Jamaica that the sentence of death should be "commuted for humanitarian reasons", in respect of both plaintiffs.

By letter dated 29th October, 1987 both plaintiffs challenged the Government of Jamaica's claim of non-admissibility, maintained that they had exhausted their local remedies and that the decision of the Judicial Committee of the Privy Council in Riley et al vs. The Attorney General precluded them from succeeding on a constitutional motion to the Supreme Court of Jamaica on the ground of delay constituting a contravention of Section 17 of the Jamaican Constitution.

On the 17th day of February 1988 the plaintiffs made further submissions to the said Committee.

A second death warrant was issued on the 23rd day of February 1988 for the execution of the plaintiffs on the 8th day of March 1988. At the request of the said Committee dated the 24th day of February 1988, execution was stayed on the 1st day of March 1988. On the 24th day of March 1988 the Committee acting under the optional protocol to the International Covenant on Civil and Political Rights decided that the communications to it by the plaintiffs were admissible and requested, inter alia, that the Government of Jamaica not carry out the executions, while the matter was being considered. On the 6th day of April, 1989, the Committee decided that - the State party, the Government of Jamaica, had committed violations of the Covenant in respect of both plaintiffs and recommended that the sentences be commuted.

On the 21st day of February 1991, a third warrant was issue in respect of each plaintiff, for execution on the 7th day of March 1991. Execution was stayed on the 6th day of March 1991.

The issue of the enforcement of the death penalty in Jamaica has attracted varied attention and evoked several pronouncements, namely:-

(i) On the 30th day of January 1979 a motion in the House of Representative was debated in favour of the retention of capital punishment, but the said House passed a resolution recommending to the Government and the Privy Council "that the cases of all persons awaiting execution be reviewed."

(ii) On the 9th day of February 1979, the Senate adopted a resolution "that capital punishment be suspended for eighteen (18) months pending a detailed study and assessment and report on the sociological and psychological effect of capital punishment in Jamaica."

(iii) In June 1979 the Fraser Committee was appointed "to consider death as a penalty for murder in Jamaica." The Fraser report tabled in Parliament in 1986 recommended that death as a penalty for murder be abolished, and whatever the ultimate decision, as an immediate first step there should be the commutation to life imprisonment of sentences of death imposed prior to December, 1980 or alternatively March, 1981.

(iv) A report in the Daily Gleaner newspaper of the 28th day of June 1988, attributed to Mr. Carlton Scott, the Governor General's secretary who is alleged to have said, "the Jamaican Privy Council had not met recently because several cases are awaiting decisions from the United Kingdom Privy Council or the results of appeals made by Human Rights organizations ... Jamaica was a party to certain Human Rights convention and care had to be taken that in dealing with cases there were no breaches of these conventions."

(v) A report in the Daily Record newspaper of the 9th day of March, 1989, of a pronouncement by the Honourable Minister of Justice and Attorney General of Jamaica in an official Government news agency release, that the question of the death penalty would be placed on the agenda of the cabinet.

(vi) A report in the said Daily Gleaner newspaper of the 10th day of August, 1990 that the Cabinet "had given consideration to commuting to life imprisonment the sentence of inmates who fall into various

categories including that of those on Death Row for more than five years.

Dr. Barnett on behalf of the plaintiff argued that Chapter III of the Constitution of Jamaica guarantees fundamental rights and freedoms to all persons in Jamaica, including convicted men, that Section 17 specificially prohibits any torture, inhuman or degrading treatment to be added to prescribed punishment, that section 20 secures a right to a person charged with a criminal offence to a fair hearing within a reasonable time and that any person who alleges a breach of the provisions of sections 14 to 21 (inclusive) may apply under Section 25(1), to the Supreme Court for redress. The Constitution expresses a fundamental notion that a person has a right to be protected against unreasonable delay in the administration of justice. Delay constitutes oppression and judicial authorities have recognized that post-trial delay, where the death penalty is imposed can amount to inhuman or degrading treatment - vide Kakis vs. Government of Republic of Cyprus [1978] 1 WLR; [1978] 3 NER 21, Michael de Freitas vs Benny et al [1975] 3 WLR 388, Abbott vs. Attorney General of Trinidad and Tobago et al [1979] 1 WLR 1342.

The majority decision in Neel Riley et al vs. Attorney General of Jamaica et al [1983] AC 719 is deficient in its interpretation of Section 17 of the Constitution in that it omits the words "or other treatment" and stating that prior to Independence there was no legal challenge to delayed execution thereby ignoring the fundamental difference that the Bill of Rights introduced into Jamaica giving the Courts review over executive acts which contravene fundamental rights of a person. The Courts should examine the true nature of the executive act and say that it is either not of the same description or amounts to other treatment which is prohibited.

