The Death Penalty: A Colonial Relic?

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"'He deserves death.'

'Deserve it? I daresay he does. Many that live deserve death. And some that die deserve life. Can you give it to them? Then do not be too eager to deal out death in judgment. For even the very wise cannot see all ends.'"

J.R.R. Tolkien

In a world rife with inequality, violence, and the struggle for justice, one question looms large: Why should the state be constitutionally entitled to kill people in the Commonwealth Caribbean and not in the UK? Is it simply the vestige of colonial law, or is there a more insidious, deeper reason rooted in our understanding of justice, punishment, and human rights? As we navigate through the labyrinth of this topic today, let us be unflinching in our scrutiny, for this issue speaks to the very heart of what society deems justifiable, what we believe about human life, and what, ultimately, we hold sacred.

The death penalty is a highly contentious political and legal issue in the Commonwealth Caribbean. While the death penalty has long since been abolished in the UK, it continues to be practised throughout the Commonwealth Caribbean, and has given rise to more constitutional litigation in the region than any other issue. Even though the practice of execution by hanging is a relic of British colonialism, many Caribbean people continue to support it. Indeed, paradoxically, some people in the Caribbean argue that attempts to abolish or restrict capital punishment are a colonialist imposition of European values on the Caribbean.

The Pros

This question inevitably invites arguments in favour of the death penalty. Some contend it serves as a powerful deterrent against violent crimes, while others see it as a form of retributive justice. The notion of cultural autonomy looms large as well, asserting that the Commonwealth Caribbean has a legal prerogative to enshrine its own ethical norms. Lastly, proponents claim that it delivers a sense of closure to the families and communities devastated by heinous crimes. These arguments are not trivial, and they deserve our scrutiny.

The Cons

While these points may at first glance seem compelling, when we take a closer look, we will see inherent flaws that call into question the very foundation of such arguments. Firstly, any claim to deterrent efficacy is marred by inconclusive and contradictory empirical data. Secondly, the death penalty risks extinguishing innocent lives, a fatal error that can never be corrected. Thirdly, the application of capital punishment is often marred by systemic bias and injustice, an undeniable stain on any legal system. Fourthly, the ethics of state-sanctioned killing remain murky, putting us in the uncomfortable position of combating violence with more violence. Lastly, one must grapple with the human capacity for change and redemption; the death penalty offers no space for such possibilities, instead delivering a grim and irreversible verdict.

But all of that is to come and I am getting ahead of myself.

So, where to begin? In this lecture, we are going to start by looking at the history and origins of the death penalty in Britain's Caribbean colonies. Next, we are going to look at the key developments in constitutional litigation about the death penalty since independence, and the ways in which the Privy Council and the Caribbean Court of Justice have restricted its imposition. Finally, we are going to look at the moral and

political arguments commonly proffered for the death penalty and the reasons why they don't stack up.

The Origins of the Caribbean Death Penalty

The Commonwealth Caribbean inherited its legal system from England, and that includes the death penalty. As I mentioned in a previous lecture, there was a time when the death penalty was extremely widely used in England. In the late eighteenth and early nineteenth century, there were hundreds of capital crimes, including many property crimes that were trivial by modern standards, a body of law known as the "Bloody Code".[1] During the course of the nineteenth century, this was gradually whittled down. By 1861, there were only five capital crimes: murder, treason, espionage, arson in royal dockyards and piracy with violence.[2]

At common law in England, the death penalty was mandatory for murder. Everyone convicted of murder had to be sentenced to death, regardless of mitigating circumstances. This rule obviously had harsh effects, and over time it was mitigated by various statutory reforms. The Infanticide Act 1922 made special provision for mothers who killed their children in the twelve months after birth due to post-natal depression and similar conditions, who were to be convicted of infanticide, a non-capital crime, rather than murder. The Homicide Act 1957 restricted the death penalty to certain cases of murder only. The 1957 Act also created the partial defences of provocation and diminished responsibility, which reduced murder to manslaughter. Finally, the death penalty for murder was abolished in England and Wales by the Murder (Abolition of Death Penalty) Act 1965.

