MOTION FOR DECLARATION

SUIT NO. M34 of 1979

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

(CONSTITUTIONAL REDRESS COURT)

B E F O R E : The Hon. Mr. Justice Wilkie
The Hon. Mr. Justice Chambers
The Hon. Mr. Justice Carey

BETWEEN NOEL RILEY
ANTHONY FORBES
CLIFTON IRVING APPLICANTS

A N D THE ATTORNEY GENERAL
THE SUPERINTENDENT OF
PRISONS, ST. CATHERINE
DISTRICT PRISON RESPONDENTS

Mr. Dennis Daly
Mr. Richard Small
Mr. Noel Edwards, Q.C. for the Applicants

Dr. Kenneth Rattray,
Mr. Lloyd Ellis) for the Respondents

13th to 15th JUNE, 1979

WILKIE, J.:

Perhaps we should begin with the history of these matters. On the 7th of March, 1975, the applicants Noel Riley and Anthony Forbes, were convicted of murder and a mandatory sentence under Section 3 of the Offences Against the Person Act, 1864, that they suffer death as felons were imposed on them. A similar situation occurred in respect of the applicant, Clifton Irving, who on the 22nd of March, 1975, was also convicted of murder and the mandatory sentence to suffer death as a felon passed upon him.

On the 23rd February, 1976, application for leave to appeal on behalf of Riley and Forbes was dismissed by the Court of Appeal; on the other hand an application to appeal on behalf of Irving was heard and was subsequently dismissed by the Court of Appeal on the 10th of January, 1977.

Thereafter, the applicant, Riley, applied for special leave to appeal to Her Majesty in Council, the said application being refused on the 18th of July, 1978. Forbes made no application for leave to appeal to Her Majesty in Council, while Irving's Attorney-at-Law wrote Solicitors in London requesting their assistance to obtain special leave to appeal to Her Majesty in Council, but these efforts were abandoned some time in October, 1978.

It seems, therefore, that all the remedies in law open to the applicants against their convictions were then spent. They were therefore in custody in the St. Catherine District Prison awaiting the carrying into effect of the sentences imposed upon them and the evidence suggests that Orders for their execution were handed down by the Governor-General when they commenced the proceedings with which we are now concerned. The proceedings are in the form of a Motion to the effect that the provisions of Sections 14 to 24, Cap. 3 of the Constitution, the grounds on which they made their application, have been infringed, and the relief they seek is a Declaration that their execution, at this time, and in the circumstances leading up to it, and surrounding the issue of the Death Warrants, would be unconstitutional and illegal contrary to Sec. 17(1) of the said Constitution.

Exhibited are Affidavits of the individual applicants describing their own individual state of mind and exhibiting excerpts from speeches made in the House of Representatives on a motion to suspend capital punishment, which, on a free vote, was defeated. Subsequently, the Senate passed a Resolution to suspend capital punishment and the Minister of Justice set up a Committee to consider and report within a prescribed period of some ten months. This Committee was to make a study and report on all aspects of capital punishment.

This is what has been exhibited in the affidavits of the applicants themselves, and this is the gravamen of their complaint.

Shortly put the applicants are relying on two grounds to bring their position within the definition of Sec.17(1) of the Constitution:

Firstly, they contend that their execution was delayed, which delay they allege was caused by the de facto suspension of the death penalty.

Secondly, the applicants complain and assert that they were led reasonably and/or hoped that their execution would not be carried out by virtue of:

(a) the suspension of the death penalty;

(b) studies undertaken into the question of the suspension of the death penalty by the National Security Committee of the House;

(c) and the debates and Resolutions passed in the House and the Senate.

They complain that the above, together, caused such mental and psychological anguish as to amount to torture, and/or degrading; and/or inhuman treatment within the meaning of Section 17(1), and this would justify the Declaration prayed for. To put it bluntly they submit that this Court should find that what is described above violated Section 17(1), and that the Court had a duty to devise a remedy, the effect of which would be to quash or set aside, or in any event to put an end to the execution of the sentence of death imposed on the applicants.

Mr. Rattray, the learned Solicitor-General, made a submission in limine and submitted inter alia, that consistent with the scheme of the Constitution, there is a separation of powers between the legislative function, the executive function and the judicial function; that in keeping

with that separation Sections 82 - 91 enshrines the principle of the prerogative of mercy and does so in unquestionably discretionary terms. That the language of the sections and the historical evolution make it clear that a convicted person has no legal right to have his case considered by the Privy Council within a certain time in the exercise of the prerogative of mercy or to have his case considered favourably. That Section 90(1)(a) are powers that are discretionary. That nothing compels the exercise of those powers. Section 90(1)(b) gives the power expressly to grant respite for indefinite or specified periods from the execution of punishment imposed on that person for such an offence. That it is only the Privy Council who has the authority to determine whether or when the death penalty should be carried out, and it is only the Governor-General in the exercise of his powers can grant respite. That the exercise of that power cannot be the basis on which application can be made to this Court. The lack of the exercise or the exercise of it cannot be the subject of complaint in these Courts.

He submitted that this is all part of the prerogative and is essentially an extra-judicial act and is exercised when all judicial avenues are closed.

He stated that mercy is above the Courts in relation to the exercise of the prerogative of mercy. He submitted that the applicants are saying there has been delay in determining the exercise of the prerogative of mercy, and that the circumstances and events which have taken place have given them a hope of expectation of life, and that accordingly in terms of the motion, it would be unconstitutional and in violation of Section 17(1) for the execution to be carried out. He submitted that any delay in execution is an act of mercy and cannot constitute torture, degrading punishment or inhuman treatment. Consequently, it cannot form the basis of complaint. He submitted

that mercy is not the subject of legal rights.

The circumstances alleged would give the applicants only a hope of a reprieve, but such could not properly form the basis of a legal right and that this Court would have no power to grant any such remedy.

He further submitted that any of the alleged agonies suffered from the delay in execution is not in any true sense caused by the delay, but is caused by the possibility of execution. That this is a direct consequence of the lawful imposition of the death sentence. That the applicants must show that the acts, if any, that affect them were acts of the State; and that they could not rely on debates in Parliament to say that these are the acts of the State that affected them and amounted to a breach of Section 17(1).

Dr. Rattray cited Michael de Freitas o/c Malik vs. Benny (1976) A.C.239 (for convenience called the Malik Case) and observed that it was directly in point, and that this Court was bound by the findings in that case.

