

In the Supreme Court of Judicature of Jamaica

(Constitutional Redress Court)

Suit M. 34/79 and M.39/79

BETWEEN	Noel Riley et al	Applicants
AND	Attorney General and Superintendent of Prisons - St. Catherine District	Respondents
AND	Elijah Beckford Errol Miller	Applicants
	The Attorney General and Superintendent of Prisons St. Catherine District	Respondents

Coram:

Parnell, Ross and Carey JJ.

Dennis Daly, )	
Earl Witter )	for <u>Applicants</u>
Delano Harrison )	Riley, Forbes and Irving
R.N.A. Henriques )	for <u>Applicants</u>
Richard Small )	Beckford and Miller
R. Langrin )	for the respondents
N. Fraser )	

March 17, 18, 19, 1980

March 25

Parnell J.

The five applicants are under sentence of death following their conviction for murder. Warrants authorising their execution have been issued by the Governor-General. Execution has been stayed pending the determination of a motion filed on their behalf pursuant to section 25(1) of the Constitution.

It is claimed that the proposed execution, if carried out "at this time" would be a breach of Section 17(1) of the Constitution and that this Court should so declare.

I shall outline in full, what section 17 of the Constitution has provided:

17. (1) "No person shall be subject to torture or to inhuman or degrading punishment or other treatment."
- (2) "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day".

Before August 6, 1962 and after, convicted murderers were and have been executed following the due process of law and practice established in this country. And the practice as I know it and which has been outlined /...

in the Constitution, is that after all the judicial steps which are open to the condemned man have been exhausted, his case is considered by the Privy Council of Jamaica with a view to the tendering of recommendation to the Governor-General (formerly the Governor). And the recommendation will be based on the record of the case, the written and confidential report of the trial judge together with such other information which the Governor-General may require. No time limit has been given by the Constitution concerning the final determination of any given case which may result in a decision that the death sentence should be carried out or that it should be commuted. The exercise of the royal prerogative is not something which may be hurried; it is too delicate to be pushed and too important to admit of anything which is not flavoured of wise and sober judgment. When a particular case is being considered with a view to recommending the direction which the prerogative of mercy should take, it is not only the right of the convicted which is of concern. The public interest and the public rights are also involved. What time may have been consumed in a tranquil Jamaica in 1961-1962 to arrive at a decision in any given case may very well not be enough in a fast moving and turbulent period in the seventies.

A careful study of the Constitution shows that the Founding Fathers were men of vision and they envisaged that the constitution should be so framed and the powers granted should be so circumscribed, so as to admit of growth and change. The judges of the Supreme Court are required to approach their difficult task of construing the constitution in such a way that it is shown clearly that they do understand what is required of them when a problem arises. The oracle of Apollo is not available at the Supreme Court building or elsewhere to consult.

When is punishment or treatment inhuman or degrading?

The contention of the applicants is not that the death penalty simpliciter is torturing, inhuman or degrading - an argument which would have been barred by the constitution itself - but that :

"that execution of the said applicants (Beckford and Miller) at this time and in the circumstances leading up to and surrounding the issue of the death warrants, would be unconstitutional and illegal being contrary to Sec. 17(1) of the said Constitution of Jamaica".

In the application of Riley, Forbes and Irving, the notice of Motion seeks a declaration that :

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"the hanging of the accused Noel Riley, Anthony Forbes and Clifton Irving, is unconstitutional and illegal, contrary to Sec. 17(1) of the Constitution".

Common factors relied on

- (1) Each of the applicants is contending that he has been subjected to torture, inhuman or degrading treatment or a combination of all these elements;
- (2) Each has alleged that his execution was delayed for a considerable period of time and this was caused or contributed to by a "de facto" suspension of the death penalty;
- (3) Hope was engendered within each breast that execution would not be carried out by virtue of :
  - (a) The de facto suspension of the death penalty,
  - (b) The fact that studies were undertaken into the question of suspending the death penalty by the National Security Committee of the House of Representatives;
  - (c) The debates and resolutions passed in the House of Representatives and the Senate on the 30th January, 1979, and the 9th February, 1979, respectively.

Picture at a glance

The evidence which has been put before the Court paints a picture as shown hereunder :

No.	Applicant	Date Convicted	Date Appeal dismissed	Judicial Comm. of Privy Council	Execution date
1	Noel Riley	7. 3. 75	23. 2. 76	18. 7. 78	29.5.79
2	Anthony Forbes	7. 3. 75	23. 2. 76	did not apply	29.5.79
3	Clifton Irving	22. 3. 76	10. 1. 77	Abandoned October 1978	29.5.79
4	Elijah Beckford	9. 5. 75	6. 11. 75	Did not apply	12.6.79
5	Errol Miller	28. 10.75	5. 2. 76	8. 12. 76	12.6.79

There were certain events which are said to have given hope to the applicants that the death penalty would not be carried out. The first, is the de facto suspension of the death penalty to which I have already adverted to. The other events may be depicted as shown hereunder :

No.	Date	Event	Remarks
1	May 1977	Ministry paper tabled in the House of Representatives re retention of Capital Punishment.	Matter referred to National Security Committee of the House
2	October 1978	House Committee recommended no change in existing law.	
3	30. 1. 79	Debate in the House of Representatives whether death penalty should be suspended	"on a conscience vote," motion defeated 23 to 20 /....

No.	Date	Event	Remarks
4.	30. 1. 79	Resolution of House requesting a review of all cases of men awaiting execution.	Resolution adopted.
5.	9. 2. 79	The Senate debated a resolution that Capital punishment be suspended for 18 months pending a detailed study and assessment and a report on the sociological and psychological effect of capital punishment in the Jamaica of today.	Resolution carried 10 to 5.

A supplementary affidavit of the applicant Noel Riley shows that a Commission of Inquiry was held into certain incidents which occurred at the Saint Catherine District Prison in 1974. Before the report of the Commissioner was completed, Warrants were issued authorising the execution of four of the condemned men who were interested in any report or recommendation which was to be sent in. As a result of representations made, the executions which should have taken place on March 25 and 26, 1975 were stayed. The Commission then examined the cases of the four concerned men and sent in an interim report.

The Court is permitted to take judicial notice of the appointment of the Commission of Inquiry by the Governor-General. Proclamation 1/1975 naming the Commission headed by Dr. Lloyd Barnett was gazetted in the Jamaica Gazette Extraordinary of January 2, 1975. The terms of reference are clearly set out in the proclamation.

Certain statistics from the evidence.

1. About 82 men were in the condemned cells at the Saint Catherine District Prison awaiting a final determination of their fate as at March 12, 1980: This is disclosed in the Affidavit of Roman Catholic Priest Alwyn Harry.
2. No execution has taken place since April 1976.
3. Since the last execution and up to May 18, 1979, twenty-one cases of conviction for murder involving the death sentence have been commuted.
4. The records of the Registrar of the Supreme Court show the following :

<u>Year</u>	<u>Number Commuted</u>
1976	6
1977	3
1978	7
1979	5

And of this amount, the following facts emerge :

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<u>Waiting period since conviction</u>	<u>Number involved</u>
7 years	1
6 years	3
5 years	1
4 years	4
3 years	2

The remainder had to wait for a period ranging between 15 months to 2 years following their conviction.

What is clear is that at least from early as in January 1975 official action had been taken to consider a question which was likely to affect the fate of men convicted for murder. And in the meantime, the Privy Council did not go to sleep. Where cases merited the exercise of the prerogative of mercy, at least those of 21 convicted men were considered and determined.

#### Evidence of torture?

An interesting affidavit has been filed by Fr. Alwyn Harry. He is a priest consultant who ministers to all condemned men in the cells who require spiritual counselling. Father Harry has been trained in Moral Theology and Human Relationships. In the case of the five applicants, he saw them all. Paragraphs 17-19 of his affidavit are as follows:

- Para. 17: "I am however clear in my own mind that in the particular circumstances of the delay, and the hope built up in the minds of these applicants that the issue of the death warrants for their execution is inhuman and degrading, and amounts to torture, in the ordinary meaning of those words."
- Para. 18: "I say this on the basis of a close knowledge of each of these applicants and also on the basis of my detached judgment of each one separately and in relation to the particular circumstances of each of them."
- Para. 19: "In my professional studies as a priest and from my experience of dealing with people in this capacity, I feel that I am qualified to express an assessment as to whether particular circumstances amount to torture, or are inhuman or degrading."

The deponent, in good faith, is putting forward a finding which is the province of the Court.

#### Medical evidence

The five applicants were medically examined by Dr. F.W. Hickling and Dr. F. Knight and they have submitted a joint report. The summary of the report is very interesting. I understand the substance of the medical report to be as follows :

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- (1) Clinical features of psychological disturbance in the five men were detected and are clearly related in a causative way to mental stresses during the time they had been under sentence of death. The stresses have been the result of discussion, comment and debate in the media, in the Senate and in the House of Representatives.
- (2) Anxiety and depression are prominent clinical features found in all the men.
- (3) One doctor (F.W.H.) is of the opinion that a psychiatrist is eminently qualified and suited to assess the nature and degree of torture on an individual; that all five men could be regarded as having been subjected to acts which could be regarded as inhuman and degrading treatment. But the treatment could not be regarded as torture.
- (4) The other doctor (F.K.) is of the view that the question of torture based on an examination of the alleged tortured victim is outside the scope of a medical report, as is the question of inhuman treatment since the latter raises moral issues and involves value judgments which are inappropriate in a medical report.

