

CARIBBEAN PERSPECTIVES ON HUMAN RIGHTS

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I. Introduction

Questions concerning human rights are topical throughout the Caribbean, and constitute an important point of contact between Caribbean and Latin American members of the Organization of American States. As a broad generalization, Caribbean countries, on the one hand, and Latin American countries, on the other, start from different legal positions, with the former relying mainly on common law approaches, and the latter showing deference to the civil law tradition. But there are similarities among the various countries, and there is the possibility that the lessons learnt from one set of countries can help to provide guidance for others. Also, even if we do not believe that human rights must be applied universally, it is clear that some human rights issues arise in similar ways across different cultural and legal traditions. In practice, therefore, it is valuable for lawyers and diplomats from one tradition to consider questions from other traditions both as a means of introspection and as a way of understanding the place of human rights throughout the world.

Still by way of introduction, there is, strictly speaking, no one set of Caribbean perspectives on human rights. In the first place, although the English-speaking countries of the Caribbean share common traditions and broadly similar constitutional structures derived from the Westminster system, they are independent States each with its peculiar internal dynamics and concerns. So, for example, societal perspectives on some human rights issues may turn on the religious orientation in a particular country: the mainly Roman Catholic populace in St. Lucia may arguably approach some issues differently from largely Protestant Barbados. Secondly, even where countries share the common law tradition, they may pursue different approaches to the same problems owing to local circumstances and internal political issues. Different approaches to human rights issues may arise, for example, because of varying degrees of pressure brought by non-governmental organizations to specific problems. Similarly, factors such as the presence of a vibrant and vocal bar association or the politicization of human rights issues may prompt governmental action in some countries while other governments remain unmoved. Thirdly, it should be remembered that even within CARICOM, the main regional integration movement in the Caribbean, countries have different legal systems.¹ In addition to the core of largely common law countries, Guyana has a system that combines Roman-Dutch law and the common law, St. Lucian law includes both common and civil law approaches, while Suriname and Haiti have essentially civil law systems.

But although there are different approaches within Caribbean societies to human rights issues, there is a core commitment to human rights values, at least at the level of legal pronouncements. This core commitment is particularly evident in the Anglophone Caribbean. Each of these countries has a chapter in its constitution dedicated to “Fundamental Rights and Freedoms”, with the list of

¹ CARICOM comprises the Anglophone islands of the Caribbean, Guyana, Belize, Suriname and Haiti. Haiti is currently suspended from the regional grouping.

rights so enshrined being drawn ultimately from the European Convention on Human Rights. Thus, each Commonwealth Caribbean country provides for its citizens, by way of constitutional guarantee, the right to life, freedom from cruel and inhuman treatment, freedom of expression, freedom of thought, conscience and religion, freedom of association, freedom of movement, freedom from arbitrary arrest, the right to a fair trial, freedom from certain types of discrimination and the right to due process of law. At the same time, in most Anglophone Caribbean countries common law protection drawn ultimately from the United Kingdom, and legislative protection provided by local statutes, take into account certain changing perceptions of human rights with the passage of time. As a result, even in some instances where the constitution does not safeguard a particular human right, this right may be provided for by virtue of the common law or under ordinary legislation.

II. The mainstream perspective

These legal arrangements themselves help to explain various human rights perspectives within the Caribbean. To begin with, most Commonwealth Caribbean countries genuinely believe that their laws are consistent with the requirements of human rights. Governments are thus keen to emphasize that they are part of the human rights mainstream, and when they examine the strictures of various treaties on human rights, they may take pride in the fact that the rights recognized in such treaties already appear to be incorporated in domestic legislation. The European Convention on Human Rights is itself largely based on the civil and political rights set out in the Universal Declaration on Human Rights, so that as far as civil and political rights are concerned there is at least general compatibility between the requirements of most Caribbean domestic systems and International Law.

The Caribbean view that local laws are within the human rights mainstream is also supportable by reference to the International Covenant on Civil and Political Rights (the ICCPR). Of the 14 member States of CARICOM, 10 are party to the ICCPR. The four States that have so far remained outside this regime are: Antigua, the Bahamas, St. Kitts-Nevis and St. Lucia. Why have these four countries opted not to ratify the ICCPR? It may be that this is, in some degree, an issue of timing. These four countries attained political independence more recently than some of their counterparts, and so, it may be that they are still giving consideration to aspects of the ICCPR and to the place of the ICCPR in the scale of national priorities. It may also be, however, that having taken the view that their human rights records are strong, these countries feel no compulsion to become party to the ICCPR regime. In addition, these countries, with small, open, underdeveloped economies, may have reservations about certain provisions in the ICCPR that require financial expenditure. In this regard, it is to be recalled that some CARICOM parties to the ICCPR – namely, Barbados, Belize, Guyana and Trinidad and Tobago – have made declarations to the effect that they do not consider themselves obliged to provide compensation for wrongful arrest or to make provision for free legal assistance in keeping with the apparent wording of

the ICCPR. The four countries that have remained outside the regime may share the sensitivities that have prompted these declarations from other CARICOM partners.

The Caribbean view – that local laws are within the human rights mainstream – should not be taken to mean that local laws are support unbridled freedom. To begin with, the same constitutions that set out various fundamental rights also contemplate a number of significant restrictions on the exercise of those rights in practice. To some extent, this is inevitable, for the enjoyment of human rights frequently involves the balancing of individual rights against the collective interest of the society in matters such as peace, good order and security. Human rights also need to be tempered by the idea that freedom to enjoy rights may need to be limited if this enjoyment infringes upon the rights of other persons. That said, however, most Commonwealth Caribbean Constitutions appear to incorporate other concerns. So, for example, with respect to rights such as freedom of movement, freedom of expression, and freedom of assembly and association, the typical constitution, after granting the basic right, indicates that the right may be restricted by law to the extent that this is “reasonably required in the interests of defense, public safety, public order, public morality and public health”.² While some of the collective rights that are used to restrict individual rights are justifiable, others may be open to the criticism: given the vagueness inherent in the notion of “public morality”, should the State always be allowed to place public morality above the rights of the individual?

