

THE DECISION OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL IN THE *LAMBERT WATSON*  
CASE FROM JAMAICA ON THE MANDATORY  
DEATH PENALTY AND THE QUESTION  
OF FRAGMENTATION\*

STEPHEN VASCIANNIE\*\*

I. INTRODUCTION .....	837
II. “EUGENIE SAMUELS AND GEORGINA WATSON”: MANDATORY DEATH SENTENCES AND INDIVIDUAL CIRCUMSTANCES .....	843
III. CONVERTING PRINCIPLE INTO LAW .....	847
A. <i>Section 17 of the Jamaican Constitution</i> .....	848
B. <i>Section 26(8) of the Constitution</i> .....	851
IV. A QUESTION OF TIMING .....	853
V. “[I]N THE HANOVER CIRCUIT COURT OF THE SUPREME COURT OF JAMAICA” .....	857
VI. “ON 19 JULY 1999” .....	864
VII. CONCLUSION .....	868

I. INTRODUCTION

On July 7, 2004, the Judicial Committee of the Privy Council,<sup>1</sup> Jamaica’s highest court, delivered its judgment in the case of *Lambert Watson v. The Queen (Attorney General for Jamaica Intervening)*.<sup>2</sup> In its decision, the Privy Council held that the mandatory death penalty for murder as applied under Jamaican law was unconstitutional and invalid.<sup>3</sup> The Privy Council’s decision has prompted amendments to Jamaican

---

\* Parts of this article have been previously published in the West Indian Law Journal.

\*\* Principal, The Norman Manley Law School, Jamaica, West Indies; Member of the United Nations International Law Commission. The writer participated in the *Lambert Watson Case* as a part of the legal team from the Attorney General’s Chambers, Jamaica. The views expressed herein do not necessarily reflect those of the Government of Jamaica.

1. Sometimes hereinafter referred to as the Privy Council.

2. [2004] UKPC 34, [2005] 1 A.C. 472 (appeal taken from Jam.).

3. *Id.*

law,<sup>4</sup> and has helped to bring Jamaican law in line with decisions on the mandatory death penalty in certain other jurisdictions.<sup>5</sup> However, the Privy Council's decision overturned pre-

---

4. The Offences Against the Person Act was amended in February 2005 in a manner that seeks to remove mandatory death sentences from the law. Specifically, where the law pre-*Lambert Watson* had required the mandatory death sentence, the judge delivering the sentence now has the option of ordering the death sentence or life imprisonment. See Offences Against the Person Act, 1864, § 3 (Jam.) [hereinafter OAPA] (amended 2005), available at <http://www.moj.gov.jm/laws/statutes/Offences%20Against%20the%20Person%20Act.pdf>. It has not yet been argued that the discretion now given under the OAPA is too limited, but this argument is to be anticipated. In *State v. Makwanyane* 1995 (1) SA 269 (CC) at ¶ 42 (S. Afr.), the Constitutional Court of the Republic of South Africa, in its review of death penalty cases in the United States of America, noted that: "Statutes providing for mandatory death sentences, or too little discretion in sentencing, have been rejected by the [United States] Supreme Court because they do not allow for consideration of factors peculiar to the convicted person facing sentence, which may distinguish his or her case from other cases" (*emphasis added*). A sentencing regime which provides for only the death sentence or life imprisonment could reasonably be held to be too limited.

5. The leading United States Supreme Court cases prohibiting mandatory death sentences are *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Roberts v. Louisiana*, 431 U.S. 633 (1977). In *Woodson v. North Carolina*, the Supreme Court found, by 5 to 4, that North Carolina legislation which made the death penalty mandatory for all first-degree murderers was unconstitutional because it violated the Eighth and Fourteenth Amendments to the Constitution. 428 U.S. at 305. The Court indicated, *inter alia*, that the legislation did not allow consideration of the record of individual defendants in assessing whether the death penalty should be imposed. *Id.* at 303-04. In *Roberts v. Louisiana*, the Supreme Court considered Louisiana legislation mandating imposition of the death penalty in cases where the defendant had a specific intent to kill or inflict great bodily harm and the murder fell within one of a number of specified categories of murder. 431 U.S. at 634 n.1. The majority found that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments because it allowed for no consideration of particular mitigating factors in deciding whether the death penalty should be imposed. *Id.* at 637-38. Prior to its decision in *Lambert Watson*, the Judicial Committee of the Privy Council had struck down mandatory death sentences in cases emanating from Saint Christopher and Nevis, Belize, and St. Lucia. See *R v. Hughes*, [2002] UKPC 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); *Reyes v. The Queen*, [2002] UKPC 11, [2002] 2 A.C. 235 (appeal taken from Belize); *Fox v. The Queen*, [2002] UKPC 13, [2002] 2 A.C. 284 (appeal taken from St. Christopher & Nevis). In November 2007, the Inter-American Court of Human Rights held in the *Case of Boyce v. Barbados* that the mandatory death sentence authorized by the Offences against the Person Act of Barbados is contrary to the American Convention on Human Rights: ". . . (t)he Court concludes that because the

existing law in Jamaica on the death penalty and created significant differences between Jamaican law on mandatory death sentences and the law on the same subject in Trinidad and Tobago and Barbados. It has therefore contributed to the fragmentation of death penalty law within the Caribbean.

More generally, the *Lambert Watson* decision did not take place in a vacuum. Rather, in a series of Jamaican cases since 1993—most notably *Pratt and Morgan v. Attorney General of Jamaica*<sup>6</sup> and *Lewis v. Attorney General of Jamaica*<sup>7</sup>—the Privy Council has found different aspects of the law pertaining to the death penalty unconstitutional and has taken the opportunity to restructure the law in this area in ways that may be said to contribute to fragmentation in both Jamaica and the broader Caribbean community. Significantly, in some of these cases the Privy Council expressly departed from some of its earlier precedents and set aside decisions of the Jamaican Court of Appeal based on those precedents. Generally, this has given an uncertain texture to death penalty law in Jamaica, and indeed, in the wider Caribbean.

---

Offences Against the Person Act submits all persons charged with murder to a judicial process in which the participation and degree of culpability of the accused and the individual circumstances of the crime are not considered, the aforementioned Act violates the prohibition against the arbitrary deprivation of life and fails to limit the application of the death penalty to the most serious crimes, in contravention with Article 4(1) and 4(2) of the Convention.” 2007 Inter-Am. Ct. H.R. (ser. C) No. 169, at ¶ 62 (Nov. 20, 2007). The United Nations Human Rights Committee has also maintained that the mandatory death penalty is contrary to the International Covenant on Civil and Political Rights. See, e.g., *Thompson v. St. Vincent & the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000); *Kennedy v. Trinidad & Tobago*, Communication No. 845/1998, U.N. Doc. CCPR/C/74/D/845/1998 (2002). Edward Fitzgerald Q.C. and Keir Starmer Q.C. have recently reported that in Africa, the mandatory death penalty was ruled unconstitutional in Uganda in 2005 and in Malawi in 2007. EDWARD FITZGERALD & KEIR STARMER, A GUIDE TO SENTENCING IN CAPITAL CASES 2-3 (*The Death Penalty Project Ltd.* 2007) (citing *Kigula v. Att’y Gen.*, (2005) Constitutional Petition No. 6/03, available at [http://www.ugandaonlinelawlibrary.com/files/judgements/j\\_other\\_judgments/Susan\\_Kigula\\_AttorneyGeneral1.pdf](http://www.ugandaonlinelawlibrary.com/files/judgements/j_other_judgments/Susan_Kigula_AttorneyGeneral1.pdf); *Kafantayeni v. Att’y Gen.*, [2007] MWHC 1 (Malawi), available at <http://www.saflii.org/mw/cases/MWHC/2007/1.html>). The mandatory death penalty was held unconstitutional in India in *Mithu v. Punjab*, (1983) 2 SCR 690.

6. [1993] UKPC 1, [1994] 2 A.C. 1 (appeal taken from Jam.).

7. [2000] UKPC 35, [2001] 2 A.C. 50 (appeal taken from Jam.).

The *Lambert Watson* case, therefore, should be read against this background of change and uncertainty in Jamaican and Caribbean death penalty jurisprudence. The case must also be viewed in the context of the wider debate in Jamaica and the Caribbean about the death penalty.<sup>8</sup> In this debate, the main fault line lies between the majority, who would wish to have the death penalty retained for capital murder, and the minority, who oppose the death penalty in all circumstances. In this context, the Jamaican Parliament voted in late 2008 to retain the death penalty in a self-styled “conscience vote” in which members of both the House of Representatives and the Senate were allowed to state their views free from the constraints of the party whip.<sup>9</sup> Supporters of both sides of the debate referred to the purposes of sentencing, Biblical authorities, traditional and modern moral arguments concerning State execution, majoritarian arguments, the evolution of international law on the death penalty, and the practice within other countries to support their arguments. However, the debate has persisted since the conscience vote among legislators and in the Judiciary. Significantly, in the debate concerning the death penalty, it has been suggested that at least some judges of the Judicial Committee of the Privy Council are sympathetic to the abolitionist cause and that this has influenced

---

8. See, e.g., Amnesty Int’l, *Jamaica: A Summary of Concerns: A Briefing for the Human Rights Committee*, AI Index AMR 38/07/97, Oct. 1997, at 4-9 (discussing the death penalty as a violation of the right to life); Christina M. Cerna, *Briefing Paper: The Abolition of the Death Penalty and the Inter-American System* (Jan. 2007), available at [http://www.europarl.europa.eu/compar/afet/droi/interamerican\\_en.pdf](http://www.europarl.europa.eu/compar/afet/droi/interamerican_en.pdf); BERNARD HEADLEY, *THE JAMAICAN CRIME SCENE: A PERSPECTIVE* 81-87 (Howard University Press 1996) (recommending an end to the death penalty). Cf. Statement by Jamaica on the Adoption of General Assembly Draft Resolution L.29, <http://www.un.int/jamaica/GAdraftresL29.htm> (last visited June 6, 2009) (arguing that “international law allows each State the right to decide whether or not it will apply the death penalty as a form of punishment”).