The stand by Dr. Knight seems to me to be fair, reasonable and is in accordance with the experience of mankind. There are several matters which may "torture" or disturb a man's mind. The sudden loss of a loved one; the guilt following his being discovered in wrong doing; the loss of wealth or reputation; the arrest and conviction on a serious charge. Indeed, the applicant Noel Riley in his affidavit dated May 30, 1979 has admitted that the fact of his conviction for murder was enough to subject him to what he has called "extreme psychological torture and anguish".

Paragraph 4 of his affidavit states in its opening as follows:

"Since the date of my conviction and particularly since the refusal of my application for special leave as aforesaid, I have been subjected to extreme psychological torture and anguish, resulting in my physical and mental deterioration etc.,"

This particular applicant is saying in effect that the "torture" or "inhuman treatment" which he has alleged as the ground to found his motion for his seeking redress started as a natural consequence of his being convicted on a capital charge followed by his losing his final judicial attempt to have his conviction quashed or varied. The result of these events has put into operation a state or condition which has brought about physical and mental deterioration.

Irving's admission

The applicant Irving has made the identical admission as to the physical and mental deterioration of which he complains. Paragraph 5 of his

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affidavit dated May 30, 1978 shows that the germ of his ailment was planted after his conviction and nourished by the abandonment of his application for special leave to Appeal to the Judicial Committee of the Privy Council.

Beckford and Miller also confess

The applicants Beckford and Miller have made a similar confession as to the cause of their ailment. In paragraph 7 of Beckford's affidavit dated June 1979 and in paragraph 9 of Miller's affidavit of the same month, each is stating in clear words what started the torture and anguish.

Stand of Anthony Forbes

The applicant Forbes in paragraph 4 of his affidavit dated May 30, 1979 states in part as follows :

"For the past four years and two months after my conviction, I have been an inmate on Death Row at the abovementioned prison and in particular for the last three years and three months have been subjected to extreme psychological torture and physical and mental deterioration resulting on the one hand from the uncertainty and considerable delay following the determination of my appeal. And on the other hand being led to hope that my execution would not be carried out as a result of the 'de facto' suspension of capital punishment since 1976 etc.,"

As I have already pointed out, this applicant lost his appeal to the Court of Appeal on February 23, 1976.

If his subjection to "torture" and "mental deterioration" started 3 years and 3 months prior to the date of his affidavit, that date would almost run from the 23rd February 1976 when he lost his appeal. He did not take any action to seek special leave to appeal to Her Majesty in Council.

Even if it is assumed that there was inordinate delay in the fixing of the execution date in the case of each of the applicants, what is very clear from the evidence is that the alleged "torture" which the medical evidence does not support or the alleged mental anguish which in turn caused the alleged "inhuman treatment" did not wholly flow as a direct result of and as a consequence of any such inordinate delay. The embryo can be traced to a mental state or psychological condition which naturally followed the mere conviction for murder or the dismissal of leave to appeal from a conviction of murder or a loss of the final judicial step in a battle to save life.

Where an applicant complains that his fundamental right has been contravened or is likely to be contravened in relation to himself, he must

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identify the right in question, show a proper respondent and prove on a balance of probabilities what he has set out to do.

The evidence which I have so far examined, satisfies me that the applicants are bound to fail. On the question of proof of what they allege, I have said enough to show that they cannot succeed.

However, as the matter is so important, I shall outline other reasons why they cannot succeed.

#### History of Sec. 17(1) of Constitution

That no person shall be subjected to torture or to inhuman or degrading punishment or other treatment is a concept which has a long history. The dignity of man should not be violated in the nature of the punishment which is prescribed for his transgression. The "torture" mentioned in the section is the cruelty inherent in the method of punishment. The punishment which is said to be inhuman or degrading must satisfy an objective test.

The Bill of Rights of 1689, has a long preamble setting out grievances against the late King James the Second. One of these grievances is mentioned in paragraph 11 as follows:

"And excessive fines have been imposed; and illegal and cruel punishments inflicted."

King James the Second had permitted several transgressions against the rights and liberties of the people. The Bill of Rights was enacted on the 16th December, 1689 in order to declare certain rights to settle the succession of the crown.

Section 10 of the Bill declared as follows:

"That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."

Blackstone in his commentaries has outlined some of the punishments used in the middle of the 18th century.

Cutting off the hand or ears, slitting the nostril, branding in the hand or cheek. See IV. 376 of Blackstone Commentaries. Coke in his Institutes (3 Inst. 210) finds scriptural passages to support the severe punishment which a person convicted of treason had to suffer. Drawing, quartering, ripping of the bowels while the victim was alive and then the severing of the head. And this was done in public to the delight of some and to the

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horror of others. Breaking an offender on the wheel, suspending him on a gibbet and even castration of a virile man were allowed. An outline of the cruel and inhuman treatment to which offenders were subjected during the period leading up to the Bill of Rights is given in "A History of English Criminal Law by Radzinowicz." See Vol.2 pages 1-8. The prohibition of cruel and inhuman punishment was based primarily on the principle that the punishment should fit the crime and the method should be in accordance with civilised standards of decency, humanity and proportionment.

In order to prevent a return to the era when punishment was a dreaded and shocking spectacle, many countries with a written constitution have provided against its revival. The Universal Declaration of Human Rights has pronounced against it. See article 5. Execution as a form of punishment for certain well defined crimes has never been regarded as cruel or inhuman. So long as the execution is instantaneous and substantially painless, that is enough.

It is my view that Sec. 17(1) of the Constitution must be examined in the light of its history and where appropriate, in the further light of the cases decided by enlightened Courts in countries which have a similar provision.

The 8th amendment to the Constitution of the United States, declares as follows:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

In 1945 one Willie Francis was convicted of murder and sentenced to be electrocuted for the crime. A death warrant was prepared for execution on May 3, 1946. On that day Francis was placed in the official electric chair in Louisiana in the presence of the authorized witnesses. The executioner touched the switch but because of some mechanical defect, death did not result. He was removed from the chair and returned to the prison. A new death warrant for execution on May 9, 1946 was issued by the Governor. But proceedings were immediately launched to prevent execution and one of the grounds relied on was based on the 8th amendment to the effect that :

"because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment."

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Both the Supreme Court of Louisiana and the United States Supreme Court rejected the contention. See Louisiana ex rel. Francis v. Resweber (1947), 329 U.S. 459. Before August 6, 1962 there was no form of punishment awarded in Jamaica at the direction of the Courts which was regarded as torturing, inhuman or degrading. What the Constitution had done is to give the Court power to invalidate any new form, type or description of punishment which is found to be inhuman or degrading. I am fortified in this view by a decision of the Privy Council in Runyowa v. The Queen, [1966] 2 W.L.R. 877. A section of the Rhodesia and Nyasaland Constitution was in terms similar to Section 17(1) of the Constitution of Jamaica. One of the questions which arose for consideration was whether a person who associated with others who used petrol or other inflammable liquid against the person of another or to destroy or cause damage to a building could suffer death on conviction as if he had been a principal. Was the sentence inhuman or degrading? Lord Morris giving the judgment of the Board has this to say:

"The provision contained in Section 60 of the Constitution enables the Court to adjudicate as to whether some form or type of description of punishment newly devised after the appointed day or not previously recognised is inhuman or degrading but it does not enable the court to declare an enactment imposing a punishment to be ultra vires on the ground that the Court considers that the punishment laid down by the enactment is inappropriate or excessive for the particular offence."  
[1966] 2 W.L.R. 877 at 891 E.

#### Complaint of the applicants

When the complaint of the five applicants is carefully examined it amounts to this :

- (1) It is not unconstitutional for the death sentence to be carried out on a conviction for murder;
- (2) What is unconstitutional is to carry out the death sentence on a man with an anguished mind which resulted from a long delay awaiting execution coupled with hope held out that the sentence would not be carried out.
- (3) The "anguished mind" had brought about a state of torture or inhuman or degrading treatment. When the argument is pushed to its logical conclusion, the sentence of death - so long as it remains a lawful sentence in Jamaica - could never be carried out. Almost every convicted man in the cell awaiting the sentence of death, suffers some kind of anxiety or mental torture. Once he can secure a moralist or an exponent of the principle for the abolition of the death penalty or a sympathiser, to support his cause, evidence would be produced suitable to support a move designed to stay or

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stop his execution.

What should be regarded as material which is fit for the consideration of those persons who advise the Governor-General, is used as evidence before the Constitutional Court in a motion seeking redress if the material is not accepted or acted on by the Governor-General advisers.

Effect on the applicants - debated in  
both Houses

Mr. Daley, in his submissions, was not afraid to face the problems in his path. When asked by the Court to outline the acts complained of which caused the torture or the inhuman or degrading treatment he mentioned the following:

- (1) The act of the executive in introducing a motion in the House of Representatives;
- (2) The act of the legislators in considering the resolutions and passing them;
- (3) The failure of the Legislature to take appropriate steps concerning the rights of subjects. A Bill should have been introduced designed to commute the death sentence while debate was going on.
- (4) The comments made during the debates raised the hopes of the applicants.

