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Courts of Appeal and Colonialism in the British Caribbean: A Case for the Caribbean Court of Justice

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NOTE

**COURTS OF APPEAL AND COLONIALISM
IN THE BRITISH CARIBBEAN:
A CASE FOR THE CARIBBEAN
COURT OF JUSTICE**

*Ezekiel Rediker**

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INTRODUCTION

In recent years, a public debate on law and the colonial legacy has engaged people of all walks of life in the English Speaking Caribbean

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(ESC), from judges and politicians to young people in the streets. Throughout the ESC, the Judicial Committee of the Privy Council (JCPC)—based in London and composed of British jurists—has been the highest court of appeal since the colonial era.¹ In the past decade, however, Caribbean governments have sought greater control over their legal systems. In 2005, they created the Caribbean Court of Justice (CCJ) to supplant the British Privy Council as the Supreme Court for English-speaking Caribbean nations.² To date, three countries—Barbados, Belize, and Guyana—have replaced the Privy Council with the Caribbean Court of Justice. Although the Caribbean Court of Justice was originally proposed and funded by Jamaica and Trinidad, their governments have yet to accept it, and the JCPC still functions as their final court of appeal.³ Numerous governmental debates have recently brought the issue to the forefront of political discourse. The question of whether to jettison the JCPC—and adopt the Caribbean Court of Justice—in the ESC has raised questions about the imposition of capital punishment, issues of self-determination, national politics, and human rights obligations. In short, the court system has become a lightning rod for issues of national identity.

The British ruled the ESC as a colonizing power for over four hundred years, beginning in the 17th century. During this time, the British imposed their model of common law.⁴ The colonial power freely used corporal punishment and the death penalty to maintain discipline—and profits—in the cane fields and sugar mills. Slaves were imported by the millions to toil on the sugar plantations of the Caribbean.⁵ A highly stratified society of

1. See *History*, JUD. COMM. OF THE PRIVY COUNCIL, available at <http://www.jcpc.gov.uk/about/history.html> (last visited June 23, 2013) (“The jurisdiction of the Privy Council originated at the Norman conquest with the premise that: ‘The King is the fountain of all justice throughout his Dominions, and exercises jurisdiction in his Council, which act in an advisory capacity to the Crown.’ . . . Appeals from the Channel Islands became the first regular appellate business of the King’s Council, now the Judicial Committee of the Privy Council. With the growth of the British empire, this business increased with appeals and petitions from the Royal Council, and Privy Council Committees were formed”).

2. *The Caribbean Court of Justice*, CARIBBEAN COMMUNITY (CARICOM) SECRETARIAT, <http://www.caricom.org/jsp/community/ccj.jsp?menu=community> (last visited Oct. 10, 2013) (“The Caribbean Court of Justice (CCJ) is the regional judicial tribunal established by the ‘Agreement establishing the Caribbean Court of Justice’. It had a long gestation period commencing in 1970 when the Jamaican delegation at the Sixth Heads of Government Conference, which convened in Jamaica, proposed the establishment of a Caribbean Court of Appeal in substitution for the Judicial Committee of the Privy Council.”).

3. *Role of the JCPC*, JUD. COMMITTEE OF THE PRIVY COUNCIL, <http://www.jcpc.gov.uk/about/role-of-the-jcpc.html> (last visited Oct. 10, 2013) (Commonwealth Antigua and Barbuda; Bahamas; British Indian Ocean Territory; Cook Islands and Niue (Associated States of New Zealand); Grenada; Jamaica; St Christopher and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Tuvalu; the Republic of Trinidad and Tobago; the Commonwealth of Dominica; Kiribati; Mauritius).

4. See CLINTON BLACK, *THE HISTORY OF JAMAICA* (1997); WILLIAM CLAYPOLE AND JOHN ROBOTOM, *CARIBBEAN STORY, BOOK TWO: THE INHERITORS* (1989).

5. *West Indies*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/640195/West-Indies> (last visited June 23, 2013) (“The population of the West Indies is ethnically heterogeneous and largely the legacy of an early plantation society based on slave

planters and black slaves emerged.⁶ The plantation economy was big business for the British, who understood that the “rule of law” was necessary to protect their “property”⁷—slaves and fertile landholdings. Although slave-owners had unchecked powers to punish their slaves, the British developed a colonial court system to hear disputes and punish criminals. The JCPC was the region’s highest court, dictating policy and precedent that affected thousands of lives. But even after the region’s independence in the 1960s, the JCPC remained its highest court. Countries like Jamaica and Trinidad still have their most important legal matters decided by judges in London. The weight of the past has deeply shaped the present legal system.

Today, many people in the ESC believe that the JCPC is a relic of the colonial past and should no longer decide the nation’s most important juridical issues. Capital punishment, in particular, is a major point of conflict. The British originally used the death penalty to bolster their rule in the ESC, but abolished the practice in 1971. Since then, the Privy Council has imposed obstacles to the application of capital punishment, even though it is written into the constitutions of numerous ESC countries and based on considerable popular support. The British have narrowed application of the death penalty in two ways: (1) by imposing a five year limit on the time between sentence and execution throughout the ESC and (2) striking down the death penalty as a mandatory punishment for murder in Jamaica. Privy Council rulings that have addressed capital punishment have been the subject of major controversy, leading many ESC citizens to accuse the Privy Council of judicial imperialism. The irony is striking: an imperial power, historically guilty of the fiercest punishment in maintaining a system of bondage, has now abandoned the death penalty, while its former colonies justify the punishment’s retention with self-determination.⁸

A number of external factors have animated the debate on the Privy Council. A recent surge in drug-related crime throughout the ESC has

labour. Most of the population is descended from African slaves or from Spanish, French, British, or Dutch colonists or is of mixed ethnicity.”).

6. *Id.* (“The plantations and slavery created a hierarchical society based upon ‘racial’ distinctions and law. During the 17th century the major strata of West Indian society were Europeans and their descendants (‘whites’)—who were generally free, though some were indentured workers serving a period of contract labour—and enslaved Africans. By the 18th century miscegenation had become more prevalent. Many children of mixed ethnicity were manumitted (obtained their freedom), creating an intermediate stratum of free ‘people of colour’ (persons of mixed ethnicity) and free ‘blacks’ (manumitted slaves of African descent). By law and by custom, however, only whites enjoyed full civil rights; the free ‘mixed-race’ and black populations suffered many legal disabilities.”). Slaves—who included many mixed-race persons by about 1800—were nonpersons, chattels to be bought and sold.

7. See JERRY DUPONT, *THE COMMON LAW ABROAD: CONSTITUTIONAL AND LEGAL LEGACY OF THE BRITISH EMPIRE* xii (2000).

8. The right to self-determination is well documented in international law. See U.N. Charter art. 1; U.N. Charter art. 37; G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 2, U.N. Doc. A/4494 (Dec. 14, 1960).

increased popular support for the highest measure of punishment. Jamaica, for example, has become a transit point for the movement of drugs between the Americas and Europe, a traffic that results in a great deal of violent crime.⁹ A majority of the population supports the death penalty for people convicted of capital murder and this overwhelming support has led numerous Caribbean governments to withdraw from the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Politicians have claimed that they were simply adjusting their human rights obligations to reflect the interests of their constituents, but they have still drawn fire from the international community for their actions.

Within the past few years, the Caribbean Court of Justice has emerged as a viable alternative to the Privy Council. Many citizens and officials argue that ESC countries should seek to resolve the controversy concerning the application of the death penalty on their own terms, rather than through the courts of their former colonial power. These advocates make three major arguments in favor of adoption of the CCJ. First, the ESC should have a distinct jurisprudence that reflects the history and values of the region. Although the new court should respect the precedent set by the Privy Council, it is crucial for the region to have institutions of its own. Second, the cost of the CCJ is not prohibitive to the countries of the ESC. In fact, the Privy Council is largely inaccessible due to the expense of its appeals, a problem that could be solved by the adoption of the CCJ. Third, Caribbean jurists are capable of doing a competent job, contrary to the charges leveled by critics that the CCJ is too undeveloped and flawed to assume the role of Supreme Court. Their appointment would not be particularly vulnerable to political pressure. Yet the CCJ remains a deeply political issue: to date, the governments in Trinidad and Jamaica have not been able to pass a special constitutional amendment designating the CCJ as the final court of appeals.

It is important to stress from the outset that this Note does not examine the effectiveness of the death penalty as a practice. Although empirical research speculates that capital punishment does not have a deterrent effect on crime,¹⁰ the practice is not illegal under international

9. See CLAIRE RIBANDO SEELKE ET AL., CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAMS 18 (2011), available at <http://www.fas.org/sgp/crs/row/R41215.pdf> (“Because of their geographic location, many Caribbean nations are transit countries for illicit drugs from South America and the Caribbean destined for the U.S. and European markets. Currently, of the 16 countries in the Caribbean region, President Obama identified four—the Bahamas, the Dominican Republic, Haiti, and Jamaica—as major drug-producing or drug-transit countries in September 2010 pursuant to annual legislative drug certification requirements. Many other Caribbean nations, particularly in the Eastern Caribbean, are also vulnerable to drug trafficking and associated crimes because of their geographic location”).

10. See, e.g., RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 218-35 (1991); Michael Radelet & Traci Lacoek, *Do Executions Lower Homicide Rates?: The Views Of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489 (2009); Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 116-17 (1989); cf. Robert Tanner, *Studies Say Death Pen-*

human rights law.¹¹ Thus, this Note argues only that ESC countries should determine their own practices of punishment through the CCJ.

Although the Privy Council has not come out against the death penalty *per se* in the ESC, it has made it procedurally impossible to enforce. In doing so, the Privy Council has created an untenable legal situation, clogging the courts with multiple appeals that cannot be addressed within the Privy Council's mandated time limit. These rulings have created unforeseen and problematic consequences. First, they have had the unfortunate effect of moving ESC countries away from their larger commitment to human rights. Second, they have sparked a nationalist backlash with genuine popular support. Indeed, this Note argues that replacing the Privy Council with the CCJ would be the best way to resolve these issues at the current time. It would allow the ESC to return to its larger human rights commitments, increase local control over law in the region, and allow for a genuine debate over the death penalty free of extraneous issues of national backlash.

This Note examines the debate surrounding the Privy Council and the Caribbean Court of Justice, with a focus on the social and political tensions related to the application of capital punishment. Part I reviews the colonial history of the British Caribbean, including British methods of governance, punishment, and law enforcement to create a hierarchical society. Part II analyzes significant Privy Council decisions affecting the procedural aspects of the death penalty. Part III considers popular attitudes toward violent crime and their effect on the human rights commitments of ESC governments. Part IV surveys the major arguments in favor and against the Caribbean Court of Justice—including the need for a Caribbean jurisprudence, cost factors, and the independence of the judiciary—ultimately concluding that the CCJ is a preferable alternative to the Privy Council.

I. COLONIALISM, LAW, AND METHODS OF GOVERNANCE

Between the 1620s and the 1960s, the British colonized many of the Caribbean islands. They developed a plantation economy, built on slave labor, to facilitate the production of sugar and its export to markets in Europe. The British imposed their tradition of common law in the Caribbean colonies to adjudicate disputes and maintain the social order of a slave society. The death penalty and corporal punishment were indispensable tools to enforce the “rule of law.” The Judicial Committee of the Privy Council (JCPC) was created to function as the ultimate court of appeal for the region. After Caribbean colonies were granted independence

alty Deters Crime, WASH. POST (June 11, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/11/AR2007061100406.html> (last visited Oct. 10, 2013).

11. Harold Koh, the State Department's former Legal Advisor, has insisted that capital punishment does not violate international law, telling the UN Human Rights Council: “International human rights law does not bar it [the death penalty] *per se*.” Mark Tran, *UN Human Rights Council Urges US to End Death Penalty*, GUARDIAN (Nov. 5 2010), <http://www.guardian.co.uk/world/2010/nov/05/un-council-urges-us-end-death-penalty>.

in the 1960s, newly-elected legislatures sought to maintain key British policies, such as use of the death penalty and appeal to the JCPC. Caribbean nations also supplemented JCPC review with human rights agreements, giving their citizenry the right to appeal to international institutions in capital cases.

This section aims to show the enormous impact of British colonialism in the region, especially through the establishment of legal institutions and traditions. Part A looks at British colonialism and the creation of the plantation economy. Part B looks at the British imposition of common law in the Caribbean, and use of the JCPC as the highest court of appeal. Part C considers the role of ESC nations after independence in maintaining a strong link to British policies of governance and legal institutions.