English law was exported to British colonies, but there were always important differences between English laws and colonial laws. In early times, the most important difference was the existence of slavery in Britain's Caribbean colonies. With slavery came extraordinarily brutal laws aimed at controlling the slave population. As Anthony Phillips notes, the Barbados Act 1688 set out this purpose plainly:

"… Forasmuch as the said Negroes and other Slaves brought unto the People of this Island… Are of barbarous, wild and savage nature, and such as renders them wholly unqualified to be governed by the Laws, Customs and Practices of our Nation: It therefore becoming absolutely necessary, that such other Constitutions, Laws and Orders should be in this Island framed and enacted for the good Regulating and Ordering of them, as may… Restrain the Disorders, Rapines and Inhumanities to which they are naturally prone and inclined…"[3]

Phillips highlights that in Barbados, though not in all colonies, it was held that the common law did not apply to slaves. Slaves were considered property, not people. Slaves could be and often were punished by their masters, and there was also a Slave Court, a special tribunal composed of two Justices of the Peace and three freeholders. Slaves had no right to trial by jury. The punishments handed out by the court included the death penalty and whipping with the cat o' nine tails.[4]

As most people know, slavery in the British Caribbean was abolished by the Slavery Abolition Act 1833. However, the death penalty was not. In relation to Barbados, Lyndsey Black and others write that *"Following the ending of slavery, practices of punishment continued to serve the plantocracy through their control and coercion of labour… Crucially, the number of capital statutes increased significantly in these years in Barbados… The classification of property offences as capital offences occurred during a period in which the reverse was happening in Britain*." In other words, while the death penalty was in decline in the metropolitan core, it was being expanded as a means of controlling British colonial subjects in the Caribbean. Black and others acknowledge that there is evidence that capital punishment was actually not frequently used in the Caribbean in these decades, but they highlight that *"Death worked as just one tool in a 'coercive network'*

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[1] Seal, Lizzie, "Criminalisation and the eighteenth-century's 'Bloody Code' Lizzie Seal explores the link between poverty and criminalisation in the eighteenth century." *Criminal Justice Matters* 74.1 (2008): 16-17 https://www.crimeandjustice.org.uk/publications/cjm/article/criminalisation-and-eighteenth-centurys-bloody-code

[2] Museum of London, "The long fight: executions and death penalty reforms in Britain" https://www.museumoflondon.org.uk/discover/long-fight-executions-and-death-penalty-reforms-england

[3] Phillips, Anthony De V. "Doubly Condemned: Adjustments to the Crime and Punishment Regime in the Late Slavery Period in the British Caribbean Colonies." Cardozo L. Rev. 18 (1996): 699.

[4] Ibid.

that could be deployed in the colonies" and that *"Criminal justice was integral to the maintenance of colonial order".*[5]

So that is the historical context of the Caribbean death penalty. It was imposed by our former colonial masters as a racialised means of controlling their colonial subjects, both before and after the abolition of slavery. It is not an accident that the method of execution used throughout the Commonwealth Caribbean is hanging, which was historically the British method of execution.

It is noteworthy that the enduring legacy of the death penalty in the Caribbean isn't unique but rather part of a broader pattern of colonial impositions that extended across the globe. From Africa to Asia, the British colonial administration promulgated its penal codes, tailoring the strictness of laws to the socio-political context of each territory. So, while English law was exported to the colonies, the law was often harsher in the colonies than in the metropolitan core.

Crucially, the British colonies of the Caribbean absorbed the English common law rule that the only sentence that could be pronounced on a person convicted of murder was death. Many retained this rule up to and after their independence from the UK in the 1960s, 1970s and 1980s. Today, Trinidad and Tobago is the only Commonwealth Caribbean jurisdiction that retains the mandatory death penalty, for reasons that we will look at shortly. However, every independent state of the Commonwealth Caribbean retains the death penalty in some form.

Constitutional Litigation About the Death Penalty

As I have mentioned, during the 1960s, 1970s and 1980s, most of the former British colonies of the Commonwealth Caribbean became independent states. They adopted constitutions which contained Bills of Rights. Unlike the UK's Human Rights Act 1998, the Bills of Rights of Caribbean constitutions prevail over contrary legislation, so that legislation can be struck down by the courts if it is held to violate constitutional rights. The Commonwealth Caribbean states also retained the Judicial Committee of the Privy Council in London as their highest court of appeal, although, as I explained in a previous lecture, some states have now replaced the Privy Council with the Caribbean Court of Justice as their highest court. We will return to the significance of this later.