He submitted broadly, very forcibly, that this Court has no jurisdiction at all to entertain the motion. The matter, in his view, was a matter entirely for the exercise of the prerogative of mercy. The Constitution very expressly had placed it in the powers of the Governor-General, and only he could exercise those powers. No one could challenge the exercise of those powers in these Courts.

Mr. Daly submitted that nothing in the motion, and in the Affidavits seeks to challenge the discretionary powers of the Privy Council; that the applicants' complaint is that their constitutional rights were infringed and Section 17(1), by what they said they were subjected to; the delay and the hope and expectation as engendered from the debates that took place in the House. The circumstances were of a peculiar nature and it should be considered in that light.

Their complaint is not against the punishment being the sentence of death, but against the treatment of a certain kind that was tantamount to torture and this treatment includes the execution as an integral part of it and they could not be severed.

He stated that Malik's case can be distinguished from what transpired here. In Malik's case they were considering the death penalty, here they are not challenging that. What they are challenging is the treatment to which the applicants were subjected to and may be summarised as the delay in the execution, the de facto suspension of capital punishment for three years; the hope engendered by the debates in the House; the establishment of the Committee by the House.

He submitted that the intended execution of the applicants constitutes torture within the meaning of Section 17(1)

Mr. Small submitted strongly that the doctrine of separation of powers was largely mythical in the modern concept of a written constitution such as we now enjoy: That the Constitutional Court, this Constitutional Court has jurisdiction over all functions of Government be it legislative or executive; it also has supervisory powers over the Courts, if it was found that they offended against the fundamental freedoms of the citizens. The effect of his submissions is that, for instance, the Moses Hines cases merely reflect a natural prejudice of English judges who have been without the undoubted boon, of a written constitution; and he submits that the powers under a written constitution should be interpreted widely and liberally and they should not be interpreted in a limited way. He suggests that interpretation could be limited only by the clearest words of the Constitution itself.

He supports Mr. Daly's contention that Malik's case does not apply and reiterates that the gravamen of the submission is that the delay coupled with the anguish suffered by the applicants occasioned by the hopes raised as a result of the debates in Parliament amounted to a condition, the effect of which was to breach

Section 17(1).

He stated that where a constitutional right is infringed the Court has a duty to devise the appropriate remedy. Rights cannot be infringed and there is no remedy. Particularly if they are of a constitutional nature, then the Court is empowered to devise some remedy to protect those particular rights.

Finally, he supported Mr. Daly's contention that the question of hope held out or whether the applicants suffered torture or not is a question essentially of fact, not law, and as such does not appropriately form an issue to be determined in limine.

Mr. Edwards adopted and embraced in most elegant terms, if I might say so, the submissions of Mr. Daly and Mr. Small. Mr. Edwards concentrated more on the moral aspects of capital punishment, having embraced the substance of the submissions of his colleagues, Mr. Daly and Mr. Small.

I would not accept Mr. Small's broad views of the powers of this Court without some reservation. Yet I have much sympathy for his views that where allegations of breaches of fundamental rights are complained of, the Court may well have the power to enquire into and review the conduct from whatever quarter it manifests itself. I am of the view, however, that each case must be examined and decided on its own peculiar circumstances. It would seem that wrongs previously non justiciable might well now be so provided they can be brought within Cap.3, the fundamental rights and freedoms clauses of the Constitution. That is as far as it goes.

I do not accept the contention of the Attorneys for the applicants that the circumstances of whether or not the applicants did suffer the conditions which applicants stipulated breached Section 17(1) is a question of fact and is not an issue to be appropriately determined in limine. I agree with Dr. Rattray's views and submission that one must look at the whole picture, that it must be examined within the context of the precise

jurisdiction which is sought to be invoked in the application itself and to see if all those facts alleged, even if admitted, whether the Court would have jurisdiction to entertain the proceedings. This was the substance of Dr. Pattray's submissions and I find no fault with either its substance or with such a procedure which might well save a great deal of judicial time.

Having heard the submissions it should be observed that the Court, although it may deal with matters involved with morals, is still a Court of Law and not one of morals. When one examines Section 2 of the Offences Against the Person Act, it provides that persons convicted of murder shall suffer death as a felon. Section 3 of the Act makes the sentence mandatory and it further provides the manner in which the sentence should be carried into execution and for the confinement of the felon.

The constitutionality of death by execution is not being questioned before us. It must be admitted that the prospect of impending execution inevitably carries with it, as a natural concomitant, an inseparable consciousness of mental anguish and pain but this is part and parcel of the imposition of sentence of death. The question of its cruelty or desirability does not arise for consideration except to say that it is an integral and inseparable part of the punishment prescribed by law.

The applicants, therefore, must show that the act complained of were illegal and were the direct cause of mental anguish or expectation over and above what would be essentially engendered by the sentence of death itself. They must show that it had caused or contributed substantially to the conditions complained of by Section 17(1).

Whatever tests be used to ascertain and measure these conditions of the mind could not affect the position of the applicants as Section 2 of the Offences Against the Person Act also makes provision for the carrying out of the execution as heretofore has been practised.

Now what is the practice? Mr. Daly, in his submission, stated that the Governor-Genral, by his Warrant, states that he is not granting a reprieve, not exercising his prerogative in favour of the particular felon and by his Warrant directed to the Superintendent of Prisons fixes the date when the execution is to be carried out.

It is reasonable to infer that that is the practice that operates today and that the practice is regular. What it means, therefore, is that after Section 3 of the Offences Against the Person Act comes into effect, the next step in the sequence of events, the other legal rights of the prisoner having been spent, is the powers outlined in Section 90 of the Constitution, that is, the Prerogative Power of Mercy.

Now, the language under Section 90(1)(b) is very, very clear, very concise and quite unambiguous. It is clear that under Section 90(1)(b) the Governor-General is empowered to grant a respite either indefinitely or for a specified period. It is a power expressly given to the Governor-General in the exercise of his prerogative and cannot in my view be illegal or be impeached on the grounds of delay. To grant such a respite while a debate is taking place in the House cannot be construed as an act other than one of mercy which cannot attract condemnation, and I so hold. Similarly, debates in the House in this regard cannot be interpreted as an act by an agency of the State which could be regarded as direct interference and calculated or not, add to the anguish of a person under sentence of death. To hold otherwise would be to oblige every person or every act on the part of any agency of the State to refrain from the performance of any lawful function lest by inadvertence it adds to the anguish or detracts from the peace of mind of persons awaiting execution, either directly or indirectly, and it may very well attract such proceedings as we now have.