9. 34:15 – *Hangman Wanted*, JAM. GLEANER, Nov. 26, 2008, <http://www.jamaica-gleaner.com/gleaner/20081126/lead/lead1.html> (last visited June 6, 2009) (discussing the vote in the Jamaican House of Representatives to retain the death penalty); *Senate Votes for Death Penalty*, JAM. GLEANER, Dec. 20, 2008, <http://www.jamaica-gleaner.com/gleaner/20081220/lead/lead4.html> (last visited June 6, 2009) (discussing the vote in the Jamaican Senate to retain the death penalty).

the way they have treated issues in capital murder cases from Jamaica.<sup>10</sup>

Against this background, the present article considers the issues concerning the mandatory death sentence in Jamaica that arose in the *Lambert Watson* case. With respect to a number of points, the perspective taken by the Privy Council departed significantly from that held by both the Jamaican Executive and the Jamaican Court of Appeal.<sup>11</sup> Given that the Jamaican Executive and the Court of Appeal are physically located in Jamaica, whereas the Privy Council is located in the United Kingdom, the question arises whether physical and cultural proximity may have been a factor in the interpretation of the law. Generally, if the Privy Council is inclined to adopt a different approach to the interpretation of law on death penalty issues than the Jamaican Court of Appeal, then this will contribute to the fragmentation of law within the Jamaican jurisdiction, as judges in lower courts will have greater uncertainty in evaluating contradicting precedents.<sup>12</sup> Given that the

---

10. For this perspective, see, for example, A.J. Nicholson, Ministry of Justice, Justice Sector Reform – State of the Nation Debate, *available at* <http://www.moj.gov.jm/justicesectorreform>. In this statement, the then Attorney General and Minister of Justice argued, *inter alia*, that capital punishment has not been carried out in Jamaica since the latter part of the decade of the 1980s because “the Privy Council appears often enough to shift the goalposts in death penalty cases that come before them. In some instances, too, they interpret Jamaican law in a way that appears contrary to what the legislature intended.”

11. For the decision of the Jamaican Court of Appeal on the constitutional issues raised in the *Lambert Watson Case*, including the question of the mandatory death sentence, see Jamaica, Supreme Court Criminal Appeal No. 117/99, *Lambert Watson v. R*, July 8, 9, 10, and 11 and December 16, 2002. For the decision of the Jamaican Court of Appeal in respect of criminal liability, see Supreme Court Criminal Appeal No. 117/99, December 11 and 12, 2000, and March 5, 2001.

12. As the final court of appeal for Jamaica, the Privy Council departs from decisions of the Jamaican Court of Appeal on a fairly regular basis. For 2007, the Privy Council disposed of 14 cases from the Jamaican Court of Appeal after a hearing. In nine of these cases, the Privy Council upheld the decision of the Jamaican Court of Appeal, and in five, the Privy Council allowed the appeal. Privy Council Office, Appeal Statistics, Table of Judicial Committee of the Privy Council: Appeals Entered and Disposed of Showing Results (2007), *available at* <http://www.privycouncil.org.uk/files/word/Appeals%202007.doc>. For the Commonwealth Caribbean as a whole for 2007, the Privy Council upheld 27 decisions from the appellate courts of the region and overturned 17. *Id.* The fact that the Privy Council departs from

Privy Council makes decisions for most Commonwealth Caribbean jurisdictions, and most of these jurisdictions retain the death penalty for murder, the position adopted by the Privy Council in this case could also set the death penalty jurisprudence in the Commonwealth Caribbean into considerable flux.

The elements of the decision in *Lambert Watson* will be considered partly by reference to the first sentence of the judgment, delivered by Lord Hope of Craighead. The first sentence reads: "On 15 June 1999 the appellant was convicted in the Hanover Circuit Court of the Supreme Court of Jamaica of the murder on 18 September 1997 of Eugenie Samuels and Georgina Watson."<sup>13</sup>

On preliminary examination, this first sentence appears to be a factual statement designed essentially to introduce the reader to the background circumstances of the case, and it certainly does that. In this Article, however, the first sentence will be analyzed more closely; it will be used as the hook for a discussion of the various aspects of the *Lambert Watson* decision, including the legal background of the case, the reasoning of the Privy Council, and the implications of the decision. Although the first sentence is not decisive in any special way, its main elements, including the names of the victims, the court from which the appeal originates, and the date of sentencing, point to the main issues in analyzing the Privy Council's decision.

Part II considers the provenance of the case, the mandatory death sentence scheme for capital murder in Jamaica before the *Lambert Watson* case, and the Privy Council's reasoning in holding the scheme unconstitutional. Part III analyzes the method by which the Privy Council turned its holding in the *Lambert Watson* case into law, while Part IV examines the timing of this change. Part V considers the impact of the Privy Council's intervention on judicial certainty in Jamaican courts and the possible resulting fragmentation due

---

appeal court decisions from the Caribbean does not, in itself, suggest fragmentation in the law. However, fragmentation may arise where the Privy Council consistently takes a different view from the local court of appeal in particular types of cases. This is arguably the case in respect of death penalty cases from the Caribbean.

13. *Lambert Watson v. The Queen*, [2004] UKPC 34, [1], [2005] 1 A.C. 472, 480.

to conflicting decisions between the Privy Council and the Caribbean Court of Justice. Part VI evaluates some of the Privy Council's previous decisions on the relationship between the death sentence and the length of time spent on death row, and considers the potential impact of this decision on further fragmentation in the Jamaican legal system. Part VII offers some concluding thoughts on the strange result in the Privy Council's decision in the *Lambert Watson* case.

## II. "EUGENIE SAMUELS AND GEORGINA WATSON": MANDATORY DEATH SENTENCES AND INDIVIDUAL CIRCUMSTANCES

Before examining the first sentence of the Privy Council judgment more carefully, it is important to note the provenance of the case. The *Lambert Watson* decision concerned the question of whether the mandatory death sentence in Jamaica, as provided for in the Offences Against the Person Act, was unconstitutional. At the time of the case, Sections 2 and 3 of the Offences Against the Person Act addressed the case of mandatory death sentences for capital murder. Section 3(1) stated in part that: "Every person who is convicted of capital murder shall be sentenced to death and upon every such conviction the court shall pronounce sentence of death, and the same may be carried into execution as heretofore has been the practice."<sup>14</sup> In other words, the law indicated that if one commits capital murder, that person will be sentenced to death. Section 2 of the Act stipulated the circumstances in which capital murder may occur. It defined capital murder as the murder of any of the following persons acting in the execution of their duties: a member of the security forces,<sup>15</sup> a correctional officer,<sup>16</sup> a judicial officer,<sup>17</sup> or a constabulary officer.<sup>18</sup> It was also capital murder to murder a person assisting a member of the security forces or a correctional officer in the execution of his or her duties,<sup>19</sup> or to murder a member of the security forces, correctional officer, or judicial officer for any reason

---

14. OAPA § 3(1).

15. *Id.* § 2(1)(a)(i).

16. *Id.* § 2(1)(a)(ii).

17. *Id.* § 2(1)(a)(iii).

18. *Id.* § 2(1)(a)(iv).

19. *Id.* § 2(1)(a)(i)-(ii).

directly attributable to the nature of his or her occupation.<sup>20</sup> Section 2 further stipulated that capital murder included the murder of any person for any reason directly attributable to the status of that person as a witness or party to a civil case or criminal proceedings,<sup>21</sup> a juror in any criminal trial;<sup>22</sup> or a Justice of the Peace acting in the execution of his or her judicial functions.<sup>23</sup> Where a person committed murder in the furtherance of a robbery,<sup>24</sup> burglary or housebreaking,<sup>25</sup> arson in relation to a dwelling-house,<sup>26</sup> any sexual offence,<sup>27</sup> or terrorism,<sup>28</sup> that person could also be convicted of capital murder. Where a person was party to an arrangement of “murder for hire”<sup>29</sup> or was convicted of committing more than one murder, either at the same time or on different occasions,<sup>30</sup> capital murder could be imposed.<sup>31</sup>

This was the scheme to be considered by their Lordships in *Lambert Watson*. As stated in the first sentence of the judgment, the appellant was convicted of the murder of two persons, Eugenie Samuels and Georgina Watson; thus, this was a case in which more than one murder had been committed at the same time, satisfying the definition of capital murder.<sup>32</sup> As

---

20. *Id.* § 2(1)(a)(iv).