A. *The Plantation Economy and Caribbean Slavery*

In his essay, "The Muse of History," famed St. Lucian author Derek Walcott writes, "The common experience of the New World . . . is colonialism."¹² The British ruled the English Speaking Caribbean (ESC) for over 350 years, beginning in 1624, when the first colonial settlement was established in St. Kitts.¹³ They created additional settlements in Barbados (1627) and Jamaica (1655), and fully colonized the rest of the region by the end of the 18th century.¹⁴ The Dutch also began to colonize the region during this time, creating settlements in countries like Guyana and Martinique.¹⁵ There was fierce competition between colonial powers to control the most fertile land, which was ideal for growing sugarcane. Countries like Guyana, for example, were controlled by multiple colonial powers at various points in its history. European powers systematically turned many of the Caribbean islands into plantation economies,¹⁶ dedicated solely to producing sugar (and in certain cases, cocoa) for export to Europe.

The islands of the Caribbean possessed fertile land and optimal climates for growing profitable cash crops. Historians have noted that there was a "monoculture" of sugar production in Barbados, Jamaica, and Guyana dating from the 17th century.¹⁷ In Trinidad, conversely, "cocoa was king."¹⁸ Sugar and cocoa cultivation in the New World created a pow-

12. DEREK WALCOTT, *THE MUSE OF HISTORY* (1974), reprinted in *WHAT THE TWILIGHT SAYS: ESSAYS* 36 (1999).

13. Michael DaCosta, *Colonial Origins, Institutions and Economic Performance in the Caribbean: Guyana and Barbados* 5 (Int'l Monetary Fund Working Paper No. 07/43, 2007).

14. *Id.*

15. *Id.*

16. George Beckford, *The Continuing Influence of the Plantation*, in *READINGS IN CARIBBEAN HISTORY AND ECONOMICS* 54, 59 (Roberta Marx Delson ed., 1981) ("Typically, a plantation is a unit of agricultural production with a specific type of economic organization characterized by a large resident labour force of unskilled workers who are directed by a small supervisory staff.").

17. *Id.*

18. ERIC WILLIAMS, *HISTORY OF THE PEOPLE OF TRINIDAD AND TOBAGO* 78 (1964). Trinidad had a more varied economy than a lot of Caribbean countries, producing rum, cot-

erful demand for cheap labor, and the result was the explosion of the slave trade. Harvesting sugarcane, in particular, required an extremely labor-intensive process. To produce large quantities of sugar it was necessary to have not only a large labor force, but also one that worked tirelessly for many hours on end.¹⁹ Slave labor was first brought from Brazil, a major slave-trading hub, but was later imported directly from the coast of West Africa. If slaves managed to survive the “Middle Passage”—the treacherous journey from Africa to New World across the Atlantic—they could expect to work under dangerous, backbreaking conditions in the Caribbean sugar plantations.²⁰

By the 1750s, almost nine out of ten men and women in the Caribbean islands were slaves on major sugar-producing plantations.²¹ A rigid system of stratification existed to separate the white owners and managers from the enslaved African workers.²² All plantations had certain features in common: they were founded on relatively large land holdings; they employed many unskilled workers; decision making was centralized with the white management; plantation governance was extremely authoritarian in character; and the workers were separated from the managers by both social and cultural differences.²³ The planter class regularly used violence to enforce the separation between owner and slave. Despite the large number of slaves brought to the islands, life and work on the plantations was so brutal that death rates were much higher than birth rates.²⁴ One historian noted, “[s]ince Caribbean slaves died without reproducing themselves, the sugar estates could operate only by constantly importing enormous numbers of new slaves.”²⁵ Slaves, however, were not without agency. They managed to resist their captors in numerous ways, including organized rebellions,²⁶ suicide, infanticide, and flight.²⁷

With a comprehensively organized system of slave labor in place, the economies of British-Caribbean colonies became entirely export-driven, centered on the production of sugar.²⁸ The British made enormous profits

ton, coffee, and cocoa in addition to sugar. Despite the different crop, Trinidad still had plantations that were just as violent as the sugar plantations.

19. See RICHARD SHERIDAN, *THE DEVELOPMENT OF THE PLANTATIONS TO 1750* 12 (1970) (“After a short period of uneasy friendship with the settlers, the Carib Indians were exterminated, forced into bondage, or confined to certain islands in the Lesser Antilles.”).

20. See generally, MARCUS REDIKER, *THE SLAVE SHIP* (2008).

21. JAN ROGOZINSKI, *A BRIEF HISTORY OF THE CARIBBEAN: FROM THE ARAWAK AND THE CARIB TO THE PRESENT* 122 (1992).

22. Beckford, *supra* note 16, at 59.

23. *Id.*

24. ROGOZINSKI, *supra* note 21, at 122.

25. *Id.*

26. The first plantation rebellion occurred in Barbados in 1649. J. H. PARRY & P. M. SHERLOCK, *A SHORT HISTORY OF THE WEST INDIES* 71 (1956).

27. *Id.* at 72 (“[I]ndividuals could and did express their resentment in other ways: by suicide, by infanticide, or by running away – especially in islands such as Jamaica where mountains and forests offered shelter to fugitive groups.”).

28. *Id.*

from the sugarcane industry, especially from Barbados, which became the most profitable of the British colonies during the 17th century. At that time, the island had a population of about 30,000 Europeans, about 11,000 of which were landholders.²⁹ By the 18th century, the Caribbean was producing 80 to 90 percent of the sugar consumed by Western Europe.³⁰ Historians estimate that in the four centuries between 1550 and 1950, there was a steady increase in per capita sugar consumption.³¹ Europeans, regardless of their class background, drank tea, coffee, and cocoa, and ate jams and candy.³² The massive profits from the sugar trade, in turn, bolstered the political power of the planter class in the Caribbean. Known as the “West India Interest,” the planter class was strongly represented in British parliament during the 18th and 19th centuries.³³ The increasingly powerful planter class sought to legitimate the violence of their economic operations and needed a means by which to protect their stratified socio-economic order. The British common law, with its emphasis on protecting personal property, provided a powerful justification for colonial operations.

B. *The Privy Council³⁴ and the Imposition of Common Law in the Colonies*

Colonial governments justified their conquest of foreign territories and protected the “property rights” of white slave-owners by imposing British models of common law. The English used two legal doctrines to justify their conquest of “new” areas. The first was the Doctrine of Imposition. Applicable to conquered territories,³⁵ the Doctrine of Imposition gave the British legal support to “impose[] laws on the colonies in order to control them.”³⁶ The second was the Doctrine of Reception, which was applicable to both settled and “uninhabited” territories.³⁷ The Doctrine of Reception provides: “[i]n case of settled territories, the settlers are presumed to have taken with them the English common law and statutes which existed at the date of the settlement. But, it is not the whole body of

29. DaCosta, *supra* note 13, at 6.

30. See ROGOZINSKI, *supra* note 21.

31. *Id.* at 109.

32. *Id.* at 109.

33. *Id.* at 112 (“In 1776, Parliament had approximately forty members with some direct relation to the West Indian planter class.”).

34. Throughout this note, the author refers to both the Judicial Committee of the Privy Council (JCPC) and the Privy Council interchangeably. The JCPC refers to the specific body that handles appeals from the Caribbean and other former British colonies. Scholars and the media often shorten the phrase simply to ‘the Privy Council.’

35. VELMA NEWTON, COMMONWEALTH LEGAL SYSTEMS: A STUDY OF SMALL JURISDICTIONS 22-23 (1988).

36. *Id.* at 23.

37. *Id.*

English law, which would have been applicable.”³⁸ Together, the Doctrine of Imposition and the Doctrine of Reception justified the first step of colonialism: the takeover of foreign lands.

During the earliest years of British colonialism, judicial disputes were usually referred to the Sovereign, who then referred them to the Privy Council, a judicial body comprised of appointed legal scholars and practitioners. In the 16th century, court systems were established in the British colonies and it became common practice for parties to appeal their decisions to the Privy Council.³⁹ As the appeals practice evolved throughout the 17th and 18th centuries, the British recognized the need for a specific body to handle appeals coming from the colonies. The Judicial Committee of the Privy Council (JCPC) was established by the Judicial Committee Act, passed by British parliament in 1833.⁴⁰ The legislation formally transferred judicial powers from the Privy Council to a specific judicial branch, which would operate independently from the rest of the council.⁴¹

The Judicial Committee became an autonomous court of law, based in London, deciding disputes on appeal from overseas territories.⁴² During the colonial era, the JCPC functioned as the highest court of appeal for many different colonies, including all of the Caribbean islands. The JCPC derived its jurisdiction from the Sovereign of England possessing power over all British subjects, at home or abroad.⁴³ Professor Barry Gaspar, originally from St. Lucia, believes that the colonial hierarchy of courts was an important enforcement mechanism for the British.⁴⁴ Within that framework, the Privy Council “had a role to play in the way English governed the Caribbean colonies. Governance was crucial to situating the empire.”⁴⁵ When laws were passed in the Caribbean, they had to be approved by the colonial office or the colonial court system. This process made clear that England was the center of power and “there was always a higher authority than governments in the Caribbean.”⁴⁶

The planter class and the British authorities actively used the death penalty and corporal punishment to enforce the laws of their colonies. The

38. *Id.* But see 1 WILLIAM BLACKSTONE, COMMENTARIES *107 (limiting the scope of the Doctrine of Reception by noting “Colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony . . . [W]hat shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in first instance by their own provincial judicature, subject to the revision and control of the King in Council.”).

39. JUD. COMM. OF THE PRIVY COUNCIL, *supra* note 1.

40. The Judicial Committee Act, 1833, ch. 41, (Eng.); Roget V. Bryan, *Toward the Development of Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 J. TRANSNAT'L L. & POL'Y 181, 183-184 (1998).

41. *Id.*

42. *Id.* at 184.

43. *Id.* at 183-84.

44. Telephone Interview with Barry Gaspar, Professor of History, Duke University (Mar. 22, 2013).

45. *Id.*

46. *Id.*

most common forms were hanging and flogging.⁴⁷ Plantation owners often exercised their own forms of brutal punishment over slave populations, but also had the option of allowing public authorities to try and punish their slaves.⁴⁸ As Anthony De V. Phillips describes,

In the case of non-capital offences, complaints were made to a magistrate, but not upon oath. The magistrate summoned the owner to produce the slave at the appointed time, together with such persons as the complainant or the owner wished to give evidence. After hearing the case, the magistrate either dismissed the complaint or ordered a punishment of whipping according to the offense. Such punishment varied from six to thirty-nine lashes. Flogging was inflicted with the military cat ('cat o' nine tails') between the shoulders.⁴⁹

Capital offenses followed a similar process of presentation of evidence before a magistrate, but the punishment was more severe: a sentence was hanging by the neck until death.⁵⁰

Anthony Bogue, a Professor of Political Thought at Brown University, grew up in Jamaica and completed his PhD at the University of West Indies, Mona Campus. He believes that punishment was a critical part of the British colonial project, which operated on two platforms.⁵¹ The first platform was the colonial use of force to subjugate the slave population—what Professor Bogue calls “might is right.”⁵² The second platform was the colonial initiative to construct a different mental framework in “creating natives.”⁵³ The disparity between a slave—a piece of property—and a “respectable Victorian subject” was enormous, justifying the binary construction of a slave society.⁵⁴ This physical and emotional violence constituted “power in the flesh.”⁵⁵ Colonial punishments such as the death penalty, flogging, and imprisonment were crucial to the development of legal systems in the Caribbean.

The planter class and the colonial administration agreed that the “rule of law” was crucial for maintaining a slave society. Most of the time they agreed on how to enforce this “rule of law,” but in certain instances they did not. For example, in the early 19th century, the two groups were at

47. Anthony De V. Phillips, *Doubly Condemned: Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies*, 18 *CARDOZO L. REV.* 699, 714-15 (1996).

48. *Id.*

49. *Id.* at 712.