Mr. Henriques put his argument forcefully and concisely. He contended that the inordinate delay between the final judicial act and the date set for the execution, is "inhuman and degrading" within the meaning of Sec. 17(1) of the Constitution. He contended further that even without the medical evidence concerning the state of the men, waiting for 3½ years before execution is "inhuman treatment" within the meaning of the 17th Section of the Constitution.

For my part, I am prepared to assume - and Mr. Daley conceded this - that the appropriate Minister responsible for justice did inform the Governor-General of the action that was being taken designed to deal with the question of capital punishment. I shudder to think that a responsible minister knowing that a paper dealing with capital punishment was being prepared to lay on the table of the House, would conceal this very important fact from the Governor-General. And having been advised of what was being proposed, it would have been prudent for the Governor-General and the Privy Council to refrain from taking any action which would have resulted in the ordering of the execution of any of the condemned men before the

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position was made clear to them of the result of the study of, and the debate on the subject in question. Whereas the Parliament of Jamaica, short of passing an Act, cannot interfere with the exercise of the Royal Prerogative, those who are responsible for its exercise are bound to take note of what step has been taken in Parliament which is likely to influence their conduct and to behave like reasonable men until the will of Parliament is known.

What happened in England?

In 1948, when the Criminal Justice Bill was passing through the House of Commons, a clause was inserted on a free vote to abolish the death penalty for an experimental period of five years. The majority of the House of Commons voted for the abolition of the death penalty but as the House of Lords had not voted on the matter, no change in the law had been effected. Finding himself in a tight spot, the Home Secretary, Mr. Chuter Ede announced that he proposed to advise the King to exercise the prerogative of mercy in every case of the death sentence being pronounced until a definite decision had been come to by Parliament. When the Bill reached the House of Lords, what was done by the Home Secretary was severely attacked by the Lord Chief Justice, Lord Goddard. It was claimed that the Home Secretary came near to suspending or dispensing powers which the Stuarts claimed and which was prohibited by the Bill of Rights to which I have already adverted.

In England, the duty of tendering advice touching the exercise of the Royal Prerogative rests with a Minister who has a seat in the Commons. But this is not so under our constitution. I, therefore, reject the argument of Mr. Henriques that no explanation has been given to the Court as to what could have caused or contributed to the delay which is complained of.

Equally, I reject any contention that a debate in Parliament or any resolution voted thereon even if it may have raised hope of a reprieve in the mind of a condemned man, is capable in law of contributing to torture or to inhuman or degrading treatment. Under the Constitution, Parliament may raise and discuss any subject which concerns the proper government of the country. Where a person or body of persons is only doing what is permitted by law, the act of that person or body of persons is not capable

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of being used as a ground to support any claim that another person's constitutional right has been breached.

I was of the view that hope does not cause torture nor is it any part of what may be a contributing cause to inhuman treatment. The effect of hope finds an echo in Shakespeare's works.

Duke: "So then you hope of pardon  
from Lord Angelo?"

Claudio: "The miserable have no other  
medicine but only hope:  
I have hope to live, and am  
prepared to die."

Measure for Measure  
Act 3, Scene 1 (1-4)

And if I am permitted to cite another author, I will refer to Oscar Wilde in "The Ballard of Reading Gaol." Wilde who was a brilliant author and dramatist, once served a prison term of two years.

"We did not dare to breathe a prayer  
Or give our anguish scope!  
Something was dead in each of us,  
And what was dead was Hope."

Certain Comments.

In my judgment, this case has raised fundamental issues touching the working of some of the organs which the Constitution has outlined in general and clear terms.

The Governor-General and his Privy Council cannot be directed how and in what manner, the prerogative of mercy may be exercised. This Court cannot devise a time-table for that august body; within their Board room no Writ may run, and no attorney may seek to enter.

An Act of Parliament and the force of public opinion are subjects permitted to seek entry into their conclave. Wisdom, good judgment and foresight are permitted to knock at their door, if during a particular discussion, it is clear that they may be of assistance.

The People's Parliament is supreme. At any time, the legislators may discuss any matter that is considered desirable in the public interest. And Parliament may take its time. No court is permitted to inquire into its internal operation. It is only public opinion which may force its pace or alter its course.

I do not think it is necessary for me to discuss the question which

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Mr. Langrin has raised, namely - whether on the facts of the case, the Crown and the Superintendent of Prisons are proper respondents. What I will say in passing is that if a man has a constitutional right which has been breached, he should be able to vindicate it. Someone should answer.

I have not discussed any of the cases which Mr. Henriques analysed with his usual skill and emphasis. Nor have I adverted in this judgment to any of the authorities cited by Mr. Langrin. And I have done this deliberately not for any disrespect for the research and industry by them displayed but for the reason that I do not think that on the facts, any of the cases is of any assistance in my arriving at a conclusion.

Some Special features outlined

(1) Noel Riley and Anthony Forbes were tried jointly. The application of Riley for special leave to appeal to Her Majesty in Council was dismissed on July 18, 1978.

Although Forbes did not exercise his right to apply for special leave, it could not be suggested that executing Forbes before the result of his co-defendant's application was known, would have been reasonable, acceptable and in accordance with sound practice.

In July 1978, the recommendation of the House Committee that capital punishment should be retained had not been debated. The debate was on January 30, 1979. A resolution of the House requested that there should be a review of all the cases of the men now "awaiting execution." Excerpts of the speeches delivered during the debate have been exhibited. The number of men awaiting execution as on the date of the debate was given as 79.

To review 79 cases with the special features which each may contain, is not a light assignment.

(2) The execution date of 29.5.79 for Riley and Forbes, is almost four months from the end of the debate in the Honourable Houses of Representatives and nine months from the final result of the judicial process which the applicant Riley had set in motion. Is that inordinate delay on the part of those responsible in finally determining the fate of these two men? I have no hesitation in saying that in the Jamaica of to-day, the answer is a resounding no. And if it is necessary, I would

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find this as a fact.

(3) In the case of Irving, his application for special leave to appeal was abandoned in October, 1978. A period of nearly six months elapsed between that date and the date set for this execution. But he was one of the 79 awaiting execution at the date of the debate. He was convicted about four months before the House Committee was named in May 1977. In his case, no inordinate delay has been shown.

(4) When the cases of Beckford and Miller went before the Court of Appeal in November, 1975 and in February 1976 respectively, the Commission appointed to inquire into the cases of certain condemned men had already reported. The affidavit of Riley shows that an Interim Report was submitted on April 1, 1975. From this, I am entitled to draw the inference - and I do so - that from an official standpoint, consideration was being given to the question of the retention of the death penalty before Beckford and Miller were convicted of murder. And when the last execution took place in April 1976, the result of Miller's Application for leave to appeal to Her Majesty in Council had not yet been known.

#### Summary of case

(1) Where an applicant alleges that his fundamental right enshrined under Section 17(1) of the Constitution has been breached, he is expected to show that the punishment which he claims to be inhuman, degrading or torturing is one which has been ordained since August 6, 1962. And he must demonstrate that on a balance of probabilities and having regard to the historical evolution of the provision and to the thinking of the modern and reasonable man, the punishment or treatment amounts to torture, or it is to be regarded as inhuman or degrading.

(2) Where a prescribed punishment or treatment is attacked as being in contravention of Section 17(1), it is a question of law whether there is any evidence or sufficient evidence to support any such claim. Whether or not torture or inhuman or degrading treatment has been established or is likely to be established is a question of fact.

(3) If the complaints are to be examined in the light of inordinate delay, I find that this has not been proved. And if they are to be examined on the basis of subjection to torture or to inhuman or degrading punishment

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or treatment, I hold that the evidence advanced is not capable of supporting any such claim.

(4) The Constitutional Court has no power to dictate to either Parliament or the Privy Council how and in what manner, the internal affairs of each of these organs should be regulated. And in particular it is not competent to formulate a schedule or time-table for each to follow.

(5) No condemned man has any constitutional right to demand his own execution before the time which may be appointed by the Governor-General. And he cannot obtain an order of mandamus (a prerogative order) against the Privy Council when it is required to consider the prerogative of mercy. Mandamus does not lie against the Crown.

(6) Although it is open to a condemned man or to those who support him, to muster public opinion in his favour, he is not permitted to obtain any judicial order which would have the effect of directing how the prerogative of mercy should be exercised.

(7) As I see it, the case of each applicant boils down to this :

That in the social and political climate which has prevailed in Jamaica over the past five years, a man awaiting execution has a legal right recognised by the Constitution to demand that reasonable dispatch should be displayed in a decision touching the exercise of the royal prerogative and which concerns his fate. If a failure to act within a reasonable time is demonstrated, then a decision ordering his execution may be challenged in the Constitutional Court. The remedy sought is a declaration which - is discretionary and although the facts to support the motion are overburdened with ethical and disputable issues which are not justiciable, the prayer should nevertheless be favourably considered. If the argument has to show the reflection which I have attempted to depict, then it is very clear what the result ought to be.