I respectfully concur with the view expressed by

Lord Diplock in the Malik case, that acts of mercy cannot be the subject of legal rights. "It begins where legal rights end"; and in relation to the exercise of the prerogative of mercy I find the Malik case is directly in point. Essentially, that is what this matter is all about. The substantial issue is the exercise of the prerogative of mercy. Implicit in the language of the motion is the praying for a relief that the prerogative of mercy be exercised in the applicant's favour because of the delay; the conduct of the House of Representatives, debates and resolutions of the House and Senate. A translation of this relief in legal terms would be:

(a) prerogative of mercy, but the Constitution gives that power only to the Governor-General in Section 90. He is the only person who could exercise it;

(b) the delay which can be construed as a respite under Section 90(1). Again that is authorised by law in Section 90, and it is granted to the Governor-General alone;

(c) the discussion of the suspension of the death penalty by Parliament; and

(d) Debates and Resolutions of the Senate.

As I said before the exercise of the prerogative in favour of the applicant and respite are matters entirely and exclusively reserved for the Governor-General in Section 90. The suspension of the death penalty and the debate, clearly these are acts of mercy and surely they cannot be the subject matter of legal rights. Legal rights must be infringed before one may seek a legal remedy. So, it would follow from all this that what the motion is seeking is for this Court to grant rights that are exclusively the Governor-General's in relation to the exercise of the prerogative in their favour, and to do so on grounds that do not create a legal right

upon which they can rely.

I find, therefore, that the point made *in limine* by Dr. Rattray is sustained and I hold that this Court has no jurisdiction to entertain the motion and I would dismiss the motion.

Before I leave this matter I should like to add that it is hoped that in the future our Legislature, although their tasks are multifarious, onerous and very difficult, will arrange their affairs in a somewhat better order than has been evidenced in this particular situation. I do not believe that an apparent confusion can enhance the peace and tranquility of good order and provide for good government in any country.

CHAMBERS J.:

In this Motion before the Full Court in relation to these three applicants named in the Motion, on the ground that a period of nearly three years has elapsed since all hanging was placed in limbo on a general basis - and at that I may add in breach of the Constitution and Section 3 of the Offences against the Person Law, as the Constitution, Sections 90(1)(b) and 91, only permits respite, suspension or putting in limbo the execution of punishment for murder in individual cases after due consideration of each case and not on a mass basis, thus giving to these applicants, as is submitted, a sense of hope, which submission should really be the giving of a false sense of hope about their being spared the penalty which they have rightly earned under Section 3 of the Offences Against the Person Law and under the Constitution - I wish to say that in my opinion there is no merit in the application, especially when the delay in carrying out the lawful execution is compared with punishment by torture and inhuman treatment.

Private citizens or even persons in official positions may have their private opinions and bias on any subject under the sun, including bias in regard to the subject of 'no hanging' generally, but the Courts, especially a Constitutional Court, should not be used in the face of the clear and specific law of the land and of the Constitution to foist any private opinion and sentiments on anyone and ultimately on the public; and as Dr. Ken Rattray, the Solicitor General, if I may say so with respect, has rightly said that this is a Court of Law, not of morals, and I may add not of sentiments. Even a presiding judge cannot use his preconceptions or any bias he may have on a subject matter in his decisions and thus embody

/it in his....

it in his findings and thus foist such preconceptions and bias, if any, in the subject matter on the public, and lawyers should not be permitted the privilege of attempting to make the Court act on their personal bias or preconceptions on any subject matter in the absence of any law to permit it. Costs should be awarded against any lawyer who persists in such conduct, however able and brilliant they may put their cases as was done in this motion.

In regard to a bias on a subject matter, I will quote from what Frank, J. says in R. v. Linahan, 1943 page 138F, 2D, page 650 at page 652, in a case decided in the United States of America and quoted at page 157 in the book, "Principles of Administrative Law" Fourth Edition, by the authors and quote:

> "If, however, 'bias' and 'partiality' be defined to mean the total absence of preconception in the mind of the judge, then no one has ever had a fair trial, and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions, and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition are prejudices.."

In this regard, I should add that no judge would or should make pronouncements on any subject matter which he is dealing with in Court from any bias or partiality on the subject matter which he may possess, but he should deal with the case as it falls in line with the Law and the Constitution, and lawyers should not allow themselves to fall in the trap of

/filing cases...

filing cases or motions based on bias, on a subject matter, if any, unsupported by law and its proper interpretation, however brilliant they may put the arguments and however genuine and convinced they may be in such beliefs.

Now, if one is basing one's arguments on the allegation that a person or persons was or were given cause to hope that their execution would not be carried out because of a de facto suspension of capital punishment since 1976 and also that suspension was 'on and off' since the 12th day of May, 1977, a matter of two years, and that this de facto suspension of hanging existed, then one should bear in mind that this hope of not being hanged should or would create in the mind of such a person awaiting his execution a psychological relief from the fact that the certain death which under the law he has earned has been delayed, thus giving him a longer time to live during which time this hope ought to be a stimulus to his morale rather than it being incorrectly regarded as subjecting the person to torture or to inhuman or degrading punishment, or other treatment.

Before dealing with the claim to relief that is stated in the Motion to exist under Section 17 (1) of the Constitution in relation to each of these three applicants, and which I will deal with as though this Court has jurisdiction to deal with the Motion, I shall refer to both the in limine submissions by Dr. Rattray that this Court is without jurisdiction to entertain the Motion and the reply by the applicants' Attorneys-at-law. I shall then analyse the Motion and its implications regardless of the outcome of the in limine submissions, as the matter is important, not only to the circumstances of this particular Motion, but any other motion filed in regard to persons convicted of any offence against the law of Jamaica, and in

/analysing...

analysing the case I will be covering all the submissions made in limine and the replies thereto.

Dr. Rattray made five submissions in limine to the effect that this Court has no jurisdiction to entertain this motion, namely:-

(1) That the question of the exercise of the prerogative of mercy involves the exercise of a discretionary power and is therefore not justiciable.

(2) That on the face of the motion, and the Affidavits in support, no legal rights have been shown to have been infringed entitling the applicants to legal redress in Court, and consequently, there is no jurisdiction under the Constitution to entertain a motion involving only moral acts.

(3) That moral or policy issues, however laudible in so far as they relate to the death penalty and its execution are irrelevant in these Courts.

(4) That the terms of the motion relate to a declaration which would challenge the validity of the death penalty.