The minority judgment in the Riley case takes into account the true nature of fundamental rights. It adopts the recognition by the Judicial Committee of the Privy Council in the Ministry of Home Affairs et al vs. Fisher et al [1979] 2 WLR 889 that the source of the fundamental rights of freedoms within the constitution was the international human rights norms, i.e. the conventions, and not merely common law rules which rules were developed in a context of an essential rule of parliamentary supremacy and non-reviewable prerogative powers. The said majority judgment is therefore

distinguishable and given per incuriam. In the instant case there was inordinately long delay substantially due to inexcusable fault by the organs of state and not being the fault or conduct of the plaintiffs. There have been national and international pronouncements on norms in the infliction of punishment, including the death penalty. "The basic concept is ... the dignity of man... the State even as it punishes must treat its members with regard for their intrinsic worth as human beings," Furman vs. Georgia, 408 U.S., 238 (1972), 22L Ed. 2d 246. "To have to undergo a prolonged wait for a sentence of this kind to be carried out may well cause mental anguish if ... deliberately caused ... might constitute inhuman treatment", Judge Fitzmaurice in Tyrer vs. United Kingdom [1978] 2 EHR R1. Both judgments in Riley's case support the contention that a sentence even if lawful because of circumstances, including delay, in which it is implemented, may become inhuman treatment. See also Soering v. United Kingdom (1989) 11 E.H.R.R. 39, Louisiana ex rel. Francis vs. Resweber, 329 U.S. 459 (1947), the People vs. Anderson 100 Cal. Rep. 152. Courts have in the interpretation of statutes ensured that they conform with human rights norms, reflected in human rights instrument - Waddington vs. Miah [1974] 2 AER 377. The Jamaica Constitution should be interpreted to accord with international Conventions, the Executive Government should pay respect to these conventions and in the light of the prolonged delay and psychological distress, which delay was not attributable to the plaintiffs, who pursued their legitimate remedies, the imposition of the death penalty is a breach of the constitutional protection granted by Section 17.

Continuing, Dr. Barnett argued that by Section 68 of the Constitution the executive authority in Jamaica is vested in Her Majesty and exercisable by the Governor General who under Section 90 exercises the prerogative of mercy on Her Majesty's behalf acting on the recommendation of the Privy Council. Sec.32(4) which provides that "the question whether he has so exercised that function shall not be enquired into in any Court" is the only excepted provision, thereby preventing judicial review of whether the advise or recommendation was given. Judicial review of other executive provisions is not excluded. The Constitution deals with the subject matter of mercy and pardon and so Her Majesty's prerogative at common law is superceded by

constitutional provisions, Attorney General vs. De Keyser's Royal Hotel Limited [1920] A.C. 508, Laker Airways Limited vs. Department of Trade [1977] 2 AER 182. Where a statutory enactment covers the field formerly covered by the prerogative at common law, the common law power ceases if the constitutional power is in the nature of the prerogative. Section 32(4) of the Constitution only limits judicial review in one aspect. The duty to act in accordance with natural justice is part of the implication of the grant of the power and if not observed the act is ultra vires. Dr. Barnett however conceded that one may not be entitled to all the aspects of judicial review. For example, there may be no right to be represented nor to appear, Attorney General vs. Ryan [1980] 2 WLR 143.

An individual is entitled to a fair hearing in accordance with the fundamental rights principle and an ouster clause will not affect the power of the Court to grant constitutional redress, Endel Thomas vs. Attorney General of Trinidad and Tobago [1982] A.C. 113.

In the instant case the Privy Council in dealing with the commutation of sentence should conform with the Wednesbury principle of reasonableness, give weight to all relevant considerations and conform with the principles of natural justice. The conduct of the executive raised a legitimate expectation that the sentence of death would be commuted and therefore the Court should grant judicial review to examine the exercise of the executive power of commutation. Council of Civil Service Unions etal vs. Minister of Civil Service [1984] 3 All ER 935, Attorney General of Hong Kong vs. Ng Yuen Shiu [1983] 1 All ER 40, Rv. Secretary of State for the Home Department, ex parte Ruddock et al [1987] 2 All ER 518.

The Privy Council is entitled to adopt its own procedure - but should act fairly and provide an opportunity to challenge it and seeing that their decision affects the applicant in the manner of service of their sentence - that decision is subject to judicial review. Jamaica is bound by its international treaty obligations in respect of the death penalty that it will not be extended, thereby giving to condemned persons the right to apply for leniency and to have their applications fairly and properly considered. In the circumstances the failure of the Privy Council to respond positively to the recommenda-

tions of two international bodies including the delaying of the third death warrant for nearly two years constitutes an unreasonable exercise of its constitutional power and breach of natural justice.

Continuing Mr. Daly argued that even if the prerogative is not superceded by the Constitution the Court still retains the power to intervene, Laker Airways case. The factors other than delay which constituted inhuman or degrading treatment included the issuing of the first death warrant while the appeal of the applicants was before the two international bodies, and the notification of the stay 45 minutes before the scheduled executions, the issue of the second death warrant, with the said appeal still pending and the statements from the Government of Jamaica, the Minister of Justice and the Secretary of the Privy Council. These created in the minds of the applicants, a legitimate expectation that the decision and recommendations of the United Nations Human Rights Committee would be respected.