There is, too, a more fundamental sense in which some Caribbean Constitutions restrict freedom. This follows from the fact that the constitutions of Barbados, Jamaica and Trinidad and Tobago contain “savings clauses” for pre-independence legislation. In summary form, these clauses ensure that no law which was valid before the date of independence from Britain can be struck down as unconstitutional today. They freeze the law as of the date of independence, so that even if a pre-independence law has been overtaken by human rights developments, the law will remain valid. The law cannot be struck down by the courts, and will only lose its effect when Parliament has acted to repeal it. Not only is this approach strongly conservative, it also ensures that the courts play no significant role in assessing the constitutionality of pre-independence legislation. The conservatism inherent in this approach may readily be demonstrated with reference to flogging and whipping in the Caribbean. The United Nations Convention on Torture, Cruel and Inhuman Treatment prohibits this form of punishment. And yet, in a region that should reject flogging and whipping as part of the unwanted legacy of slavery, flogging and whipping may still be constitutional; this is so not least because pre-independence legislation sanctions flogging and whipping, and that legislation is “saved”.

In some cases, the pre-independence savings clause may be restricted; so, for instance, in the case of Belize, laws that predate independence were saved from constitutional scrutiny only for the first five years after independence; now,

² See, e.g., the Jamaican Constitution, Sections 16(3)(a), 22(2)(a)(i), and 23(2)(a)(i).

however, pre-independence laws in Belize may be struck down if they are held by the courts to be inconsistent with basic human rights. It should also be noted that the savings clause does not apply to new legislation even in countries where pre-independence law is preserved indefinitely. In the case of *Lambert Watson v. The Attorney General of Jamaica*, the Judicial Committee of the Privy Council held that the mandatory death penalty, as contemplated by Jamaica, was not preserved by the country's savings clause because the law setting out the mandatory death penalty had been amended following independence. In other words, the savings clause is to be read restrictively, and amendments to pre-independence laws bring the entire pre-independence law within the purview of the courts. Even so, however, the savings clause approach places a significant fetter on the development of human rights law in the Caribbean. As a given society evolves, judges may well wish to consider whether human rights standards also change. The effect of the savings clause is to confine some human rights standards to originalist positions, and to mandate that pre-independence laws are always virtuous until the legislature indicates otherwise in new legislation.

III. Economic and social rights

Caribbean Governments may also argue that they are in the mainstream of human rights developments in matters concerning economic and social rights. The main point in support of this perspective is the fact that nine of the fourteen CARICOM States are party to the International Covenant on Economic, Social and Cultural Rights (ICESCR). The four CARICOM States that have not become party to the ICCPR together with Haiti constitute the five countries that are not party to the ICESCR. It is fair to say, however, that within the Caribbean Region there is some degree of skepticism on the question whether all economic and social rights are actually rights properly so-called. Specifically, the Caribbean tradition, drawn mainly from the common law, has been to regard rights as entitlements that may be enforced within a court of law; thus, for example, freedom of association is clearly justiciable in the courts, and is therefore widely accepted as a human right. In contrast, some economic and social rights (such as the right to employment and the right to social security) may not be cognizable in the courts of the Region, and so, are not regarded as rights properly so-called. This is not merely a terminological debate. Caribbean Governments simply do not have the means to ensure that all citizens have an enforceable claim for some economic and social benefits; it would therefore be pointless for the Governments to argue that all economic and social rights are available. Rather, the approach has been to acknowledge that benefits such as those contemplated under the rubric "the right to employment" are desirable goals of public policy, but they are not regarded as rights. At the same time, however, there is increasing acceptance that some economic and social rights are sufficiently fundamental - and affordable - to have the status of rights; and, as a result, some Caribbean Governments are

prepared to contemplate, for example, that citizens should have an enforceable right to primary education.³

It should be noted, however, that ratification of the ICESCR does not necessarily give rise to a legally binding commitment on Governments to safeguard all the economic, social and cultural rights recognized in that treaty. This is so because Article 2 of the ICESCR sets out a programmatic agenda for its States Parties, reaffirming, in particular, that the rights in this treaty shall be realized progressively, and only to the extent that resources are available to ensure the realization of those rights. A similar approach prevails in the Inter-American context; for, Article 1 of the Protocol of San Salvador requires States to undertake measures to achieve economic and social rights progressively and “to the extent allowed by their available resources, and taking into account their degree of development”.⁴

But although the Protocol of San Salvador is similar to the ICESCR in terms of its non-binding language, and although nine CARICOM countries are party to the ICESCR, only one CARICOM country, Suriname, has ratified the Protocol of San Salvador.⁵ Even taking into account Caribbean skepticism about the legal pedigree of economic and social rights, it is not easy to explain why CARICOM States have remained so firmly outside the scheme in the Protocol of San Salvador. One factor may again be timing: The Protocol was adopted in 1988 (as against the adoption of the ICESCR in 1966); as a result, it is plausible that some Caribbean States have not yet to consider whether it is worthwhile to accede to the Protocol. Secondly, given the similarities between the ICESCR arrangements and the rules contemplated in the Protocol of San Salvador, it is open to conjecture that the CARICOM States have concluded that, as a matter of law, there is little new to be gained from ratifying the Protocol: this would be particularly true for the nine countries that have already ratified the ICESCR.

Thirdly, it is possible that the decision of CARICOM countries to remain outside the regime of the Protocol of San Salvador reflects rather fundamental misgivings concerning the Inter-American scheme for the protection of human rights. There has been no formal statement to this effect by any CARICOM States, but the point bears further exploration. Six CARICOM countries are party to the American Convention on Human Rights, a treaty that sets out the main civil and political rights recognized in the Caribbean.⁶ But, although CARICOM States perceive themselves as adhering to the rights set out in the American Convention, various approaches taken by the Inter-American Commission on

³ The Jamaican Charter of Rights Bill tabled in Parliament in April 2003 refers, for example, to “free tuition in a public educational institution at the pre-primary and primary levels” as a fundamental human right. The Charter of Rights Bill is yet to be passed into law.

⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, adopted November 17, 1988. For a listing of States Parties to the Protocol of San Salvador, see, e.g., Organization of American States, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser. L/V/I.4 Rev. 9, 31 January 2003, p. 85.

⁵ Suriname acceded to the Protocol of San Salvador in July 1990. 12 countries in the Inter-American region have ratified this treaty.

⁶ American Convention on Human Rights, “Pact of San Jose, Costa Rica”, adopted 22 November 1969. For a listing of parties to this treaty, see, e.g., Organization of American States, *loc. cit.* note 5. p. 56.

Human Rights – established under the American Convention – have not been favourably received by Caribbean Governments. This has been especially true with respect to death penalty matters, where the complaint from the Caribbean is that the Inter-American Commission does not understand the challenges faced in the Region with respect to violent crime and murder. To this criticism, Caribbean Governments are also inclined to add that the membership of the Commission is heavily skewed against the Caribbean States, so that there is little scope for sensitivity on the Commission to regional concerns. Against this background, there may be little surprise that CARICOM Governments have been unprepared to adhere to the Protocol of San Salvador. They believe that the American Convention has not served their interests, and assume that the same would be true with respect to the Protocol.

IV. Implementing legislation

Generally speaking, Caribbean perspectives on human rights are largely influenced by perceptions of what the law requires. In this regard, however, some care needs to be taken in identifying what the relevant law happens to be for a particular case. As noted above, most CARICOM countries are parties to the ICCPR, and in their constitutional rules show deference to the strictures of the ICCPR, at very least. Some, too, are parties to the ICESCR and to the American Convention. It should not be assumed, however, that treaty provisions setting out human rights standards are automatically binding within Caribbean societies. On the contrary, with respect to the common law countries of the Region, treaty rules are not a part of the domestic legal system unless and until they have been formally incorporated into the local system by an Act of Parliament. In short, the common law countries of the Caribbean – which constitute the vast majority of CARICOM member States – follow the dualist model concerning the relationship between treaty law and municipal law. Within this model, judges in the municipal sphere may have occasion to refer to treaty law as an aid to the interpretation of a local statute; but, where the local statute does not expressly incorporate a treaty right into domestic law, the treaty right is not available for the benefit of domestic litigants.

This point is not merely of academic significance. In several instances, countries have ratified human rights treaties, including the ICCPR and the American Convention, but have taken no further measures to bring these treaties into the *corpus* of domestic law. Usually, as noted above, the Caribbean Government concerned will argue that there is no need to take additional steps to incorporate these treaties because the rights in question are already a part of the domestic law. In many instances, this will be true, but sometimes the existing rules in domestic law do not capture the nuances of particular treaty provisions. Moreover, with respect to some treaties, the claim that local law already incorporates the relevant treaty provisions is unsustainable. One example of this concerns the 1951 Refugees Convention and its 1967 Protocol (together, “the Refugees Convention”). Among other things, the Refugees Convention makes provision for the right of *non-refoulement* for persons who satisfy the definition

of a refugee in the Convention. Even with respect to those Caribbean countries that are party to the Refugees Convention, however, one would be hard-pressed to find the right of *non-refoulement* in the domestic legislation of CARICOM countries. Similarly, although some CARICOM countries ratified the four Geneva Conventions on humanitarian law several years ago, the record of implementation of these treaties in domestic law has not been impressive.

The question naturally arises: if Caribbean Governments wish to have themselves regarded as being in the mainstream of human rights law, why have they not been more rigorous in passing implementing legislation after they have ratified particular human rights treaties? There is no single answer to this question. As already mentioned, in some cases the argument will be that further implementing legislation will be superfluous as the rights are already safeguarded in domestic law. But other factors may also be mentioned. For a start, there may well be some degree of inertia within some Caribbean governmental structures, prompted by the view that the State is not apt to abuse human rights, so there is no need to move quickly to pass domestic legislation. Critics of individual Caribbean Governments are also apt to argue that the practice of ratifying treaties without implementing them in domestic legislation is deceptive: it represents, in the view of the critics, an attempt by the Government to attract the kudos for ratifying the treaties, when in fact the Government has no intention of giving effect to the treaties. On a more sympathetic note to Governments, the failure to pass implementing legislation in some cases is largely the result of limited capacity. Where there is a small legal staff assigned to draft legislation, as is often the case in the Caribbean, it will be difficult for priority to be given to the preparation of implementing legislation when competing legislative demands may be perceived as more urgent.

Two other dimensions of the situation may be briefly considered. In the first place, CARICOM States are not alone in the practice of ratifying treaties without bringing them into local law in good time. In some jurisdictions, such as the United States of America, the process of ratification of a treaty will normally include consultations between the Executive and the Legislature, and, consequently, when the treaty is ratified it may automatically become domestic law. In the common law jurisdictions of the Caribbean, however, the ratification of a treaty is an act of the Executive, with no input being required from the Legislature as a body. From the point of view of democratic theory, this is regarded as undesirable by some analysts: the argument is that the treaty (when implemented) will have implications for the rights and duties of citizens, so, as with other laws, treaty-based laws should be brought before the Legislature in each Caribbean country before the country commits itself to the binding treaty obligation. This recommendation is readily supportable, although in practice it may mean that Caribbean countries will move more slowly to ratify human rights and other treaties in the future.

Secondly, in the present discussion, emphasis has been placed on the relationship between treaties and domestic law, and no mention has been made of other formal sources of international law, namely, customary law and general

principles of law.⁷ This is deliberate. As a source of international law, custom continues to play a significant role in influencing State behaviour in the area of human rights, and Caribbean States as a whole have not voiced any systematic opposition to the place of custom. Clearly, therefore, customary rules will help to identify obligations of Caribbean States at the international level; and this will remain true even for those countries that have ratified the ICCPR and other treaties on human rights, for treaty law does not automatically displace customary law in particular spheres of activity.