(5) That nothing in the motion has established as is required in constitutional issues that there was anything which constituted torture or degrading punishment or treatment.

In dealing with the first submission in limine, Dr. Rattray referred to the constitutional principles of the separation of powers between executive, the legislative and the judiciary, and submitted that the Jamaica Constitution deals with these three separate arms of Government in

/different chapters...

different chapters or portions of the Constitution. Dr. Rattray cited Sections 90 and 91 of the Constitution which deal with the exercise of the prerogative of mercy based specifically on unquestionable discretionary terms.

Dr. Rattray further submitted that these Sections of the Constitution show that a convicted person has no legal right to have his case considered within a certain time in the exercise of the prerogative of mercy. Neither has he any right to have his case considered favourably. Further, that if the Courts acted on the motion they would be reviewing the manner in which the prerogative of mercy was exercised, and such review is exclusively within the province of the Privy Council.

The first submission as well as all the other submissions by Dr. Rattray, except one, has dealt with the issue of the Court having no jurisdiction. The exception is the submission in relation to an applicant's hope because of the delay in carrying out the execution, and Dr. Rattray submitted that the hope, during the delay, would not result in the subjecting of any of the applicants to turture or to inhuman or degrading punishment or other treatment, but rather, it would be the other way around because the delay in execution gives hope to the condemned and "where there is light there is hope." With this I respectfully agree.

However, Dr. Rattray replied that if this Court were to assume a position which it does not possess and grant a relief asked for in the Motion, they would be transforming a mere hope into a reality and that would be assuming powers that the Court does not possess and would totally contradict the provisions of Section 3 of the Offences Against the Person Law, which provides a mandatory sentence of death for convicted murderers.

/Dr. Rattray cited...

Dr. Mattray cited the case of Michael Abdul Malik (1976) Appeal Case, page 239, a Privy Council case, in support of his submission that mercy is not the subject of legal rights and as stated by Lord Diplock at page 247 of the judgement at letter 'G',"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." Lord Diplock went on to deal with the exercise of the prerogative of mercy as it related to the Constitution of Trinidad and Tobago, and which provisions in relation to the exercise of the prerogative of mercy is similar to the provisions in this regard in our Jamaica Constitution. And Lord Diplock emphasised that the exercise of the prerogative of mercy is personal in nature and thus to show that the exercise of the discretion cannot be questioned.

The case also went on to decide that if the death penalty is mandatory under the law, it cannot be regarded as cruel and unusual punishment whether at Common Law or in the Bill of Rights or inferentially in the Constitution of Trinidad. At page 248 of the Malik's Judgement at letter 'E' Lord Diplock stated and quote:-

> "In their Lordships' view these provisions are not capable of converting the functions of the Minister in relation to the advice he tenders to the Governor-General from functions which in their nature are purely discretionary into functions that are in any sense quasi judicial."

I, for the purpose of this case, substitute the word, "Minister" for the words, "Privy Council" in the case of Jamaica.

/It was also...

It was also stated that the Trinidad Constitution is similar in this respect to the Jamaica Constitution, with which submissions I agree. I respectfully agree also with the decision and pronouncements in the Malik case which is almost on all fours with the present facts in this motion.

As the motion before us did not assert for the purpose of the motion that the actual carrying out of the death penalty was inhuman or degrading punishment as was claimed in the Malik case cited above, but amounted to such punishment as well as to torture by virtue of the delay of approximately three years, Dr. Rattray referred to the case of R. v. Stanley Abbot, in which he submitted without his being able to produce the official report of the case that a period of six years in the death cell between sentence and final appeal, though, as allegedly stated by Lord Diplock, that such long delay was to be greatly deplored, nevertheless it was not realistic to suggest that a condemned man would wish to expedite the final decision. While there was life there was hope. Abbot's appeal failed.

Dr. Rattray finally submitted in regard to his claim that the Court has no jurisdiction to enquire into the exercise of the discretionary powers of the Governor-General exercised under Sections 90 and 91 of the Jamaica Constitution, referred the Court to Basu's Commentary on the Constitution of India Volume 2, Fifth Edition, which stated at page 409 under the heading, "Court's Power to Interfere, If Any", and quote:-

> "The Court is accordingly, precluded from examining the wisdom or expediency of exercise of the power in a particular case."

Dr. Rattray further submitted that debates and resolutions in Parliament cannot affect any matter arising

/before the...

before the Court on the motion and that this Court is a Court of law and not one of mercy.

After Dr. Rattray ended his in limine submissions, Mr. Noel Edwards, Q.C., applied for an adjournment pursuant to his supplementary Affidavit sworn to by Dr. Frederick Hickling, Consultant Psychiatrist and Senior Medical Officer at the Bellevue Hospital, so as to enable Dr. Hickling and two other psychiatrists to complete their evaluation of the applicants. The Affidavit requested a four week adjournment.

After considering the submission of Mr. Noel Edwards, Q.C., and that of Mr. Ellis in reply, the President, after consulting with the other two members of the Court, rejected the application for the adjournment as a unanimous rejection and requested the applicants' Attorneys-at-law to reply to the in limine submissions of Dr. Rattray, and so Mr. Dennis Daley, Attorney-at-law for Mr. Noel Riley, began his reply but after a few minor submissions the adjournment was taken at 3:55 p.m. to continue at 10:00 a.m. the next day, that is, today, the 14th of June, 1979. On the 14th of June, yesterday, Mr. Daley continued with his submissions.

Mr. Daley submitted that the motion did not seek to challenge the discretionary powers of the Privy Council but to show that a combination of facts, including the failure of the Privy Council to exercise its discretion in relation to persons in death row for a considerable period, affected the applicants and constituted an infringement of Section 17(1) of the Constitution. Further, that this along with combination of other factors, aggravated and increased the anguish and torment which normally attends the failure of all

/judicial...

judicial proceedings when the sentence of death is imposed and that this is the matter that the Court is being asked to consider and not the exercise of the discretionary power of the Governor-General or Privy Council. That that being so, this Court has jurisdiction to consider the Motion.

This submission I cannot agree with as the Motion is asking the Court to find that the execution of the applicants at this time is unconstitutional. How can it be said that it is unconstitutional to carry out the death penalty if such is authorised by the Constitution? And whether the time for the execution is delayed because the Governor-General in his discretion delays either the granting of a respite from the execution or delays issuing his Warrant for the execution would not give the Court a right to enquire into the exercise of this prerogative of mercy. The Motion specifically states that the delay in carrying out the executions complained of was significantly caused and/or contributed to by the de facto suspension of the death penalty, as only the Governor-General has in the name of Her Majesty, in accordance with the Law and the Constitution as it now stands, the right to suspend the death penalty whether it be called a respite or not, and as such suspension or respite is a prerogative right exercisable in the discretion of the Governor-General, this Court has no jurisdiction to hear a matter based, as stated in the motion, significantly on the exercise of discretionary powers.