The Government of Jamaica should not, in the instant case be allowed to rely on the evidence of Eric Knight and Joslyn Davis. It is estopped because the said Government did not traverse these allegations before the United Nation Human Rights Committee - Dallal vs Bank Mellat [1986] 1 ALL ER 239. The applicants were prevented from petitioning Her Majesty in Council seeing that they could not get counsel's certificate. The procedure is that the petition would not be heard if counsel has not certified that there is a point of law of general public importance. Section 25 of the Constitution confers wide powers on the Court to grant redress and if appropriate to hold that the death penalty be not carried out. Under Section 91, the report to the Privy Council should include the report of the United Nations Committee and if unfavourable - the applicants should be given an opportunity to respond. The Constitution deals fully with the protection of human rights and decisions relating to the death penalty and therefore the Governor General and the Privy Council.

Mr. Campbell replying for the respondents, submitted that the delay complained of was not attributable to the Crown; the applicants sat on thier rights which if asserted, no delay would have been caused. To show a breach of a right to a fair hearing the applicant would have to show that they had

been prejudiced - Barker v. Wingo 407 U.S. Rep. 514 (1971), Bell vs. Director of Public Prosecutions (1985) 32 WIR 317.

No prejudice was shown - there was no delay which adversely affected the right of the applicants to appeal to the Judicial Committee of the Privy Council. The Registrar of the Court of Appeal applied promptly to the applicants' letters. Both applicants petitioned international bodies.

By Section 10 of the Judicial Committee Act 1844 (United Kingdom) the applicants could invoke the power of the Judicial Committee of the Privy Council to order the Court of Appeal to submit its reasons. Written reasons are not a pre-condition. The current Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, in force from the 7th day of February 1983 in its definition of "judgment" to be submitted with the petition, does not include reasons. Petitions, in practice have been submitted without reasons.

The applicants' self-induced misconception that the request of the United Nation Human Rights Committee was binding on the Government of Jamaica and so gave rise to legal rights claiming inhuman or degrading treatment arising from the subsequent issue of the death warrants cannot be attributed to the said Government. Informing the applicants of the stay, and removal from the condemned cell is a legal procedure likely to induce relief. The said Government is not estopped from now showing that the circumstances of and the notification of the said stay were not deliberately delayed because the said Human Rights Committee is not a judicial body with linkage to this Court. In addition, the issue before the said Committee was the admissibility of the complaint. The decision of the said Committee on 6th April 1989 and the finding of a violation by the Government of Jamaica could not give rise to a legitimate expectation that the sentence should be commuted, as there was no express statement nor regular practice shown in order to induce that belief - Council of the Civil Service Union case.

The decision in Riley's case that delay for whatever reason cannot constitute inhuman and degrading treatment, is irrefutably binding on this Court. The Constitution arose out of the United Nation Declaration on Human Rights and there is no intention to dehumanise shown.

The prerogative is personal to Her Majesty, and by its nature it is not subject to legal rights and therefore its exercise is not reviewable. Sec. 32 preserved the common law status of the prerogative and excludes any review of the exercise of this discretionary power by the Governor General - vide cases of Riley, Council of the Civil Service Union and Royal De Keyser's Hotel. Even if the statutory provisions prevail, the nature of the prerogative has not changed, is not reviewable, the only limitation on it being the advise of the Privy Council, and there is no legal right to a condemned man to be heard or make submissions.

The exercise by the Governor General of the prerogative under Section 90 in the instant case, even if reviewable, was proper and reasonable. Section 91 places no restriction on the report that he may send to the Privy Council.

The Governor General in Privy Council is not constitutionally and legally bound by the decisions of and emanations from the United Nation Human Rights Committee and the Inter American Commission. They are merely recommendations. The treaties signed by the Government of Jamaica with those bodies, not having been incorporated in legislation, cannot be enforced in these Court and therefore cannot be relied on by the said Government or the individual - Blackburn v. Attorney General [1971] 1 AER 1380, the Parliament Belge 1879 4 Prob. Division 129. The parties to the treaty may pursue breaches of it at international level. Where breaches of human rights treaties are required to be enforced - the parties to the treaty usually established courts, e.g. the European Court of Human Rights and the Inter American Court of Human Rights. Mr. Campbell submitted, finally, that no injunction may be granted against the Crown restraining the execution of the applicants and that the Court would be ursurping the function of the Governor General under Section 90 if it were to order that the sentences be commuted to life imprisonment - Riley's case and De Freitas vs. Benny's case.

The issues to be decided are as follows:-

(1) Is delay, not attributable to the applicants, of such a nature, as to make what was otherwise lawful punishment, unlawful?

(2) Is the delay in the instant case so inordinate that the death penalty imposed, along with the said delay such that the said punishment may be described as "inhuman or degrading" in contra-

vention of Section 17 of the Constitution thereby entitling the applicants to Constitutional redress?

(3) If not, is the combined effect of the said delays, utterance, and the issuing and withdrawals of the death warrants of such that it raised in the applicants a legitimate expectation that the sentences would be commuted and so entitling them to judicial review.