#### Final Comments

Mr. Earl Witter replied to the submissions of Mr. Langrin, on behalf of the applicants Riley, Forbes and Irving. One of the broad propositions of Mr. Langrin was put in this form:

"The terms of the motion relate to a declaration which would challenge the validity of the death penalty."

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In a spirited and eloquent reply which was charged with a certain amount of emotion, Mr. Witter urged that this Court should seize the opportunity to pronounce upon the degree, severity, enormity and finality of the death sentence.

Attractive as his invitation is, I must decline it. Whether or not the death penalty should be retained in Jamaica is a vexed question. There is a division of opinion among the members of Parliament in both Houses.

The issue is strongly charged with politics and embellished with philosophy. There is no need for the judges to enter the arena nor should they rashly allow themselves to be touched by the stain of this farrago.

In my judgment, these motions fail and should be dismissed with costs.

ROSS J:

In these cases the applicants by motion seek a declaration that the execution of the said applicants at this time and in the circumstances leading up to and surrounding the issue of the death warrants, would be unconstitutional and illegal being contrary to section 17(1) of the Constitution of Jamaica.

The grounds of the application as set out in the said motion are that the applicants have been subjected to torture and/or inhuman and/or degrading treatment within the meaning of and contrary to section 17(1) of the Constitution of Jamaica in that:

- (a) Their execution was delayed for a considerable period of time which delay was significantly caused and or contributed to by the "de facto" suspension of the death penalty, and
- (b) The applicants were led reasonably to believe and or strongly hope that their executions would not be carried out by virtue of;
  - (i) The aforesaid suspension of the death penalty;
  - (ii) The fact that studies were undertaken into the question of suspending the death penalty by the National Security Committee of the House of Representatives, and
  - (iii) The debates and resolutions passed in the House of Representatives and the Senate on the 30th January, 1979 and 9th February, 1979.

Section 17 of the Constitution of Jamaica states:

- (1) "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment;
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent

"that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day" (6th August, 1962).

In his submission on behalf of the applicants Beckford and Miller Mr. Henriques stated that it would not be a part of his argument that the death penalty, per se, is unconstitutional as he conceded that the authorities indicated clearly that the death penalty, per se, would not be a contravention of section 17 of the Constitution.

It may be convenient here to set out briefly the history of these matters:-

Noel Riley and Anthony Forbes were tried together and convicted of murder on 7th March, 1975, their appeals to the Court of Appeal were dismissed on 23rd February, 1976. Riley then sought leave to appeal to the Judicial Committee of the Privy Council, and he was refused leave on 18th July, 1978. Forbes did not seek leave to appeal to the Judicial Committee of the Privy Council. The Legal Aid Clinic on behalf of Riley and Forbes, by letter dated 17th November, 1978, wrote to the Governor-General stating, inter alia, that the Clinic "intends to forward the petition for mercy on behalf of Noel Riley as soon as this can be done. In the case of the co-defendant Anthony Forbes, we do not intend to pursue an appeal to the Privy Council in England".

Clifton Irving was convicted of murder on 22nd March, 1976, and his appeal to the Court of Appeal was dismissed on 10th January, 1977; then by letter dated 15th November, 1978, his attorney informed the Privy Council "that the petition for leave to appeal will no longer be proceeded with".

Mr. N. H. Smith, the Governor-General's secretary and secretary to the Privy Council in his affidavit of 11th March, 1980, stated, inter alia, that "it is the practice of the Privy

Council to await the exhaustion or abandonment of all appeals to the courts before the final determination of the question of whether the Prerogative of Mercy shall be exercised" and that "in the case of Noel Riley, Anthony Forbes and Clifton Irving, the final determination was made after the communications received from their attorneys in November, 1978".

The applicant Elijah Beckford was convicted of murder on 9th May, 1975, and on 6th November, 1975, his application for leave to appeal was dismissed by the Court of Appeal; he did not seek leave to appeal to the Judicial Committee of the Privy Council as he was advised that there was no legal point to warrant such an appeal. A petition on his behalf for mercy was submitted to the local Privy Council on 4th March, 1977, and this was considered and rejected by the local Privy Council on 15th November, 1977; subsequently a further undated petition was submitted by Elijah Beckford and this was also considered by the Local Privy Council and rejected on 24th April, 1979.

In the case of Errol Miller he was convicted of murder on 28th October, 1975, and on 5th February, 1976, his appeal was dismissed by the Court of Appeal; then on 8th December, 1976, his petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed. Two petitions on his behalf for mercy were submitted to the Local Privy Council. One in February, 1977, and another on 4th March, 1977. Both were considered and rejected by the Privy Council on 15th November, 1977.

Finally the executions of Noel Riley, Anthony Forbes and Clifton Irving were scheduled to be carried out on 29th May, 1979, while the executions of Elijah Beckford and Errol Miller were scheduled for 12th June, 1979. Evidence was also adduced that from about April, 1976, no executions had taken place and that around May, 1977, a Ministry paper was tabled in the House

of Representatives by the Minister of Justice recommending an enquiry as to whether capital punishment should be retained, and the matter was referred to National Security Committee of the House for study. In October, 1978, the House Committee recommended that there should be no change in the law relating to capital punishment; on 30th January, 1979, a motion that the death penalty should be further suspended pending a detailed study was debated in the House of Representatives and defeated; after this a resolution was adopted by the House recommending to the Governor-General and Privy Council that the cases of all persons now awaiting execution should be reviewed. Then the Senate on 9th February, 1979, adopted a resolution that capital punishment be suspended for 18 months pending a detailed study, and consequent on this the Minister of Justice appointed a Committee to study the matter.

It is against this back-ground that the motions have been filed in these matters seeking the declaration set out above.

Mr. Henriques, for the applicants Beckford and Miller said that their motion was brought under the provisions of section 25 of the Constitution which section confers jurisdiction on the court to hear complaints by citizens where there has been an infringement of sections 14-24 of the Constitutions; the complaint here is made under section 17(1) set out above. He submitted that because of substantial delay, through no fault of the applicants they have been subjected to inhuman treatment and the delay complained of was in respect of the period between the last judicial act on the part of the applicants and the issue of the warrants.

The issue before the court, as he saw it was that when a man is condemned to die, he suffers and that through no fault of his own he has been kept in that state for 3½ years, a totally unjustified delay. No reason, he says, had been put forward for

three applicants. Riley, Forbes and Irving. He went on to point out that during the time since the sentences were imposed on the applicants there had been a de facto suspension of capital punishment - this was from April, 1976, and in May, 1977, a House Committee was set up to deliberate and decide whether there should be an investigation as to the desirability or otherwise of retaining the death penalty. So even before all the judicial proceedings had been concluded there was this hope, says Mr. Daley, being held out to them by the action of the Legislature - the hope that their executions would be suspended pending the outcome of investigations into the desirability of the death penalty continuing and the further hope that as a result their execution would not be carried out.

Mr. Daley stated that on 18th July, 1978, Riley's appeal to the Privy Council was refused and that no action was taken in regard to carrying out the sentence up to October, 1978 - but we must bear in mind Mr. Smith's affidavit, which I accept, that it was only in November, 1978, that the Legal Aid Clinic advised the Governor-General that a petition for Riley would be forwarded and that the appeal to the Judicial Committee of the Privy Council was abandoned. In October, 1978, he said, the House Committee had decided to recommend that there be no change in the law and in January, 1979, there was a motion in the House that capital punishment be suspended - this motion was debated and defeated. The debate in the House must have raised the hopes of the applicants; the importance of the debate, he suggests, is in its effect on the minds of the applicants, having regard to what was said and the members who said it. Further another motion was at the same time unanimously adopted recommending a review of all the cases by the Governor-General.

It was Mr. Daley's submission that the proper course to have been adopted in the situation was that the sentence

the delay and it should be the case that where a person is under sentence of death it should be carried out quickly and not kept hanging over his head.

He further submitted that the debates which took place in Parliament only made matters worse as the hopes of the applicants were raised and then dashed. No execution has been carried out from April, 1976, and the de facto suspension of the death sentence made it worse, as nothing was done.

Among the documents filed on behalf of the applicants were affidavits by Fr. Harry and a report and affidavit of Dr. Knight and Dr. Hickling, psychiatrists, as to the mental condition of the men and in a summary of their report they stated (inter alia):

"It is our opinion that the clinical features of psychological disturbance in the 5 condemned men examined by us are clearly related, in a causative way, to the mental stresses they have undergone during the time they have been under sentence to death. These stresses have in turn been the result of discussion, comment and debate in the public media and in the Senate and House of Representatives. The most prominent clinical features were those of anxiety and depression present in all the subjects, part of the anxiety being related to their uncertainty through their hopes being alternatively raised and lowered".

Mr. Henriques went on to point out that even without the affidavits of Fr. Harry and the psychiatrists as to the state of the men, he would still argue that the suspension of the death sentence amounted to inhuman treatment, as looking at the objective test, if a person is kept in such circumstances with a sentence of death hanging over him, then he must certainly be in anguish or be subject to some suffering which must be inhuman. Reliance was placed on the judgment of Lord Diplock in Abbott's case to which I will refer later.