21. *Id.* § 2(1)(b)(i).

22. *Id.* § 2(1)(b)(ii).

23. *Id.* § 2(1)(c).

24. *Id.* § 2(1)(d)(i).

25. *Id.* § 2(1)(d)(ii).

26. *Id.* § 2(1)(d)(iii).

27. *Id.* § 2(1)(d)(iv).

28. *Id.* § 2(1)(f).

29. *Id.* § 2(1)(e). By virtue of this provision, both the person soliciting the murder and the person who undertakes the act of murder was subject to the possibility of the death penalty, provided that the murder was committed.

30. *Id.* § 3(1A)(a)-(b).

31. As long as the prosecution applied for the death penalty and demonstrated that the murder had been committed in the circumstances of “murder for hire” or that the murderer had committed more than one murder, the law required the imposition of the death penalty. The death penalty was automatic once the conditions had been met. OAPA § 3(1A) (1992).

32. This is sometimes referred to as “multiple murder.” The Jamaican Court of Appeal noted that Lambert Watson’s act was a particularly grievous crime. Panton J.A. in his judgment for the court in respect of Watson’s liability noted that: “After a trial that lasted seven days, the record of appeal shows that the jury retired at 12:54 p.m. and returned at 1:00 p.m. with a verdict that was unmistakably unanimous. In sentencing the applicant, the

a result, the case raised the question of whether there is any rationale for suggesting that every person who commits more than one murder at the same time should be subjected to the mandatory sentence of death. Assuming, *arguendo*, that capital punishment may be justified in at least some circumstances, it may be the case that a multiple murderer should be more vulnerable to that punishment than a person who murders only one person. The act of deliberately killing not one, but two persons is at the very least an aggravating circumstance, for it implies a greater disrespect for the sanctity of life. This suggests that if a society, through its Parliament, makes the decision to retain the death penalty for some but not all murders, it is rational to have the penalty retained for multiple murders on the ground that a person who murders more than one person has committed a more egregious crime, or at least a crime with potentially greater consequences, than a person who murders one person.<sup>33</sup>

But does this mean that the person convicted of multiple murders should always be sentenced to death? In response to this question, the Privy Council unanimously agreed that the answer is no.<sup>34</sup> In reaching this conclusion, the Privy Council did not confine itself to the particular case of a multiple murderer but instead addressed more generally the main problem associated with mandatory death sentences.<sup>35</sup> In the judgment of the court, it would be wrong to apply the mandatory death sentence to Lambert Watson because to do so would be a denial of his basic humanity. In the words of the majority judgment:

To condemn a man to die without giving him the opportunity to persuade the court that this would in his

---

learned Senior Puisne Judge expressed agreement with the verdict and indicated that in his nineteen years on the Bench, this case was one of the most brutal and callous he had seen. There is no basis for disagreement with the learned Judge's view of the nature of the crime." Supreme Court Criminal Appeal No. 117/99.

33. The Offences Against the Person Act, as amended since the *Lambert Watson* decision, continues to assume that the murder of more than one person is an aggravating factor which may give rise either to the death penalty or life imprisonment. OAPA § 3(1A) (as amended 2005).

34. *Lambert Watson v. The Queen*, [2004] UKPC 34, [35], [55], [2005] 1 A.C. 472, 491, 497 (appeal taken from Jam.).

35. *Id.* at [4], [2005] 1 A.C. at 481.

case be disproportionate and inappropriate is to treat him in a way that no human being should be treated. There are no limits to the variety of circumstances which may lead a man to commit homicide. The crime of which he has been convicted may turn out to have been far more serious than [sic] he foresaw or contemplated: *R v. Powell (Anthony)* [1999] 1 AC 1, 14, per Lord Steyn. Attempts to confine the mandatory death sentence to those categories of murder that are most reprehensible will always fail to meet these objections.<sup>36</sup>

The Privy Council, therefore, suggested that each murder needs to be given individual treatment, attaching decisive significance to the circumstances of the individual and the circumstances of the individual crime. This approach is valuable, for it emphasizes that individual murderers and their actions must be scrutinized. The Privy Council's approach also implies that attention must be given to the circumstances of the murder victim in each case. If this is so, the Privy Council has placed itself in a position to resist the suggestion heard from time to time in popular discourse—that it is not sufficiently sensitive to the circumstances of individual murder victims. In this context, the decision by the Privy Council to mention the names of the individual murder victims in the first sentence of the majority decision in the *Lambert Watson* case takes on added significance. While there may be nothing to this mention, it can be contrasted with two earlier, well-known, and controversial death penalty decisions from Jamaica, *Pratt and Morgan v. Attorney General of Jamaica*<sup>37</sup> and *Lewis v. Attorney General of Jamaica*.<sup>38</sup> In both cases, the Privy Council failed to mention the names of the murder victims, and instead merely stated in the first sentence of each case that the appellants were convicted of murder.<sup>39</sup> It may be that the Privy Council's concern

---

36. *Id.* at [33], [2005] 1 A.C. at 490.

37. [1993] UKPC 1, [1994] 2 A.C. 1 (appeal taken from Jam.).

38. [2000] UKPC 35, [2001] 2 A.C. 50 (appeal taken from Jam.).

39. In *Pratt*, the first sentence reads, "The appellants, Earl Pratt and Ivan Morgan, were arrested 16 years ago for a murder committed on 6th October 1977 and have been held in custody ever since." [1993] UKPC 1, [1], [1994] 2 A.C. 1, 17. In *Lewis*, the first sentence reads, "These six appellants have been sentenced to death in Jamaica after conviction of murder." [2000] UKPC 35, [1], [2001] 2 A.C. 50, 65.

for the individual and individual circumstances prompted its express reference in the first sentence of *Lambert Watson*, in contrast to some other major constitutional death penalty cases; this, though, must remain in the realm of speculation, for even a committed postmodernist would be reluctant to draw significant conclusions from this mention alone.

### III. CONVERTING PRINCIPLE INTO LAW

From the Privy Council's perspective, it is wrong in principle to establish pre-ordained categories that require the mandatory death sentence. Various questions arise from this *ex cathedra* pronouncement of the Privy Council, among which the following two are significant:

(A) How was the Privy Council able to convert this strong position of principle into law?

(B) At what point in time did this strong position of principle actually become a part of Jamaican law?

Regarding the first question, the short answer is that the Privy Council was able to establish its position of principle as part of Jamaican law by reference to the Constitution. Section 17(1) of the Jamaican Constitution, in the Chapter on Fundamental Rights and Freedoms, states, "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment." Because the mandatory sentence did not allow for individual sentencing, the Privy Council believed it amounted to inhuman punishment or treatment, and therefore fell short of the constitutional requirements of Section 17(1).<sup>40</sup> From this, the Privy Council was able effectively to strike down the validity of Sections 2 and 3 of the Offences Against the Person Act because, under the Jamaican Constitution, where any other law is inconsistent with the Constitution, the latter shall prevail and the other law shall be void to the extent of the inconsistency.<sup>41</sup>

---

40. *Lambert Watson*, [2004] UKPC 34, [35], [2005] 1 A.C. at 491.

41. The rule in Section 2 of the Jamaican Constitution establishing the supremacy of the Constitution is stated to be "subject to sections 49 and 50 of the Constitution." Jamaica (Constitution) Order in Council, 1962, c. 1, § 2 [hereinafter Jamaican Constitution]. Sections 49 and 50 deal with procedures for altering the Constitution and a special procedure for amending fundamental rights and freedoms in the Constitution. Constitution, c. 5,

A. *Section 17 of the Jamaican Constitution*

In converting its strong position of principle against mandatory death sentences into Jamaican law, the Privy Council in *Lambert Watson* needed to overcome a number of obstacles, both implicit and explicit. First, Section 17(1) of the Constitution is normally read along with Section 17(2), which 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 [i.e. August 6, 1962].

Section 17(2) allows the State to retain any “description of punishment” which was lawful in Jamaica prior to Independence. One question that arises, therefore, is whether the mandatory death penalty—as distinct from the death penalty—is a form of punishment that is constitutionally preserved by Section 17(2) on the basis that it existed before Independence. As a matter of fact, the mandatory death penalty predated Independence, and in the period immediately preceding Independence, the Offences Against the Person Act imposed the mandatory death sentence on all murder convicts.

This question, concerning the precise scope of Section 17(2) in the context of the mandatory death penalty, is not expressly addressed in the *Lambert Watson* decision, although the Privy Council had addressed the same issue in its judgment in *R. v. Hughes*<sup>42</sup> in 2002. In *Hughes*, their Lordships noted that paragraph 10 of Schedule 2 to the St. Lucia Constitutional Order of 1978 was similar to the formulation used in Section 17(2) of the Jamaican Constitution.<sup>43</sup> In interpreting paragraph 10, the Privy Council held that the savings clause concerning punishment did not preserve the mandatory death sentence that predated Independence because this savings clause refers to the situation in which the pre-Independence

---

§§ 49-50. Neither section 49 nor section 50 was relevant for the purposes of the *Lambert Watson* Case.