Mr. Daley's next submission was to the effect that in spite of the scheme of the Constitution, providing for a separation of powers, this could not deprive this Court of the jurisdiction to challenge the power of the executive

/where they...

where they exercise their power in such a way that infringes any of the fundamental rights under Cap. 3 of the Constitution. This submission ignores the fact that the Motion has not disclosed that any fundamental rights of any of the applicants has been infringed and Dr. Rattray's submission that a person sentenced to death has no fundamental right not to be hanged.

The Law, Section 3 of the Offences Against the Person Act, says that a person convicted of murder shall hang, and any respite or suspension of hanging, in the absence of proof, firstly by Affidavit, that it was not the Governor General who suspended the execution in the exercise of his discretionary power, it must be presumed that the suspension or respite, for whatever reason, including combinations of factors, if any, or however long, is a matter of the exercise of discretionary powers vested in the Governor-General and the Courts have no jurisdiction to enquire into the exercise of the discretionary powers of the Governor-General under Sections 90 and 91 of the Constitution.

Mr. Daley further submitted that Section 90 (1)(a) to (d) of the Constitution requires a positive act on the part of the Governor-General and that he did not act, that is, the Governor-General did not act.

I hold that even if it could be said that the Governor-General did not act in the matter, as he did not grant a respite et cetera, and there is no evidence of this, once the Governor-General has issued the Warrant for execution the Governor-General must have exercised his discretion, and as this Motion was issued after that exercise, and as a result of such exercise of that discretion by the Governor-General, this Court would have no jurisdiction to enquire into this prerogative act. The issue of the Death Warrant must be as a result of the

/exercise of...

exercise of the discretion in relation to the respite, namely, that there be no respite or further respite.

A further submission by Mr. Daley that the exercise of the discretion must be done in a reasonable time, and if not so done, the delay, if not the discretion could be challenged. I hold that this submission has no weight as the delay obviously must be discretionary.

Mr. Daley further submitted that the jurisdiction of the Court would exist in relation to the agony and torment which arise from the long delay in carrying out the executions. On this submission, I hold that the Court would have jurisdiction to enquire into torture or inhuman or degrading treatment, but only if the Court dismisses the in limine submissions and such enquiry may then result in a declaration which could not affect a lawful sentence. The decided case of Malik or DeFreitas v. Benny has shown that the mandatory sentence of death contained in the Offences Against the Person Law cannot amount to torture or to the other forms of punishments or treatments mentioned in Section 17 (1) of the Constitution.

In my opinion nothing much turns on the other submissions of Mr. Daley. However, I will deal with those submissions later in this judgement.

Mr. Richard Small dealt with the Resolution in Parliament and the hope it created in the minds of the applicants and its resultant torture or inhuman treatment, and submitted that torture and inhuman treatment is a question of fact and not of law and therefore cannot be dealt with in limine.

I hold, for my part, that a question of whether a person has suffered torture or inhuman treatment is a question of fact which cannot be a matter

/for a decision...

for a decision in limine, but I also hold that one has first to get over that hurdle as to whether the Court has jurisdiction to hear the motion in the terms presented, which involves questions of law as to the exercise of the Governor-General's discretion on the prerogative of mercy and the question of law whether the death penalty is unconstitutional, which is not the claim.

Mr. Small in very interesting submissions, set out to distinguish the Malik case from the situation arising in the present motion, and also sought in an interesting address to confer on the Supreme Court Judges, sitting in a Constitutional Court, wider powers than they possess and also tried to convince this Court that our situation in relation to enquiring into constitutional matters is wider than a country such as England, who, unlike us, does not have a written Constitution.

Mr. Small's other submissions kept me listening interestingly, but the submissions took the matter no further and did not destroy the in limine submissions made by Dr. Rattray. Mr. Small even asked the Court not to place much reliance on some of the overseas cases as they are distinguishable from the situation on this Motion.

Dr. Rattray, in reply to Mr. Small's submission that the Constitutional Court should take a bold step and control interference or breaches of the Constitution, even in relation to discretionary powers, cited the case of Horwitz v. Connor (1908) 6 Commonwealth Law Reports, page 38, an Australian case based on a similar constitution as our own, where it was held that no Court has any jurisdiction to interfere with the discretionary power of the Governor-General to remit a sentence.

/Mr. Noel Edwards...

Mr. Noel Edwards, Q.C., adopted the submissions of his learned friends who made submissions before he did, but reiterated that he did not challenge the Constitutional validity of the death sentence or the exercise of the prerogative of mercy, but that its exercise must be in a reasonable time and the death penalty should not be delayed so as to be prejudicial to the applicants and so infringe their Constitutional rights.

On this the Court holds that no Constitutional rights of the applicants have been shown to be infringed.

I now propose to deal with the claim to relief that is stated to exist under Section 17 (1) of the Constitution which portion of the Section reads as follows:

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

Under this portion of Section 17 of the Constitution, namely, Section 17 (1), the words, torture, inhuman or degrading punishment or other treatment must be considered in the light of the words, "No person shall be subjected to.." And these words would obviously mean, "subjected to" by the deliberate actions of others, whether by deliberate acts of omission or commission, whether by the State or otherwise with that intention in mind and not with the intention of relieving that person from the ultimate punishment which latter intention seemed to have been what those who caused the suspension of the death penalty to have had in mind.

Even if by any stretch of the imagination I am wrong in this view, Sub-section 2 which is a portion of the very same Section 17 of the Constitution relied on by

the applicants' Attorneys-at-law specifically states and quote:-

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section (that is, Section 17) 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."

As everyone knows, the appointed day was the day appointed in 1962 for the coming into force of the provisions of the Jamaica Constitution Order in Council 1962, and which appointed day was in August, 1962.

Further, Section 26 (8) of the Constitution states and quote:-

> "Nothing contained in any law enforced immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter, and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

The words, "this Chapter" as used in the Section is in reference to Cap. 3 of the Constitution which Chapter inclules Sections 13 to 26 of the Constitution.