(4) If yes, did the Privy Council fail to take into consideration, the said factors and also the reports and recommendations of the United Nations Human Rights Committee and the Inter American Commission on Human Rights and as a consequence incorrectly exercised the prerogative of mercy!

(5) If yes, may the Court grant judicial review of the exercise of the said prerogative directing that it be exercised in the applicant's favour?

Section 20(11) of the Constitution of Jamaica reads,

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

By Section 25(1),

> "... if any person alleges that any of the provisions of Sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

Delay is inevitable in any system of the criminal trial process. However the determining factor is the length of the delay and whether or not that delay was of such to operate to the prejudice of the plaintiffs in respect of their right to a fair hearing within a reasonable time.

The test to be applied to "presumptively prejudicial" delay was enunciated in Bell vs. Director of Public Prosecutions [1985] 32 WIR 317 adopting the principle laid down in the American case of Barker vs. Wingo, (1972) 407 U.S. 514. This latter case had under consideration the 6th amendment to the Constitution of the United States guaranteeing, "In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ..." - a pre-trial process.

Powell, J in Barker vs. Wingo, said, at page 530,

> "The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed ... We can do little more than identify some of the factors which court should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Lenth of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to a speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case ...

He continued at p.531,

> "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the Government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant ...", and further,

> "... the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factor we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences ... ... Prejudice, of course should be assessed in the light of the interests of defendants which the speedy trial was designed to protect. The Court has identified three such interests: (i) to prevent pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."

Although the Wingo and Bell cases were both concerned with delays in the pre-trial process as such, it seems to me that inordinate delay at any stage of judicial proceedings, creating prejudice to the plaintiffs is undesirable. However, such delays must be considered in the context of circumstances peculiar to Jamaica.

Lord Templeman, in his opinion in Bell vs. Director of Public Prosecutions supra said, at p.326,

> "Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in Barker vs. Wingo. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must, however, vary from jurisdiction to jurisdiction and from case to case. Their Lordships accept the submission of the respondents that in giving effect to the rights granted by Sections 13 to 20 of the Constitution of Jamaica, the Courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justive in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable."

There is today no significant change in this situation in Jamaica. Inordinate delay, of sufficient length can give rise to such circumstances to cause the effect of such delay on the accused to be argued as being inhuman or degrading treatment as contemplated by Section 17(1) of the Constitution.

However, as regards punishment lawfully inflicted, such as, sentence of death validly authorised by Section 14(1) of the Constitution, the majority decision in Riley et al vs. Attorney General of Jamaica supra held that delay for whatever reason cannot contravene Section 17(1) of the Constitution.

Lord Bridge, in delivering the majority judgment, said at p.726:

> "... since the legality of a delayed execution by hanging of a sentence of death lawfully

> imposed under Section 3(1) of the Offences against the Person Act would never have been questioned before independence, their Lordships entertain no doubt that it satisfies condition (c). Accordingly whatever the reasons for or length of delay executing a sentence of death lawfully imposed the delay can afford no ground for holding the execution to be a contravention of Section 17(1). Their Lordships would have left impelled to this conclusion by the language of Section 17 alone, but they are reenforced by the consideration that their decision accords fully with the general principle stated in D.P.P. Nasralla [1967] 2 A.C. 238 and de Freitas v. Benny [1976] A.C. 239."

Condition (c) being, "it must not exceed in extent the description of punishment so authorised."

The De Freitas case decided that sentence of death for murder in Trinidad and Tobago, had not become unconstitutional since Independence, because of delay in its execution such delay causing the sentence to be described as "cruel and unusual punishment".

In Nasralla's case, the Judicial Committee of the Privy Council, Lord Devlin delivering the judgment, said of Cap. III of the Jamaica Constitution - Fundamental Right and Freedoms, including Section 17.

> "This chapter ... proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed."

This Court is bound by the majority decision in the Riley case. I am not convinced as the plaintiffs argue that that said decision was given per incuriam.

I have always understood the per incuriam rule to arise where a decision by a court was given in circumstances where a previous decision on the point was not brought to the attention of the said court and that if it had been brought to the court's attention, the said court would have decided differently.

As to the per incuriam rule, Lord Diplock, in Baker v. Regina (1975) 13 JLR 169, a judgment of the Judicial Committee of the Privy Council, said, at p. 179.

> "Strictly speaking the per incuriam rule as such, while it justifies a court which is bound by precedent in refusing to follow one of its own decision (Young v. Bristol Aeroplane Company) does not apply to decisions of courts of appellate jurisdiction superior to that of the court in which the rule is sought to be invoked ... to permit this use of the per incuriam rule would open the door to disregard of precedent by the court of inferior jurisdiction by the simple device of holding that decisions of superior courts with which it disagreed must have been given per incuriam."