42. [2002] UKPC 12, [43], [2002] 2 AC 259, 279-80 (appeal taken from St. Lucia).

43. *Id.* at [43], [2002] 2 AC at 279.

law “authorizes” a particular form of punishment. For the Privy Council, acts undertaken pursuant to laws that authorize a form of punishment are preserved as valid, but acts undertaken pursuant to laws that *require* a form of punishment are not preserved by the savings clause. Because mandatory death sentences are “required” and not merely “authorized” by the law, the savings clause in paragraph 10 does not apply here. The Privy Council put the matter in this way:

Their Lordships have already held that section 178 “authorises” the infliction of the death penalty on all murderers. If that were all that the section did, then by reason of paragraph 10 it could not be held to be, to any extent, inconsistent with section 5 of the Constitution. For the measure of the exception in paragraph 10 is simply the extent to which the law “authorises” the infliction of the specified type of punishment. In fact, however, section 178 goes much further than authorising: it does not merely authorise, it actually *requires* the infliction of the death penalty on anyone convicted of murder . . . . While every law which requires that an act be performed authorises that act, no law which merely authorises an act requires that it be performed. Therefore a law, like section 178, which requires that an act be performed contains a crucial additional element that goes beyond mere authorization. Indeed at the heart of the appeals in all these cases lies the very fact that there is a world of difference between a law that requires a judge to impose the death penalty in all cases of murder and a law that merely authorises him to do so. More particularly, it is because the law requires, rather than merely authorises, the judge to impose the death sentence that there is no room for mitigation and no room for consideration of the individual circumstances of the defendant or of the murder. . . .

Their Lordships therefore conclude that, to the extent that section 178 is to be regarded as authorising the infliction of the death penalty in all cases of murder, it cannot be held to be inconsistent with section 5 of the Constitution. But, to the extent that it goes

further and actually requires the infliction of the death penalty in all cases of murder, the exception in paragraph 10 does not apply.<sup>44</sup>

In short, for the Privy Council, to the extent that the death penalty was authorized by Jamaican law before Independence, it has remained so authorized by virtue of Section 17(2). But, to the extent that the death penalty was required by law before Independence, Section 17(2) does not keep the death penalty law valid. The reasoning of the Privy Council on this point is not altogether convincing. It is established that while all acts that are required are also authorized, not all acts that are authorized are required. Given this, any law in force before Independence that required the death penalty must also have authorized the death penalty. Thus, the mandatory death penalty, required by certain laws, must also have been authorized by those laws before Independence. If so, the Privy Council was on uncertain ground in *Hughes* when it suggested that the mandatory death penalty was not in the category of acts authorized before independence. The matter may be examined from another angle. Precisely because all acts that are required are also authorized, the category of acts that are required constitutes a sub-set of the acts that are authorized. Thus, when Section 17(2) of the Jamaican Constitution refers to the law authorizing a particular form of punishment, it must also refer to the law requiring a particular form of punishment: the set embraces all elements of the subset, as well as other items in the set.

The result is that the semantic distinction drawn in the *Hughes* decision, subtle though it may be, is questionable. The Privy Council implicitly relied on this distinction in the *Lambert Watson* case as well. As there is no evidence that the Attorney General raised the point in submissions to the Privy Council in *Lambert Watson*, the Court would have had to act on its own initiative to address the point, which it did not do explicitly. However, it is not surprising that the Attorney General did not pursue this issue. The *Hughes* decision was hardly two years old at the time of the *Lambert Watson* case, and the Attorney General was already obliged to argue that aspects of another

---

44. *Id.* at [47]-[48], [2002] 2 AC at 281-82.

recent decision of the Privy Council—*Roodal v. The State*<sup>45</sup>—were incorrectly decided in some respects. The Attorney General’s decision was probably a strategic one, as it was unlikely that the Privy Council would abandon its interpretation of Section 17(2) as well as other aspects of its jurisprudence on mandatory death sentences all at once.

### B. *Section 26(8) of the Constitution*

In converting its strong position of principle into law, the Privy Council also encountered arguments concerning the savings clause in Section 26(8) of the Jamaican Constitution. Section 26(8) seeks to save pre-Independence laws from challenge on the grounds that they are inconsistent with the provisions of Chapter III of the Constitution concerning Fundamental Rights and Freedoms. Section 26(8), which is itself set out in Chapter III of the Constitution, reads: “Nothing contained in any law in force immediately before [Independence 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 these provisions.” At the Court of Appeal stage in the *Lambert Watson* case, the judges in Jamaica were unanimously of the view that Section 26(8) “saved” the mandatory death penalty in Jamaica, so that it could not be struck down as inhuman punishment or treatment.<sup>46</sup> In contrast, the Privy Council found—also unanimously—that Section 26(8) did not, in fact, save the mandatory death penalty from being in breach of Section 17(1) and was therefore unconstitutional. In support of this conclusion, the Privy Council noted that Section 2 of the Offences Against the Person Law, originally passed in 1864, had been repealed by the Offences Against the Person (Amendment) Act of 1992. This amendment created the distinction between capital and non-capital murder by carving out a set of circumstances in which murder would no longer automatically be regarded as capital murder, and by identifying other circumstances in which murder would continue to

---

45. [2003] UKPC 78, [2005] 1 A.C. 328 (appeal taken from Trin. & Tobago).

46. *Lambert Watson v R*, Supreme Court Criminal Appeal No. 117/99, December 16, 2002, Judgment of Forte P., p. 1 at p. 25; Judgment of Panton J.A., p. 38 at p. 58; Judgment of Clarke J.A. (Ag.), p. 59 at p. 67.

be automatically treated as capital murder. The Privy Council reasoned that because the law following the amendments was different from the law prior to Independence, the law which was in force immediately before Independence was no longer the law, and the current law therefore could not be saved by Section 26(8).<sup>47</sup>

On this point, Jamaica's Solicitor General had argued, *inter alia*, that the amendments to the Offences Against the Person Act made in 1992 did not amount to a change in the law concerning mandatory sentences. The Solicitor General maintained that because the mandatory sentence was part of the law both before Independence and after the 1992 amendment, no new offences were created by the 1992 amendments, and so the law had not changed with respect to capital murder. The Privy Council responded, however, by suggesting that the rights and freedoms recognized in Section 13 of the Constitution should be generously interpreted, and conversely, that restrictions to these rights, as set out in Section 26(8) read in conjunction with Section 26(9), must be construed restrictively.<sup>48</sup> The Privy Council also concluded that with reference to the language of Section 26(9), the exceptions set out in this provision are exhaustive; thus, as long as a change in the law occurred and it was not covered by Section 26(9), the savings clause in Section 26(8) would become inapplicable.<sup>49</sup>

Section 26(8) does not expressly state that any law in force immediately before Independence shall remain valid after Independence; it actually states that "nothing contained in any law in force" before Independence shall be held inconsistent with Chapter III. If one references only the first part of Section 26(8), then there is support for the view that because the mandatory death penalty was contained in the law in force immediately before Independence, Section 26(8) preserves this punishment. The difficulty with this interpretation, however, is that the second part of Section 26(8), beginning with "and nothing done under the authority of any such law," would take the mandatory death penalty outside the protec-

---

47. *Lambert Watson*, [2004] UKPC 34, [47], [2005] 1 A.C. 472, 495 (appeal taken from Jam.).

48. *Id.* at [43]-[46], [2005] 1 A.C. at 493-95.

49. *Id.* at [45], [2005] 1 A.C. at 494.

tion of the savings clause because the mandatory death penalty—as applied after 1992—would not be done under any such (i.e. pre-Independence) law. Thus, when Section 26(8) is read as a whole, it supports the reasoning of the Privy Council, as long as one is prepared to accept the Privy Council’s view that acts which are required by a law are distinguishable from acts which are authorized by a law.