The Bill of Rights of Caribbean constitutions, however, expressly allowed the death penalty. For example, section 4 of the Constitution of Antigua and Barbuda states *"No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a crime of treason or murder of which he has been convicted."*

Another limit on the protection provided by Caribbean constitutions is that most of them contained a savings clause which, to a greater or lesser extent, immunises laws from constitutional challenge where those laws pre-date the Constitution. The wording of the savings clause differs significantly between different constitutions, and we will come back to the significance of that. But the savings clauses have been a significant brake on the development of constitutional jurisprudence in the Commonwealth Caribbean. As Margaret Burnham states, *"The savings clause has become a constitutional Frankenstein's monster, destroying the founding instruments' central covenants and leaving behind a pitiful pile of unrealised hopes."* [6]

Clearly, given that Caribbean constitutions expressly allowed for the death penalty, there was no room to argue that the death penalty *per se* was unconstitutional. Although hanging is now regarded internationally as an unnecessarily brutal method of execution, the Privy Council held in *Boodram v Baptiste* [1999] 1 WLR 1709 that hanging was immunised from unconstitutionality by Trinidad and Tobago's savings clause. However, that did not mean there was no room for a constitutional challenge to particular death sentences. The Privy Council has found this a difficult issue, as illustrated by the number of times it has overruled its own decisions in this area, sometimes within a short space of time.

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[5] Black, Lynsey, et al. "The death penalty in Barbados: Reforming a colonial legacy." International Journal for Crime, Justice and Social Democracy (2023)

[6] Burnham, Margaret A. "Indigenous constitutionalism and the death penalty: The case of the Commonwealth Caribbean." International Journal of Constitutional Law 3.4 (2005): 582-616

This vacillation by the Privy Council highlights the complexity of navigating moral, legal, and social terrains on the issue of the death penalty. Each overturning decision reflects not only an internal judicial debate but also broader conversations about human rights, state sovereignty, and evolving standards of decency.

One important area of challenge was the delay in carrying out the death penalty. Historically, both in England and throughout the Commonwealth, executions had been carried out quickly after the imposition of a sentence, and the idea of executing a person after a long delay was considered aberrant. In fact, in 1947 questions were asked in the House of Commons about a case in the British colony of the Gold Coast (now Ghana) in which a number of men had been *"Six times brought up for execution over a period of years,"* with Winston Churchill calling this *"An affront to every decent tradition of British administration,"* and Clement Davies stating that *"Never in the history of this country has a postponed capital sentence been carried out, as it is realised that that would deeply shock public sentiment".*[7]

But by the late twentieth century, things had changed due to the increased availability of appeals and other routes of challenge such as petitions to the UN Human Rights Committee or the Inter-American Convention on Human Rights. In the landmark case of *Pratt and Morgan v Attorney General of Jamaica* [1994] 2 AC 1 the Privy Council held that to execute a condemned man after a delay of fourteen years was unconstitutional. They anticipated that the appeals process should normally take no more than two years, and that applications to international bodies should normally take no more than 18 months. They held that in any case in which execution is to take place more than five years after sentence, there will be strong grounds for believing that the delay is such as to constitute *"Inhuman or degrading punishment or other treatment"* within the meaning of the Constitution.

The *Pratt and Morgan* ruling was a watershed moment not only for the jurisprudence of the Commonwealth Caribbean but also for global human rights dialogue. The decision resonated well beyond the Caribbean, influencing other jurisdictions and international bodies to consider the ethics and constitutionality of prolonged delays in executing a death sentence.

The five-year period was a rule of thumb; it did not mean that delays of less than five years would inevitably be upheld as constitutional. In *Guerra v Baptiste* [1996] AC 397, a delay of four years and ten months was held to be unconstitutional in the circumstances of the case. In *Henfield v Attorney General of the Bahamas* [1997] AC 413 it was held that the general limit in the Bahamas was three and a half years, because the Bahamas was not a signatory to the International Covenant on Civil and Political Rights and to the Optional Protocol, meaning that time did not have to be allowed for a petition to the Human Rights Committee.