50. *Id.*

51. Telephone Interview with Anthony Bogue, Professor of History, Brown University (Mar. 19, 2013).

52. *Id.*

53. *Id.*

54. *See id.*

55. *Id.*

odds over “proper” methods of governance. In 1807, the British abolished the trans-Atlantic slave trade and began advocating for a more patriarchal, religiously-influenced philosophy of governance.⁵⁶ Indeed, the abolition of the slave trade helped to raise life expectancy rates and improve medical and nutritional standards for slaves.⁵⁷ Administrators in London urged colonial legislatures to convert their slaves to Christianity and to provide them with moral instruction.⁵⁸ London Administrators encouraged planters to use the whip more sparingly and mitigate the violence of the slave trade. But planters still had “virtually untrammelled power over their slaves,” a power they did not want to relinquish.⁵⁹

Despite their philosophical differences, the two groups were able to unite their political agendas to keep slave classes disenfranchised. In 1865, the British enacted the Colonial Laws Validity Act, which gave a substantial amount of autonomy to colonies to regulate their own affairs.⁶⁰ Historians have criticized the Act for its veiled attempt to keep the white planter class in power, fearing the spread of “black rule.”⁶¹ The Act did not expand suffrage to the entire citizenry and sought to keep in place political institutions that were governed by the planter class.⁶² Jamaica, for example, did not enjoy universal suffrage until 1944.⁶³ Historian Gordon Lewis argues that race hierarchy and fear of black rule “lay at the heart of British policy.”⁶⁴

After the abolition of the trans-Atlantic slave trade in 1807, the planter class found it increasingly difficult to keep the plantation economy as profitable as it once was.⁶⁵ The massive importation of slaves meant that whites were a small minority population in the Caribbean. The descendants of African slaves began to accumulate political influence and become involved more heavily in governance. By the 1950s, the British

56. Phillips, *supra* note 47, at 702-03.

57. *Id.* at 702.

58. *See id.* at 703.

59. *Id.* (“The tension within the amelioration debate essentially arose from planter resistance against attempts to impose controls on what had been virtually untrammelled power over their slaves.”).

60. ANN SPACKMAN, *CONSTITUTIONAL DEVELOPMENT OF THE WEST INDIES*, 1922-1968 64 (1975) (stating that the Colonial Laws Validity Act did make it explicitly clear, however, that these new powers were still subordinated to the ultimate power of Westminster Parliament).

61. Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 *INT’L J. CONST. L.* 582, 589 (2005).

62. *Id.*

63. *Id.*

64. GORDON K. LEWIS, *THE GROWTH OF THE MODERN WEST INDIES* 107 (1968).

65. Despite the abolition of the slave trade, serious inequalities persisted. *See West Indies*, *Encyclopedia Britannica*, *supra* note 5 (“The persistence of the plantation system and of white elitism, bolstered by colonialism, shored up the structure of the grossly inegalitarian societies of the West Indies after emancipation. Colour-class and culture-class correlations persisted in a situation where—excepting the French West Indies from the late 19th century—democracy was systematically denied”).

knew that independence for many of their colonies was inevitable.⁶⁶ The British originally united a number of the Caribbean islands into one country, the Federation of the West Indies, to which they would then grant independence.⁶⁷ The Federation of the West Indies included Jamaica, Trinidad, Barbados, and other islands in the Windward and Leeward parts of the Caribbean.⁶⁸ The Federation collapsed after four years, however, as larger countries like Jamaica and Trinidad voiced their disapproval at a constitutional convention held in London in 1961.⁶⁹ The larger countries were not convinced of the benefits they would receive from participation in the federation, and shortly thereafter decided to draft their own independence constitutions.⁷⁰ Trinidad and Jamaica both became independent in 1962, and other countries followed throughout the 1960s.

C. *Legacies of the British: The Death Penalty, the JCPC, and Human Rights*

As independence movements gained momentum throughout the English-Speaking Caribbean (ESC) in the 1950s, emerging nations were charged with creating constitutions and bodies of law in order to establish self-rule. Many countries sought to adopt a modified version of the Westminster system of parliamentary democracy, which was created by the British.⁷¹ Liberal democratic structures became the standard throughout the ESC, illustrating the full influence of the former colonizing power.⁷² ESC governments sought to maintain many of the most powerful practices of the colonial state, including the death penalty. Even though capital punishment was once used to reinforce the stratification of slave societies,

66. A number of social and economic factors led to eventual decolonization. *Id.* (“By this time labour disturbances were about to break out throughout the region, a consequence of the Great Depression and the lack of means for democratic dissent; popular demands for development and decolonization were spreading from Jamaica to Trinidad. Most of the West Indian societies were decolonized with imperial consent after World War II—by a grant of full independence, as in the case of most of the British territories, or by incorporation into the mother country, as in French-affiliated islands of the Lesser Antilles, or through their association with the colonial power, as in the former Netherlands Antilles and some of the British territories.”).

67. *See generally*, ELISABETH WALLACE, *THE BRITISH CARIBBEAN: FROM THE DECLINE OF COLONIALISM TO THE END OF FEDERATION* (1977).

68. Originally included in the Federation of the West Indies were the sovereign states of Antigua and Barbuda, Barbados, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. The islands, which are still British protectorates, included the Virgin Islands, Anguilla, Montserrat, the Cayman Islands, and the Turks and Caicos Islands.

69. *See* WALLACE, *supra* note 67, at 185-91.

70. *Id.* at 192-214.

71. But many ESC countries departed from the Westminster model in adopting ‘Bill of Rights’ to supplement constitutional authority, showing that newly independent nations desired to have an explicit grant of judicially enforceable rights, as opposed to protection stemming only from the common law. Burnham, *supra* note 61, at 596.

72. *Id.*

ESC countries sought to retain the practice as the ultimate punishment for the most severe offenses.

The governments of Trinidad, Jamaica, and Barbados were just a few examples of former colonies that chose to keep the death penalty as mandatory punishment for the crime of murder. The mandatory death sentence was written into the constitution of each country as part of a “saving clause,” a legal inheritance of state punishment from the former colonial power.⁷³ In Jamaica, Section 2(1) of The Offences against the Person Act provides, among other things, that “persons convicted of capital murder shall be executed.”⁷⁴ In Trinidad and Tobago, capital punishment was retained in ‘The Offences Against the Person Act of Trinidad and Tobago.’ Section 4 of the Act (Chapter 11:08) states: “Every person convicted of murder shall suffer death.” This means that individuals who intentionally commit homicide receive the death sentence.⁷⁵ The Statute cites no difference between first and second degree murder, or between voluntary or involuntary manslaughter.⁷⁶ Judges and juries are not allowed to consider any “pertinent circumstances” involved in the homicide,⁷⁷ in contrast to death penalty laws in the United States.⁷⁸ Lower courts have been particularly harsh in imposing this sentence, leading some scholars to maintain that the death penalty is “automatically imposed.”⁷⁹

ESC nations that utilize the JCPC as the final court of appeals, including Trinidad and Tobago, also provide defendants domestic avenues for appeal in capital cases. The Eastern Caribbean Supreme Court for smaller countries like Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and three British overseas territories

73. See Leonard Birdsong, *The Formation Of The Caribbean Court Of Justice: The Sunset Of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 249 (2005).

74. Stephen Vasciannie, *The Lambert Watson Decision*, JAMAICA GLEANER (July 12, 2004), <http://jamaica-gleaner.com/gleaner/20040712/cleisure/cleisure2.html>.

75. Brian Angelini, *Trinidad and Tobago’s Controversial Death Penalty Law: A Note on Hilaire, Constantine and Benjamin v. Trinidad & Tobago*, 10 SW. J.L. & TRADE AM. 361, 363 (“[O]n a more specific level, the death penalty statute in Trinidad & Tobago is quite distinct from that of the U.S. Indeed, these distinctions are not only conspicuous, but they reveal potentially unconscionable terms in Trinidad & Tobago’s death penalty law.”).

76. *Id.* at 364.

77. *Id.* (“Evidence that defendants may have acted under the influence of drugs, or who may have acted under extreme emotional distress after, for instance, witnessing spouses in compromising situations with adulterous lovers, are both circumstances in which such facts might be declared inadmissible.”).

78. *Id.* at 389 (“In summary, there are two notable distinctions between the death penalty in Trinidad & Tobago and that of the United States. The most conspicuous is the failure to distinguish between varying degrees of murder that renders the death penalty laws in Trinidad & Tobago cruel and unusual punishment because they punish an individual disproportionately to the severity of the crime he committed. Second, Trinidad & Tobago’s failure to require a trial within a reasonable time period further exacerbates the deplorable conditions endured by defendant while confined to their prison cells. . .”).

79. *Id.* at 363.

function in a similar way. These national courts of appeal usually have unlimited jurisdiction over civil and criminal matters.⁸⁰ After the national appeals court renders its decision, the defendant can file a “petition for special leave” to appeal to the Judicial Committee of the Privy Council.⁸¹ The Privy Council hears individual matters in five (or nine) judge panels. It is quite difficult for a defendant to be heard at the JCPC, which is often thought of as a court of last resort.

Defendants in capital cases can also apply to two international bodies that serve the ESC: the Inter-American Court of Human Rights (IACHR) and the United Nations Human Rights Committee (Human Rights Committee). The IACHR is a judicial body that was created by the American Convention on Human Rights of 1969.⁸² All Caribbean nations, except for Cuba, are members of the OAS. For the court to adjudicate the disputes, a state that is a party to the OAS must be accused of a human rights violation, and that state must accept the court’s jurisdiction.⁸³ As it stands, Haiti is the only country that accepts jurisdiction of the court in all contentious cases; the rest of the Caribbean countries accept jurisdiction on an ad hoc, case-specific basis.⁸⁴ The Human Rights Committee also hears petitions on human rights abuses in capital cases. Unlike the IACHR or the JCPC, the Human Rights Committee is not a court, but rather a group of experts that consider state reports on compliance with the ICCPR.⁸⁵ The Committee reviews complaints alleging compliance with the ICCPR.⁸⁶ Both the Human Rights Committee and the IACHR have played a large role in the process of considering death penalty appeals in the Caribbean, as the next section will show.

II. PRIVY COUNCIL CASES ON THE DEATH PENALTY

Since the 1970s, the Privy Council has heard a number of important death penalty cases. Its rulings have had an enormous impact on the capital appeals process. In particular, Privy Council opinions have addressed two major procedural issues: (1) the amount of time that can elapse between a death sentence and an execution and (2) whether the death penalty is mandatory when an individual is convicted of capital murder. This section aims to show that there is significant tension between the Privy Council and Caribbean governments on the issue of the death penalty. The Privy Council, an English court, has essentially defined death penalty

80. *Eastern Caribbean Supreme Court*, ORGANISATION OF EASTERN CARIBBEAN STATES, <http://www.oecs.org/about-the-oecs/institutions/eastern-caribbean-supreme-court-ecsc> (last visited Nov. 26, 2013).

81. *Id.*

82. Organization of American States, American Convention on Human Rights art. 34, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

83. *Id.* art. 62.

84. *Id.*

85. Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1996, 999 U.N.T.S. 302, 303 [hereinafter Optional Protocol].

86. *Id.* at 302.

jurisprudence for the Caribbean, creating enormous friction with national governments over their rights to enforce criminal laws. Section A examines the issue of delay between sentence and execution, with a focus on the ruling in *Pratt and Morgan v. Attorney General of Jamaica*. Section B analyzes the debate over whether the death penalty should be automatically imposed for defendants convicted of capital murder.

A. *Delays Between Sentence and Executions*

The debate between the JCPC and national governments on the application of the death penalty dates back to the 1970s. In 1975, Michael Freitas (aka Michael Abdul Malik or Michael X) was sentenced to death for a double-murder on a commune in Trinidad. Freitas challenged the constitutionality of the death penalty on two different grounds.⁸⁷ First, he argued that capital punishment was, per se, a cruel and unusual punishment. Second, he argued that the enormous lapse of time between sentence and execution in Trinidad made it unconstitutional to execute anyone.⁸⁸ Although Freitas was ultimately convicted and put to death, he was the first defendant to raise serious constitutional questions about the death penalty for the Privy Council to consider.⁸⁹ Less than four years later in 1979, the case of *Abbott v. Attorney-General of Trinidad and Tobago* raised similar questions about delays in execution.⁹⁰ Abbott, also convicted of murder, challenged his death sentence on the grounds that six years had elapsed between his conviction and his date of execution. The Privy Council once again upheld the death sentence even though it stated the massive delay “brings the administration of criminal justice into disrepute among law abiding citizens.”⁹¹ The court held that six years was not long enough to qualify as too long, although it stressed that there should not be an “enormous” length of time between sentence and execution.⁹²

The decision in *Abbott* paved the way for *Riley v. Attorney-General of Jamaica* in 1983, a case that prompted even greater reservations than its predecessor.⁹³ Riley challenged the application of the death penalty on the grounds that five to six years had elapsed between his sentence and proposed date of execution. The Privy Council, in a close and controversial decision, held 3-2 that delay alone could “afford no ground for holding the execution to be a contravention of the relevant Section (17) of the Jamaican Constitution.”⁹⁴ But the two dissenting judges, Lord Scarman and

87. De Freitas v. Benny, [1976] A.C. 239 (P.C.) (appeal taken from Trin. & Tobago).

88. *Id.*

89. *See id.*

90. *Abbott v. Attorney Gen. of Trin. & Tobago*, [1979] 1 W.L.R. 1342 (P.C.) (appeal taken from Trin. & Tobago).