#### IV. A QUESTION OF TIMING

As to question (b) noted above—namely, at what point in time did the Privy Council’s strong position of principle become a part of Jamaican law—one answer is that it became Jamaican law upon pronouncement by the Privy Council in July 2004. However, if this is the case, then at the time of the murders by Lambert Watson, which occurred in 1997, the mandatory death sentence was still valid. A number of factors point in this direction. For example, if the mandatory death penalty was unconstitutional in 1993, when the *Pratt and Morgan* case was decided, the Privy Council could have decided the case on the basis that the mandatory death penalty set out in the Offences Against the Person Act was unconstitutional. It did not do so. Similarly, in the *Lewis* case, the Privy Council could have avoided some of the more questionable aspects of the majority judgment if it had held in 2000 that mandatory death sentences were contrary to the Constitution.<sup>50</sup>

---

50. In the *Lewis* Case, the Judicial Committee of the Privy Council attached particular significance to two questions, namely, (a) what rights do convicted murderers have when they petition the Jamaican Privy Council for mercy, following the failure of all their judicial appeals; and (b) whether murder convicts have a right not to be executed before an external human rights agency—the Inter-American Commission on Human Rights or the United Nations Human Rights Committee—has finally responded to their petitions. [2000] UKPC 35, [1], [2001] 2 A.C. 50, 65 (appeal taken from Jam.). With respect to question (a), the Judicial Committee of the Privy Council found that convicted murderers had the right to a hearing before the Jamaican Privy Council, including the right to legal representation before that body. *Id.* at [63], [2001] 2 A.C. at 79. This conclusion was challenged on a number of grounds. Among other things, it was argued that the Judicial Committee of the Privy Council ignored the clear wording of Section 91(1) of the Jamaican Constitution, which provides that for death penalty cases that come before the Jamaican Privy Council, 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 else-

In response, though, it could be argued that mandatory death sentences have been invalid since 1992, when the Offences Against the Person Act was amended and removed from the ambit of the savings clause in Section 26(8). This argument is strengthened by the fact that this point had not previously been taken to the Privy Council, and so the Court had not had the occasion to rule on mandatory sentences from Jamaica prior to 2004. Nonetheless, this response would be artificial because the Jamaican Government, which introduced the amendments to the Offences Against the Person Act, maintained in the *Lambert Watson* Case that it did not intend to remove the mandatory death penalty from the ambit of the savings clause.

The response would also be misleading to the extent that it suggests that the Legislature ought to have realized that mandatory death sentences were unconstitutional in 1992

---

where as the Governor-General may require” to be forwarded to the Jamaican Privy Council. Nowhere is it expressly stated that the convict shall have the right to a hearing or to legal representation before the Jamaican Privy Council, which is set up to deal with requests for mercy after the judicial process is completed. The decision on this point was also challenged because it departed from earlier precedents of the Judicial Committee of the Privy Council, namely, *De Freitas v. Benny*, [1976] A.C. 239 (P.C.), and *Reckley v. Minister of Public Safety & Immigration (No. 2)*, [1996] A.C. 527 (P.C.). With respect to question (b), the Judicial Committee of the Privy Council concluded that murder convicts had the right not to be executed before an external agency responded to their petitions. *Lewis*, [2000] UKPC at [86], [2001] 2 A.C. at 85. The Judicial Committee of the Privy Council indicated that this right followed from the fact that Section 13 of the Jamaican Constitution granted everyone the “protection of law.” *Id.* at [86], [2001] 2 A.C. at 85. This conclusion has been criticized on the basis that the “protection of law” guarantee in the Constitution does not refer to external human rights agencies, and had never before been interpreted to mean that, as a matter of law, the Jamaican State had to await responses from such agencies before carrying out executions. The Privy Council’s approach on this point has also been criticized as giving direct effect in local law to treaty provisions that have not been incorporated into local law. It has also been noted that the external agencies make recommendations, which do not, in any event, have to be followed by the Jamaican Privy Council. See, e.g., A.J. Nicholson, *The Privy Council Frustrating the Will of our People*, SUNDAY HERALD (Jamaica), Oct. 8-14, 2000; Geoff Madden, Letter to the Editor, *Privy Council Ruling Devoid of Juridical Integrity*, JAM. GLEANER, Oct. 8, 2000, <http://www.jamaica-gleaner.com/gleaner/20001008/letters/letters2.html>; Geoff Madden, Letter to the Editor, “*Erudite*” *Judgment of the Judicial Committee*, JAM. GLEANER, Oct. 21, 2000; Douglas Leys, *Judgment Flawed, Conclusions Suspect*, SUNDAY HERALD (Jamaica), Sept. 24-30, 2000.

when they amended the Offences Against the Person Act. In 1992, when the Offences Against the Person Act was amended, the governing objective of the Legislature, acting partly in response to the Report of the Fraser Committee on the Death Penalty,<sup>51</sup> was to ameliorate the rigor of the death penalty. Thus, as already noted, the effect of the amendment was to tighten the categories of murder for which the death penalty would apply. At no stage in the deliberations—either of the Fraser Committee or of the Legislature—was the mandatory character of sentences for capital murder called into question. Moreover, in 1992, the international jurisprudence on the subject, as gleaned from recommendations of the Inter-American Commission and the United Nations Human Rights Committee and decisions of the Inter-American Human Rights Court, did not condemn mandatory death sentences. Although the United States Supreme Court had found mandatory death sentences unconstitutional by 1992,<sup>52</sup> this ruling was limited in jurisdiction and was not given definitive status—or even mentioned—in Commonwealth Caribbean deliberations on the subject. No doubt this was mainly because American constitutional arrangements are significantly different from those in the Commonwealth Caribbean,<sup>53</sup> but this attitude could also be explained by the fact that, until recently, the Privy Council and other courts of the Caribbean have not normally relied on decisions of the United States Supreme Court.

---

51. Report of the Committee to Consider Death as a Penalty for Murder in Jamaica (H. Aubrey Fraser, Chairman, Dec. 1981).

52. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 431 U.S. 633 (1977).

53. This is not the place for a detailed exploration of the differences between the Constitution of the United States of America, on the one hand, and Commonwealth Constitutions derived from the Westminster model, on the other. It may be noted, however, that in respect of the separation of powers, the Westminster model assumes that there will be considerable overlap in the composition of the Executive and the Legislature and that the Executive has considerable and direct influence on the agenda of the Legislature. Specifically, in the Westminster system, legislation is normally passed on the basis of decisions made by the Executive. In respect of the death penalty, the provisions of the typical Commonwealth Caribbean Constitution expressly remove debate concerning whether the death penalty may itself be regarded as inhuman or degrading punishment or other treatment. So, for example, Section 17(1) of the Jamaican Constitution prohibits inhuman or degrading punishment or treatment, but Section 14(1) expressly accepts the lawfulness of the death penalty.

In addition, the implicit assumption made by the Jamaican Legislature in 1992 that mandatory death sentences were consistent with the Constitution was no doubt influenced by the decision of the Privy Council in the Jamaican case of *Hinds v. The Queen*,<sup>54</sup> decided in 1977. Specifically, in a well-known passage from the majority judgment in *Hinds*, Lord Diplock noted:

The power conferred upon the Parliament to make laws for peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: see Constitution, Chapter III, section 20(1). . . . *In the exercise of its legislative powers, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence – as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishment up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case (emphasis added).*<sup>55</sup>

Lord Diplock expressly accepted that mandatory death sentences for murder were constitutional in 1977, subsequent to the U.S. Supreme Court cases striking down mandatory sentences in *Woodson v. North Carolina*<sup>56</sup> and *Roberts v. Louisiana*.<sup>57</sup> At the very least, therefore, it would be misguided to argue that the Jamaican Legislature or the country's policymakers were mistaken when they proceeded on the assumption that mandatory death sentences were valid in 1992.

---

54. *Hinds v. The Queen*, [1977] A.C. 195 (P.C.) (appeal taken from Jam.).

55. *Id.* at 225 (emphasis added); see also *Ong Ah Chuan v. Pub. Prosecutor*, [1981] A.C. 648, 674 (P.C.) (per Lord Diplock) (cited in the concurring opinion of Lord Nicholls of Birkenhead in *Lambert Watson*).

56. 428 U.S. at 305.

57. 431 U.S. at 637.

V. “[I]N THE HANOVER CIRCUIT COURT OF THE SUPREME COURT OF JAMAICA”

The first sentence of the majority judgment notes that Lambert Watson was convicted in the Hanover Circuit Court of the Supreme Court of Jamaica. This part of the sentence prompts at least two considerations. First, the reference to the Hanover Circuit Court, or indeed to any of the first instance courts of higher jurisdiction in Jamaica, provides a reminder that one advantage of the mandatory death sentence is its certainty. In effect, the Offences Against the Person Act (as amended) provided that if one committed murder in particular circumstances, in any part of Jamaica, the result would be execution, with the certainty of this rule being tempered only by the possibility of commutation from a death sentence or pardon by the local Privy Council pursuant to Sections 90 and 91 of the Constitution, or by other Constitutional safeguards. Because of this certainty, the deterrent effect of the mandatory sentence for capital murder is arguably greater than sentences, including execution, that are not automatic. However, one should not become overly reliant on the supposed certainty of mandatory sentences because, as the Privy Council’s strong statement of principle indicates, in some instances the quest for certainty could mean that, in practice, inappropriate or disproportionate sentences are handed down owing to the mandatory nature of the sentencing arrangements. Nonetheless, some support should be offered for certainty in the present context. After the *Lambert Watson* case, there is the possibility that different High Court Judges, in different parts of Jamaica, may reach divergent conclusions as to executions in similar circumstances. Under the mandatory scheme, there was no possibility that the decision of the Circuit Judge in Hanover could depart from decisions of the Circuit Judge in another parish. While guidelines for sentencing in death penalty cases might reduce the risk of variable and inconsistent decisions in this area, a lack of mandatory sentences might lead to the perception that some judges are “hanging judges” while others are “bleeding heart liberals” who never find appropriate circumstances in which to apply the death penalty.