The question here, however, concerns the relationship between customary law obligations of each Caribbean State at the international level and the applicability of those obligations in municipal law. Are customary international law obligations binding in local law? This question does not readily permit a short answer, not least because there appear to be conflicting common law authorities from the distant past in the United Kingdom. But two tentative conclusions may be offered. For one thing, the constitutions of Anglophone Caribbean countries do not expressly incorporate customary international law as a source of national law; and because this could have been done, but it was not, it provides an *a contrario* argument to the effect that customary international law is not automatically a part of the law in the vast majority of Caribbean States. And for another, the courts in Caribbean common law jurisdictions have not treated customary international law automatically as a part of municipal law. On the contrary, the courts have consistently assumed, apparently as a matter of course, that rules of customary law operate at the international level and do not become part of binding domestic law unless the customary rule is expressly incorporated by local legislation.

As to “general principles of law recognized by civilized nations”, the matter is more straightforward. Municipal law courts in the Caribbean may well take into account some general principles in reaching their decisions; but they do so, not because these general principles are part of international law and thus binding on within Caribbean jurisdictions. Instead, if municipal law courts apply general principles of law, they do so because these general principles are a part of the common law, and fully recognized as such by virtue of long usage. For example, if a Caribbean court applies the concept of estoppel today, the court is likely to trace this approach ultimately to the common law line of cases from the United Kingdom linked to the *High Trees* decision by Denning J. (as he then was). No thought – or hardly little thought – will be given to the fact that the concept of estoppel has also found its way into the jurisprudence of the International Court of Justice, in the *Temple Case*, for instance.

The upshot is that Caribbean States may be regarded as having a rather clear line of demarcation between international obligations, on the one hand, and domestic obligations, on the other. Each State has its international obligations defined mainly by treaties it has ratified and by prevailing customary law rules; but these obligations do not automatically identify the commitment of each government to its citizens at the municipal law level. In considering Caribbean

⁷ Statute of the International Court of Justice, Article 38(1)(b) and (c).

perspectives in human rights matters, therefore, attention needs to be paid to both international and domestic commitments, before reasonable conclusions may be drawn.

V. Particular issues

In assessing Caribbean perspectives on human rights, it is also necessary to consider some of the main human rights issues of interest within the CARICOM Region. This discussion will also enable us to consider more fully how the broad commitments accepted by Caribbean States largely through treaties and in customary law are applied in practice in the domestic sphere, and provide some insight into the perspective taken by various Caribbean Governments on a number of controversial matters. The discussion will consider three particular human rights questions, namely, (a) the death penalty, (b) abortion and (c) the International Criminal Court.

a. The death penalty

The common law countries of the Caribbean retain the death penalty for some types of murder. This fact has come to be one of the primary issues for critics of the Caribbean approach to human rights. Not only has it prompted significant criticism within the sphere of the Organization of American States, it has also opened the Caribbean to accusations of uncivilized behaviour and even barbarity. What, though, is the perspective of Caribbean Governments on the question of the death penalty?

As a political matter, Caribbean Governments take the view that the death penalty is a necessary component in their attempts to restrain the level of murder and violent crime within the Region. This, of course, presupposes that the death penalty serves as a deterrent to murder, a point not usually conceded by opponents of this form of punishment. But Caribbean Governments are also in a position to point out that their overall perspective on the death penalty is strongly supported by most residents of the Region. Whether the majority in the Caribbean supports the death penalty out of fear or whether the majority perspective is derived from a rational assessment of local needs and conditions is a matter of continuing debate. The point here, however, is that majority sentiment, across significant sections of Caribbean society, tends to be strongly in favour of the death penalty at this time. This is not to say that abolitionists are inactive; indeed, some of the strongest advocates of human rights in the Caribbean have been especially prominent in their opposition to the ultimate sanction. But the point remains: any Caribbean Government that seeks to overturn the death penalty at this time would be courting a serious, highly damaging political backlash. This reality helps to explain why some political leaders who harbour misgivings about the death penalty on moral grounds have not brought themselves to the point of supporting legislation against the sentence.

As a legal matter, Caribbean Governments have consistently maintained that the death penalty, properly carried out, is compatible with both binding treaty law and customary international law. On the question of treaty law, Caribbean Governments point to the language in Article 6 of the ICCPR. Article 6, which safeguards the right to life, also stipulates that in countries which have not abolished the death penalty, the sentence may be implemented as long as certain conditions are met. Thus, the sentence of death may be imposed “only for the most serious crimes”, must not be applied retrospectively, must not be undertaken in a manner contrary to the provisions of the ICCPR or the Genocide Convention, and must be done only pursuant to the final judgment of a competent court.⁸ In addition, Article 6 requires the State to allow pardon and commutation of sentences, notes that amnesty, pardon or commutation may be granted in all cases,⁹ and prohibits the execution of persons who were below 18 years of age at the time they committed the crime in question.¹⁰ The penalty shall not be carried out on pregnant women.¹¹ Article 6 also indicates that “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party”,¹² language which could be said to encourage abolition of the sentence, but which also indirectly confirms that Article 6 does not itself bar the death penalty. The approach taken in Article 6 of the ICCPR is also generally reflected in Article 4 of the American Convention, although the latter provision prohibits the imposition of the death penalty in some circumstances not barred by the ICCPR.¹³

Caribbean Governments also share the view that capital punishment is not contrary to customary international law. To support this proposition, reference is made to the fact that at least one-half the countries in the world still provide for the death sentence for specified crimes: for Caribbean Governments, this fact alone suggests that neither the generality of practice nor the *opinio juris* is present for the formation of a custom against the death penalty. In addition, Caribbean Governments may note that the United States and China, among other countries that are likely to have significant weight in the assessment of whether a custom exists, retain the death penalty for certain crimes. Moreover, the fact that most countries have refrained from acceding to the Second Optional Protocol to the ICCPR should also have some bearing on whether the death penalty is contrary to customary law. The Second Optional Protocol is expressly aimed at the abolition of the death penalty: the limited support it has received from States to date sharply undermines the idea that non-parties perceive themselves as prohibited from applying the death penalty in practice. The limited support also prevents scope for the view that the rules in the Second Optional Protocol have crystallized into

⁸ ICCPR, Article 6(2).