91. David Simmons, *Conflicts of Law and Policy in the Caribbean-Human Rights and the Enforcement of the Death Penalty – Between a Rock and a Hard Place*, 9 J. TRANSNAT'L L. & POL'Y 263, 267 (2000).

92. *Abbott*, *supra* note 90.

93. *Riley v. Attorney Gen. of Jam.*, [1983] 1 A.C. 719 (P.C.) (appeal taken from Jam.).

94. Simmons, *supra* note 91, at 267-68.

Lord Brightman, laid the groundwork for the Privy Council's next decision on the matter: "Prolonged delay when it arises from factors outside the control of the condemned man can render a decision to carry out the sentence of death an inhuman and degrading punishment."⁹⁵

These three cases set the stage for one of the most important Privy Council decisions in *Pratt and Morgan v. Attorney General of Jamaica*. In 1979, Earl Pratt and Ivan Morgan were sentenced to death in Jamaica for the crime of murder.⁹⁶ Their appeal to the Jamaican Court of Appeal was dismissed in December of 1980. In 1986, their petition for special leave to appeal to the Privy Council was refused.⁹⁷ Their execution was scheduled for March 7, 1991.⁹⁸ Pratt and Morgan then filed an appeal arguing that imposing a death sentence after a fourteen year delay, during which they were held in "subhuman" prison conditions, would constitute a violation of Section 17(1) of the Constitution of Jamaica, which prohibited "inhuman and degrading punishment."⁹⁹

Over the course of their imprisonment, the appellants had death warrants read to them three times. They were also moved to "dead man cells" close to the gallows in anticipation of execution.¹⁰⁰ The two men pursued appeals through a number of different tribunals and organizations, including the Human Rights Committee and the IACHR.¹⁰¹ The Human Rights Committee, after doing some fact finding of its own, found that the Jamaican Court of Appeal breached the ICCPR. The Human Rights Committee stated that the delay of forty-five months had violated Article 5 of the ICCPR, which guarantees the right to be tried "without undue delay."¹⁰² The failure of the Jamaican prison authorities to promptly inform the applicants about the stay of their execution also contravened Article 7 of the Covenant. The IACHR decided that the applicants had unfairly endured over four years on death row, in violation of Article 5(2) of the American Convention, which prohibits "torture and ill treatment." In 1987, the Inter-American Commission requested that the executions "be commuted for humanitarian reasons."¹⁰³

After a considerable amount of procedural wrangling, the Privy Council finally heard the appeal in 1993. The Privy Council held that an unconscionable delay in carrying out a death sentence violated 17(1) of the Jamaican Constitution.¹⁰⁴ The Privy Council commuted the death

95. *Id.*, at 267-269.

96. Bryan, *supra* note 40, at 188.

97. *Id.*

98. *Id.*

99. *Id.* at 188-89.

100. *Id.* at 189-90.

101. *Id.* at 188-89.

102. Barry Phillips, Case Note, *Pratt & Morgan v. Attorney Gen. for Jam.*, 2 A.C. 1 (1993), 88 AM. J. INT. L. 775, 776-77 (1994).

103. *Id.*

104. *Pratt & Morgan v. Attorney Gen. for Jam.*, [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.).

sentences of Pratt and Morgan to life imprisonment. In its ruling, the Privy Council established a two year period for completing the domestic appeals process.¹⁰⁵ National courts would have twelve months to hear a capital appeal following conviction, and then there would be another twelve months allotted for an appeal to the Privy Council.¹⁰⁶ The Court also mandated that there should be only a five year gap between sentence and execution, with all appeals included.¹⁰⁷ Lord Griffiths expressed the unanimous conclusion of the seven members of the Privy Council:

In their lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. The total period of delay is shocking and now amounts to almost fourteen years. It is double the time that the European Court of Human Rights considered would be an infringement of article 3 of the European Convention on Human Rights and their lordships can have no doubt that an execution would now be an infringement of section 17(1) of the Jamaican Constitution. To execute these men now after holding them in custody in an agony of suspense for so many years would be inhuman punishment within the meaning of section 17(1). The delay in this case is wholly unacceptable and this appeal must be allowed.¹⁰⁸

The result of this ruling was felt in criminal justice systems throughout the ESC. Jamaica immediately commuted the death sentences of all prisoners that had been on death row for more than five years. In Trinidad, fifty-three death row inmates had death sentences commuted since more than five years had elapsed since the original sentence,¹⁰⁹ while Barbados commuted nine such cases.¹¹⁰ Throughout the ESC, national courts of appeal had to table the resolution in order to concentrate on hearing capital murder appeals.¹¹¹

The ruling in *Pratt* also had several unanticipated consequences for capital cases. Tribunals found their dockets inundated with death row appeals, inadvertently causing a delay in reviewing petitions that exceeded

105. *Id.*

106. Bryan, *supra* note 40 at 189.

107. *Id.* at 189-90.

108. *Id.*; see also Dennis Morrison, *The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*, 30 NOVA L. REV. 403 (2006).

109. Bryan, *supra* note 40, at 190.

110. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights*, 102 COLUM. L. REV. 1832, 1872 (2002).

111. *Id.*

the five-year limit established in *Pratt*. The number of death row petitions grew from between three to fifteen per year between 1989 and 1993 to twenty-two to twenty-eight per year between 1994 and 1999.¹¹² One author notes that by simply exhausting all domestic and appeals processes, capital defendants could “effectively force Caribbean governments to commute their death sentences. The result was a near de facto abolition of the death penalty in Caribbean states subject to the Privy Council’s jurisdiction”¹¹³ The court in *Pratt* sided with the minority opinion in *Riley*, and with their ruling effectively overturned *Abbott* and *Riley*.¹¹⁴ The effect of the ruling was to bind all Caribbean common law countries to the Privy Council’s interpretation of the restrictions on the death penalty. Caribbean governments responded strongly to the ruling and its consequences, soon coming to view the Privy Council and human rights tribunals as obstacles to imposing capital punishment.¹¹⁵

In cases that followed, the Privy Council ruled that the time lapse should be even shorter than five years. In *Guerra v. Baptiste*, the Privy Council ruled that the five-year limit imposed in *Pratt* was not the “limit,” but that cases should be considered on an individual basis.¹¹⁶ In *Guerra*, the delay was four years and 10 months, which still amounted to “cruel and unusual punishment” and a violation of the constitution of Trinidad.¹¹⁷ Like *Pratt*, *Guerra* illustrated the tension between the Privy Council and national courts. A confrontation between the Privy Council and the Trinidad and Tobago Court of Appeal soon followed in the wake of the appeal.¹¹⁸ The Privy Council staunchly defended its role in the process of appeal, noting that if the defendants had been executed before their right of appeal was completely exhausted it would constitute “the gravest breach of constitutional rights.”¹¹⁹ One author argued that the effect of the Privy Council’s decision showed an “unflattering lack of confidence in the local Court of Appeal and encroachment on the local Court’s exercise

112. *Id.* at 1875 (“This increase was not spread evenly across the two tribunals, however. The Human Rights Committee received the over-whelming majority of cases filed in 1995 and 1996, whereas the Inter- American Commission received the bulk of the cases filed between 1997 and 1999.”).

113. *Id.* at 1879.

114. Simmons, *supra* note 91, at 270-271. (“The court in *Pratt* therefore sided with the minority view in *Riley* and, in effect, overruled *Abbott* and *Riley*. . . Governments were therefore mandated to improve their criminal justice systems or face the prospects of murderers escaping the hangman’s noose.”).

115. See Helfer, *supra* note 110, at 1880.

116. *Guerra v. Cipriani Baptiste* (Trin. & Tobago) [1995] UKPC 3 (appeal taken from Trin. & Tobago).¶29. The ruling in *Pratt* “was not intended to provide a limit, or a yardstick, by reference to which individual cases should be considered in constitutional proceedings”.

117. *Id.* ¶32.

118. Bryan, *supra* note 40, at 192. (“That action by the Privy Council produced an embarrassing confrontation between the Judicial Committee and the Trinidad and Tobago Court of Appeal.”).

119. *Id.*

of discretion through a blatantly inappropriate assumption of jurisdiction.”¹²⁰

B. *Is the Death Penalty a Mandatory Punishment for Murder?*

The issue of delayed executions was not the only procedural matter addressed by the Privy Council. The Court also confronted major questions as to whether the death penalty could serve as a mandatory punishment for murder. In 2002, three cases – one each from Belize, Saint Kitts and Nevis, and Saint Lucia – reached the Privy Council on appeal from the Eastern Caribbean Court of Appeal (ECCA). Known as the “Trilogy Cases,” the ECCA ruled on appeal that the constitutions of these countries did not render the death penalty mandatory.¹²¹ Further, no legislation from any parliamentary body in these three countries made the death penalty mandatory. The Privy Council upheld the lower court’s ruling, arguing that the mandatory exercise of the death penalty amounted to inhuman and degrading treatment.¹²²

The Privy Council’s ruling in the “Trilogy Cases” set the stage for a major legal battle over the mandatory death penalty in Jamaica, Trinidad, and Barbados. All three countries had specific constitutional provisions, with different iterations, mandating that individuals convicted of capital murder should be put to death. Known as “saving clauses,” these constitutional provisions enshrined British practices, like the mandatory death penalty, into the law of newly-independent Caribbean nations. In *Lambert Watson v. The Queen*, the Privy Council addressed the “saving clause” in Jamaica’s constitution.¹²³ The defendant in that case had been convicted of the non-capital murder of his wife and daughter, whom he killed at the same time. The Privy Council, applying dicta from the “the Trilogy Cases” concluded that the mandatory imposition of the death penalty violated the applicant’s constitutional protection against cruel, inhuman, or degrading punishment, since it deprived him of “the opportunity to show why the

120. *Id.* Other cases following Pratt also addressed access to human rights bodies for capital cases. In *Henfield v. Attorney General of the Bahamas* (1997), the Privy Council ruled that a delay of three and a half years could also violate the constitution of the Bahamas. In the Bahamas, unlike Jamaica, there was no right of petition allowed to the Human Rights Committee or the IACHR. See *Henfield v. Att’y Gen. of the Bah.*, App. Case 413 (P.C. 1996). The court later recognized that individuals still could petition the Inter-America Commission about alleged violations of the American Declaration of the Rights and Duties of Man. *Fisher v. Minister of Pub. Safety & Immigration*, [1998] A.C. 673, at para. 41 (P.C. 1997) (appeal taken from Bah.).

121. The Trilogy Cases consisted of *Reyes v. The Queen* [2002] 2 W.L.R. 1034, [2002] U.K.P.C. 11, [2002] 2 A.C. 235 (appeal taken from Belize); *The Queen v. Hughes* [2002] 2 W.L.R. 1058, [2002] U.K.P.C. 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia); and *Fox v. The Queen* [2002] 2 W.L.R. 1077, [2002] U.K.P.C. 13, [2002] 2 A.C. 284 (appeal taken from St. Kitts & Nevis).

122. Anthony Gifford, *The Death Penalty: Developments in Caribbean Jurisprudence*, 37 INT’L J. LEGAL INFO. 196, 201 (2009).

123. *Watson v. The Queen*, [2004] 3 W.L.R. 841, [2004] UKPC 34 (appeal taken from Jam).

sentence of death should not be passed on him” on the basis of “the facts of the case, personal background, and circumstances.”¹²⁴ The court cited Section 17(1) of the Jamaican Constitution, which states that no person shall be subject to torture or inhuman or degrading punishment or other treatment. In the *Lambert Watson* Case, the State argued that there were specific social conditions in Jamaica which should differentiate it from St. Kitts, St. Lucia, and Belize.¹²⁵ In particular, the high rate of murder and drug trafficking required mandatory death sentencing. The Privy Council rejected this argument.¹²⁶

The Privy Council did not accept the Jamaican government’s “saving clause” argument either. The court’s ruling examined the validity of Section 3(1A) of the Offenses Against Person Act of 1864, which imposes the death penalty on a defendant convicted of non-capital murder if before that conviction he or she had already been convicted of murder. The Court noted that Jamaica had amended its pre-independence law on the death penalty in 1992 and, therefore, the mandatory death penalty rules under consideration were not part of a pre-independence law.¹²⁷ In other words, they were not “saved” by Section 26(8) of the Constitution. After *Lambert Watson*, sixty sentences of death were commuted.¹²⁸ The Privy Council was clearly uncomfortable with the mandatory death penalty, believing that it did not allow convicted defendants to be treated with humanity and dignity.¹²⁹ The effect of the Lambert decision was that judges were asked to hear evidence and other considerations that might impact the process of sentencing.