Even so, in the absence of the mandatory scheme, sentencing guidelines might remain the best way to ensure that death sentences are applied uniformly throughout the coun-

try. If sentencing guidelines are to be adopted, a number of issues may need to be addressed. One such issue concerns the authority to be given to these guidelines. If the guidelines are given the force of legislation, or even if they sound only in the common law, it is possible that the way in which the guidelines are applied in a particular case could give rise to the possibility of appeals to the Jamaican Court of Appeal and to the Judicial Committee of the Privy Council. This would not normally be problematic and, to the extent that it will promote uniformity and fairness in judgments, it should be encouraged. At the same time, however, a particular difficulty should be anticipated. By virtue of the *Pratt and Morgan* decision of the Privy Council, there is a strong presumption that confining persons on death row for more than five years amounts to inhuman or degrading treatment or punishment.<sup>58</sup> In such situations, the Jamaican Mercy Committee (the local Privy Council) normally commutes the sentence of death to life imprisonment. However, the length of the appeals process can often approach or even exceed the five-year timeframe. This tight deadline is further exacerbated by the Privy Council's decision in *Lewis*. In that case, the Privy Council ruled that where the sentence of death has been imposed, the State must await the response of the Inter-American Commission with respect to any petitions brought by the convict to that Commission, while the five-year period continues to run.<sup>59</sup> This requirement means that the State is pressed to complete various appellate and other processes in five years, even though the time taken by the Commission is beyond the control of the State. Thus, within the five-year period from the time of sentencing at first instance, the appellant has the right to appeal against the conviction on the facts, followed by the right to bring petitions to the Inter-American Commission, followed by the right to bring constitutional motions and appeals that may be appropriate.<sup>60</sup> In cases where procedural safeguards may not have been fully

---

58. [1993] UKPC 1, [82], [1994] 2 A.C. 1, 36 (appeal taken from Jam.). The time problems concerning appeals on the application of sentencing guidelines discussed in the text would also arise in the event that there are no formal guidelines, for convicted persons can be expected to bring appeals in respect of the exercise of judicial discretion in death penalty cases.

59. *Lewis v. Att'y Gen. of Jam.*, [2000] UKPC 35, [86], [2001] 2 A.C. 50, 85 (appeal taken from Jam.).

60. This is the procedure that was followed in the *Pratt* and *Lewis* Cases.

respected by the local Privy Council, the convict also has the right to appeal with respect to the procedures taken. In addition to these appeals, after *Lambert Watson* the convict will also have the right to appeal the sentence, whether or not sentencing guidelines are given the force of legislation. While each of these rights is fully justifiable, and considering the finality of the death penalty, each should be afforded to convicts on a liberal basis. The practical result is that the five-year time period during which these procedures must be completed if the death sentence is to be imposed seems increasingly unrealistic.<sup>61</sup>

The second consideration arising from this portion of the first sentence of the judgment may be phrased as a very basic question: why are appeals arising from the Hanover Circuit Court of the Supreme Court of Jamaica heard by the Judicial Committee of the Privy Council, a court based in London? The arguments concerning the abolition of appeals to the Privy Council are much rehearsed, and some of them fall beyond the scope of the present discussion.<sup>62</sup> Significantly, however, when one considers that the members of the Privy Council, with the exception of former Chief Justice Zacca,<sup>63</sup> have had no serious exposure to Jamaican political circumstances or social and cultural conditions, it does seem incongruous, even inappropriate, for the Privy Council to render decisions concerning life and death arising from an episode in Hanover, Jamaica. Indeed, this position is even supported in a statement made by Lord Hoffman, a member of the Privy Council,

---

61. See *infra* Part VI.

62. For the elements of this debate, see, for example, THE WEST INDIAN COMMISSION, TIME FOR ACTION 497-501 (2d ed., 1993); WE WANT JUSTICE: JAMAICA AND THE CARIBBEAN COURT OF JUSTICE (Delano Franklyn ed., 2005); DUKE E. POLLARD, THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE (2004); SIMEON C.R. MCINTOSH, CARIBBEAN CONSTITUTIONAL REFORM: RETHINKING THE WEST INDIAN POLITY 263-349 (2002); SELWYN RYAN, THE JUDICIARY AND GOVERNANCE IN THE CARIBBEAN 161-200 (2001); STEPHEN VASCIANNIE, THE PRIVY COUNCIL VERSUS THE CARIBBEAN COURT OF APPEAL: SOME GENERAL OBSERVATIONS (2000); Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 FORDHAM INT'L L.J. 930 (2004).

63. Edward Zacca, a former Chief Justice of Jamaica, was invited by the Privy Council to sit, along with eight United Kingdom-based judges, in the *Lambert Watson* Case. Judges from the Commonwealth Caribbean are rarely invited to hear Privy Council appeals.

to members of the Trinidad and Tobago Bar Association in October 2003,<sup>64</sup> where Lord Hoffman admitted that the Privy Council may be unduly cautious on some points of law arising in Caribbean cases because it lacks full knowledge of social conditions in the region.<sup>65</sup> Lord Hoffman put the matter this way:

It is an extraordinary fact that for nearly nine years I have been a member of the final court of appeal for the independent Republic of Trinidad and Tobago, a confident democracy with its own culture and national values, and this is the first time that I have set foot upon the islands. . . . Although the Privy Council has done its best to serve the Caribbean and, I venture to think, has done much to improve the administration of justice in parallel with improvements in the United Kingdom, our remoteness from the community has been a handicap. We have been necessarily cautious in doing anything which might be seen as inappropriate in local conditions and although this caution may have occasionally saved us from doing the wrong thing, I am sure it has also sometimes inhibited us from doing the right thing.<sup>66</sup>

Lord Hoffman's statement can be seen as an invitation for the Caribbean to consider alternative arrangements. In evaluating this statement, a parallel example might be helpful in illuminating the crux of the issue. The people of Jamaica would today certainly find it politically inappropriate to set up an appellate court in which the supreme court of another jurisdiction, for example, the United States Supreme Court, had the final word in the interpretation of their laws. Given this, why does the Jamaican State continue to operate on the belief that there is nothing unusual about appealing to English judges as the ultimate source of its justice?

In fact, the Jamaican State had considered abolishing appeals to the Privy Council in 2004 and replacing them with appeals to the Caribbean Court of Justice, established by the countries that form the Caribbean Community (CARICOM)

---

64. The Rt. Hon. Lord Leonard Hoffman, Speech at the Annual Dinner of the Law Association of Trinidad and Tobago (Oct. 10, 2003).

65. *Id.*

66. *Id.*

partly for reasons of political sovereignty and national self-respect. The initial intent for the Caribbean Court of Justice was that this court will become the final appellate court for the Caribbean region. To date, two countries, Guyana and Barbados, have accepted the Caribbean Court of Justice as their final appellate court. Barbados, in the course of accepting the final jurisdiction of the Caribbean Court of Justice, abolished appeals to the Privy Council; Guyana abolished appeals to the Privy Council prior to the establishment of the Caribbean Court of Justice, and has its own two-stage appellate procedure. In 2004, Jamaica attempted to join Guyana and Barbados in accepting the Caribbean Court of Justice as its final appellate court. This attempt, however, was stymied by the decision of the Privy Council itself in *The Independent Jamaica Council for Human Rights (1998) Ltd. v. Syringa Marshall-Burnett and the Attorney General of Jamaica*.<sup>67</sup> In this case, the Privy Council held that the legislative procedures adopted by the Jamaican government allowing appeals to the Caribbean Court of Justice were contrary to the Jamaican Constitution.<sup>68</sup> The decision has led to some degree of uncertainty in Jamaica about the correct procedure for the introduction of appeals to the Caribbean Court of Justice, and perhaps more impor-

---

67. [2005] UKPC 3, [2005] 2 A.C. 356 (appeal taken from Jam.).

68. *See id.* at [3], [24], [2005] 2 A.C. at 363, 372. In addition to the Independent Jamaica Council for Human Rights, a non-governmental organization, the parties that brought this case against the Jamaican Government included Edward Seaga (the then Leader of the Jamaican Opposition), the Jamaican Bar Association, Jamaicans for Justice (another non-governmental organization), and Leonie Marshall (a private individual). The case against the Government was presented primarily on legal grounds, but a number of political factors help to explain why some sections of the Jamaican polity have opposed the replacement of the Privy Council by the Caribbean Court of Justice. Opponents of the decision to replace Privy Council appeals argue, *inter alia*, that the Privy Council has served as a fair, impartial, and authoritative court for Jamaica for centuries. It has also been said that the Privy Council enjoys the confidence of the majority of the people, it is available to litigants without charge, and that in the charged political environment of Jamaica, there is value in having, as the final court, a body that is free from local passions and impervious to political interference. *See generally*, Stephen Vasciannie, *The Debate on the Establishment of the Caribbean Court of Justice*, 2 INTEGRATIONIST 39 (2004).

tantly, it has postponed attempts in Jamaica to end appeals to the Privy Council.<sup>69</sup>

The point for emphasis here is that in some cases the Privy Council may make decisions that do not fully conform to expectations of the Jamaican polity.<sup>70</sup> Arguably, the decision in the *Lambert Watson* case falls within this category of cases in the sense that a majority of Jamaicans retain the view that the death penalty should be applied in cases of murder. At the same time, the efforts of Jamaica and some of its Caribbean counterparts to establish a final appellate court which would be more sensitive to the sociopolitical and cultural circumstances of region have encountered serious legal difficulties. This situation will no doubt encourage the fragmentation of legal rules applicable in the Caribbean. In fact, this has already started to happen. In the case of *Attorney General of Bar-*