Mr. Henriques was followed by Mr. Daley who first dealt with the history of the matter in relation to each of the other

should have been commuted of all persons on death row while the issue was being debated. Then he went on to say that following on this was the debate in the Senate in February when a motion for suspension of capital punishment was adopted, and the cumulative effect of all this on the minds of the applicants must have been immense.

Mr. Langrin on behalf of the respondent first submitted that there had been no unreasonable delay on the part of the executive in taking the decision that the death sentence should be carried out - he referred to the affidavit of Mr. N. H. Smith in regard to the practice of the Privy Council to await the exhaustion or abandonment of all appeals to the courts before the final determination of the question of whether the

Prerogative of Mercy should be exercised. Then he went on to observe that it would not be reasonable for the Privy Council to go ahead and issue a warrant for execution when the condemned men's attorneys are asking that you hold on as a petition for mercy is being sent. He submitted that the three men Riley, Forbes and Irving were pursuing their remedies up to November, 1978, and consequently, the argument put forward on their behalf that a de facto suspension over a protracted period had caused them to suffer torture or degrading treatment is untenable.

In the case of Beckford, he said, his appeal terminated on 6th November, 1975, as there was no appeal by him to the Judicial Committee of the Privy Council; but having regard to the manner in which the machinery of the Privy Council operates, this body would not then be expected to make a move to prepare a warrant for his execution as in the normal course of events he would have been expected to pursue his appeal to the Judicial Committee of the Privy Council.

Up to March, 1977, Beckford and Miller were petitioning the Privy Council for mercy. In fact an undated petition by

Elijah Beckford was rejected as late as 24th April, 1979. He pointed out that in May, 1977, a Ministry paper was tabled in the House of Representatives on the subject of whether capital punishment should be abolished and it was only in January, 1979, that on a "conscience" vote in Parliament it was decided that there should be no change in the existing law. Since then, a further Committee had been appointed to study, assess and report in regard to the psychological and sociological effects of capital punishment in Jamaica today.

On the question of the reasonableness of the period of time he referred to D.P.P. v. Michael Feurtado and Attorney General, Civil Appeal No. 59/79 where Kerr J.A. at page 8 of the judgment stated:

"What is a reasonable time would depend upon the circumstances of each case, including the nature of the case, the formalities of the pre-trial procedures, the facilities existing and the efforts that have been made to conclude the proceedings".

Kerr J.A. then went on to refer to the judgment of Fox J. in Shirley Chin-See's case - where Fox J. stated:

"Secondly, what is a reasonable time is determined not by an objective quest in vacuo of the ideal, but subjectively by reference to circumstances prevailing in the corporate area at the present time".

Among the other submission made by Mr. Langrin were:

- (1) Assuming there was delay such delay would not constitute a contravention of section 17(1) of the Constitution;;
- (2) That nothing in the affidavits has established that the acts complained of were illegal and were the direct cause of mental anguish or expectation on the part of the applicants over and above what would be reasonably expected by the passing of the sentence of death on a person - and he observed .

that the two psychiatrists were in disagreement as to whether the applicants had suffered torture, etc.,

- (3) Applicants have not proved it is the State which has contravened their constitutional rights under section 17 (1), assuming those rights have been contravened;
- (4) In seeking from the courts a declaration that there should be no execution at this time, the applicants on their own argument are asking the court to prolong the torture or punishment and consequently the contravention of section 17(1) of which they complain.

In considering this matter it is necessary first of all to decide:

- (1) Whether or not there has been substantial or unreasonable delay;
- (2) Whether because there has been substantial delay through no fault of the applicants they have been subjected to torture or inhuman or/degrading treatment;
- (3) Whether the delay by itself or taken along with the debates and steps taken by Parliament in regard to the issue of capital punishment made matters worse as the hopes of the applicants were raised and then dashed, thereby subjecting the applicants to torture or inhuman or degrading treatment contrary to section 17(1) of the Constitution;
- (4) Whether, if there is contravention of section 17(1), the redress should be the declaration sought, viz, that the executions are unconstitutional and illegal, being contrary to section 17(1).

To deal first with the question of delay, I formed the impression that it was conceded on behalf of the applicants that no steps could properly have been taken by the Privy Council until the applicants had exercised their rights to appeal or to seek leave to appeal and the appeal or application for leave had been dismissed and the secretary of the Privy Council so informed. I note too, as stated by Mr. Smith, the secretary to the Privy Council, that it was the practice of the Privy Council to await the exhaustion or abandonment of all appeals to the courts before the final determination of the question of whether the Prerogative of Mercy should be exercised. Mr. Smith's affidavit also suggests that it was the general practice for a petition seeking clemency to be filed on behalf of a condemned man after his final appeal had been dismissed.

Now, sections 90 and 91 of the Constitution deal with the exercise of the Prerogative of Mercy, the Governor-General acting on the recommendation of the Privy Council. In section 91 it is provided that:

"Where any person has been sentenced to death for an offence against the law of Jamaica, the Governor-General shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Governor-General may require, to be forwarded to the Privy Council so that the Privy Council may advise him in accordance with the provisions of section 90 of this Constitution".

So whether or not a petition is submitted to the Privy Council the Governor-General has to obtain the report of the trial judge and other information from any source he considers necessary to put before the Privy Council to enable them to advise him on the matter, and it may well be several weeks or months before all the necessary information is available to be put before the Privy Council for their consideration. Then time must be allowed for consideration of the information by the

Privy Council. As Kerr J.A. said in Michael Feurtado's case

"What is a reasonable time would depend on the circumstances of each case".

Bearing all this in mind let us look at the case in regard to each applicant:

In the case of Noel Riley the Legal Aid Clinic by letter dated 17th November, 1978, wrote and informed the Governor-General that the clinic intends to forward the petition for mercy on his behalf as soon as this can be done so we know that the petition would have reached the Governor-General some-time after 17th November, 1978, and it would have been only around this time or after this that the steps set out in section 91 of the Constitution would have been put in train. The execution of Noel Riley was scheduled to be carried out on 29th May, 1979, and in the circumstances related it does not seem to me that it can be said that there was substantial or unreasonable delay in taking the decision that the sentence of the court should be carried out.

The case of Anthony Forbes is similar: In the same letter above of 17th November, 1978, <sup>in</sup> which the Governor-General was informed about Noel Riley, he was also advised by the Legal Aid Clinic that they did not intend to pursue an appeal on behalf of Forbes to the Privy Council in England. After this the usual steps would have been taken and Forbes execution was also scheduled to be carried out on 29th May, 1979; again, the lapse of time between 17th November, 1978, and 29th May, 1979, was a reasonable period in which to do all that was required to be done.

Clifton Irving's appeal to the Court of Appeal was dismissed on 10th January, 1977, but it was only by letter dated 15th November, 1978, that his attorney informed the Privy Council that the petition for leave to appeal would not be proceeded with;

again in this case the execution was scheduled to be carried out on 29th May, 1979, and it cannot be said that the time span from 15th November, 1978, to that date could be considered to be a substantial or unreasonable delay.

Next, let us take the case of Elijah Beckford: After his appeal was dismissed a petition on his behalf for mercy was submitted to the local Privy Council on 4th March, 1977, it was considered and rejected by the local Privy Council on 15th November, 1977, then subsequently a further undated petition was submitted by Beckford (there is no evidence as to the date of its submission) and this was also considered and rejected on 24th April, 1979. The execution of Beckford was scheduled to be carried out on 12th June, 1979. Here the last petition was rejected only on 24th April, 1979, we do not know when this petition was submitted but even if it is so that there was some delay in the consideration of this petition it seems clear to me that the reason for this is to be found in the fact that there was this de facto suspension of capital punishment to which I will refer presently.

Finally we have Errol Miller whose petition for special leave to appeal to the Judicial Committee of the Privy Council was dismissed on 8th December, 1976, following which two petitions for mercy were submitted on his behalf in February, 1977, and March, 1977, both were rejected by the Privy Council on 15th November, 1977; his execution was scheduled for 12th June, 1979, about Nineteen (19) months later, but, again, it was during this period that the question of suspension of abolition of the death penalty was being debated and that there existed a de facto suspension of capital punishment.

One of the submissions made by Mr. Henriques on behalf of his clients Beckford and Miller was that no reason had been put forward to explain or justify the delay on the part of the Governor-General and Privy Council in dealing with their cases

and that as a consequence there is no justification of this delay, since no affidavit has been filed stating the reason or reasons for the delay in issuing the warrants for the execution of Beckford and Miller.

In the present circumstances it does not seem to me that any such affidavit is necessary. The applicants Beckford and Miller have in their affidavits set out fully the steps taken in Parliament since May, 1977, to discuss and deliberate on the question of the retention, suspension or abolition of capital punishment, and it is an obvious and irresistible inference that the Governor-General and Privy Council would have been aware of what was happening - whether by being advised by the Government or by reading about it in a newspaper, and would in the circumstances, as responsible individuals, whether so requested or not, have decided that there should be a suspension of executions until Parliament had come to a decision on the matter. Further, there is no time limit laid down and there should not be any, as to the period which should elapse between the exhaustion or abandonment of an appeal and the issue of the warrant of execution.