In *Charles Matthew v. the State (Trinidad)*¹³⁰ and *Lennox Recardo Boyce v. the Queen (Barbados)*,¹³¹ the Privy Council found that the mandatory death sentence could be applied in these two countries because their “saving clauses” had not been amended. During the trial, the Government of Trinidad and Tobago (hereinafter Trinidad) was a strong advocate for mandatory imposition of the death penalty.¹³² Trinidad Attorney John Jeremie made it clear that the Privy Council should uphold the mandatory exercise of the death penalty. Breaking from the decision in Lambert, the court ruled 5-4, in favor of upholding the mandatory death penalty. The majority ruled that the constitutions of Trinidad and Barbados included a “saving clause” which allowed the countries to keep the

124. *Id.*

125. *Id.*

126. Stephen Vasciannie, *The Lambert Watson Decision*, JAMAICA GLEANER (July 12, 2004), <http://jamaica-gleaner.com/gleaner/20040712/cleisure/cleisure2.html>.

127. Bryan, *supra* note 40.

128. *Id.*

129. *Id.*

130. *Matthews v. State*, [2004] UKPC 12 (appeal taken from Trin.).

131. *Boyce v. The Queen*, [2004] UKPC 99 (appeal taken from Barb.).

132. Francis Joseph, *State Wants Mandatory Death Sentence*, TRIN. & TOBAGO NEW BULL. BOARD (Dec. 21 2003), http://www.trinidadandtobagonews.com/forum/webbbs_config.pl/noframes/read/1330.

British practice because it was established law before independence.¹³³ The UNHRC and the IACHR have both ruled that the mandatory death penalty, in any situation, was inconsistent with human rights obligations under international law.¹³⁴ The mandatory death penalty should therefore be considered a violation of international law, though not domestic law.

In *Matthews*, the JCPC overruled precedent from *Balkisoon Roodal v. The State*.¹³⁵ The holding in *Roodal* originally struck down the mandatory death sentence in Trinidad, explicitly noting that capital punishment should be discretionary, not mandatory.¹³⁶ The holding in *Matthews* reversed course, stating that the mandatory death sentence was constitutional on the basis of the saving clause in both the Trinidadian and Barbadian constitutions (Sections 6-1 and 26 respectively) which exempt any laws in existence before the entry into force of the Constitution from being declared subsequently unconstitutional.¹³⁷ The Court concluded that this was a matter for the parliament of the two countries to decide, rather than the court. This was despite the fact that all parties (including the State) argued that they amounted to “cruel and unusual punishment.”¹³⁸ The Court stated:

“The Offences Against the Person Act was passed in 1925, replacing earlier similar legislation. It therefore cannot be invalidated by anything in sections 4 or 5. As the Constitution contains no other provisions which can affect its operation or validity, it follows that if one is concerned only to construe the Constitution as the supreme law of Trinidad and Tobago, there is no basis for challenge. . . . As a consequence, the majority concede that the death penalty must be regarded as existing law and, therefore, the mandatory death sentence must continue to form part of the law of Trinidad and Tobago and, in the process, there can be no challenge against that.”¹³⁹

The JCPC did accept, however, that those currently sentenced to death should benefit from *Roodal* and as a result, 100 prisoners were reprieved.¹⁴⁰

In the wake of these decisions, a large controversy erupted over the powers of the Privy Council to affect governance in the Caribbean. Vasheist Kokaram, an attorney-at-law in Trinidad and Tobago, argued in a

133. See Gifford, *supra* note 122, at 201.

134. It will likewise not be consistent with the current interpretation of various human rights treaties to which Trinidad and Tobago is a party.

135. *Matthews*, *supra* note 130 at 67.

136. *Roodal v. State*, [2003] UKPC (appeal taken from Trin. & Tobago).

137. *Id.*

138. *Id.*

139. *Id.*; see also Hamid Ghany, *Will the Privy Council Decide?*, TRINIDAD GUARDIAN (July 18 2004), <http://legacy.guardian.co.tt/archives/2004-07-18/HamidGhany.html>.

140. *Id.*

newspaper editorial that the decisions of *Charles Matthew, Lambert Watson*, and *Lennox Recardo Boyce* “transcend just criminal law and raise questions of huge constitutional significance as to the meaning of our supreme law.”¹⁴¹ Legal commentators have noted a contradiction in the court’s different treatment of constitutional law in Jamaica on the one hand, and Trinidad and Barbados on the other:

There is irony in this result. Jamaica sought to improve its death penalty law in 1992, and now finds that this improved law has been struck down. Trinidad and Tobago and Barbados have done nothing to amend the law. . . and these laws remain valid because they are saved.¹⁴²

The ESC legal community was also upset that the court refused to acknowledge the surging rates of violent, drug-related crime. Although the court tried to be sympathetic to these concerns in the *Lambert Watson* opinion, it made clear that the rising tide of violent crime could not affect their reasoning:

We mention one last matter. In the Court of Appeal and in argument much emphasis was laid on the very high incidence of murder and the widespread use of firearms in Jamaica. These facts are well known to the Board and are, regrettably, notorious . . . But prevailing levels of crime and violence, however great the anxiety and alarm they understandably cause, cannot affect the underlying legal principle at stake, which is that no one, whatever his crime, should be condemned to death without an opportunity to try and persuade the sentencing judge that he does not deserve to die.¹⁴³

III. THE IMPACT OF NATIONAL POLITICS AND HUMAN RIGHTS OBLIGATIONS

Throughout the ESC, administration of the death penalty has been shaped by trends in crime and popular attitudes toward punishment. Although the British used the death penalty as a tool of colonization, they abolished the practice in 1971. Since then the Privy Council has limited the ability of ESC countries to apply the death penalty in landmark cases like *Pratt* and *Lambert Watson*. Yet despite changes in the British approach, the death penalty still has strong support throughout the ESC, especially as a means to punish violent drug-traffickers. To understand the entire spectrum of views on “justice” and “punishment” in the ESC, one must consider the political climates of Jamaica, Trinidad, and Barbados. Strong

141. Vasheist Kokaram, *Give Me Liberty or Give Me Death*, TRIN. & TOBAGO NEWS-DAY (Aug. 2 2004), <http://www.newspaper.co.tt/news/0,20488.html>.

142. Vasciannie, *supra* note 126, at 2.

143. *Watson*, [2004] 3 W.L.R. 841, [2004] UKPC 34.

local support for the death penalty among citizens of all class positions has created a climate hostile to the Privy Council and its rulings imposed from outside the country. In the wake of *Pratt* and *Lambert Watson*, popular support for the death penalty led certain Caribbean countries to withdraw support of human rights agreements, including accession to the Optional Protocol of the ICCPR and the American Convention on Human Rights. Part A examines the scope of drug-related violence in the Caribbean and popular opinion toward capital punishment. Part B analyzes the effect of local opinion on the decision of Caribbean governments to denounce their human rights obligations.

A. *Popular Attitudes toward the Death Penalty and Effects of Drug-Violence*

Throughout the Caribbean, only the English-speaking countries have insisted on using the death penalty in their criminal justice system. The practice was made illegal in the French and Dutch Antilles, Haiti, and the Dominican Republic.¹⁴⁴ In Cuba, executions have not occurred since 2003.¹⁴⁵ But despite the positions of close neighbors and countries of origin, capital punishment still has strong popular support throughout the ESC. Scholars have noted that the “vast majority” of people in these countries support the death penalty in “appropriate cases.”¹⁴⁶ In fact, a survey conducted by Systems Caribbean Limited found that well over 80% of residents in Barbados and Trinidad and Tobago support use of the death penalty.¹⁴⁷

What can explain such high rates of popular support? The rising crime rate, especially crime associated with drug violence, is partly responsible. Beginning in the 1980s, crime rates in the ESC skyrocketed. Government officials saw two primary causes for the growth of violent crimes: (1) the general decline in the region’s economic growth; and (2) the activity of South American drug cartels in using ESC countries as transshipment points for drugs bound for the United States.¹⁴⁸ A number of Caribbean nations, most notably Jamaica, had unofficial moratoria on the death penalty, but executions were resumed in response to the rising tide of violence.¹⁴⁹ The surging number of violent crimes led to a massive increase in death sentences and executions. In 2005, the death row population in the ESC was approximately four times that of the United States.¹⁵⁰

144. Gifford, *supra* note 122, at 198.

145. *Id.*

146. Simmons, *supra* note 91, at 266.

147. *Id.*

148. IVELAW LLOYD GRIFFITH, *DRUGS AND SECURITY IN THE CARIBBEAN: SOVEREIGNTY UNDER SIEGE* 53-92 (1997).

149. Burnham, *supra* note 61, at 601 (“Until the 1980s, when a dramatic increase in homicide in the region led to its revived popularity with the electorate, the death penalty was used so infrequently as to amount to a virtual moratorium. But violent crime skyrocketed beginning in the 1980s, and so, too, did the number of death sentences and executions.”).

150. *Id.*

Jamaica and Trinidad were two of the nations hardest-hit by the drug trade. The abundance of drug money has fueled drug-related corruption in both countries. According to the UN's INCB Report, corruption has

increasingly weakened the criminal justice systems in . . . the Caribbean. Corruption, including among police and other law enforcement officials, has interfered with the ability of States in the region to promote development, blocking the delivery of services and distorting public spending.¹⁵¹

While Jamaica has a long history of drug-related violence and problems continuing to the present day, Trinidad has experienced a more recent spike in such violence.¹⁵² The island has also become a major hub for arms smuggling and money laundering in recent years. Geographically speaking, Trinidad occupies a prime location for the smuggling of contraband, since it is only seven miles off the coast of Venezuela, a prominent drug transit point in South America. Further, Trinidad has a comparatively well-developed banking and transportation infrastructure, which allows drug dealers to funnel money and product through the country with ease. In August of 2011, the Trinidadian Prime Minister, Kamla Persad-Bissessar, declared a nationwide state of emergency after 11 people were killed in four days.¹⁵³ She linked the crime surge to major police seizures of narcotics, which were valued in excess of \$20 million, noting that such “large sums of money do not just disappear from the drug trade without consequences.”¹⁵⁴ Terrific violence traumatized numerous neighborhoods in Port of Spain, the capital City of Trinidad. The state of emergency was extended from August into September, and was finally lifted only in the beginning of December.¹⁵⁵ Despite the curfew, Trinidad, a nation of only 1.3 million, reported more than 350 homicides in 2011.¹⁵⁶

Jamaica's history as a desirable location for drug smuggling reaches back much further. Jamaica is known for the growth and export of Cannabis, which travels to many countries in North and South America.¹⁵⁷ Like

151. INT'L NARCOTICS CONTROL BD., ANNUAL REPORT, at ¶ 382, U.N. Doc. E/INCBW/2011/1, U.N. Sales No. E.12.XI.5 (2011) [hereinafter INCB REPORT], available at http://www.incb.org/documents/Publications/AnnualReports/AR2011/AR_2011_E_Chapter_III_Americas.pdf.

152. Reshma Ragoonath, *PM Declares Limited State of Emergency*, GUARDIAN MEDIA (Aug. 23, 2011), <http://www.guardian.co.tt/news/2011/08/22/pm-declares-limited-state-emergency>.

153. Reshma Ragoonath, *PM Declares Limited State of Emergency*, GUARDIAN MEDIA (Aug. 23, 2011), <http://www.guardian.co.tt/news/2011/08/22/pm-declares-limited-state-emergency>.

154. *Id.*

155. Michael Coleman, *Jamaica, Trinidad Battle Violence as Drug Smuggling Plagues Caribbean*, DIALOGO NEWS (Sept. 1 2012), http://dialogoamericas.com/en_GB/articles/rmisa/features/regional_news/2012/01/09/aa-caribbean-violence.

