HUMAN RIGHTS AND THE MANDATORY DEATH PENALTY IN THE PRIVY COUNCIL

At common law the penalty for murder was death. This simple rule came to apply to many territories of the Crown. It persisted, sometimes in modified form, in many territories now independent States. At independence such States adopted entrenched Constitutions heavily influenced by the European Convention on Human Rights (ECHR). The final appeal from several of these States lies to the Judicial Committee of the Privy Council.

In three appeals, the Privy Council (Lords Bingham, Hutton, Hobhouse, Millett and Rodger) considered whether the mandatory nature of the sentence offended against the constitutional prohibition on "inhuman or degrading" punishment: *Reyes* v. *The Queen*, *R.* v. *Hughes*, *Fox* v. *The Queen* [2002] UKPC 11, 12, 13, [2002] 2 W.L.R. 1034, 1058, 1077. The appeals were heard together, although separate judgments were given. In *Reyes* (from the Court of Appeal of Belize), the Crown took no part. However, in *R.* v. *Hughes* and *Fox* v. *The Queen* (from the Eastern Caribbean Court of Appeal (respectively St. Vincent and St. Lucia)) the Board heard full argument on all points, including those relevant to the issues in *Reyes*.

In *Reyes*, the defendant, a man of good character, argued with a neighbour about a fence next to his home. He fetched a gun and shot dead the neighbour and the neighbour's wife before shooting himself in an unsuccessful suicide attempt. Under the Criminal Code (modelled on the British Homicide Act 1957) murders are classed by reference to certain factors. "Class A" murders, of which murder "by shooting" is one, attract the mandatory death penalty.

Under the Constitution the defendant was entitled (*inter alia*) to a fair hearing before an independent and impartial court established by law (section 6) and not to be subjected to "inhuman or degrading treatment or punishment" (section 7). He could not argue that the death penalty itself breached these rights: the Constitution expressly contemplated execution as an exception to the right to life (section 4(1)). He complained, instead, of the absence of any discretion for the sentencing court to take into account factors in mitigation.

The facts and law in the other appeals were similar, save that under the applicable legislation all murders attracted the mandatory death sentence.

Previously, the mandatory nature of the death penalty had gone unquestioned in many cases before the Privy Council; and in *Ong Ah Chuan* v. *Public Prosecutor* [1981] A.C. 648 the Board had

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expressly held that a such a sentence for drug trafficking in Singapore was constitutional.

The Board observed (*Reyes* at paras. [11] *ff.*) that it had long been recognised that murder could involve widely varying degrees of culpability. This proposition was supported by citation of a raft of material, judicial and otherwise, from around the common law world. Some jurisdictions, such as India, permitted judicial discretion and reserved death for the worst cases. In others, as a matter of executive clemency, the defendant could seek mercy. This was the position in the United Kingdom before abolition, when many sentenced to hang were reprieved by the Home Secretary. It was the position too in Belize, where clemency was vested in an Advisory Council established by the Constitution under a chairman with a judicial qualification and comprising "persons of integrity and high national standing".

The Privy Council set out (*Reyes* at paras. [25] *ff.*) "the approach to interpretation". In the familiar expression, a "generous and purposive interpretation" was to be given to constitutional provisions protecting human rights. The court had "no licence to read its own predilections and moral values into the Constitution", but was "required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right". This had to be done "in the light of evolving standards of decency that mark the progress of a maturing society": *Trop* v. *Dulles* (1958) 356 U.S. 86, citing the observation in *Weems* v. *United States* (1910) 217 U.S. 349, 378 that the Eighth Amendment ("cruel and unusual punishment") might "acquire meaning as public opinion becomes enlightened by a humane justice".

The Crown had argued that public opinion, which in any event had not been consulted, was not a valid basis for rendering unconstitutional that which was formerly constitutional. The Board emphasised (citing *S.* v. *Makwanyane* 1995 (3) S.A. 391) that it was *not* concerned to give effect to public opinion, since this would render constitutional adjudication unnecessary. Rather,

> In considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such norms to which Belize has subscribed.