⁹ Article 6(4).

¹⁰ Article 6(5).

¹¹ *Id.*

¹² Article 6(6).

¹³ For example, Article 4(2) of the American Convention prohibits the application of the death penalty to crimes which were not subject to that punishment at the time the Convention was prepared. Article 4(4) also expressly prohibits capital punishment for “political offenses or related common crimes”, while Article 4(5) bars the imposition of the death penalty on persons who were over 70 years of age at the time of the commission of the crime.

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norms of customary law. By parity of reasoning, the fact that only eight countries in the Inter-American region have become parties to the Protocol to the American Convention on Human Rights to Abolish the Death Penalty¹⁴ reinforces the idea that there is no customary rule prohibiting the death penalty, whether internationally or within Inter-American region alone.

Nevertheless, several States continue to argue that the death penalty should be prohibited as a matter of international law, and in recent years the United Nations Commission on Human Rights has passed resolutions calling on all States to suspend the death penalty and to consider completely abolishing the sentence. Amnesty International, too, has been relentless in its criticism of the death penalty, and various Governments – largely member States of the European Union - have been prepared to provide funding to human rights groups in the Caribbean in the hope that these groups can influence local perspectives in the direction of abolition. Critics of the death penalty are also apt to point out that the Rome Statute of the International Criminal Court – a recent, authoritative statement on aspects of human rights – does not contemplate capital punishment, even for the most egregious crimes. These considerations, together with the fact that the United Nations Human Rights Committee and the Inter-American Commission on Human Rights appear to be opposed to the death penalty as a matter of principle, suggest that the weight of international opinion is moving significantly against the approach retained by Caribbean Governments.

But a mere restatement of current international perspectives on the death penalty would not provide a full picture of the situation in the Caribbean. For, although Caribbean Governments maintain that the death penalty is permissible, there have been fewer than ten executions in the CARICOM Region in the last decade. This apparently paradoxical situation has arisen at least partly as a result of the decision of the Judicial Committee of the Privy Council in the controversial case of *Pratt and Morgan v. The Attorney General of Jamaica and the Superintendent of Prison, St. Catherine, Jamaica*.¹⁵ In *Pratt and Morgan*, the Judicial Committee of the Privy Council held that in death penalty cases whenever the period from sentencing to the date of execution exceeds five years, it is to be strongly presumed that the execution would be inhuman or degrading punishment or treatment, and thus contrary to domestic constitutional law. This decision, which is binding in significant respects on all Commonwealth Caribbean States except Guyana, has been reinforced by a number of other Privy Council decisions, including the case of *Neville Lewis et al v. The Attorney General of Jamaica and the Superintendent of St. Catherine District Prison*.¹⁶ At the risk of oversimplification, the result of this line of cases is that as long as five years have elapsed between the delivery of the sentence of death by the competent court and the actual execution, the convicted person shall have his sentence of death commuted to life imprisonment.

¹⁴ Adopted at Asuncion, Paraguay, June 8, 1990. The States Parties are: Brazil, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay and Venezuela.

¹⁵ (1993) 30 JLR 473).

¹⁶ (2000) 3 WLR 1785.

The *Neville Lewis Case* also stands for two other important propositions, namely, (a) that persons to be executed must be allowed legal representation when his or her case comes before the local mercy committees, and (b) that whenever a convicted person in a death penalty case has petitioned an external human rights agency, the State must await the recommendation of the external agency before carrying out the execution. Proposition (b) has had significant bearing on death penalty practice in the Caribbean, and merits further consideration.

By virtue of *Pratt and Morgan* and *Neville Lewis*, among other decisions, the State will have five years in which to complete the entire appellate process for persons convicted of murder. This appellate process will include not only appeals on the question of liability for murder, it will also include constitutional motions, and appeals on constitutional questions. In addition, it will include petitions from convicted persons to the Inter-American Commission on Human Rights and, where the country is party to the First Optional Protocol to the ICCPR, petitions to the United Nations Human Rights Committee. Against this legal background, CARICOM countries have argued individually and as a group that it is difficult, if not impossible, to meet the five-year time period required by the Judicial Committee of the Privy Council for executions to be carried out. These countries have further suggested that the net effect of the approach required by the Judicial Committee of the Privy Council could be the abolition of the death penalty in practice.

When all factors are taken into account, there is at least some support for the perspectives of the Caribbean Governments on this issue. Consider, in particular, Proposition (b) above, that the State must await recommendations from external agencies before carrying out executions. If the external agency is opposed to the death penalty, for philosophical or other reasons, it may well be inclined not to reach its position on individual petitions with any degree of celerity; for, the longer the external agency takes to complete its deliberations on an individual petition, the greater will be the likelihood that the five-year limit will be exceeded. The Judicial Committee of the Privy Council has been aware of this possibility, and suggested in *Pratt and Morgan* that in calculating the five-year time period, it had assumed that approximately 18 months would be needed to complete petitions to external agencies.¹⁷ Roughly speaking, we may take that to mean about 18 months for petitions to both the Inter-American Commission on Human Rights and the United Nations Human Rights Committee, or nine months for each agency. Jamaica has recently undertaken a study of the time period taken by the Inter-American Commission on Human Rights with respect to the 18 death penalty cases fully heard by the Commission in the period between 1993 and 2003. In none of these 18 cases were petitions heard and fully considered within nine months. The shortest time period for any of the 18 cases was one year, while the longest was 3 years, 5 1/2 months. Seven of the cases lasted for more than two years before the Inter-American Commission on Human Rights. If the

¹⁷ In a subsequent case, *Thomas v. Baptiste* ((1993) 3 WLR 249), the Judicial Committee of the Privy Council mentioned that, with hindsight, the 18-month period suggested in *Pratt and Morgan* may have been unduly optimistic: at p. 264. Nothing has been done, however, to change the five-year time period, which incorporates the assumption that 18 months is adequate.