---

69. In *Independent Jamaica Council*, the Privy Council was careful to point out that “the Board [i.e. the Privy Council], sitting as the final court of appeal of Jamaica, has no interest of its own in the outcome of this appeal. [2005] UKPC 3, [4], [2005] 2 A.C. 356, 363. For the Privy Council, the question in this case was whether the steps taken to abolish Privy Council appeals and replace them with appeals to the Caribbean Court of Justice were “constitutionally appropriate.” *Id.* at [4], [2005] 2 A.C. at 363. So, the Privy Council suggested that its decision had nothing to do with the desire to protect its own jurisdiction. There is some support for this perspective in the fact that the Privy Council did not expressly challenge the idea that the Government of Jamaica could have abolished appeals to the Privy Council pursuant to the terms of Section 110 of the Constitution. Rather, the crux of the Privy Council’s position was that the voting procedure used by the Jamaican Government to abolish appeals to the Privy Council *and* to establish appeals to the Caribbean Court of Justice was not the correct procedure required by the Constitution. The decision is open to the criticism that the Privy Council was not able to indicate any express provision that invalidated the voting procedure used by the Jamaican Government, relying instead on the structure of the Constitution and on the concept of judicial independence.

70. Although the discussion in the text is concerned primarily with the question of the death penalty, it may be noted that the decision in *Independent Jamaica Council* concerning the replacement of Privy Council appeals by appeals to the Caribbean Court of Justice falls within the category of cases that do not necessarily conform to expectations of the Jamaican polity. *See id.* at [22], [2005] 2 A.C. at 372. In this case, the Government of Jamaica had proceeded on what may be regarded as a reading of the clear words of the Constitution, for Section 110 of the Constitution allowed for the abolition of Privy Council appeals by a majority vote in both Houses of Parliament, and said nothing about the need for a special majority to establish a court to replace the Privy Council. *Id.* at ¶ 5.

*bados v. Joseph*,<sup>71</sup> some members of the Caribbean Court of Justice expressly declined to follow aspects of the reasoning of the Privy Council in the earlier case of *Lewis v. Attorney General of Jamaica*.<sup>72</sup> Thus, in its first case concerning the death penalty, the Caribbean Court of Justice, the final appellate court for Guyana and Barbados, has departed from the Privy Council, the final appellate court for Jamaica, Trinidad and Tobago, and several other Caribbean states which share strong legal bonds with Guyana and Barbados.<sup>73</sup> In all likelihood, further fragmentation will occur. Final appellate courts are often called upon to make decisions which incorporate policy prescriptions and which reflect ideological perspectives; thus, the Privy Council and the Caribbean Court of Justice can reasonably be expected to follow divergent paths on some questions. This is particularly true given that the Caribbean Court of Justice regards itself as having a mandate to develop Caribbean jurisprudence, while the Privy Council presumably does not undertake its judicial function with this consideration in mind.<sup>74</sup> Moreover, fragmentation will lead to uncertainty in the domestic law of individual countries. For example, although Jamaica is not presently bound by decisions of the Caribbean Court of Justice, pronouncements from that court, a court comprised predominantly of eminent Caribbean com-

---

71. Att'y Gen. of Barb. v. Joseph, CCJ Appeal No. CV2 of 2005 (Nov. 8, 2006).

72. See, e.g., *id.* at ¶ 76. The President and Justice Saunders expressly departed from the approach taken by the Privy Council in *Lewis*, [2000] UKPC 35, [2001] 2 A.C. 50, and *Thomas v. Baptiste*, [1999] UKPC 13, [2000] 2 A.C. 1 (appeal taken from Trin. & Tobago) on the circumstances in which a rule in an unincorporated treaty may become a part of the municipal law of a Caribbean State which applies dualist principles in keeping with the English common law. *Id.*

73. Decisions of the Privy Council on a particular issue from one English-speaking Caribbean jurisdiction normally constitute binding precedents for all other English-speaking Caribbean jurisdictions (with the exception of Guyana, and now, Barbados). Also, the constitutional arrangements in each of these countries are very similar, if not identical, so that there is considerable sharing of precedents. See, e.g., *Hinds v. The Queen*, [1977] A.C. 195 (P.C.) (appeal taken from Jam.).

74. In *Joseph*, before the Caribbean Court of Justice, President de la Bastide and Justice Saunders noted as follows: “[t]he main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue.” *Joseph*, CCJ Appeal No. CV2 of 2005, at ¶ 18.

mon law jurists, can be expected to have a persuasive effect on the development of law in the Jamaican jurisdiction.<sup>75</sup> For the time being, however, uncertainty rests in the fact that lower courts in Jamaica have no guidelines on how much weight, if any, they may attach to decisions of the Caribbean Court of Justice.

## VI. "ON 19 JULY 1999"

The first sentence of the majority judgment in the *Lambert Watson* case begins with a reference to the fact that Lambert Watson was convicted on July 19, 1999. The case was heard by the Privy Council on March 25, 29, and 30 of 2004, and the decision was made on July 7, 2004. Thus, almost five years elapsed between the date of Watson's conviction and the date that the Privy Council considered his final appeal. As already noted in Part V, by virtue of the *Pratt and Morgan* case, when the time period between sentencing and execution for murder convicts exceeds five years, there is a presumption against execution. In the *Lewis* case, their Lordships appeared to treat this five-year guideline as a rule of law; in that case, having found that the some of the appellants were on death row for slightly under five years, the Judicial Committee of the Privy Council concluded that by the time these appellants would be allowed to follow certain procedural safeguards before the local Privy Council, five years would have passed. Based on this

---

75. This conclusion follows from the closeness that has traditionally characterized the development of the law in the Caribbean jurisdictions as a whole. But it may also follow from the fact that the judges for the Caribbean Court of Justice have been drawn mainly from the appellate and supreme courts of the various Caribbean jurisdictions. There is no reason to believe that judges in the Jamaican Court of Appeal will disregard decisions of their colleague judges in the Caribbean Court of Justice, save where there is a binding Privy Council precedent on the point. It should also be noted that the current President of the Jamaican Court of Appeal, Justice Seymour Panton, has strongly argued that Jamaica should become party to the appellate jurisdiction of the Caribbean Court of Justice. Before he became President of the Court of Appeal, Justice Panton submitted to the Jamaican Constitutional Commission that: "After thirty years of so-called independence, Jamaican Judges have to be facing the *infra. dig* [sic] situation where we cannot afford to think without seriously considering what our English counterparts sitting in England would wish us to do." Submission to the Jamaican Constitutional Commission by Justice Seymour Panton (Aug. 31, 1992), at 3.

reasoning, the Judicial Committee of the Privy Council commuted the death sentences to life imprisonment.<sup>76</sup>

Given these precedents, it is arguable that the Judicial Committee of the Privy Council could have decided the *Lambert Watson* case without reference to the issue of the mandatory death penalty, because even if the Judicial Committee of the Privy Council had upheld the conviction, Lambert Watson's execution could not have taken place within the five-year limit. Furthermore, he still had the right to have his matter considered by the local Mercy Committee, and given that a period of five years less twelve days had already elapsed, the Mercy Committee would not have been able to reach a decision concerning Watson's execution before the expiration of the five-year time limit. In addition, had the Privy Council upheld Watson's conviction, it is highly likely that he would then have petitioned the Inter-American Commission on Human Rights for a recommendation concerning his death sentence, pursuant to the terms of the American Convention on Human Rights. If nothing else, this petition would have brought the period between sentencing and execution well beyond the period of five years, and would have prompted commutation of the death sentence, in keeping with the decision in *Pratt and Morgan*.<sup>77</sup>

Thus, the date July 19, 1999, mentioned in the first sentence of the *Lambert Watson* case, carries more significance than initially may be apparent. However, this raises the broader issue of whether the *Pratt and Morgan* line of authori-

---

76. *Lewis v. Att'y Gen. of Jam.*, [2000] UKPC 35, [103]-[104], [2001] 2 A.C. 50, 87 (appeal taken from Jam.).

77. *Pratt & Morgan v. Att'y Gen. of Jam.*, [1993] UKPC 1, [85], [1994] 2 A.C. 1, 35 (appeal taken from Jam.). Article 48(1) of the American Convention indicates that where the Inter-American Commission receives a petition, the Commission shall give the State concerned "a reasonable period" in which to respond to the petition (assuming that the petition is admissible). Organization of American States, American Convention on Human Rights art. 48(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. For death penalty cases, the Privy Council assumed, in *Pratt*, that a period of 18 months would be sufficient for the purpose of allowing external agencies to make recommendations on petitions. *Pratt*, [1993] UKPC 1, [7], [1994] 2 A.C. at 19. It is clear that the Jamaican Government would not have been able to respond to a petition from Lambert Watson in twelve days.

ties remains fully justifiable.<sup>78</sup> In general, *Pratt and Morgan* has been supported mainly by the notion that it is inhuman and degrading to keep a convict on death row for more than five years. This proposition can be supported by humanitarian considerations, as conditions on death row, as well as the grief and jeopardy associated with time on death row, amount to stark and depressing trauma. On the other hand, *Pratt and Morgan* has been criticized on a number of grounds. Among other things, some argue that long stays on death row arise in part from the efforts of convicts to retain their lives. In the circumstances, it may be that such a convict should not have things both ways: his understandable efforts to rely on the processes of the law to retain his life should not, at the same time, lead to a situation in which he could be rewarded by extending the processes beyond a period of five years.