Mindful of the doctrine of precedent and certainty of the law, the **Judicial** Committee does not regard itself as strictly bound by the ratio decidendi of its own previous decisions. However, Courts in Jamaica are bound to follow the ratio decidendi of the said Judicial Committee in an appeal from Jamaica. The exception being where the rationes decidendi of two decisions of the Board conflict with each other and the latter decision does not purport to overrule the earlier. In such latter case the Jamaican Court may choose and follow which ratio decidendi they find more convincing - vide Baker's case, supra.

The arguments in Riley's case followed the principles enunciated in the Fisher case. The majority judgment therefore by its decision decisively overruled the ratio in Fisher's case.

However, if I am incorrect and the minority judgment in the Riley case which embraced the ratio decidendi of the Fisher case should be followed, giving to the said section 17, the generous interpretation, the questions are, was the delay inordinate and not attributable to the plaintiffs, and did it so cause the punishment to be seen as "inhuman or degrading?"

The plaintiffs do not complain of a pre-trial delay. After their conviction on the 15th day of January 1979, each promptly filed an application to the Court of Appeal for leave to appeal. Both applications were refused on the 5th day of December 1980 - a period of approximately 1 year and 11 months from the date of the application. The period of delay is not inordinate, in the context of the Jamaican judicial and legal circumstances.

The central period of complaint of official delay was that from the 5th day of December 1980 the date of the judgment until the 24th day of

September, 1984 when the Court of Appeal finally delivered its reasons - a period of three years and nine months. The foundation of this complaint is that the non-issuance of its reasons for judgment by the Jamaican Court of Appeal prejudiced the plaintiffs, because the absence of the written reasons prevented the plaintiffs from applying to Her Majesty in Council for special leave to appeal from the judgment of the Jamaican Court of Appeal.

This complaint has as its base the comments of Lord Templeman in delivering the judgment of the Judicial Committee of the Privy Council in Morgan and Pratt vs. The Queen on the 17th July 1986, when he said, inter alia,

> "On 5th December 1980, the Court of Appeal dismissed the petitioner's appeal against conviction and the sentence of death and promised to put their reasons for so doing in writing.
>
> These reasons were not delivered until three years and nine months later, namely on 24th September 1984 ... of course no action could be taken on his behalf, or on behalf of the authorities, pending the possibility of an appeal to this Board which could only be considered when these reasons had been delivered" (emphasis supplied).

Chapter VII Part 3, Sec.110(3) of the Constitution of Jamaica reads,

> "110(3) - Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal from decisions of the Court of Appeal to Her Majesty in Council in any civil or criminal matter."

The plaintiffs therefore have the right to petition Her Majesty in Council, directly, by way of an application for special leave.

The Judicial Committee Act, 1844 (U.K.) in force from the 6th day of August 1844, provides in section 10,

> " It shall be lawful for the said judicial committee to make an order or orders on any court in any colony or foreign settlement or foreign dominion of the crown, requiring the judge or judges of such court to transmit to the clerk of the privy council a copy of the notes of evidence in any course tried before such court, and of the reasons given by the judge or judges for the judgment

pronounced in any case brought by appeal or by writ of error before the judicial committee."

This enabling provision is a clear indication that the receipt of the reasons for judgment by the plaintiffs in the instant case is not a precondition to the initiation of a petition to Her Majesty in Council.

The Judicial Committee (General Appellate Jurisdiction) Rules Order 1982, in operation from the 7th day of February 1983, and revoking the Judicial Committee Rules 1957 as amended, does not require that reasons be obtained as a pre-condition to the petitioning of Her Majesty in Council.

Rule 3 recites the matter to be contained in the petition and the requirement that it should be signed by Counsel.

Rule 4, requires the petition for special leave to lodge

"(a) Six copies of the petition and of the judgment for which special leave to appeal is sought

(b) an affidavit in support of the judgment ....

(c) .... an affidavit of service of notice of the intended application."

Rule 1 interprets "judgment" to include "decree, order, sentence or decision of any Court or judge or judicial officer."

Rule 11 states that "As soon as the appeal has been admitted, whether by an order of the Court appealed from or by an Order of Her Majesty in Council granting special leave to appeal (unless in such case the said Order in Council otherwise provides) the appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar." (emphasis added)

Rule 16 states, "There shall be included in the Record the reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the appeal arises."

The rules provide a further illustration that the delivery of the written reasons is not a pre-condition to the filing of a petition for special leave to Her Majesty; and in any event is not required to be filed until after the appeal has been admitted.

The finding therefore, of the United Nations Human Rights Committee under the Optional Protocol dated the 6th day of March 1988 that,

> "In the absence of a written judgment of the Court of Appeal the authors were not able to proceed to appeal before the Privy Council, thus entailing a violation of artivle 14, paragraph 3(c) and article 14 paragraph 5."

and the contention by each plaintiff that,

"During the period between the date of dismissal and the rendering of reasons therefor, I was unable to appeal further against my conviction and sentence .." are both misconceived. The plaintiffs deliberately chose not to pursue their rights before the Judicial Committee - they slept on those rights.