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Jamaican situation before the Inter-American Commission is used as a guide, it is unlikely that the five-year limit can be met in practice. Moreover, it does not matter whether or not delay in these cases was caused by the Jamaican Government: the point is that the internal processes of the Inter-American Commission allow petitions to be heard over a period of time that is broadly incompatible with the overall five-year period allowed for consideration of death penalty cases.

Still with reference to Proposition (b), Jamaica withdrew from the First Optional Protocol to the ICCPR with effect from January 1998.¹⁸ The Jamaican Government's perspective at the time was that it could not meet the five-year limit arising from *Pratt and Morgan*, and simultaneously have petitions heard by both the Inter-American Commission and the United Nations Human Rights Committee. In withdrawing from the First Optional Protocol, therefore, Jamaica was simply trying to meet obligations arising in its domestic law concerning the death penalty. Withdrawal was not intended as a statement about Jamaica's attitude to human rights in general. The Jamaican action was criticized, however, because it gave the impression that the country was trying to shield itself from the sunlight of the Human Rights Committee. In order to avoid this criticism, but to meet the requirements of *Pratt and Morgan*, the Government of Trinidad and Tobago sought to withdraw from the First Optional Protocol only with respect to matters concerning the death penalty.¹⁹ This approach (also taken by Guyana) faced opposition from various countries, and in *Kennedy v. Trinidad and Tobago*,²⁰ the United Nations Human Rights Committee found that the Trinidadian effort was contrary to the provisions of the First Optional Protocol. As a result, Trinidad and Tobago, like Jamaica, withdrew from the First Optional Protocol, and Trinidad and Tobago took the additional step of withdrawing from the American Convention on Human Rights.²¹

This set of circumstances gives fuel to the argument that international human rights bodies do not fully appreciate, or are not sensitive to, realities in the Caribbean. If the international agencies had paid closer attention to the terms of the domestic law on the death penalty within Commonwealth Caribbean States, it is quite possible that both the Inter-American Commission and the Human Rights Committee could have kept several CARICOM States within their purview and could also have attracted some of the newer States to both human rights schemes. Instead, owing at least in part to insensitivity to Caribbean concerns about the death penalty, the only parties to the First Optional Protocol to the ICCPR are

¹⁸ Ministry of Foreign Affairs and Foreign Trade, Jamaica, Ministry Paper No. 34/97, Jamaica's Withdrawal from the Optional Protocol to the International Covenant on Civil and Political Rights, October 28, 1997.

¹⁹ Trinidad and Tobago sought to withdraw from the First Optional Protocol to the ICCPR and then to re-accede to that treaty with a reservation concerning death penalty issues: see Ministry of Foreign Affairs, Republic of Trinidad and Tobago, Notice to Denounce the Optional Protocol to the International Covenant on Civil and Political Rights, 26 May 1998, and 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, 26 May 1998, reprinted in *Human Rights Law Journal*, Vol. 20, No. 4-6, pp. 280-281.

²⁰ Communication No. 845/1999, UN Doc. CCPR/C/67/D/845/1999, 31 December 1999.

²¹ Trinidad and Tobago denounced the American Convention on May 26, 1998; its denunciation took effect one year later.

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Barbados, Guyana, St. Vincent and Suriname.²² And, as noted above, although six CARICOM States are party to the American Convention, these countries and their CARICOM counterparts have been slow to ratify the Protocol of San Salvador largely because they believe that those responsible for Inter-American human rights monitoring are insensitive to CARICOM concerns.

Finally, because CARICOM Governments perceive the Inter-American Commission and the Human Rights Committee as insensitive to domestic concerns, they have probably not been anxious to give due deference to recommendations from either agency. Thus, even where either Inter-American Commission or the Human Rights Committee offers sound recommendations on domestic issues, there is a body of local opinion that is inclined to resist those recommendations: neither agency understands the Region, it is argued. This has had the unfortunate effect of limiting the impact that, say, the Commission could have in matters such as police killings in Jamaica. To be sure, the problem of police killings has several dimensions, but at least in some instances there is evidence that police in Jamaica have willfully taken the lives of others in circumstances that could amount to murder. On one view, police killings are one manifestation of the breakdown of law and order in Jamaican society, and they must be seen in light of the grave dangers facing police officers in their daily activities. On another, police killings reflect that fact that the State has been negligent in monitoring police abuses, or that the State has not acted with determination to solve the problem. In these circumstances, if the members of society perceive the Inter-American Commission to be an honest broker, the Commission could contribute to the resolution of the problem. But, as long as the Commission may be portrayed as insensitive to domestic concerns, its impact will be limited.

b. Abortion

In most Anglophone Caribbean countries, the law concerning abortion is governed by the Offences against the Person Act, inherited from the colonial period. Thus, although Caribbean Governments have shown awareness of the liberal approach to abortion matters, as reflected in the American case of *Roe v. Wade*²³ and its progeny,²⁴ most Caribbean jurisdictions do not regard abortion issues as matters concerning privacy rights. In fact, even in those Caribbean

²² Of these countries, Barbados amended its constitution in order to ensure that death penalty convictions do not need to be commuted if five years have elapsed between the date of sentencing and execution: that is, the Barbadian legislature has overturned the effect of the *Pratt and Morgan* ruling. Guyana is not subject to decisions of the Judicial Committee of the Privy Council but has, in any case, sought to withdraw from the First Optional Protocol with respect to death penalty matters. Suriname is not subject to the Judicial Committee of the Privy Council and is clearly not bound by the restrictions in *Pratt and Morgan*. St. Vincent, which is not a party to the American Convention, has joined other CARICOM countries in criticizing the situation that has arisen as a result of the *Pratt and Morgan* decision.

²³ 410 U.S. 113 (1973).

²⁴ From the extensive and growing list of cases, see, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

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countries, such as Barbados, that have moved away from the colonial approach,²⁵ abortion is treated not as a constitutional law issue in which the right to privacy is weighed against the right to life: rather, abortion remains a matter of ordinary legislation in which considerable weight is attached to medical opinion concern the health of the mother and the viability of the foetus.