Again, it is well known that death by hanging was the sentence and punishment prescribed by law prior to and immediately before the coming into force of the Constitution for any person convicted of murder and such hangings must continue both under the previous law and confirmed by the very Constitution under which this well intended but misguided application is made.

/In addition...

In addition, Section 2 of the Offences Against the Person Law states and quote:-

> "Whoever shall be convicted of murder shall suffer death as a felon."

And Section 3 thereof prescribes for the pronouncement of the sentence of death. Again, Section 91 (1) of the Jamaica Constitution states, and quote:-

> "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 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."

This Sub-section (1) of Section 91 of the Constitution confirms that hanging continues to be part of the law of the land and it also confirms that the Governor-General shall cause a written report of the case from the trial Judge to be sent to the Privy Council, together with such other information derived from the record of the case 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 the Constitution.

Section 90 (1) of the Constitution states that the Governor-General may, in Her Majesty's name and on Her Majesty's behalf:-

/(b) grant to...

(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 sentence and under Sub-section 2 of the said Section 90 the Governor-General is required to act on the recommendation of the Privy Council except pursuant to Section 91 (2) the matter is too urgent to admit of his waiting on the recommendation of the Privy Council.

Nowhere under these two sections of the Constitution, namely, Sections 90 or 91, or under any other Sections for that matter is the Governor-General required to act on any private or public sentiments or information communicated to him whether from private or official persons or bodies when or where such information is not derived from the records of the particular case itself and indeed the communication to him should be through the Privy Council and at that at his request pursuant to Section 91 (1) of the Constitution.

Now, to deal specifically with the question of delay in carrying out the hanging as specifically emphasised by Mr. Noel Edwards, Q.C., and the alleged hope caused by the so-called "on and off' suspension of hanging, resulting, as is incorrectly claimed in this Motion that a breach of Section 17 (1) of the Constitution has resulted, as I hold, and just pointed out Supra, Section 90 (1) (b) of the Constitution provides for the suspension or respite for a specific period or for an unspecified period of the punishment before, as in this case, the hanging or hangings of a convicted murderer or murderers is or are carried out,

/hence how can...

hence, how can it be, if the provisions of the Constitution of Jamaica is obeyed or complied with, can it be said that a breach of the said Constitution has occurred in relation to any particular person? It should be noted that the Jamaica Constitution does not permit a suspension or respite to be granted in mass in regard to every convicted murderer, but only in relation to a person or persons, be the numbers 70 or 79 continuing on this question of delay being unjust and a breach of a person's Constitutional rights.

I hold that in the particular circumstances of this Motion this cannot be so. I am fortified in this opinion by the case of Kakis v. The Republic of Cyprus, 1 Weekly Law Reports, House of Lords, 1978, cited to this Court in another case.

In the Kakis case, Mr. Kakis was, along with others, granted an amnesty or general pardon in the case of an alleged murder committed in Cyprus on the 5th of April, 1973. The amnesty was proclaimed on the 7th of December, 1974, thus giving to Mr. Kakis not a false hope but a genuine hope that he would never be tried for the murder. However, in October, 1975 the House of Representatives in Cyprus revoked the amnesty. In March, 1976 extradition papers were sent from Cyprus to the Commonwealth Office in London seeking the extradition of Mr. Kakis to stand his trial in Cyprus for the murder committed by him three years earlier, in April, 1973, and not until February 18, 1977 was authority granted by the Secretary of States to proceed on the hearing of the extradition under Section 3 of the Fugitive Offenders Act 1967.

Mr. Kakis was arrested in London on 28th March, 1977, which was over two years and three months from the amnesty

/and general...

and general pardon of all persons involved in certain crimes in Cyprus, including Mr. Kakis.

The hearing of the habeas corpus proceedings on behalf of Mr. Kakis pertaining to his arrest and extradition was heard by the Divisional Court on December 15, 1977, over three years from the amnesty or general pardon which was granted to him and others.

Both the learned men in the House of Lords and the Divisional Court of England saw nothing wrong or unjust or inhuman or degrading after this "on and off" amnesty and lengthy delay since the amnesty in 1974 and the hearing in December, 1977 by the Divisional Court and even up to April, 1978 by the House of Lords. If Mr. Kakis was sent back to Cyprus in December, 1977 for his trial for a murder committed in April, 1973, then three years and eight months would have elapsed between the murder and the hearing before the Divisional Court and five years before the hearing by the House of Lords in April, 1978. The only reason why Mr. Kakis was not sent back to Cyprus was because of the majority decision of the House of Lords which held that the delay would or may result in an unfair trial as Mr. Kakis' only witness, apart from his wife, as to his alibi had justly refused to go back to Cyprus to give evidence of Mr. Kakis's alibi for the reason which he, the witness, stated before the Divisional Court that he feared he would have been arrested in Cyprus for his non-extraditable offence for his involvement in a coup.

In the instant motion nothing therefore can now arise for the delay because a trial, fair or unfair, cannot now be affected by an absent witness as the trial

/has already...

has already taken place as well as all avenues of appeal have either been exhausted or considered.

Dr. Rattray, in regard to a delay of some length, nearly six years between the crime and the hearing of the appeal, referred the Court to R. v. Abbot, a Privy Council case, which shows that that period cannot affect execution of the sentence.

I shall now deal in brief with the supplentary Affidavits filed in this matter, though they add nothing of substance to the other Affidavits.

Excerpts of speech made in Parliament as referred to in Mr. Noel Riley's Affidavit and commented on by the Counsel for the applicants to the effect that the suspension of the death penalty in regard to condemned prisoners had given such hope that it would now be callous to proceed with a mass execution without recommending a review of their cases or without a study being made in regard to the question of hanging, in this regard I must emphasise and reiterate that the Constitution, Sections 90 and 91 provide for a review by the Privy Council of all the individual cases, so there is no necessity for any person or body to recommend a review, and all things are presumed to be correctly done until the contrary is proved. Similarly, Section 90 (1) of the Constitution, as stated earlier, provides for a respite for a definite or indefinite period but only in accordance within the terms of the Constitution.

So how can it be held to be a callous or arbitrary act, or how can it be thought that hanging in accordance with the Law and the Constitution might well be adjudged to amount to unusually cruel and brutal

/punishment?

punishment? Indeed, disobedience to or the ignoring of the plain words and requirements of the Constitution may very well be held to be a callous or arbitrary act and possibly an unusually cruel or brutal act.