By letter dated the 7th day of January 1981 to the Registrar Court of Appeal, both plaintiffs requested "Kindly to set my case in a position so that whenever my attorney, Mr. Noel Edwards wishes to further his argument of appeal to the Privy Council of England he can do so. Furthermore, he and his colleagues Mr. Frater and Miss Lightbourne is sole responsible for our case ..."

The Registrar of the Court of Appeal by letter dated the 30th January, 1981, replied to the said letter stating that she had "spoken to your Attorney-at-law Mr. Eric Frater. Mr. Frater has advised me that he is endeavouring to take your matter to the Privy Council in England."

Mr. Frater of Counsel was not precluded from proceeding with petitions for special leave to appeal on behalf of both plaintiffs. He could have certified the point of law involved; he had appeared at the hearing where the points of law were argued. Except with leave, no new points could be argued before the Judicial Committee, which were not argued in the Court below.

Thereafter, the plaintiffs opted to pursue their cases by way of appeal to the Inter American Commission for Human Rights by application dated the 12th day of June 1981.

On the 3rd day of September 1984, on receipt of a letter requesting the written reasons for judgment the Court of Appeal delivered it on the 24th day of October 1984.

I am of the view that there was extraordinary delay on the part of the Court of Appeal in delivering the written reasons for judgment as

promised. However, this was not "a deliberate delay "as contemplated by Powell, J. in the Barker v. Wingo case. It was an act of negligence, which is, a "more neutral reason ... weighted less heavily .. but nevertheless should be considered."

The majority decision in Riley's case conceded that long delay in the execution of a death sentence is less than desirable. Lord Bridge said at p.725,

> "Their Lordshipsfully accept that long delay in the execution of a death sentence, especially delay for which the condemned man is himself in no way responsible, must be an important factor to be taken into account in deciding whether to exercise the prerogative of mercy. But it is not for this Board to usurp the function allocated by Section 90 of the Constitution to the Governor General acting on the advise of the Privy Council in Jamaica. The sole question for their Lordships' decision is whether the execution of sentence of death upon any of the applicants would contravene Section 17 of the Constitution."

The majority held that it would not.

It is significant to note that the next succeeding act of the plaintiffs, after the receipt of the written reasons for judgment was an appeal, not to the Judicial Committee of the Privy Council, but to the United Nations Human Rights Committee. Petitions to the said Judicial Committee were filed, by the plaintiff Morgan on the 13th day of August, 1985 - eleven months after, and by the plaintiff Pratt, on the 12th day of March 1986, eighteen months after the receipt of the said written reasons. In all the circumstances this conduct of the plaintiffs show that the said delay in the delivering of the written reasons was not the operative cause of the plaintiffs' delayed petition to Her Majesty in Council and therefore the latter delay from December 1980 cannot be regarded as not attributable to the plaintiffs.

Lords Scarman and Brightman, in delivering the minority judgment in Riley's case, adopted as the proper approach to the interpretation of the Constitution, the "generous interpretation" advocated by Lord Wilberforce in delivering the opinion of the Judicial Committee in Minister of Home Affairs vs. Fisher, supra, "... suitable to give to individuals the full

measure of the fundamental rights and freedoms referred to." The minority held that the prolonged delay after conviction would cause the execution of punishment of death to be seen as "inhuman or degrading treatment" within the context of the prohibition of Section 17(1) and such treatment could not be made valid by Section 17(2).

Assuming that the approach of the minority judgment in Riley's case is the correct approach, one has to examine further whether or not the plaintiffs had, in all the circumstances a legitimate expectation that their sentences would be commuted to life imprisonment, thereby entitling them to judicial intervention.

The most helpful case in this regard is the Council of Civil Service Unions vs. Ministry of the Civil Service [1985] 1 A.C. 375. This case involved an order by the Minister for the Civil Service that certain public officers could no longer become members of national trade unions. This was a variation of their conditions of service in circumstances where it was an established practice in the past that any such instruction would not be made without prior consultation with the said officers and the unions.

Lord Fraser in his judgment said, at p.401,

> "... where a person claiming a benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law .... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

Judicial review was denied on the ground of national security.

The resolution of the House of Representatives of the 30th day of January 1979, recommending "that the cases of all persons awaiting execution be reviewed" and the resolution by the Senate on the 9th day of February 1979 that "capital punishment be suspended for eighteen (18) months ... pending a detailed study and assessment and report," cannot be seen as express promises given to the plaintiffs that their sentences would be commuted.

The Fraser Committee report tabled in 1986, recommending the abolition of the death penalty and the commutation to life imprisonment of sentences of death imposed prior to either December 1980 or March 1981, equally cannot be elevated to that of express promises to the plaintiffs; they remained recommendations. The newspaper report of the 28th day of June 1988, attributed to the Governor General's secretary, is a statement of the procedure adopted by the Privy Council in Jamaica when appeals are pending before the Judicial Committee and the posture of Jamaica in its respect for the treaties into which it had entered. The Government news agency release, reported in the daily newspaper of the 9th day of March 1989, that "the question of the death penalty would be placed on the agenda of the cabinet" is no higher than a purported intention to discuss the issue. The further newspaper report of the 10th day of August 1990 that the Cabinet had given consideration to commuting to life imprisonment the sentences of inmates who fall into various categories including that of those on death row for more than five years is an imprecise statement revealing a mere contemplation, by the "Cabinet" which itself has no powers to commute sentences of death.