Those instruments included the ECHR (until independence), the Universal Declaration of Human Rights (1948) (at independence) and regional treaties, each of which contain in some form the rights on which the defendant relied. The Board emphasised that it was not concerned with the narrow question of whether such instruments had

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the effect of incorporating rights into domestic law, nor even in fact with whether the State was actually a party to the relevant instrument. Rather, although States were

> not bound to give effect in their Constitution to norms and standards accepted elsewhere ... the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual rights, unless it is clear, on a proper interpretation of the Constitution, that it does.

The Board then cited (*Reyes* at paras. [31] *ff.*) decisions of no fewer than seven jurisdictions, the European Court of Human Rights, the Inter-American Commission on Human Rights and the Human Rights Committee of the International Covenant on Civil and Political Rights (1977). Two themes emerged from this material: that any sentence (death or otherwise) will be hard to square with basic constitutional rights where it is grossly disproportionate to the culpability of the offence; and that death is a uniquely severe punishment which consequently calls particularly for the exercise of discretion before it is imposed. Accordingly it was held (*Reyes* at para. [43]) that a process was inhumane which required a sentence of death, however much mitigation there might be. The Board left open whether there could ever be a provision for a mandatory death penalty in particular circumstances which was sufficiently discriminating to obviate any inhumanity in its operation.

Two additional points were considered. First (*Reyes* at paras. [44] *ff.*), whether any lack of humanity in the process was corrected by the existence of an Advisory Council or similar body whose procedures were amenable to judicial review (*Lewis* v. *Attorney-General of Jamaica* [2001] 2 A.C. 50). The Board held that the State could not rely on clemency as part of the process without asserting that the Council had a role in sentencing; yet the Council, even with constitutional safeguards, was not an "independent and impartial court" (cf. now *Stafford* v. *United Kingdom* (ECHR, 28 May 2002, noted at p. 508 below) on the Home Secretary's power to set the tariff for prisoners subject to the mandatory "life" sentence).

The second point applied to St Lucia and St Vincent, whose Constitutions incorporated a "savings clause":

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with [the prohibition on inhuman punishment] to the extent that the law in question authorises the infliction of any description of punishment that was lawful [before independence].

The Crown argued that the relevant words of the Criminal Code, "whoever commits murder is liable ... to suffer death", were a

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"description of punishment", *i.e.* the mandatory death sentence, "contained in" a law which "authorised" the infliction of that punishment, which was lawful before independence. Thus the mandatory death penalty could not be held inconsistent with the Constitution. The Board's response (*Hughes* at para. [47]) illustrates the corollary of the "generous and purposive" interpretation to which the individual is entitled. The pre-independence law, it held, not only authorised the death penalty for murder but *required* it. To the extent that it required it the law was not protected by the savings clause. There is an elegant sleight of hand here: when the defendants argued that their "punishment" was inhuman, "punishment" meant the *mandatory* death penalty; when the Crown argued that that "punishment" was authorised by a pre-independence law, "punishment" became the death penalty *simpliciter*.

Two techniques of modern constitutional interpretation are particularly illustrated in these decisions. First, a certain ambiguity as to the source of the imperative to change an established practice: the key passage in *Reyes* refers to "contemporary protection of the right", "evolving standards of decency" and "the progress of a maturing society" before eliding into international material. Secondly, the very volume of such material. Only 10 of the 34 cases cited in *Reyes* were decided in the United Kingdom. Such internationalism tends to add legitimacy and authority to the decision. When, however, their Lordships feel compelled (*Hughes* at para. [35]) to cite the Court of Appeal of Botswana in support of the simple proposition that derogations from Constitutional rights should be narrowly construed, one wonders whether the technique may not perhaps have been taken a little far.

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WHAT ARE PRISONS FOR?

LET us start with what seems like an easier question: how long should a prison sentence be? The Criminal Justice Act 1991 confirmed that the basic rule is that the length should be commensurate with the seriousness of the offence committed (section 2(2)(*a*) of the 1991 Act, now section 80(2)(*a*) of the Powers of the Criminal Courts (Sentencing) Act 2000). Exceptionally a sentence may be longer, in order to protect the public from serious harm (section 2(2)(*b*) of the 1991 Act, now section 80(2)(*b*) of the Powers of the Criminal Courts (Sentencing) Act 2000).

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