Again, the respite granted by virtue of a representation made on 24th March, 1975 by a Commission of Enquiry, is again not in accordance with Section 90 of the Constitution as pointed out earlier. Section 90 of the Constitution authorises the Governor-General in Her Majesty's name to consider the question whether to grant a respite to any person from the execution of any punishment, but only on the recommendation of the Privy Council, and Section 91 (1) of the said Constitution requires that the recommendation of the Privy Council should be based on the 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.

The Constitution does not provide for nor does it permit any mass respite of dozens of convicted persons on the recommendation of even the Privy Council. Neither does the Constitution provide for any respite being granted on the recommendation or representation of a Commission of Enquiry, and at that without the request of the Governor-General.

So,again the Supplementary Affidavits and enclosures on this point are without merit, and if this motion does not amount to an abuse of the process of the Court it amounts to at least the playing of games with the Constitution.

In the deliberations, however short this morning with my brothers, the President, Wilkie J. and Carey, J., we have all agreed that the motion should

. /be dismissed..

be dismissed for want of jurisdiction. None of us had the opportunity of reading each others notes, but having heard what the President has read in Court, I must say I agree with the contents thereof and the manner of expressing his findings. I must, however, add that for my part I hold that the Affidavit of Dr. Frederick Hickling has no relevance to this Motion and should not have been filed, and this again seems to me to be a further playing of games with the Constitution. But for the apparent sincerity of the Attorneys-at-law for the applicants and the able manner in which they handled a motion that had no merit, I would have made other comments as we have not gone back to the days of the divine rights of kings.

This Court has no jurisdiction to interfere with the exercise of the prerogative of mercy which is a discretionary power authorised to be exercised under Section 90 of the Constitution so as to delay or expedite an execution.

It would seem that the only persons or body that could be able to delay an execution in this regard are the persons who, as a result of the separations of powers between the Executive Legislature and the Judiciary are able to file writs to one of those arms, namely, the Judiciary by motions such as the one before this Court and which causes a temporary halt to the orders or directions made in the exercise of that discretionary power by the Governor-General.

For the want of jurisdiction in this Court on the Motions as filed, and for the reasons I have stated, I agree with my brothers that this Motion should be dismissed. The Motion is therefore for my part dismissed.

CAREY: J.

The issues which have been raised in this matter have been, if I may say so, clearly and exhaustively dealt with by my brethen, and I venture a few comments of my own merely because I regard a matter such as this as important and I feel that in a constitutional court each member of the court should express some view of the issues that are raised.

The Constitution declares as one of the fundamental rights and freedoms the right to life, a fundamental right and freedom, however, which these applicants no longer are entitled to enjoy. It has been abrogated by due process of law. They have been condemned to suffer death in the manner authorised by law pursuant to Section 3 of the Offences against the Person Act. All means of judicial redress as respects that sentence have been exhausted. They may hope for clemency: it cannot be demanded. Such a plea can only be entertained and acted upon by the Governor-General exercising the prerogative of mercy on the recommendation of the Privy Council in virtue of Section 90 of the Constitution. Such a petition, it seems unnecessary to add, is not within the competence of this Court sitting as we now are; a Constitutional Court, is not a Court of mercy. Our most conspicuous function, if I may use the words of Bacon are "ius dicere" - to declare the law. Our powers are set out in Section 25 of the Constitution. The effect of the provision therein stated is to hear and determine any application made by a person who alleges that any of the protections and rights to which he is entitled has been or is likely to be infringed and the Court is empowered to give redress in the form of orders or other directions and to ensure the enforcement of those rights.

The applicants now appear by learned counsel asserting that they enjoy the right to life, for it is in protection of that right to life and the other fundamental rights and freedoms that Sections 14-24 of the Constitution were enacted.

Specifically it is being argued that they have been subjected to psychological torture by reason of:

(a) the protracted delay in carrying out their execution; and

(b) the belief reasonably held that the sentence would not be executed upon them;

because of:

(1) the de facto suspension of the death penalty;

(2) the fact that studies were undertaken into the question of the suspension;

(3) debates and resolutions passed in the House and the Senate.

These factors precisely set out in the Motion constitute, it is said, torture or inhuman or degrading punishment or other treatment proscribed by the Constitution in Section 17(1). This breach entitles them, so the argument goes, to have their sentence set aside; damages is not their suit.

The Declaration which is sought is in the following form:

> "A Declaration that the execution of the said Applicants at this time and in the circumstances leading up to and surrounding the issue of the death warrants would be unconstitutional and illegal being contrary to Section 17(1) of the said Constitution of Jamaica."

But the true nature and character of this Declaration may the more easily be highlighted and so discerned if the words in capital letters were emphasized:-

> " A DECLARATION THAT THE EXECUTION OF THE SAID APPLICANTS at this time and in the circumstances leading up to and surrounding the issue of the death warrants WOULD BE UNCONSTITUTIONAL AND ILLEGAL IN THAT THEY WERE SUBJECTED TO TORTURE OR TO INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT."

This aspect will be considered hereafter.

Do the remaining words, accorded no emphasis, alter to any degree those emphasized and which clearly form the linch-pin of this declaration? In my view the phrase "at this time" can only refer to the delay in carrying out the execution. The words "in the circumstances leading up to and surrounding the issue of the death warrants" involve the exercise of the prerogative of mercy. Indeed, Mr. Small without the sustaining assistance of any known principle or authority asseverated that this Court could question the exercise of the prerogative seeing that a legal right was infringed.

It was not surprising, therefore, that the learned Solicitor General challenged the jurisdiction of this Court to entertain a Motion in the terms of this Declaration. I pause to pay tribute to the clarity of those submissions and the felicity of the language in which they were couched. It was contended that the Motion seeks to question just that exercise of the prerogative of mercy which involves discretionary powers exclusively within the province of the Privy Council and on that basis is not justiciable. The exercise of the prerogative in other words is non-reviewable.

It is clear law that the exercise of the prerogative of mercy is not reviewable and, therefore, is not competent for this Court to enquire into its exercise or for that matter its non-exercise. The applicants contended that the complaint was not as to the exercise of the prerogative, but as to non-exercise. Lord Diplock in the case of Michael de Freitas v. Benny & ors. [1970] A.C. 239 at p. 247 speaking of the legal nature of the exercise of the prerogative of mercy had this to say:

> "At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention 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 discretionary act as contrasted with the exercise of a quasi-judicial function."