156. *Id.*

157. Congressional Research Service Report, *supra* note 9, at 1 (“Cannabis is cultivated in virtually all countries in the region, mainly for local consumption, but notable cannabis

Trinidad, Jamaica's geographical makeup is advantageous to drug smugglers. The country has 638 miles of coastline and is accessible via airplane and speedboat.¹⁵⁸ Drugs are transported through way stations on the coast or moved to the Bahamas before being trafficked to Europe or the United States. Guns and ammunition are also trafficked through Jamaica, along with migrants and prostitutes.¹⁵⁹ The flourishing drug market in Jamaica has transformed the country into one of the most dangerous nations in the world and taken a fatal toll on the local population. In 2010, Jamaica had a homicide rate of 52 per 100,000, qualifying the country as the fourth most violent in the world.¹⁶⁰ The same year, Jamaica made headlines when the United States ordered the extradition of Kingston drug boss Christopher "Dudus" Coke on drug trafficking and gun smuggling charges. After some initial recalcitrance, Jamaica waged a manhunt for Coke, which ended in 73 civilian deaths.¹⁶¹ Much of the fighting took place in Tivoli Gardens, a vast shantytown—or "garrison" as it is called in Jamaica. Coke was highly influential in the area, which was a haven for the operation of his gang, known as the "Shower Posse."¹⁶² The incident prompted Jamaica to declare a temporary state of emergency.

Citizens of the ESC have passionately expressed their support for exacting "appropriate" justice on the perpetrators of violent crime. As noted previously, administration of the death penalty is carried out through hanging.¹⁶³ The public response to violent crime has become so impassioned that "[r]ecently in Jamaica a pastor put his name forward to fill the post of hangman, an act that even advocates for the death penalty found disturbing."¹⁶⁴ Popular support for retributive justice has urged corporal punishment in addition to application of the death penalty. For example, in the Bahamas the legislature responded to a crime wave by passing harsh penalties for crime. The practice of flogging was reinstated in 1991 (though abolished three years later) to serve as a deterrent to drug related crime.¹⁶⁵

exporters include Mexico and Jamaica. Drug processing and refining may take place in source zones as well as along transit routes.").

158. Dave Eberhart, *Jamaica Sees Jump in Cocaine Seizures Since Dudus Extradition in 2010*, DIÁLOGO (Mar. 6, 2013) http://dialogo-americas.com/en_GB/articles/rmisa/features/regional_news/2013/06/03/jamaica-drugs (last visited Oct. 11, 2013).

159. INCB REPORT, *supra* note 151, at 50.

160. Coleman, *supra* note 155.

161. Jason Beaubieu & Corey Flintoff, *Drug Violence Tarnishes Jamaica's Paradise Image*, NPR NEWS (May 26 2010), <http://www.npr.org/templates/story/story.php?storyId=127130637>.

162. *Id.* ("The gang's name is said to come from a Labour Party election slogan promising to shower Jamaicans with benefits, but it also is said to be a reference to the gang's ability to shower enemies with bullets.").

163. Leonard Birdsong, *The Formation Of The Caribbean Court Of Justice: The Sunset Of British Colonial Rule in the English Speaking Caribbean*, 36 U. MIAMI INTER-AM. L. REV. 197, 203 (2005).

164. Gifford, *supra* note 122, at 197.

165. Burnham, *supra* note 61, at 582.

The popularity of the death penalty also extends beyond class boundaries in the ESC, making it politically expedient. Government officials, legal elites, and working class people all share “a strong preference for capital punishment as a way to deter the region’s persistently high violent crime rate.”¹⁶⁶ Since the death penalty is popular with major political donors as well as the wider population of ESC countries, politicians have been reluctant to uphold human rights obligations over the state’s right to execute criminals. According to the Attorney General of Trinidad and Tobago, “the legality of the death penalty was an essential condition of Caribbean participation in human rights regimes.”¹⁶⁷ Scholars have speculated that for countries attempting to balance respect for human rights agreements and local views, the latter currently outweighs the former: “In the end, the regional preference for capital punishment was strong enough to outweigh the weaker preference for maintaining commitments to constitutional and human rights systems that effectively incorporated abolitionist norms.”¹⁶⁸

History Professor David Johnson is originally from Trinidad and Tobago. He grew up in a working class community called Morvant, located just outside of the Port of Spain area.¹⁶⁹ Today, he says that Morvant is one of the “centers of gun violence.”¹⁷⁰ He notes that if one were to walk the streets of Morvant, talking to people outside their homes, there would be no shortage of citizens who say the state should “string them [criminals] up.”¹⁷¹ But according to Professor Johnson, there is not enough public education about the practice of capital punishment.¹⁷² Amid rates of rising crime, it becomes easy to resort to supporting the death penalty. The Trinidadian government has not facilitated an open and creative public discussion about the practice. Johnson states that instead of conducting “straw polls” about the death penalty, the government could show leadership and encourage a dialogue.¹⁷³ One of the things that must be addressed in this dialogue is the class implications of the death penalty. Almost all death penalty cases involve the “downtrodden classes”—the main perpetrators and victims of violent crime. There is a serious need for political leaders to “step out of the fray” to address class division, drug crime, and its relation to capital punishment.¹⁷⁴

166. Helfer, *supra* note 110, at 1886.

167. *Id.*

168. *Id.* at 1887 (“Supporting this conclusion is the fact that two of the three denouncing states immediately sought to reaffirm their treaty commitments for human rights unrelated to capital punishment.”).

169. Telephone Interview with David Johnson, Professor of History, City College, City University of New York (Mar. 30, 2013).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

B. *The Human Rights Obligations of Caribbean Governments*

Popular support for the death penalty in the Caribbean at present differs fundamentally with European jurisprudence on the topic. For decades, European judicial bodies have had strong reservations about the use of the death penalty by countries in the Americas. In the 1989 case of *Soering v. United Kingdom et al.*, the European Court of Human Rights addressed the “Death Row Phenomenon,” which is often defined by serious delay in execution following sentencing, as well as the grim conditions of detention imposed upon inmates, signifying that all attempts at rehabilitation have failed.¹⁷⁵ In *Soering*, the European Court on Human Rights refused to extradite an individual, convicted of murder, from the United States to stand trial on a first degree murder charge.¹⁷⁶ The court ruled that it could not extradite the individual unless extradition was accompanied by an assurance from the U.S. that the death penalty would not be imposed. While the court stopped short from deeming the death penalty itself as inhuman or degrading,¹⁷⁷ the court did note that delays and mistreatment of prisoners often constitute a violation of Article 3 of the European Convention on Human Rights.¹⁷⁸

As is evidenced by the rulings in *Pratt* and *Lambert Watson*, the JCPC shares these reservations toward application of the death penalty. But the rulings in these two cases have placed ESC governments in a difficult position. One author argues that the JCPC’s decisions and attitude on international human rights has placed ESC countries “between a rock and a hard place.”¹⁷⁹ First, democratically-elected politicians in countries like Jamaica and Trinidad must represent the views of their constituents. Second, the constraints imposed by the JCPC in *Pratt* have placed considerable pressure on the two international bodies capable of hearing death penalty appeals—the Human Rights Committee and the IACHR. These bodies have found themselves unable to process all of the many appeals they receive within the strict five-year window designated by *Pratt*.¹⁸⁰ For death row inmates who want to exhaust the appeals process, which now includes recourse to a national appeals court, human rights bodies, and the JCPC, it is

175. William A. Schabas, *Soering’s Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk down Death Row*, 43 INT’L & COMP. L.Q. 913, 913 (1994).

176. *Id.*

177. *Id.* (“The Court stopped short of holding the death penalty itself to be inhuman and degrading, although one judge, Jan De Meyer, adopted such views in his concurring reasons.”).

178. Schabas, *supra* note 175, at 914.

179. Simmons, *supra* note 91, at 282 (“The law is a mess! It has taken the Judicial Committee of the Privy Council, our highest court, almost six years to confess that their decisions and the attitude of the international human rights have truly placed our countries “between a rock and a hard place.”).

180. *Id.* (“The Republic, in common with other Caribbean countries, found itself in an impossible position”).

nearly impossible to complete this process without significant delay to the execution.

In response to the rulings in *Pratt and Lambert Watson*, Trinidad and Tobago and Jamaica withdrew from the Optional Protocol to the ICCPR.¹⁸¹ Both countries re-acceded to the Protocol with a reservation for all cases involving the death penalty.¹⁸² The Optional Protocol provides “international machinery for dealing with communications from individuals claiming to be victims of violations” of the rights that are listed in the Covenant, meaning that it serves as the enforcement mechanism for human rights in the ICCPR.¹⁸³ It is unfortunate that the Caribbean countries felt they had to implement this reservation, because they were among the first signatories to the ICCPR. Jamaica signed the ICCPR, in 1966, and then ratified the agreement in 1975.¹⁸⁴ Trinidad ratified the treaty in 1978 following revision of its constitution. Jamaica then ratified the Optional Protocol in 1975, while Trinidad did in 1980.¹⁸⁵ Both countries demonstrated their commitment to the international treaty before many countries did in the 1990s. The two countries took a slower approach to adopting the rules of the Inter-American Commission, partly because the OAS was originally created with only the participation of Latin America and not the Caribbean.¹⁸⁶ The contentious issue of the death penalty has thus forced the Caribbean countries to retreat from human rights pledges that they once willingly and enthusiastically endorsed.

The reasoning of the Trinidadian and Jamaican governments is that they are unable to apply the death penalty in accordance with the Optional Protocol. The two governments believed it impossible to comply with the five-year window imposed by Pratt, finding the five-year limit an unrealistic mandate.¹⁸⁷ Trinidad also withdrew fully from the American Convention on Human Rights, effectively withdrawing its participation in the IACHR. The Inter-American Court no longer has jurisdiction to consider individual human rights violations originating in Trinidad.¹⁸⁸ Law professor Laurence Helfer argues that Jamaica and Trinidad withdrew from their human rights obligations and jurisdiction from international tribunals for two reasons. First, the two countries resented the judicial imperialism of the JCPC in Caribbean death penalty matters. Second, the withdrawal from human rights agreements can be understood as a “response to the overlegalization of the governments’ human rights commitments.”¹⁸⁹ According to Helfer, there are three important instances of

181. Helfer, *supra* note 110, at 1864.

182. *Id.*

183. Morrison, *supra* note 108, at 415.

184. Helfer, *supra* note 110, at 1864.

185. *Id.*

186. *Id.*

187. It is worth noting that the United Kingdom, the United States, and other Caribbean states are not signatories to the Optional Protocol.

188. Simmons, *supra* note 91, at 285.

189. Helfer, *supra* note 110, at 1832.

overlegalization in this case. First, the Privy Council set in motion a contradictory ruling in Pratt by creating a five-year window for executions but refusing to allow executions while human rights petitions or appeals were pending. Second, it “increased the treaties’ precision by particularizing the content of the degrading punishment norm shared both international and domestic instruments.” Third, it urged states to collaborate with human rights organizations and encouraged defendants to file petitions with these organizations, resulting in an outcome that would likely result in the commutation of their sentences.¹⁹⁰ Helfer writes, “Seen from this perspective, the legalization of international commitments is not unambiguously good, and overlegalized treaty regimes may pose particular dangers.”¹⁹¹

The Privy Council has had a generally positive relationship with the international human rights bodies in the ESC. The Privy Council even took measures to discourage Jamaica from discontinuing its membership.¹⁹² But the Privy Council also urged the tribunals to complete review of all applications within eighteen months, while noting that the process should speed up considerably once delays were resolved at the national level.¹⁹³ Scholars have criticized the Privy Council for these exhortations, noting that the Privy Council was uninformed about the way that human rights institutions function. The two tribunals simply do not have the capacity to review cases with any haste, since they meet only a few times a year and are stretched to the limit with crowded dockets.¹⁹⁴ Thus, although ESC countries recognize the need to honor their human rights commitments, the rulings of the Privy Council have made it difficult for them to do so.

IV. THE CARIBBEAN COURT OF JUSTICE AS AN ALTERNATIVE TO THE PRIVY COUNCIL

In the wake of escalating drug violence and controversy over the human rights obligations of ESC Countries, the Caribbean Court of Justice (CCJ) has been debated as a suitable alternative to the Privy Council. Application of the death penalty has served as a flashpoint, but it should be examined within the context of other philosophical and practical considerations regarding the adoption of a new, regional court of appeals.

190. *Id.* at 1891-92.

191. *Id.* at 1837.

192. *Id.* at 1873 (“The court expressed a generally positive view of the tribunals’ roles in reviewing death row petitions. Notwithstanding the fact that the tribunals’ decisions were not legally binding, the court took pains not to ‘discourage Jamaica from continuing its membership of these bodies and from benefiting from the wisdom of their deliberations,’ and urged that their decisions ‘be afforded weight and respect’ by the government.”).

193. *Id.* at 1874.

194. *Id.* (“Both of these predictions were based on a misperception of how human rights petition procedures function. As for the time required to review death row petitions, the court in Pratt failed to recognize the tribunals’ institutional incapacity to review cases quickly. The tribunals are part-time bodies which meet only a few times per year and manage an increasingly crowded docket with inadequate material and financial resources.”).