I note that in making his submissions on the question of delay Mr. Henriques referred only to the period between the last judicial act done on behalf of his clients and the date scheduled for the execution; he omitted the times of submission of petitions by or/on behalf of the applicants. It does not seem to me that there is any proper basis for this as I feel sure that the members of the Privy Council consider it an important part of their duties to consider carefully any petition forwarded by or/on behalf of condemned men and that they would not come to a decision in the matter until after they had considered the petition. So where a petition or petitions are submitted time must be allowed for their consideration by the Privy Council, as well as of the other matters mentioned in

section 91 of the Constitution, to which reference has been made.

In his submission Mr. Daley stated that the debate in the House and the other actions taken must have raised the hopes of the applicants, and that the importance of the debate is its effect on the minds of the applicants, having regard not only to what was said but the source from which it came and that despite the defeat of the suspension motion, there was another motion passed recommending a review of the cases of persons awaiting execution. As I understood him, he further submitted that the circumstances of the delay in carrying out the sentence of the court together with the alternating hope and despair of the applicants and the debate whether or not to carry out a sentence of the utmost severity, were such that persons awaiting execution must have suffered. The affidavits of the applicants as to the extent of their suffering were supported by affidavits and reports of two psychiatrists, a psychologist and Fr. Harry a Roman Catholic priest who had for many years ministered to condemned men at the St. Catherine District Prison. It seems to me, however, that the reports and affidavits as to the condition of the men disclose nothing more than that they were under severe stress because they were condemned men, uncertain of their fate eventually.

One psychiatrist hazarded an opinion that the men showed evidence of being subjected to acts which could be regarded as inhuman and degrading treatment, but he added that the treatment could not be regarded as torture. The other considered that such an opinion was inappropriate in a medical report. Having read the various affidavits and reports, I find there is no credible evidence that any delay in the executions or any act of Parliament or of members of Parliament caused any torture or inhuman or degrading treatment to any applicant or any other condemned men and I do not accept the evidence or opinions adduced to this effect.

As I see it, it is only normal and natural and to be

expected that someone under a sentence of death should from that fact itself be subjected to severe mental stress, and no doubt, any report or act by anyone which gives cause for hope that the sentence will not be carried out is eagerly grasped with the result that from time to time their hopes were raised. I am quite unable to appreciate how an act which happens to raise the hopes of persons in a situation such as the present one can be said to be torture, inhuman or degrading treatment whether those hopes are realised or dashed.

As I understand the argument here, it is that the delay in the execution of the applicants and particularly when considered along with what was done in Parliament amounted to torture or to inhuman and degrading treatment of the applicants and so constituted a contravention of section 17(1). It would seem to me that after a person has been sentenced to death any act which results in a postponement of his execution for even a day is an act of inestimable benefit to him and so the de facto suspension of capital punishment conferred a priceless benefit on these five applicants as well as on all others then under sentences of death; while it may be that the uncertainty of the situation would naturally cause some mental stress, this would I imagine be as nothing compared to the certainty when one is informed that <sup>a</sup>date has been fixed for one's execution.

When we look at the debate in the House and the other steps taken in regard to the question of the retention suspension or abolition of the death penalty, the whole purpose of the exercise was for Parliament to investigate and decide what action should be taken in regard to the death penalty. It is natural that in the situation of the applicants their hopes were raised but that is not the fault of the legislators and the applicants themselves could well have gained tremendously from the exercise of the "conscience" vote had it gone the other way. To say that the speeches and other steps taken in Parliament, where the legislators were only lawfully carrying out their functions under the Constitution, have inflicted

torture, inhuman or degrading treatment on the applicants is completely without any factual or legal basis and must needs be rejected. As I have already indicated the delay involved was reasonable in the circumstances and to my mind conferred great benefit on the applicants by postponing the carrying out of the sentence of the court.

In the course of the submissions counsel for the applicants referred to Abbott's case (1979) 1 W.L.R. 1342) in support and so I should deal with it: The attention of the court was directed to the following passage in the judgment of Diplock L.J.:

"That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is in their Lordship's view greatly to be deplored. It brings the administration of criminal justice into disrepute among law abiding citizens".

But Lord Diplock went on to add:

"Nevertheless their Lordships doubt whether it is realistic to suggest that from the point of view of the condemned man himself he would wish to expedite the final decision as to whether he was to die if he thought that there was a serious risk that the decision would be unfavourable. While there is life there is hope".

Mr. Henriques submitted that the period of delay deplored by Lord Diplock was only 8 months, and that if Lord Diplock was there deploring a delay of 8 months, how much more would he have deplored a delay of 3½ years, as was the case here with his clients. But it seems to me that when Lord Diplock referred to the total period allowed to elapse between the passing of the death sentence and its being carried out he was referring as I understand it, to the period of 6 years which had passed since the death sentence was passed in the Abbott case, and while deploring the delay Lord Diplock fully appreciated that it was not realistic to suggest that the condemned man would want to expedite the final decision if he felt it was likely to be unfavourable to him.

Then later in the same judgment Lord Diplock had this to say:

"Since the section imposes duties arising under public law upon the designated Minister and upon

"the Advisory Committee, a person aggrieved by any failure to perform those duties with reasonable dispatch would, in their Lordship's view be entitled to apply to the High Court for an appropriate remedy in public law such as an order of mandamus requiring the Minister to refer the case to the Advisory Committee and the Advisory Committee to proceed with the consideration of it. Their Lordship recognise that it is hardly realistic to expect the person primarily affected by tardy performance of those duties, the condemned man himself, to take that course; and delayed performance of a public duty for which no express time limit is set is not generally ultra vires".

In the circumstances of the instant case can there be any doubt that the last thing that the applicants would have wanted would be the expeditious performance of the duties of the Governor-General and Privy Council in connection with the issue of the warrant for their execution?

Still later in his judgment Diplock L.J. went on to say:

"In their Lordships view the proposition that, in the instant case, the fact that seven or eight months elapsed before the appellant's petition for reprieve was finally disposed of by the President made his execution at any time thereafter unlawful is quite untenable. Their Lordships accept that it is possible to imagine cases in which the time allowed by the Authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent, and, in their Lordship's view would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not "by due process of Law", but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open".

In the first place although the above comments are obiter dicta they deserve careful scrutiny as opinions of a distinguished judge of the Judicial Committee of the Privy Council; in the second place it is to be noted that he states that the proposition that in the circumstances of that case 7 or 8 months had passed before the petition for a reprieve was disposed of made the execution at anytime afterwards unlawful is quite untenable.

What is more, the situation described there is different from the case with which we are here concerned in that although the time between the pronouncement of the death sentence and the notification to the condemned man that it was to be carried out

covered a period of years much of this time was taken up with efforts by or on behalf of the condemned men to upset the sentence and conviction, or to have the Prerogative of Mercy exercised and their sentence commuted; further, there is no evidence to suggest that anything was said or done by anyone to arouse in any of the condemned men a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment; on the contrary, the applicants' complaint is directed to the uncertainty of their position, having their hopes raised at one moment and then having them dashed the next moment.

It should further be noted that Lord Diplock put the position no higher than to say that in such a situation as he outlined it might be argued that the taking of the condemned men's life was not by due process of law. As I see it even in such a situation it is unlikely that it could be successfully argued that the execution was illegal; what might probably happen in such a case would be that because there were circumstances which had aroused a reasonable belief in the condemned man that his sentence must have been commuted to life imprisonment, the Privy Council would consider the case a proper one in which to recommend to the Governor-General that the sentence be commuted, and act accordingly.

As I have found that the applicants were not subjected to torture, inhuman or degrading treatment it will be clear from the above that there has been no contravention of section 17(1) of the Constitution, and no question of redress arises for consideration.

In this motion the applicants seek a declaration that the execution of the said applicants at this time and in the circumstances leading up to and surrounding the issue of the death warrants would be unconstitutional and illegal being contrary to section 17(1). The applicants' attorneys have made it clear that they are not saying that the execution of the death penalty is contrary to the Constitution. If therefore it is being alleged that the execution of the applicants is illegal and unconstitutional it can only be so because the sentence of the court which imposed it was for some reason illegal and unconstitutional; but no argument was

raised to suggest this or for that matter could properly have been so raised as the appeals against conviction and sentence had all been dismissed; nor was there any authority cited to support a submission that delay or failure to carry out the sentence of a court could render that sentence illegal or unconstitutional.

The attorneys for the applicants, as far as I understand it, made no attempt to show how the execution came to be illegal and/or unconstitutional. All that they said was that because there had been a failure to carry out the execution within what they considered to be a reasonable time, the effect of this failure was to cause torture or amount to inhuman and degrading treatment of the applicants. I have already dealt with this, but even assuming that the failure of the executive did amount to torture or inhuman and degrading treatment, I am unable to see how their failure had or could have the effect of changing a legal sentence of a court into an illegal and unconstitutional sentence.

There is no basis for this in law or logic and all that can be said is that if such treatment had been meted out, it would be only one of the factors which the Privy Council would no doubt take into account in deciding whether or not to recommend clemency.

Of course, in theory it is possible that they might have the right to come to the court to ask for an order of mandamus to compel the Governor-General to put an end to their alleged torture or inhuman or degrading treatment by issuing the warrant of execution, but that is not realistic.