The provisions of the Offences against the Person Act that govern abortion in most Caribbean countries appear draconian. In language that is replicated in the laws of various countries, Section 72 of Jamaica's Offences against the Person Act reads as follows:

“Every woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with like intent... shall be guilty of felony, and, being convicted thereof, shall be liable to be imprisoned for life, with or without hard labour”.

This provision appears to contemplate life imprisonment for abortion, and it makes no exceptions for circumstances concerning the mother. So, for example, if an abortion is undertaken following the rape of a mother, or if an abortion is necessary to preserve the life of the mother, neither case will be legally justifiable. Provisions of the Offences against the Person Act also ensure that doctors or other persons participating in procuring the miscarriage will be subject to serious criminal charges.²⁶ The law as stated in the Offences against the Person Act would readily support the assumption that Caribbean Governments maintain a strong position against abortion, and are prepared to impose harsh penalties on those who violate the law, even in cases that require sympathetic consideration for the plight of the mother.

It is important, however, to qualify this conclusion. To begin with, the provision of the Offences against the Person Act quoted above is rarely, if ever, used in the Caribbean. The harshness of the language may well serve to deter some women inclined to consider abortion, but, in practice, cases are hardly ever brought before the courts. Secondly, the language quoted above needs to be considered against the background of principles of statutory interpretation applied in the Anglophone Caribbean. Where the provision refers to imprisonment “for life”, this is actually a statement of the maximum sentence that may be imposed for the crime – a stiff maximum limit, no doubt, but significantly different from the idea that all acts of procuring a miscarriage will lead to the mandatory sentence of life imprisonment.

Thirdly, it would be an exaggeration to suggest that the language of the Offences against the Person Act reflect majority sentiment in the Caribbean today. True, there is intensity of feeling on both sides of the debate on abortion in the Caribbean, as elsewhere; but the view that all abortions, in all circumstances,

²⁵ See the Medical Termination of Pregnancy Act (Barbados); generally, see Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions* (1992), pp. 126-130.

²⁶ Sections 72 and 73, Offences against the Person Act (Jamaica).

should give rise to imprisonment for mothers and medical doctors in all cases is probably not widely shared. Why, then, has the law been allowed to remain in place even in the post-independence period? One possible explanation is that governments are reluctant to tackle an issue as divisive as abortion at a time when there are no easy compromise solutions. Moreover, the government perspective may well be that it is not necessary to change the statutory law on abortion given that changes have already been brought about through the common law process of judicial interpretation. More specifically, the sharp language of the Offences against the Person Act has been read in a more sympathetic light in a line of cases from the United Kingdom beginning with *R v. Bourne* in 1939.²⁷ In *R v. Bourne*, Macnaghten J. noted that the English Offences against the Person Act prohibited persons from acting “unlawfully” and concluded that this implied that there are lawful ways of procuring a miscarriage.²⁸ For Macnaghten J., lawful ways included the procurement of an abortion to preserve the life of the mother. Cases following *Bourne* have extended the category of lawful termination of pregnancy to those required to preserve the mother’s health, including her mental health.²⁹ Governments in countries that retain the Offences against the Person Act may believe that the stringent abortion law has been amended by the courts in a manner that is not directly controversial, but which reflects a fair balance among the different perspectives on abortion. This may be so, but reliance on judicial interpretation in this situation is not without its problems: in particular, the law is somewhat uncertain, with there being no guarantee that a judge in some future case will rely on the reasoning of Macnaghten J. offered in a case from before World War II, long ago and far away.³⁰

The Inter-American Commission has had occasion to consider some aspects of the abortion question in the *Baby Boy Case*,³¹ concerning the proper interpretation of Article 4(1) of the American Convention. Article 4(1) enjoins respect for the right to life and stipulates that this right shall be protected “in general, from the moment of conception”. A majority of the Commission concluded that this form of words did not prohibit abortion in all circumstances, for Article 4(1) represented a compromise among States that had laws permitting abortion and those which did not. For the majority, the phrase “in general” was taken to permit the possibility of lawful abortions in cases of rape or to save the mother’s life, among other things.³² Whether or not this is an artificial reading of Article 4(1) is not the point for consideration today. Rather, the point is that although six CARICOM countries are party to the American Convention, neither the language of Article 4(1) nor the interpretation offered in the *Baby Boy Case* has played a noticeable role in the abortion debate in the Caribbean. If anything,

²⁷ (1939) 1 KB 687.

²⁸ Section 58 of the English Offences against the Person Act, considered by MacNaghten J. has been restated verbatim in the relevant Caribbean legislation.

²⁹ See, e.g., *R v. Newton and Stungo* (1958) Criminal Law Review p. 469.

³⁰ The validity of *R v. Bourne* has also been weakened by comments by Lord Diplock in *Royal College of Nursing of the United Kingdom* (1981) 1 All ER 545, a decision of the British House of Lords.

³¹ *Human Rights Law Journal*, Vol. 2, No. 1-2 (1981), p. 110.

³² The words “in general” were reportedly incorporated into Article 4(1) on the recommendation of the Inter-American Commission on Human Rights in 1966: see Colon-Collazo, “The Drafting History of Treaty Provisions on the Right to Life: A Legislative History of the Right to Life in the Inter-American Legal System”, in Ramcharan (ed.), *The Right to Life in International Law* (1985), p. 33 at p. 39.

this reinforces the view that on matters of great interest to the Caribbean polity, the Inter-American Commission does not carry much weight in local deliberations. For the sources of influence in the local abortion debate, reference has to be made instead to domestic religious conceptions, social circumstances, cultural perspectives and, arguably, the role of the intelligentsia in influencing political viewpoints.

c. The international criminal court

The Rome Statute establishing the International Criminal Court is not always perceived as a human rights treaty, given its provenance in the realm of humanitarian law. In effect, however, this treaty is about human rights, and in particular, about the promotion and protection of human rights in the context of conflict and the use of force. Of course, the Hague Conventions, as well as the Geneva Conventions and Protocols both promote the application of humanitarian principles during times of war, and undermine Cicero's premise that the law is silent amidst the clash of arms (*inter arma silent leges*). The Rome Statute builds on this tradition by ensuring that individuals involved in conflict situations cannot act with impunity: thus, the Rome Statute provides clearly for the imposition of sanctions upon persons involved in war crimes, crimes against humanity and genocide, three areas which have not fallen consistently within the reach of international law. The three heads of jurisdiction recognized in the Rome Statute may help to influence the behaviour of political leaders and military agents in times of conflict, and to that extent, may serve as important components in the international protection of human rights.