Three major factors have framed this debate: the importance of a distinct Caribbean jurisprudence; the comparative financial costs and accessibility of the CCJ and the Privy Council; and the partiality of Caribbean judges compared with their counterparts in England. This Section, considers each of these factors in turn and argues that the CCJ is a preferable alternative to the Privy Council.

Part A analyzes the idea of Caribbean Jurisprudence and the legacy of British colonialism, arguing that if adopted, the CCJ has the potential to balance preservation of Privy Council precedent with new judicial interpretations that reflect the history and values of the Caribbean people. Addressing capital cases would be a major component of this balance. Part B examines the costs associated with both the CCJ and the Privy Council to show that the former is a financially feasible proposition. Part C argues that there would not be a loss of judge partiality after a switch to the CCJ.

A. *The Importance of a “Caribbean Jurisprudence”*

In the decade following independence, economic and judicial integration of the ESC was a top priority for Caribbean nations.¹⁹⁵ Critics of the JCPC maintained that a Caribbean Court was necessary to replace the JCPC, which they viewed as a colonial institution established to protect the interests of the white planter class.¹⁹⁶ Independence leaders were eager to develop a Caribbean jurisprudence—through a regional Supreme Court—that reflected the history and values of its population. The Caribbean Court of Justice (CCJ) was conceived in 1970, when a political delegation from Jamaica to the Sixth Heads of Government Conference proposed an independent Caribbean court to replace the Privy Council.¹⁹⁷ In 1974, the Caribbean Task Force re-affirmed the message of the Jamaican delegation, arguing that a Caribbean Court of Appeal represented the final step in the independence process: “independence imposes an obligation on sovereign nations to be the architects of their own destiny. To fulfill this obligation, the people must in turn create their own institutions.”¹⁹⁸

ESC countries envisioned a Caribbean Court of Appeals as an extension of their regional economic community. A regional trading block, known as the Caribbean Community and Common Market (“CARICOM”), was established in 1973 when heads of Caribbean governments, including Jamaica, Trinidad, Guyana, and Barbados among others, signed the Treaty of Chaguaramas.¹⁹⁹ CARICOM replaced the Caribbean Free

195. Bryan, *supra* note 40 at 206.

196. David Rowe, *Op-Ed: Is Now the Time for the Caribbean Court of Justice*, CARIBBEAN J. (Sept. 15, 2012), <http://www.caribjournal.com/2012/09/15/op-ed-is-it-time-for-the-caribbean-court-of-justice>.

197. *The Caribbean Court of Justice*, CARIBBEAN COMMUNITY SECRETARIAT, (Oct.20, 2000), http://www.caricom.org/jsp/community_organs/caribbean_court.jsp?menu=cob.

198. Bryan, *supra* note 40, at 206.

199. *The Original Treaty*, CARIBBEAN COMMUNITY SECRETARIAT, (2011), http://www.caricom.org/jsp/community/original_treaty.jsp?menu=community.

Trade Association.²⁰⁰ In addition, the Treaty sought to address issues of foreign policy coordination and inter-state cooperation.²⁰¹ The Treaty was revised in 1997 through the Revised Treaty Establishing the Caribbean Community Including the CARICOM Single Market and Economy (CSME).²⁰² Today, there are twelve full members of both CARICOM and CSME.²⁰³

In the same year, ten countries signed the Agreement Establishing the Caribbean Court of Justice.²⁰⁴ The court was given two primary functions. The first was to serve as a final court of appeal for the ESC. The CCJ was envisioned to be a final replacement for the Judicial Committee of the Privy Council as the ultimate court of appellate jurisdiction for both criminal and civil matters. It is the highest municipal court in the region. The second function was to serve as an international court with original jurisdiction for the region. The CCJ is vested with the right of original jurisdiction to interpret the Treaty of Chagamuvaras. States with the Caribbean Community (signatories of the Caricom treaty) are supposed to utilize the court to settle major inter-state disputes.²⁰⁵ Scholars have characterized the CCJ as having a “hybrid nature”—since it has both original and appellate jurisdiction—which contributes to regional integration into a global legal framework.²⁰⁶

Despite the promise of the CCJ, only three countries adopted it as their Supreme Court: Barbados, Guyana, and Belize. Jamaica and Trinidad, two of the earliest and strongest advocates for a Caribbean court, still have not been able to change their constitutions to adopt it. The Honorable Rolston Nelson, a judge on the CCJ, believes that this is due to the high level of political support needed to change a country’s constitution.²⁰⁷ For example, in Trinidad, three quarters of the House of Representatives and two thirds of the Senate must support adoption of the CCJ.²⁰⁸ Nonetheless, the current prime ministers of Trinidad and Jamaica,

200. *Id.*

201. *Id.*

202. Birdsong, *supra* note 163, at 201-02.

203. The full members are Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. The Bahamas and Haiti are full members of CARICOM but not the CSME. See THE CARIBBEAN COURT OF JUSTICE, *The CCJ: from Concept to Reality* (2012) <http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-concept-to-reality> (last visited Oct. 11, 2013).

204. The original signatories included ten states: Antigua & Barbuda; Barbados; Belize; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; Suriname; and Trinidad & Tobago. Dominica and St. Vincent and the Grenadines joined the agreement less than two years later in 2003. *Id.*

205. Birdsong, *supra* note 163, at 200.

206. *Id.*

207. *Politics Hindering the Success of Caribbean Court of Justice*, DAILY HERALD (Apr. 10, 2012), <http://www.thedailyherald.com/index.php/regional/2-news/26937-politics-hindering-the-success-of-caribbean-court-of-justice-.html>.

208. *Id.*

Kamla Persad-Bissessar and Portia Simpson Miller, respectively, have announced that the countries will switch over to the Caribbean Court of Justice.²⁰⁹ Following the 50th anniversary of Jamaica's independence from Britain, Miller stated that it was time to "end judicial surveillance from London."²¹⁰ The opposition Jamaican Labor Party has been skeptical of the CCJ and has advocated for a nationwide referendum on the issue. The government has responded that all that is necessary is a 2/3 majority in Parliament.

The debate over whether to adopt the CCJ has inevitably raised issues of nationalism and self-determination. One of the most hotly debated questions is whether a Caribbean Court should create its own jurisprudence, or must instead strictly follow precedent set by the Privy Council. Indeed, the Privy Council leaves a complex legacy regarding the application of binding law in national Caribbean courts. On the one hand, the Privy Council was the only judicial body serving a multitude of Caribbean nations with the power to create binding law. A Caribbean Court of Appeals could unite the national legal systems of the ESC countries.²¹¹ On the other hand, the precedent that is already in place from the Privy Council is unlikely to be overturned en masse by the Caribbean Court of Justice. The adoption of the CCJ does not guarantee a proliferation of death sentences and executions. Certain authors have speculated that the principle of stare decisis, enshrined in the tradition of English Common Law, will temper any willingness to rely on the death penalty.²¹² The decisions rendered by the Privy Council, including *Pratt v. Morgan*, would not be completely disregarded by the CCJ in its determination of death penalty cases. Even if the Privy Council is abolished, its rulings will still be considered active precedent and binding law by courts of all levels throughout the Caribbean.

If the CCJ is adopted, it will have to engage in a complex balancing act. It will have to consider the rulings of the Privy Council while also reflecting the will of the people it serves. The ruling in *Pratt*, although designed to enforce human rights obligations, had the unfortunate effect of allowing London to dictate policy to ESC countries. ESC governments and people alike felt the binding ruling in *Pratt* created an impossible situation for the administration of the death penalty. The *Pratt* decision

209. Chris Summers, *Jamaica's London Appeal Court Dilemma*, BBC NEWS (Aug. 2, 2012), <http://www.bbc.co.uk/news/world-18668861>.

210. *Id.*

211. Birdsong, *supra* note 163, at 206 ("Rarely in Courts of Appeal throughout the region will one see lawyers citing or quoting an appellate case from another Caribbean country unless that case was decided before the Privy Council. The result of this reliance on the judgments of the Privy Council is a notable absence of precedents in the region.")

212. *Id.* at 224-225 ("It is this author's belief that even if the Privy Council no longer exists, the concept of stare decisis will moderate a rush to the death penalty. . . . The concept of stare decisis is written into the Agreement to Establish the CCJ. . . . The Privy Council, over the years, has interpreted the constitutions of Jamaica and Trinidad in a way that moderates the imposition of the death penalty. Both *Pratt and Morgan* and *Roodal v. State* are now constitutional requirements that must be followed.")

greatly narrowed the operation of the death penalty by invalidating the time limits states had attempted to impose on tribunals and staying all executions while petitions were pending.²¹³ The time frame imposed by *Pratt* made it difficult for Caribbean states to permit human rights petitions to be heard in a “reasonably deliberative amount of time.”²¹⁴ The Privy Council was heavily criticized for refusing to adopt an incremental approach to the overhaul of the capital appeals process. One historian stated that this enormous judicial restructuring of the Caribbean death row forced a “new legal norm . . . upon a resistant legal and political culture.”²¹⁵

Indeed, Professor Bogues thinks that the Caribbean Court of Appeals is not a final jurisprudential break from colonialism, but rather an overview and repeal of colonial laws, which still reside on the books.²¹⁶ The adoption of the Caribbean Court of Justice is just one piece of a needed comprehensive legal reform for ESC nations. Reforms need to be practical, including an effective public defender service, shorter time to trial, and better police work.²¹⁷ Most importantly, there needs to be a thorough review of laws that have their roots in colonialism, including legislation on vagrancy, drug policy, and homosexuality.²¹⁸ The development of a Caribbean jurisprudence is crucial, but it cannot be “piecemeal.”²¹⁹ Similarly, Professor Gaspar points to education as a major factor in reforming the legal system.²²⁰ People need to be educated about the role of the criminal justice system in their own lives, including the benefits of the Caribbean Court of Justice and the Privy Council. Professor Gaspar describes this as the process of “ventilating” issues within the context of popular opinion.²²¹ The formula for political and judicial change requires informed input from the general public.

Yet another source of support for the Caribbean Court of Justice has come from a seemingly unlikely place: the Privy Council. Judges on the JCPC have stated publicly that it is important for the Caribbean to have its own supreme court and develop its own jurisprudence. Sir David Simmons, Chief Justice of the Barbados Supreme Court and President of the Regional Judicial and Legal Services Commission of the CCJ stated: “The Privy Council and the House of Lords judges fully understand the necessity for the CCJ, fully support what we’re doing and pledged their continued support for the court.”²²²

213. Helfer, *supra* note 110, at 1889.

214. *Id.*

215. *Id.*

216. Bogues Interview, *supra* note 51.

217. *Id.*

218. *Id.*

219. *Id.*

220. Gaspar Interview, *supra* note 44.

221. *Id.*

222. Birdsong, *supra* note 163, at 220.

B. Accessibility and Costs of the Privy Council and CCJ

Another major consideration in the adoption of the CCJ is cost. The cost dilemma functions on two levels: the expense of appeals to the Privy Council and the operational costs of the CCJ. Each signatory gave a one-time contribution to the fund establishing the CCJ. Trinidad was the largest contributor to the fund, giving an initial sum of TT 199 million. Trinidad also agreed to provide a home for the court in its capital of Port of Spain and fund the ongoing costs of its operation.²²³ It has been predicted that Jamaica would contribute \$28.7 million to the fund,²²⁴ while Guyana would contribute \$47.8 million.²²⁵ The other amounts, given by smaller ESC countries, amounted to approximately \$2.5 million.²²⁶ The government of Japan also contributed to \$300,000 to the establishment of the CCJ through their Human Resource Development Fund.²²⁷ But major questions remain about how the operations of the court will continue to be financed. Many of the ESC nations that are considering adoption of the CCJ are developing nations with scarce financial resources.²²⁸ CARICOM projections have stated that the cost to operate a six-judge Caribbean Court of Justice would be approximately \$EC 4 million per year. Trinidad, Jamaica, Guyana, and Barbados would undoubtedly pay the largest share of maintenance for the court, although only Barbados is a current member of the CCJ.²²⁹ Conversely, the salaries of the Privy Council judges and other costs associated with the court are paid for by the Commonwealth. Retention of the Privy Council has been a relatively cheap proposition for ESC countries.²³⁰

Although the Privy Council requires little funding from ESC countries, there are obstacles to accessibility. First, the cost of appeals to the Privy Council is almost prohibitive for the majority of citizens in the ESC. To file an appeal with the Privy Council, an individual would have to pay

223. Although Port of Spain was designated as the temporary home of the court, it has not since relocated.

224. *CCJ Loan To Be Repaid Over 10 Years*, JAMAICA OBSERVER (Aug. 14, 2003), http://www.jamaicaobserver.com/news/html/20030813T200000-0500_47526_OBS_CCJ_LOAN_TO_BE_REPAID_OVER___YEARS.asp.