The issuing of the three death warrants in respect of each plaintiff and each subsequent stay of execution would have caused extreme anxiety, in the mind of each plaintiff.

Lords Scarman and Brightman said in the Riley case, of the sentence of death, at p.735,

> "It is, of course, true that a period of anguish and suffering is an inevitable consequence of sentence of death."

and continuing said,

> "But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not ..."

The issuing of the death warrants for the plaintiff was a lawful exercise of the power under the Constitution to do so. The stay of execution by the Governor General was, in each case, in response to pleas by the public, by the Human Rights Committee and by the plaintiffs themselves, respectively. One could hardly complain where the Governor General

was responsive to requests in such circumstances.

The plaintiffs cannot rely on any existing regular practice nor point to any express promise given to them that their sentences would be commuted. There was a continuing debate, to which the executive was not insensitive. There was a continuing hope in the mind of each plaintiff and an understandably constant quest in avenues that seemed able to assist. Each factor has to be examined separately in order to determine whether or not any genuine legitimate expectation was capable of arising. I can see no legal basis on which the plaintiffs may maintain that a legitimate expectation arose in their favour, to give rise to judicial review, in accordance with the principles in the Council of Civil Service Union case. In the circumstances, the cumulative effect of the above-mentioned factors including the delay, do not anymore so give rise to any such legitimate expectation. In any event it would be unhelpful to consider such factors cumulatively, as Mr. Daly for the plaintiffs projected.

If this conclusion is incorrect and the plaintiffs should be held to have had the said legitimate expectation entitling them to judicial review, may the Courts examine the exercise of the prerogative of mercy and direct that it be exercised in favour of the plaintiffs?

The prerogative of mercy originated as a power of the sovereign to show mercy to his subjects. It was a power to bestow the sovereign's benevolence - even to condemned men. Dicey, the leading historian, describes it as,

> "... the residue of discretionary power left at any moment in the hands of the Crown, whether such power is in fact exercised by the King himself or by his ministers."

With the ascendancy of parliamentary supremacy, historically, most of what was regarded as the royal prerogative became exercisable not by the king himself but by public officials, the fact and method of such exercise being incorporated in statutes.

In Attorney General vs. De Keyser's Royal Hotel Limited, supra, a case involving the requisitioning of private property and the question of compensation, in referring to the royal prerogative, Lord Paramoor said, at p.575:

> "The constitutional principle is that when the power of the Executive to interfere

> with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject."

and Lord Atkinson said, at page 540,

> "After the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted Royal Prerogative may theretofore have been."

He stated,

> ".... its prerogative power to do that thing is in abeyance."

The Court has reserved to itself the right to examine whether or not the prerogative power exists in any given situation and the extent but not the manner of its exercise - De Keyer's case. Lord Denning in Hanratty et al vs. Lord Butler of Saffron Walden S.J. 21.5.71 page 306, in an action against the Home Secretary for failing to consider new material presented to him after the conviction and dismissal of appeal but before execution, said,

> "The high prerogative of mercy was exercised by the monarch on the advice of one of her principal secretaries of state who took full responsibility and advised her with the greatest conscience and care. The law would not enquire into the manner in which that prerogative was exercised."

A comprehensive examination of the exercise of the prerogative power was done in the Council of the Civil Service Union's case, explaining the modern development of the law.

Lord Fraser, after referring to the reviewability of the existence and extent and the non-reviewability of the manner of exercise of the prerogative power as laid down in the De Keyser's case, continued, at page 399,

> "This is undoubtedly the position as laid down in the authorities ... and is plainly reasonable in relation to many of the most important prerogative powers which are concerned with control

> of the armed forces and with foreign policy and with other matters which are unsuitable for discussion or review in the law courts."

Lord Scarman observed, at p.407

> "Today ... the controlling factor determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."

Lord Diplock said, at p.410

> "I see 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. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third procedural impropriety'".

and at page 411,

> "As respects 'procedural impropriety' I can see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative ... ... Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, 'procedural impropriety' will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision-making (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made."

Lord Roskill was of the view that judicial review of the prerogative power was available to the citizen whether it is derived from common law or the statute.

He however cautioned, at page 419,

> "... I do not think that that right of challenge can be unqualified. It must, I think depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument

> of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process ..."

The prerogative of mercy being the bestowal of a privilege by the person of the Sovereign - an act of benevolence - was never the subject of legal rights.

With parliamentary supremacy, that power was still exercised by the Sovereign, but on the advice of an official functionary in the executive arm of Government. In England, this function was performed by the Home Secretary. This development necessitated the formulation of specific rules guiding this official as to the procedure to be adopted in the performance of this official function. The nature of the exercise of mercy - the subject matter - has not changed by reason of its inclusion in a statute.