Looking at the evidence adduced in this case, at the submissions made and the authorities cited, it is clear that this motion is misconceived and must be dismissed.

I would order that the motion be dismissed with costs.

Carey, J. :

In general, expedition is one of the imperatives as regards the protection of the right to life, liberty and the security of the person guaranteed under our Constitution. So it is enacted in sec. 15(3) of the Constitution that a person who is arrested "shall be brought without delay before a court," and that person "if not tried within a reasonable time shall be released" on bail. Where a person is charged with a criminal offence, he shall "be afforded a fair hearing within a reasonable time." See sec. 20(1). The interpretation of this latter section was considered by this court in Feurtado v. D.P.P. (unreported) Suit M. 17/79, July 13, 1979, and by the Court of Appeal in the subsequent appeal therefrom, SCCA 59/79, November 16, 1979. But the Constitution does not guarantee that men condemned to suffer death by law, will be executed without delay, nor does it guarantee that such persons during the period of incarceration will not suffer anguish, anxieties, or depression, that they may not enjoy a feeling of hope or may not be plunged into despair. I have not the least doubt that, in the due and proper administration of criminal justice, such sentences ought to be carried out with reasonable despatch. That they may not be tortured or subjected to inhuman or degrading treatment, is a safeguard which they, in common with all other citizens of this country, are entitled, and for which, redress is provided in the Constitution.

The applicants all aver, in their applications to this court, that they have been subjected "to torture and/or inhuman and/or degrading treatment within the meaning of and contrary to sec. 17(1) of the Constitution." Accordingly, they each seek a declaration in terms which have already been recited by my Brethren, and consequently, in the interest of brevity, it is wholly unnecessary to rehearse them. For the same reason, I gratefully adopt the statement of facts comprehensively detailed by

Parnell, J.

I now set out "in extenso" the provision of the Constitution on which these applicants rely:

" 17. - (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day. "

The effect of the latter sub-section is to anticipate and forestall an argument that any punishment permissible by the Laws in force up to Independence, should be struck down as unconstitutional on the ground that it infringed the provisions against inhuman or degrading punishment. To ensure that the matter was put beyond a peradventure of a doubt, the provision of sec. 14(1) recognises that the death penalty is still the lawful sentence for the offence of murder. It is thus stated:

" 14. - (1) No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted. "

Degrading punishment may be rendered constitutional; but degrading treatment is not.

This court, therefore, cannot be concerned with the constitutionality of the death penalty as it relates to these applicants: that sentence is by the law of the land mandatory on conviction for murder. [Sec. 2 Offences Against the Person Act.] See also Runyowa v. R. [1966] 2 W.L.R. 877, Mr. Henriques, for the applicants Beckford and Miller, expressly and correctly stated that he was not intending to found any argument upon this point. Mr. Daley, on behalf of the other applicants, adopted Mr. Henriques' submissions and was therefore deemed to have accepted this position. Additionally, the court, it should have been unnecessary to point out, is not called upon to determine or pronounce on the efficacy of this penalty as a deterrent to the many murders being committed nor as to whether it should be

abolished or retained. Mr. Witter, who appeared with Mr. Daley, although conceding that any remarks of his, in this connection, could scarcely further the main line of their arguments, nonetheless, seized the opportunity in this forum to invite us to express our views on the quality, degree, nature and finality of the punishment, especially, as he emphasized, the legislature had vacillated in its approach to the problem. For myself, to accede to this "plea ad misericordiam," would amount to an unwarrantable **interference or encroachment** in an area which is the peculiar jurisdiction of Parliament. The principle of the separation of powers embodied in the Constitution calls for a decorous reticence on the part of the court in this regard. Further, I am in respectful agreement with the words of Lord Simon of Glaisdale in *Milliangos v. Geo. Frank (Textiles) Ltd.* [1975] 3 W.L.R. 758 at p. 792:

" The training and experience of a judge is unsuitable for this type of decision-making unaided; his circumspection is too narrow; his very qualities of keen perception of his immediate problem tend to militate against sound judgment of the wider and more general issues involved. But if courts are to undertake legislative responsibilities, something might be done to equip them better for the type of decision-making which is involved. Official advice and a balanced executive view might be made available by a law officer or his counsel acting as *amicus curiae*. "

And lastly, the court is not, on these motions, required to enquire into or even take cognizance of the facts which led to the convictions of these applicants.

I can now turn to consider the real issues which, in my view, fall to be determined on these motions, having regard to the arguments advanced and the concessions which have been made by learned counsel. They are dichotomous and may be stated in this way:

Firstly, was the delay in executing sentence of death on these applicants so substantial as to establish the torture, or inhuman or degrading treatment forbidden by the Constitution?

Secondly, was such delay aggravated by the fact that the hopes of these applicants had been repeatedly raised and dashed by a Ministry Paper, debates, motions and resolutions in Parliament acceptable as proof of the torture, or inhuman, or degrading treatment, forbidden by the Constitution?

I begin by noting that the two dyslogistic terms used in sec. 17(1) to qualify the word "treatment" viz, "inhuman" and "degrading" have nowhere been defined in the Constitution. But they are ordinary English words readily understandable. Since the applicants claim to have been tortured, this word too, bears analysis. "Torture" connotes the infliction of severe physical or mental pain, such as is conjured up by the use of the thumb-screw and the rack, familiar engines of torture at the time of the Inquisition. It comprehends the causing of severe agony, anguish or torture, which all affect the mind of the victim. "Inhuman" in this context suggests cruel, or barbaric or savage treatment. Dr. Barnett, in his book "The Constitutional Law of Jamaica" at p. 391, is, I think, right in his view that, in addition, this word involves not merely such treatment as results from want of pity or human feeling. "Degrading" is, as I understand it, a lowering of the physical, moral or intellectual character of an individual. To qualify as inhuman or degrading treatment, the act or acts, it seems to me, must be deliberate or intentional. The use of these epithets and the inclusion of the word "torture" suggest that the Framers of the Constitution were intending to show that the treatment must comprise acts which are without just cause.

The issues suggested must be seen as having these elements of intention and being without just cause as a leit-motif. Mr. Henriques' contention was that it was "inhuman" treatment to keep these applicants locked away in a condemned cell for such a long time, especially as responsibility for this situation was not attributable to them. He conceded that it was an inevitable condition of prisoners under sentence of death that they would

suffer anguish but urged, nevertheless, that their long incarceration amounted to treatment within the terms of sec. 17(1). He pinned these arguments to the mast of Abbott v. The Attorney General for Trinidad and Tobago [1979] 1 W.L.R. 1342 at p. 1348, where Lord Diplock observed:

" Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not 'by due process of law',.... "

The relevant period for consideration to be noted as likely to contravene the "due process of law provisions" was between pronouncement of sentence and the date the condemned man was notified of his execution. It was not without significance that Mr. Henriques did not accept that period, but was content that time should run from the date of the last judicial act, which <sup>would,</sup> of course, effectively exhaust legal redress by way of appeal procedures, to the date of notification of execution. The concession was a realization that the Jamaican situation was altogether different from that in the United Kingdom and Scotland when capital punishment was then the appropriate sentence for murder. See paragraph 763 of Command Paper No. 8932 Royal Commission on Capital Punishment, for the time lag in those countries.

Sitting, as I often do, in the Circuit Courts, I am very acutely aware that appeals from convictions for murder take anything up to a year to come on for hearing. If thereafter a petition should be made to the Judicial Committee of the Privy Council, a considerable amount of time could have elapsed. Moreover, such Rules as exist regulating petitions to the Judicial Committee, our court of last resort, prescribe no time limits nor is there any requirement that our Privy Council should be advised.

The result is to further postpone consideration of the ultimate fate of persons under sentence of death. The Privy Council, we were told, adheres to a practice of awaiting the exhaustion by prisoners of their remedies by judicial process. Delays which thus result from the machinery of justice and the system itself, would necessarily be measured in years rather than weeks or months.

Some statistical data was produced to reflect the picture of delays during the period between 1962-1970. It was noted that the average time between final judicial act and execution was nine weeks; the shortest time being <sup>no</sup> more than two weeks and the longest 22 weeks. As a historical fact, this was interesting, but unhelpful in the circumstances of these matters before the court. The situation, as is a matter of common knowledge, has altered to a significant degree, since those relative crime-free days. There are, at present, a greater number of convictions for murder than was the case in those halcyon days, and consequently, delays caused by the preparation of and the hearing of appeals from these convictions, have become more protracted.

Lord Diplock in his advice in Abbott v. Attorney General for Trinidad and Tobago (supra), was, of course, considering provisions in the Trinidad Constitution. It should therefore be emphasized that the provisions for the exercise of the prerogative of mercy here are not "in pari materia" with those of our Commonwealth Caribbean neighbour. From the learned Law Lord's analysis in that case, it appeared that the prerogative is exercised by the President on the advice of a designated Minister who is chairman of an Advisory Committee, which he may consult but whose advice he is not obliged to accept. He is, however, required to submit the judge's report and such other information as he may be advised for that body's consideration and to enable them to tender advice to him. By reason of these duties, imposed by their constitutional provisions, a prisoner would be entitled to petition the High Court for an order of

mandamus. Lord Diplock adding:

" Their Lordships recognise that it is hardly realistic to expect the person primarily affected by tardy performance of those duties, the condemned man himself, to take that course: and delayed performance of a public duty for which no express time limit is set is not generally *ultra vires*. "

Abbott v. The Attorney General for Trinidad and Tobago (supra) at pages 1345 - 1347.