225. Patrick Denny, *Ten-Member Team for Caribbean Court of Justice Seminar in Trinidad, Guyana to Contribute US\$47-8M to Court*, STABROEK NEWS (July 20, 2002), <http://landofsixpeoples.com/news022/ns207203.htm>.

226. Felicia Toby, *CCJ Will Be a Reality*, BARBADOS ADVOCATE (Sept. 9, 2003), <http://www.barbadosadvocate.com/newviewnewsleft.cfm?record=14858>.

227. *Caribbean Court of Justice Technical Assistance US\$300,000 Agreement Signed with Japan*, STABROEK NEWS (Aug. 21, 2002), <http://landofsixpeoples.com/news022/ns208213.htm>.

228. Bryan, *supra* note 40, at 209.

229. *Id.* (“At a recent meeting of regional Attorneys General, several options for funding the Court of Appeal were discussed. One option proposed the following distributions: Jamaica 35.7 percent (\$EC 1.5 million), Guyana 10.6 percent (\$EC 444,000), Barbados 15.6 percent (\$EC 660,000), Trinidad and Tobago 38 percent (\$EC 1.58 million) and other smaller territories less than 2 percent.”).

230. Helfer, *supra* note 110, at 1867.

attorney fees, airfare, and other costs to send their attorney to the United Kingdom.²³¹ Lord Anthony Gifford QC, an English hereditary peer and a barrister who set up a law firm in Jamaica in 1991, put it well when he stated: “I’m in favour of the move to the CCJ. It would be far more accessible. At the moment the only people who can appeal to the Privy Council are those with a lot of money or those with none, who are on Death Row.”²³²

The reason for the prominent number of capital appeals is that many prisoners facing the death penalty have secured pro bono representation from lawyers in London.²³³ Yet for those unable to get high-quality pro bono representation in death penalty cases, it is extremely difficult to file an appeal with the Privy Council. Junior lawyers assigned to these cases through national legal aid systems, are unprepared to handle the complexity of capital cases. Legal aid programs also do not provide adequate training to their younger lawyers and do not pay them to assist their clients during specific pretrial and post-trial proceedings.²³⁴ Further, lawyers are often unable to gather the appropriate forensic, investigative, or medical expertise to make a compelling case at trial.²³⁵ The CCJ will be less costly and more accessible as an appellate court serving all of the ESC countries.

C. *Can the CCJ be a Truly Independent Judiciary?*

One of the strongest arguments for the Privy Council is its ability to function as an impartial arbiter of the law. The judicial integrity of the Privy Council is maintained by its remoteness from the regional political conflicts of the Caribbean.²³⁶ Supporters of the Privy Council have noted that, “the Caribbean has often seen the geographic and social distance of the Privy Council as a calming and stabilizing influence.” Legal elites have come in force to support the Privy Council.²³⁷ The Jamaican Bar, for example, is one organization that has consistently supported use of the Privy Council. Within the Jamaican Bar, there is a small but powerful group of

231. Giselle Reid, *The Legacy of Colonialism: A Hindrance of Self-Determination*, 10 *TOURO INT’L L. REV.* 277, 300 (2000) (“An inaccessible court is, arguably, a denial of an inherent constitutional right to justice. A regional Caribbean court of last resort would undoubtedly be more accessible and more affordable to the average person than travelling to the Privy Council.”).

232. Summers, *supra* note 210, at 300.

233. Gifford, *supra* note 122, at 202.

234. Burnham, *supra* note 61, at 602.

235. *Id.*

236. Bryan, *supra* note 40, at 203 (“One of the most convincing arguments set forth in favor of retention of the Privy Council in its present capacity is the impartiality that it provides in the judicial process. This is seen largely as a result of its geographic distance from the Caribbean region, far removed from the reach of regional politics.”).

237. Burnham, *supra* note 61, at 583 (“The region’s legal elites appreciated the proficiency and efficiency of the Privy Council judges, as well as the impartiality that distance seemed to foster, all critical judicial attributes that are hard to realize in these small, closely-knit island nations.”).

attorneys who are fiercely loyal to the JCPC.²³⁸ Dr. Paul Ashley, a Jamaican attorney and political commentator, notes a strong intersection between the pace of decolonization and the reliability of English judges. Ashley believes that Jamaicans are reluctant to put issues of local justice in the hands of Caribbean judges. “The feeling, he says, is ‘better to let it remain with the tried, tested and proven British.’”²³⁹

Privy Council judges are also seen as more experienced than their counterparts in the ESC.²⁴⁰ This experience, combined with the remoteness of their office, ensures that they are fully insulated against the political and social pressures of a small, politically and socially intimate region like the Caribbean.²⁴¹ Jamaican attorney Hugh Wildman, a former senior prosecutor in Jamaica, asserted in 2012 that regional governments should use utmost caution in their attempts to replace the Privy Council with the Caribbean Court of Justice. “I am not confident or comfortable that we are going to replace the Privy Council with a court of equal standing in terms of erudition . . . It is my considered view that the quality of the judgments given by the Privy Council are far superior to what we are seeing in the region and for that matter what we are seeing coming out of the CCJ.”²⁴² In a swift response, Patrick Atkinson, the current Attorney General, defended Caribbean judges: “I reject completely any suggestion that the decisions coming out of our courts are inferior to decisions coming out of the English courts.”²⁴³

Yet the CARICOM agreement establishing the CCJ has a mechanism for reducing the role of politics in the appointment of judges.²⁴⁴ The Agreement states that Caribbean politicians have no power to appoint or remove judges from positions at the CCJ. Instead, judges will be appointed by “a majority vote of all the members of the [Regional Judicial and Legal Services] Commission.”²⁴⁵ The Agreement establishing the Court delineates specific guidelines for the appointment of judges. The signatory countries determined that CCJ judges should not be directly appointed by member states or elected by the citizenry of the Caribbean. The CCJ agreement created a regional ‘Judicial and Legal Services Com-

238. Rowe, *supra* note 196.

239. Summers, *supra* note 210.

240. Helfer, *supra* note 110, at 1867 (The Privy Council was staffed with “able common law judges,” a fact that helps to explain why Caribbean Legal elites supported it.).

241. Bryan, *supra* note 40, at 204 (“Conversely, jurists from the region, despite their integrity and independence, may find it difficult if not impossible to be uninfluenced, due to the small size of the region and the fact that it proves almost impossible to keep the business of one person private from that of another. This concern is part of the reason that there is some division as to whether the Caribbean Court of Appeal should handle only criminal appeals.”).

242. Lavern Barrett, ‘Our Judges Not Good Enough,’ JAMAICA GLEANER (Sept. 7 2012), <http://jamaica-gleaner.com/gleaner/20120907/lead/lead1.html>.

243. *Id.*

244. Reid, *supra* note 231.

245. Birdsong, *supra* note 163, at 213.

mission' that chooses the judges of the court. The Commission was designed to insulate the judges of the CCJ against political influence or bias from different Caribbean nations.²⁴⁶ To qualify as a judge for the CCJ, an individual must have at least five years of judicial experience and "good moral standing." The President of the CCJ is appointed "by a three-fourths majority vote of the States upon recommendation of the Commission."²⁴⁷ Judges are allowed to serve indefinitely, without a limit to their terms. Judges, however, cannot serve past the age of seventy-two years old.

Professor Bogues and Professor Johnson both believe that Caribbean judges are not more partial to political influence or professionally unqualified than judges in other countries. Professor Bogues cited the life-term appointment of federal judges in the United States as one example.²⁴⁸ Similar to the appointment process in the United States, it is nearly impossible to have the appointment of judges be free of political influence.²⁴⁹ It is unreasonable to think that judges just magically appear in office, as if they "sprang from the head of Zeus."²⁵⁰ Similarly, Professor Johnson notes that there are a number of outstanding legal minds in the Caribbean.²⁵¹ But the opportunity for these jurists to fully exercise their influence can never fully be realized while the Privy Council still functions as the highest court of appeal in the Caribbean.²⁵² Professor Johnson notes that the Privy Council is composed of men who are experts on Caribbean law, but have little idea of "what is happening in the Caribbean." The Caribbean judiciary has "fought fiercely for their autonomy over the years," and on the whole, the judiciary has been fairly autonomous. A link with England's legal training clearly exists, since many Caribbean lawyers and judges were educated in England, but these groups have still managed to maintain their own independence.²⁵³

Although the Caribbean Court of Justice has not seen many death penalty appeals from the countries of Barbados, Guyana, and Belize, it has heard one in its young tenure. In 2006, the CCJ was asked to hear an appeal from the *Lennox Boyce* case, which originally came before the

246. *Id.* (The Commission consists of a President, two persons nominated by the Commonwealth Bar Association and the Eastern Caribbean Bar Association, one local chairman of the Judicial Services Commission from a signatory state, one local chairman of a public service commission of a signatory state, two persons from civil society determined by regional nongovernmental organizations, two "distinguished jurists" nominated by deans of Caribbean law schools, and two person nominated jointly by the bar associations of the signatory states.).

247. *Id.*

248. Bogues Interview, *supra* note 51.

249. *Id.*

250. *Id.*

251. Johnson Telephone Interview, *supra* note 169.

252. *Id.*

253. *Id.*

Privy Council in 2004.²⁵⁴ The government of Barbados asked the CCJ to overturn the sentence of the Privy Council, which had commuted the death sentence to life imprisonment. The CCJ refused to do so, stating that the Privy Council's decisions will continue to be binding until the CCJ finds that they must be overturned.²⁵⁵ This decision has lent credence to the belief that the CCJ can, in fact, be a neutral arbiter of the law in the English Speaking Caribbean.

CONCLUSION:

In the English Speaking Caribbean, current governance is impacted by the weight of the colonial past. The British ruled the region for close to 400 years, leaving an enormous influence on political and legal institutions. They implemented systems of punishment, including the death penalty, and established a supreme court for the region, the Judicial Committee of the Privy Council. Although most ESC nations received their independence in the 1960s, they retained the JCPC as their court of appeal. Over the years, significant rulings by the JCPC on the death penalty have created a local backlash against continued judicial imperialism. Rulings like *Pratt* and *Lambert Watson* made it difficult for Caribbean countries to retain their human rights obligations and respond to rising rates of violent crime.

Many of the dilemmas faced by ESC countries in their application of the death penalty can be traced directly back to colonialism. Application of the death penalty is not illegal under international law, and independent nations throughout the world should have the right to determine their own matters of governance and self-determination. The Privy Council also has not formally come out against the death penalty, but has restricted procedure to such a degree that it is functionally impossible to impose. Considering the length of the appeals process in the ESC, it is impossible for a plaintiff to exhaust the process within the mandated five-year window from *Pratt*. Courts have been placed under enormous strain by this decision and the present volume of capital appeals, especially legal human rights bodies that only meet a few times per year. The decisions by the Privy Council have actually had the effect of limiting the human rights commitments of ESC nations, considering the pressure on the appeals process and strong popular support for the death penalty throughout the ESC. Caribbean countries are unlikely to abolish the death penalty anytime in the imminent future.²⁵⁶

254. Dawne Bennett, *CCJ Rejects Barbados Death Penalty Appeal*, CARIBBEAN NET NEWS (Nov. 9, 2006), <http://www.caribbeannewsnow.com/caribnet/cgi-script/csArticles/articles/000041/004168.htm>.

255. *Id.*

256. Morrison, *supra* note 108, at 407 ("The fact is that the rate of violent crime, particularly murder, in these small countries continues to be such (and it is on the increase) that abolition of the death penalty at this time is unlikely to attract the level of public support that governments will probably want to look to in order to promote such a radical change in the

The answer to this complicated problem can be found in ESC countries determining their own matters of governance. This can be accomplished through the adoption of the Caribbean Court of Justice. Provided that ESC countries can resolve their internal political challenges, the CCJ would allow countries to re-establish their human rights commitments and create their own binding precedent on issues like the death penalty. Local control over law in the ESC would calm nationalist feelings about the colonial legacy and judicial intervention from Britain. The abolition of appeals to the Privy Council and the creation of the CCJ are the final steps to ending colonial influence and attaining true independence.

status quo. So the death penalty remains, and is likely to remain for some time, the penalty for murder throughout the region.”).