Generally speaking, CARICOM Governments are inclined to support the Rome Statute. Five CARICOM States have ratified the convention, and these countries are in the process of putting their implementing legislation into place. Trinidad and Tobago, which made an earlier proposal to the United Nations on the establishment of an international criminal court, has reached an advanced stage in this legislative process, while others are considering the terms of the Rome Statute against the requirements of national law on questions such as double jeopardy and the role of the Director of Public Prosecutions. Jamaica has signed the Rome Statute, but is yet to complete domestic aspects of the ratification process.

But although CARICOM Governments support the International Criminal Court, there has been no extensive debate involving the peoples of the Region about the nature of the new court. It may well be that court schemes, by their very nature, are not likely to generate considerable public attention, though given the debate in some CARICOM countries about the Caribbean Court of Justice, this point is at best arguable. The relatively low level of interest about the International Criminal Court may also be influenced by Caribbean self-perception. More particularly, with the exception of Haiti (which is widely perceived to be unique within the Caribbean), CARICOM member States have been spared substantial civil unrest since independence. Grenada had a much-publicized period of turmoil, giving rise to United States intervention in 1983, and

there has been serious election violence and loss of life for political reasons in Jamaica and Guyana but, in the main, CARICOM has not been an area in which war crimes, crimes against humanity and genocide are prevalent. For this reason, the International Criminal Court tends to be viewed by Caribbean people as an institution whose work will come mainly from other parts of the world: the Court is worthy of support, but it is hardly a matter of urgency for conditions in the Region.

This shared perspective may need to be qualified in one respect. As is well-known, the United States Government has adopted a strong position against the International Criminal Court, essentially on the basis that the Rome scheme could give rise to politically motivated prosecutions against American personnel. In giving effect to its opposition to the Court, the United States administration has sought to complete a series of bilateral immunity agreements (“Article 98 Agreements”) with various countries. In broad outline, each Article 98 Agreement provides a guarantee to the United States that American service members and military contract workers will not be exposed to prosecution before the International Criminal Court. State parties to the Rome Statute have therefore been encouraged to enter into Article 98 Agreements, and failure to complete such an agreement is likely to give rise to sanctions under American law, pursuant to the American Servicemembers Protection Act and related initiatives. Some Caribbean Governments have reacted negatively to the American approach. For these countries, American insistence on immunity from the Court and its decision to support this insistence with sanctions amounts to unwarranted pressure on small, friendly countries. It is to be noticed, however, that after an initial period of negative reaction to the American position, the question of Article 98 Agreements has lost some of its political intensity.

The situation concerning Article 98 Agreements also tends to highlight the fact that on some issues CARICOM Governments may be between Scylla and Charybdis. On the one hand, the American Government wishes to have an agreement in place with each CARICOM State. On the other hand, European Union countries are quite strongly supportive of the Rome Statute, and have suggested that some aspects of the typical Article 98 Agreement may be incompatible with the Rome Statute. These European Union countries, together with a number of non-governmental organizations, have actively encouraged CARICOM States to ratify the Rome Statute (presumably without entering into Article 98 Agreements). The CARICOM Governments have been called upon to play in a delicate political game – in light of this, some CARICOM Governments have apparently adopted a policy of *festine lente* with respect to the International Criminal Court and Article 98 Agreements.

VI. Conclusion

The theoretical debate on human rights pays considerable attention to whether, and to what extent, we may perceive human rights as universal entitlements held by all peoples, wherever in the world they may be. In practice,

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however, people from different parts of the world have differing perspectives on the meaning of particular human rights and on the way human rights are to be applied within individual societies. This observation applies with as much force for the Caribbean as it applies elsewhere. In general, CARICOM Governments hold themselves out to the world as supporters of fundamental human rights and freedoms. Particularly with respect to the Anglophone Caribbean, the prevailing attitude among the respective governments is that Caribbean citizens enjoy the full range of civil and political rights contemplated by the Universal Declaration of Human Rights and other international human rights instruments. Throughout the Region, there is some degree of skepticism concerning whether economic and social rights amount to entitlements that may be enforceable in court, but this does not detract from the idea that economic and social advancement are desirable goals for public policy.

While there is no one perspective within the Caribbean about a range of human rights questions, some Caribbean Governments appear to share the view that their good human rights record is insufficiently appreciated by the rest of the world. Thus, Anglophone Caribbean Governments feel that their perspective on the death penalty has been treated superficially by international human rights agencies, with these agencies being unnecessarily insensitive to the realities of life in the Caribbean. Also, although CARICOM Governments and people within the Region are not parochial in their attitudes to social issues such as abortion, they are strongly inclined to resolve those issues domestically, and on their terms. This pattern is especially evident when reference is made to the Inter-American Commission on Human Rights; for, in respect of abortion, little attention has been paid within the Caribbean to the approach advanced by the Commission on this inherently controversial question.

Finally, some human rights issues, though important for diplomatic reasons, have not been of great interest to Caribbean people as a whole. The attitude within the Region to the question of ratification of the Rome Statute establishing the International Criminal Court exemplifies this point. To be sure, the American approach to Article 98 Agreements has stimulated some sentiments of national pride and political pronouncements in defense of sovereignty, but in the main the Caribbean Street has not embraced the International Criminal Court as a cause that requires passionate support.