As suggested above, the *Pratt and Morgan* decision is also vulnerable to the criticism that it has, in practice, overturned the death sentence in most cases from Jamaica.<sup>79</sup> In support of this criticism, it should be noted that shortly following the decision in *Pratt and Morgan*, the Jamaican government withdrew from the First Optional Protocol to the International Covenant on Civil and Political Rights.<sup>80</sup> The Jamaican gov-

---

78. For a careful review of the implications of the *Pratt and Morgan* decision and a critique, see Lawrence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1867-82.

79. In some other Caribbean jurisdictions, this view has also been advanced by governmental authorities. So, for example, the government of Barbados has amended that country's constitution to the effect that delay in the execution of the death sentence shall not constitute inhuman or degrading punishment or treatment. See Barbados Constitution (Amendment) Act 2002 (No. 14), Official Gazette, No. 74 (Sept. 5, 2002), at 1-3. For a comment of the highest authority on this point, see Hon. Justice David Hayton, *The Caribbean Court of Justice: Precedents, Human Rights and Incrementalism 8*, available at <http://www.caribbeancourtsofjustice.org/papersandarticles/HumanRightsandIncrementalism.pdf>.

80. See Jam. Ministry of Foreign Affairs and Foreign Trade, Ministry Paper No. 34/97, Jamaica's Withdrawal from the Optional Protocol to the International Covenant on Civil and Political Rights (1997). In light of the decision in *Pratt and Morgan*, Trinidad and Tobago also maintained that the five-year limit could not be met while petitioners from that country had access to the United Nations Human Rights Committee and the Inter-American Commission on Human Rights. Trinidad and Tobago sought to withdraw from the First Optional Protocol to the International Covenant on Civil

ernment maintained at the time that individuals who had the right to petition the United Nations Human Rights Committee under the First Optional Protocol, and then to petition the Inter-American Commission on Human Rights under the American Convention on Human Rights, would almost certainly exceed the five year period set out in *Pratt and Morgan*. However, even after withdrawing from the First Optional Protocol, the Jamaican government maintained that the time period of five years was frequently being exceeded because of the time the Inter-American Commission was taking to hear individual petitions.<sup>81</sup>

Moreover, the *Pratt and Morgan* decision has contributed to the fragmentation of the law. In the first place, the Judicial Committee of the Privy Council overturned its own decision in *Riley v. The Attorney General of Jamaica*<sup>82</sup> in order to reach the conclusion on the five-year presumption.<sup>83</sup> Secondly, the approach taken by their Lordships has not been received with favor within the United Nations Human Rights Committee itself. Rather, the Human Rights Committee has maintained that time spent on death row does not in itself contribute to the possibility of commutation of a death sentence. For exam-

---

and Political Rights and to re-accede thereto with a reservation to the effect that death penalty-related petitions would no longer go to the United Nations Human Rights Committee. See Trin. & Tobago Ministry of Foreign Affairs, Notice to Denounce the Optional Protocol to the International Covenant on Civil and Political Rights (1998); Trin. & Tobago Ministry of Foreign Affairs, Instrument of Re-accession to the Optional Protocol to the International Covenant on Civil and Political Rights with a reservation excluding the Competence of the Human Rights Committee to Receive and Consider Communications relating to the Imposition of the Death Penalty, 1998, 20 HUM. RTS. L.J. 280, 281 (1999). This approach was regarded as impermissible by a majority in the Human Rights Committee. *Kennedy v. Trinidad & Tobago*, U.N. Hum. Rts. Comm., No. 845/1999 at 6.1-6.8, UN Doc. CCPR/C/67/D/845/1999 (1999).

81. See Stephen Vasciannie, *Caribbean Perspectives on Human Rights*, in Organización de los Estados Americanos, Comité Jurídico Interamericano, XX-XII CURSO DE DERECHO INTERNACIONAL 349, 361-64 (Org. of Am. States 2006).

82. *Riley v. Att'y Gen. of Jam.*, [1983] 1 AC 719 (P.C.) (appeal taken from Jam.). In *Riley*, the time period during which the five convicted appellants were held on death row was in excess of five years, yet the Privy Council held, by a majority, that they could be executed.

83. *Pratt & Morgan v. Att'y Gen. of Jam.*, [1993] UKPC 1, [58], [1994] 2 A.C. 1, 29 (appeal taken from Jam.).

ple, in *Barrett and Sutcliffe v. Jamaica*,<sup>84</sup> where over thirteen years elapsed between the conviction of Barrett and Sutcliffe and their proposed execution, the Human Rights Committee asserted:

In States whose judicial system provides for a review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.<sup>85</sup>

The United Nations Human Rights Committee has maintained this approach in other matters before them, including *Johnson v. Jamaica*<sup>86</sup> and *Michael Robinson v. Jamaica*.<sup>87</sup> The upshot is that, on the question of the five-year limit, Jamaica is required by the Privy Council to go in one direction, while the Human Rights Committee recommends that it should go in quite the opposite direction.

## VII. CONCLUSION

As part of a trilogy of cases, the *Lambert Watson* decision stands out because the Judicial Committee of the Privy Council was able to reach a unanimous verdict, in contrast to the decisions in *Boyce and Joseph v. The Queen*<sup>88</sup> and *Charles Matthew v.*

---

84. *Barrett v. Jamaica*, U.N. Hum. Rts. Comm., Nos. 270/1988 and 271/1988, at 250 ¶ 8.4, UN Doc. A/47/40 (1992).

85. *Id.*

86. *See Johnson v. Jamaica*, U.N. Hum. Rts. Comm., No. 588/1994, at 178-81, UN Doc. A/51/40 (1996) (finding that an extended length of delay before execution is not per se a violation of the Covenant).

87. *See Robinson v. Jamaica*, U.N. Hum. Rts. Comm., No. 731/1996, at 127 ¶ 9.3, UN Doc. A/55/40 (2000) (reiterating the Committee's jurisprudence that "detention on death row for any specific period of time does not per se constitute a violation of . . . the Covenant, in absence of further compelling circumstances").

88. *Boyce v. The Queen*, [2004] UKPC 32, [2005] 1 AC 400 (appeal taken from Barb.).

*The State*,<sup>89</sup> which were both decided by a vote of 5 to 4. *Lambert Watson* also stands out for a reason that was not lost upon at least some of their Lordships: its decision provides a perverse incentive for Caribbean countries to refrain from amending the broad scope of their mandatory death penalty sentences. Indeed, the Jamaican government's original intention in amending the Offences Against the Person Act in 1992 was to reduce the broad sweep of the death penalty. In pursuit of this important objective, however, the government removed the death penalty law from the scope of the savings clause in the Constitution, and thus made the entire mandatory scheme—in its ameliorated form—vulnerable to constitutional attack. Thus, the Jamaican death penalty law was struck down notwithstanding that the legislative reform introduced in 1992 was meant to reduce the possibility of arbitrary death sentences. In contrast, Trinidad and Tobago and Barbados made no significant efforts to amend their pre-Independence death penalty laws, and have maintained the mandatory death penalty for murder in the broadest possible form. Because the savings clauses in the Constitutions of Trinidad and Tobago and Barbados are still applicable to the pre-Independence laws of these countries, the mandatory death penalty provisions were found to be valid by the Privy Council.

So if, post-Independence, a Caribbean State amends its death penalty law to restrict its broad reach, the law will be struck down, while if the State does nothing to improve the law, the law will remain valid.<sup>90</sup> Though a strict interpretation of the language of each of the relevant Constitutions may require this result, one is inclined to agree with those Privy Council judges who have described this result as “anomalous”<sup>91</sup> or “bizarre.”<sup>92</sup>

---

89. *Matthew v. Trinidad & Tobago*, [2004] UKPC 33, [2005] 1 A.C. 433 (appeal taken from Trin. & Tobago).

90. For a recent assessment of the way capital punishment works in Trinidad and Tobago (from an abolitionist perspective), see ROGER HOOD & FLORENCE SEEMUNGAL, *A RARE AND ARBITRARY FATE: CONVICTION FOR MURDER, THE MANDATORY DEATH PENALTY AND THE REALITY OF HOMICIDE IN TRINIDAD AND TOBAGO* (2006).

91. *See, e.g.*, *Lambert Watson v. The Queen* [2004] UKPC 34, [51], [55], [63], [2005] 1 A.C. 472, 496-97, 501 (appeal taken from Jam.).

92. *See, e.g.*, *Matthew*, [2004] UKPC 33, [69], [2005] 1 A.C. at 470 (Lord Nichols, dissenting).