In this country, the exercise of the prerogative of mercy is beyond judicial review: it is not justiciable. I will return to this aspect later in the judgment but at this point it is sufficient to say that no prisoner would be entitled as his Trinidad counterpart to petition this court for mandamus to compel the Governor General to exercise the prerogative. (See De Freitas v. Benny [1975] 3 W.L.R. 388 at p. 394.)

It appears to me that in determining whether time is inordinate or excessive or unreasonable or substantial, all the circumstances need to be taken into account. The words of that great judge, Fox, J., (as he then was) in R. v. Chen See (unreported, delivered 8th January, 19<sup>6</sup>8) are appropriate:

" .... what is a reasonable time is determined not by an objective quest in vacuo of the ideal, but subjectively, by reference to circumstances prevailing .....

Delay caused by the pendency of appeal proceedings at the instance of the prisoner cannot avail. He is the author of the delay and it would hardly lie in his mouth to complain on that ground. See De Freitas v. Benny (supra at p. 390):

" The initiative for securing expedition in all these proceedings lay with the appellant; "

I would also, for the same reason, regard delays caused by the prisoner in petitioning the Governor General for clemency as being exempted from consideration.

Assuming for the moment that the "due process" clause to which Lord Diplock alluded in Abbott's case was analogous to Sec. 17 of our Constitution, it is clear that evidence would have to be adduced to show that the condemned men by reason of the

passage of time and the absence of any appeal or petition on their part had been induced to believe that sentence would not be executed upon them and therefore must have been commuted. But this is not the case with respect to these applicants; they were under no misapprehension as to their fate. All had petitioned for clemency: all had been refused. I do not for a moment doubt that delay, even inordinate delay, is to be deplored, but delay per se, in my judgment, gives rise to no legal rights. Nothing said in Abbott's case (supra) gives ground for such a view.

The Governor-General has the power, under sec. 90(1) (b), to grant a respite either indefinite or for a specified period from the execution of the punishment imposed on a prisoner convicted of murder. Even if the delay were inordinate, I do not think that sec. 17(1) could be successfully prayed in aid as a means of constitutional redress. The mere effluxion of time, I hold, does not come within the definitions I have earlier stated as amounting to the infliction of treatment causing severe agony or anguish; or as cruel, barbaric or savage treatment or as lowering a person's physical, moral or intellectual character. So far as it is necessary, I would concur in holding that the delay in the case of each applicant was not inordinate.

In my view, the obiter dictum of Lord Diplock in Abbott's case, on which Mr. Henriques relies, does not assist him, for delay which can be explained, is not to be held unreasonable. Moreover, that dictum would conflict with our constitutional provisions as to the Governor-General's exercise of the prerogative if applied in the manner urged on us by Mr. Henriques.

With respect to the other limb of the dichotomy, on examination of the reports by the medical and other experts, these confirm that these applicants suffered stress, which is directly related to the nature of the sentence imposed upon them. Their awareness of the debates has also contributed to their "anxieties and depression manifestations." It is plain, and Mr. Henriques said as much, that men under sentence of death were

bound to suffer anguish. The question is whether they suffered severe mental or physical pain, or severe agony, or anguish, or was there "treatment" which could be called cruel, barbaric, or savage, or treatment which has lowered their physical, moral or intellectual character?

The onus was clearly on these applicants to show on a balance of probabilities a violation of section 17(1). Logically, it seems to me, they cannot discharge this duty unless they prove the direct responsibility of some arm of the State armed with coercive powers for their torture or degrading treatment within the scope of those terms as defined. The act of State must be the dominant or major cause of the anguish or anxieties or depression which are the result of the forbidden treatment, for a person under sentence of death, it has been accepted at the Bar, must necessarily suffer anguish, anxieties or depression; these are inextricably bound up with the nature and character of the sentence. To show that the applicants suffered, what they would have suffered at all events, is to fall short of the standard necessary. The evidence adduced, did not, in my view, demonstrate that the State was the major contributor to this anguish, about which the applicants complain.

So far, I have assumed that there was some act of State or some act of an arm of the State armed with coercive powers which subjected these applicants to torture, or inhuman or degrading treatment. It is therefore necessary to consider the nature of the act or acts of State to which critical attention is being drawn. What constituted this torture or inhuman or degrading treatment was the delay, exacerbated or aggravated by the debates, resolutions and motions in Parliament which raised and dashed the hopes of the applicants that their sentences would not be carried out. I have considered the question of delay earlier in this judgment and need not return to it. In the course of these debates, individual contributions varied, according to the speaker's particular point of view. I ask a rhetorical question:

which of the differing points of views, is it being asserted, inflicted on the applicants, severe mental pain or anguish, or constituted cruel, savage or barbaric treatment or lowered their physical, moral or intellectual character? The result of the debates in the Lower House was that the death penalty remained the lawful sentence of the land. But hope springs eternal in the human breast and so while there is life, there is hope. After the debates in the Upper House, the death penalty was not abolished. At the end of all this Parliamentary activity, the people's elect in the Lower House were for retention; Vox populi: vox Dei: the elected officials were for abolition.

Debates, resolutions and motions in Parliament are a legitimate exercise of the parliamentary process. The members of both Houses were engaged upon their constitutional responsibilities and concerns: it was lawful. It was difficult to appreciate how the discharge of these constitutional responsibilities could possibly result in breaching the constitutional rights of the applicants, viz, subject them to torture or inhuman or degrading treatment. Mr. Daley sought to say, as I understood his arguments, that the debates in the Houses were only prima facie constitutional. If in fact the debates resulted in a breach, then they became unconstitutional. It was, I fear, difficult to follow the logic of this contention. Were Parliament to enact legislation which in the event was struck down by the court as unconstitutional, it is the result of the debates, viz, the legislation itself, which would be held to be in contravention of the Constitution: the debates do not become transmuted into an unconstitutional debate by reason of the judicial decision. If the argument of learned counsel is valid, it would allow a person accused of murder to successfully plead provocation where the provocation arose from the doing of some perfectly lawful act on the part of the deceased. I am quite unable to find that these debates, resolutions or motions were capable of constituting torture or inhuman or degrading treatment as I have defined those terms and so offend against sec. 17(1) of the Constitution.

It was also urged before us that one of the arms of the Executive, namely, the Governor-General, should have commuted the sentence of these applicants, during the course of what was described as "Parliamentary irresponsibility." His failure to do so was a breach of sec. 17(1). Precedent for this course when abolition is mooted, was found in the United Kingdom and recently in Canada.

It was quite clear that the Governor-General in deference to the debates in the House, the Ministry Paper, the Resolutions and Motions, refrained from issuing warrants of execution against the applicants. I would characterise his forbearance as merciful: a world away from torture, inhuman or degrading treatment. The House of Representatives in 1978, resolved as follows:

" WHEREAS for sometime national consideration has been given as to whether Capital Punishment should be continued.

AND WHEREAS during that period of time many persons have been awaiting execution following the completion of all steps for legal review of their sentence of death.

Be it resolved that this Honourable House recommend to the Governor General and Privy Council that the cases of all persons now awaiting execution be reviewed. "

Both before and after that Resolution, the Governor-General and his Privy Councillors met to review the cases of condemned men. In the result, some 21 of those persons had their sentences commuted. Mr. Daley said that he did not seek on these motions to impugn the exercise of the Governor-General's discretion. In my judgment, however, the argument suggesting that he should have commuted sentences, plainly does nothing more than question the exercise of the prerogative of mercy. The time and manner of its exercise alike give rise to no legal rights.

" At common law this has always been a matter which lies solely in the discretion of the sovereign, who by constitutional convention exercises it in respect of England on the advice of the Home Secretary to whom Her Majesty delegates her discretion. Mercy is not the subject of legal rights. It begins where legal rights end. A convicted person has no legal right even to have his case considered by the Home Secretary in connection with the exercise of the prerogative of mercy.

" In tendering his advice to the sovereign the Home Secretary is doing something that is often cited as the exemplar of a purely discretionary act as contrasted with the exercise of quasi-judicial function. "

per Lord Diplock in DeFreitas v. Benny [1975] A.C. at p. 394.

This I respectfully accept as a correct formulation of the law, in this connection. We are bound by this decision.

In the result, having given my best consideration to the case of each of these applicants, I too would dismiss their applications with costs.

By way of postscript, I recall Mr. Henriques pointing the court to its clear mandate to interpret the Constitution and to carry out this serious responsibility regardless of the difficulties. It is not a challenge which we for one moment shirk. For myself, I am mindful of the counsel of the late Justice Oliver Wendel Holmes, Jnr., of the American Supreme Court, that the judge should be responsive "to the felt necessities of the time, the prevalent mood and political theories, the intuities of public policy avowed or unconscious." The interpretation of this basic document of the Nation, calls for a just balance between ideals to be aimed at and the cold realities of life in this country, the present. In this way, we essay to build a just society for the citizens today, in the hope that it will become more just in the years to come.