By section 68(1) of the Constitution of Jamaica the executive authority of Jamaica is vested in Her Majesty.

Section 68(2) reads,

> "Subject to the provisions of this Constitution, the executive authority of Jamaica may be exercised on behalf of Her Majesty by the Governor General either directly or through officers subordinate to him."

Section 82 establishes a Privy Council for Jamaica and its members consist of "six members appointed by the Governor General, after consultation with the Prime Minister, by instrument under the Board Seal."

Section 90 authorises the Governor General to exercise the prerogative of mercy "in Her Majesty's name and on Her Majesty's behalf." Subsection (2) reads,

> "In the exercise of the powers conferred on him by this section the Governor General shall act on the recommendation of the Privy Council."

Section 91 requires that the Governor General in the case of a person sentenced to death, cause a written report of the case from the trial judge, and any other information from the record of the case or elsewhere, as

the Privy Council may recommend is required, to be sent to the Privy Council in order that the Privy Council may advise him in accordance with the provision of section 90.

Section 32(4) reads,

> "Where the Governor General is directed to exercise any function, in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, or on the representation of, any person or authority, the question whether he has so exercised that function shall not be enquired into any court."

In Jamaica the prerogative of mercy is exercisable by the Governor General in Her Majesty's name, and in that regard he is bound only by the recommendation of the Privy Council.

The Governor General cannot be bound by the recommendations of the United Nations Committee on Human Rights or the Inter American Commission on Human Rights, as contended for by the plaintiffs; that would be patently unconstitutional as being in contravention of Section 90(2). It would be acting under the dictation of these international bodies. In addition, the recommendations of these said bodies should be accorded respectful consideration, but because the treaties, by which the Government of Jamaica is bound to these organizations, have not been incorporated in our municipal law, the Privy Council is not bound by them; vide, The Parliament Belge (1879) 4 Probate Division 129 and McNair's , The Law of Treaties. It seems to me that if the Privy Council purported so to act, it would be subjecting itself to the criticism that it was effecting a procedural impropriety, and acting ultra vires, thereby attracting the issue of one of the prerogative orders.

Lords Scarman and Brightman, in the Riley case, said, of the prerogative of mercy in the Jamaican Constitution, at page 731,

> "It is to be noted that this is an executive power subject to the sort of safeguard, i.e. the confidential advice of a distinguished independent body, which is a familiar feature in administrative law. The condemned man though the power exists for his protection as well as for the protection of the public interest, has no right to be heard in the deliberations of the Privy Council and the Governor General. In short, the exercise of this executive power is a classic

> example of an administrative situation in which the individual affected has a right to expect the lawful exercise of the power but no legal remedy; that is to say, no legal remedy unless the Constitution itself provides a remedy."

The Judicial Committee of the Privy Council in the De Freitas vs. Benny case held that under the Constitution of Trinidad and Tobago, a constitution of the same "family" as Jamaica's, in the exercise of the prerogative by the Governor General the condemned man has no entitlement to be shown the material which the designated Minister tenders in his advice to the Advisory Committee (the body corresponding to the Privy Council of Jamaica). Nor did he have a right to be heard by the said Committee.

The Constitution of Jamaica is a comprehensive statutory scheme detailing the operation of the prerogative of mercy. It is exercisable by the Governor General in Her Majesty's name, on the recommendation of the Privy Council, as provided by section 90. Certainly, if the Governor General acts on the advice of a body to the exclusion of the Privy Council e.g. the Cabinet, therein would lie a claim that it was acting ultra vires.

Section 32(4) is an effective non-certriorori clause, which protects from review by the Courts any decision by the Governor General acting on the advice of the Privy Council.

The prerogative of mercy which by its nature was never the subject of legal rights, never attracted to itself the operation of the trial process. The condemned man had no right to appear nor to make representations. Nor has he any right to see the material relied on by the Governor General in Privy Council. Sec. 88(3) provides that the Privy Council may regulate its own procedure, "subject to the provisions of this Constitution." The Constitution has not extended the provisions governing the exercise of the power, to include these said rights claimed by the plaintiffs.

It is worthy of note that Section 89 provides,

> "the Privy Council shall not be disqualified for the transaction of business by reason only of any vacancy among its members (including any vacancy not filled when it is first constituted or is reconstituted at any time), and any proceeding there in shall be valid notwithstanding that same

person who was not entitled so to do
took part therein."

This is a statutory validation of an improperly constituted Privy Council - an improper composition whose decision would, in the absence of such an clause, be subjected to judicial review, on behalf of anyone affected by its decision. The Privy Council would have been improperly constituted if a person who was not entitled to take part in the deliberations and decision in fact did so.

For the above reasons I find that the Court has no power to grant judicial review of the exercise of the prerogative of the Governor General in the instant case.

In all the circumstances I hold that the declarations and order asked for should not be made and that the injunction should not be granted.

President:

The actions are accordingly dismissed. There will be Judgment for the defendants - no order as to costs.