That proposition, with which I respectfully agree, is equally applicable to the Jamaican situation with the necessary modification, for it has been accepted at the Bar that this Court is bound by a decision of the Privy Council where the issues and the law are similar. The issues raised in de Freitas v. Benny (supra) are similar to what is in fact raised in this Court despite the valiant attempts made by Mr. Daly and Mr. Small to distinguish it.

Since this Court is bound by that decision, the applicants in this case to the like extent have no legal right to have their cases considered by the Governor-General. Seeing that they are under sentence of death, any delay is an indulgence, an act of mercy. Mr. Daly on behalf of one of the Applicants may well be right when he says that the "respite" mentioned in Section 90(1)(b) requires some positive act on the part of the Governor-General which must be communicated to the prisoner, and that the Governor-General did not grant a respite. But that contention cannot avail. The Applicant cannot complain to the Court that he is not executed. He has no legal right to do so. Delay, even more so inordinate delay is to be deplored, but it creates no legal rights in the prisoner. He cannot ask that his case be favourably considered. The time and manner in which the prerogative is exercised alike give rise to no legal rights. Once counsel for the applicants in their arguments were constrained to refer to the exercise of the prerogative which are discretionary and not quasi-judicial powers, they were asserting a right that does not exist in law for the benefit of the Applicants.

This was the basis of the second submission in limine by the learned Solicitor General. It was argued that no legal rights were infringed which were capable of giving rise to legal redress. Mercy plainly is not the subject of legal rights. The Applicants may hope to be reprieved but hope cannot found a legal right. For such hope no remedy at law or in the Constitution is provided. None may be fashioned.

The Applicants maintained that torture, that is, torture, or inhuman or degrading punishment or other treatment is constituted by "delay and hope". That riposte by the Applicants is, in my view, without merit and/is clearly untenable. Neither delay in carrying out the execution nor hope in their non-execution can create rights which may be invoked in favour of the Applicants.

The case of de Freitas v. Benny to which I have already made reference and to which my brothers have also called attention is conclusive of the matter.

The order sought in the terms of the Declaration is really inconsistent with and contrary to Section 14(1) of the Constitution, which renders it constitutional and legal to execute sentence of death upon a person convicted of the criminal offence of murder. A Declaration must assert some legal right as being infringed or about to be infringed, and in respect of which some redress is claimable. Their execution is clearly not the right infringed nor the redress sought. Nevertheless, the Declaration sought is in terms that their execution would be unconstitutional and illegal.

The Constitution does not so much create new rights as it creates new remedies. Maharaj v. The Attorney General for Trinidad and Tobago No.2 [1978] 2 W.L.R. 902. We are being asked to create a new right. No known legal right has, therefore, been identified as having been infringed having regard to what appears on the face of the Motion and upon the affidavits filed in support.

The Applicants say that the Declaration sought does not challenge the constitutional validity of the death penalty by indirect means. Indeed, that much was Mr. Daly's concession. Despite that disclaimer, however, the Motion does precisely that. It is explicitly stated therein that the execution would be unconstitutional and illegal. As I understand what was being urged on the Court was that the anguish being suffered was irretrievably bound up with the sentence, and any redress granted would inevitably have the effect of removing the sentence. The complaint was not so much against execution but execution and anguish.

It is undoubtedly true that the anguish is occasioned by the fact that the applicants are under sentence of death. But

if they are to obtain relief in this Court, it must be demonstrated to the required standard that some legal right, which cannot be the sentence, for that is legal and constitutional, has been infringed. Necessarily, agony is an integral part of the feelings of a condemned man but that agony flows from the sentence and not from other external factors, although other external factors or combination of factors might increase that agony. The Applicants, in my judgment, must show that the State, meaning some arm of the State, has inflicted torture within the meaning of Section 17(1). Agony and anguish arising from the sentence exacerbated by hope engendered by debates and Resolutions are not in my judgment within the terms of that Section.

I found it impossible to appreciate what was the act of the State which constituted the breach of Section 17(1). The de facto suspension of the death penalty is a reprieve and indisputably a benefit for persons under sentence of death. By what process is that tortore? By what alchemy is mercy transformed into torture? I am prepared to accept that Resolutions of any of the Houses of Parliament may amount to acts of the State. I found it difficult, however, if not impossible, to regard the expression of opinions by individual members of the House in the course of debates as an "act of the State" capable of inflicting torture. The affidavits filed showed that one of the Houses voted to retain capital punishment. That act of the State, it is said, inflicted torture, inhuman and degrading punishment or other treatment on the Applicants. The Resolution passed called for a review of all cases. The Privy Council complied with that recommendation. The prerogative was exercised. Where was the torture, inhuman or degrading punishment or other treatment which was inflicted by the State by virtue of that Resolution or vote?

Mr. Small called upon the Court to be bold and asserted the unlimited power of this Court as he said, to fashion appropriate remedies to vindicate the rights of persons aggrieved by unconstitutional acts by the State. This Court, he said, is armed with a plenitude of power to do so and it ought not to shrink from its clear duty. That was indeed a clear clarion call to arms. It is attractive but dangerous. Is it not founded on any known principle or authority. It is a mere fulmen brutum. It is based largely, I regret to say, on emotion. I entertain not the slightest doubt that this Court would not be lacking in courage if that were needed, to fashion appropriate remedies where some identifiable right was proven infringed. But that is not the same as saying that the Court is above all other Courts or organs or authorities in the State and therefore is all powerful. I confess I find it difficult to conceive of a situation where the exercise of some legal or constitutional right could itself, give rise to a breach of the Constitution. There is no balance of power in this Court save where that is accorded by the Constitution or by law. The Constitution of Jamaica is based on the separation of powers but all that this means, according to the learned editor of Hood Phillips on 'Constitutional and Administrative Law' at page 14, is that the main application of the doctrine is the securing of the independence of the Courts from control of the Executive. In totalitarian countries, it was noted, the Executive has acquired complete dominion over both legislative and judiciary.

In the result, such arguments as have been advanced on behalf of the Applicants amount to no more than a crie de coeur. This application is wholly misconceived and this Court, I concur, in holding with my brothers is without jurisdiction to entertain it.

The five learned Counsel who appear in support of this conjoint application have shown valour in the face of the formidable and in the event insuperable hurdles. That trumpets their worth as fighters in defence of freedom. They fight, I doubt not, for a cause which they sincerely believe to be just. But this battle must be waged on other fronts. It must be waged, if I may be permitted to say so, at the bar of public opinion and by lobbying the people's elect. The Court is an inappropriate forum for this battle for the reasons I have endeavoured to adumbrate.

WILKIE: J.

The application is dismissed.