In *Fisher v Minister of Public Safety and Immigration* [2000] 1 AC 434 the Privy Council held that executing a person before their petition to the Inter-American Commission on Human Rights had been dealt with did not constitute inhuman treatment contrary to the Constitution of the Bahamas. *Fisher* also held that pre-trial delay did not count towards the maximum period in *Pratt and Morgan.* It was also noted that in *Henfield* it had been overlooked that Bahamians did have the opportunity to apply to the Inter-American Commission on Human Rights pursuant to the Charter of the Organisation of American States, meaning that the reduction in *Henfield* of the relevant period from three and a half to five years had been incorrect. *Fisher* was qualified by *Thomas v Baptiste* [2000] 2 AC 1 in which the Privy Council held that the constitutional right to due process of law under the Constitution of Trinidad and Tobago did require execution to be delayed until the Inter-American Commission had dealt with a petition. It held that by ratifying a treaty which provided for individual access to an international body, the Government had made that process part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution, and while it could take away that right for the future, it could not do so retrospectively. On the other hand, in *Higgs v Minister of National Security* [2000] 2 AC 228 it held that the same did not apply to the Bahamas, which had not ratified the Inter-American Convention on Human Rights and in respect of which the Inter-American Commission's jurisdiction was more limited.

This line of jurisprudence was extremely controversial in the Commonwealth Caribbean. David Simmons QC, then-Attorney General of Barbados, said in a 2000 lecture that *"[T]he cumulative effect of the decisions*

[7] HC Deb 03 March 1947 vol 434 cc37-51

of the Judicial Committee of the Privy Council and the attitude of the international human rights bodies have engendered the greatest uncertainty in the region about the ability of Governments to carry out the death penalty in suitable cases… Our people believe that British judges are making a mockery of the death penalty and, by policy decisions, are virtually abolishing the penalty for the Caribbean in order to make the region comply with a European movement for its universal abolition". Simmons argued that Commonwealth Caribbean countries were *"between a rock and a hard place,"* since they were required to wait for the outcomes of petitions to international bodies before executing a person but were not permitted to execute them if the five-year limit was exceeded.[8]

The phrase "between a rock and a hard place" aptly encapsulates the conundrum faced by Caribbean states. It points to an intricate web of national imperatives, regional pressures, and international obligations that make straightforward policymaking in this area almost impossible. These multi-layered complexities are an essential backdrop against which constitutional litigation occurs.

This kind of populist rhetoric is not uncommon in the Commonwealth Caribbean. Despite the death penalty itself being a product of British colonialism, many Caribbean politicians have, ironically, decried the Privy Council's curtailment of executions as a colonial imposition by British judges against the will of the Caribbean people.

This ironic turn of events presents a compelling study of political rhetoric. While the death penalty originated as a tool of colonial control, its current critique by British judicial bodies is framed as yet another form of colonialism. This complex entanglement of past and present, colony and coloniser, merits closer scrutiny, for it reflects the deeper anxieties about identity, autonomy, and justice that plague post-colonial societies.

Meanwhile, there were other innovations in death penalty jurisprudence. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, the Privy Council overruled its own decisions in *de Freitas v Benny* [1976] AC 239 and *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527, to hold that a person sentenced to death who was being considered for the exercise of the prerogative of mercy by the Jamaican Privy Council had the right to see the material on which the Council was to rely and to make representations as to why their sentences should be commuted.

Another important area of constitutional challenge was the mandatory nature of the death penalty in most Caribbean territories. As long ago as 1976, the United States Supreme Court in *Woodson v North Carolina* 428 US 280 (1976) held that the mandatory death penalty for murder, without consideration of the circumstances of the particular offence, constituted cruel and unusual punishment which violated the Eighth Amendment to the United States Constitution. There was obviously room for similar challenges in the Commonwealth Caribbean. This came to fruition in *Reyes v The Queen* [2002] UKPC 11, a case from Belize in which the Privy Council held that the mandatory death penalty, without regard to the individual circumstances of the offender, constituted inhuman and degrading punishment.

The *Reyes* case served as a crucial pivot in the discourse surrounding the mandatory death penalty, drawing attention to the importance of considering individual circumstances. It opened the door for one that is not merely punitive but also attentive to the complexities of human behaviour and social context. By setting this precedent, the court indirectly challenged the Caribbean states to reevaluate not just the application but the very essence of the death penalty as it stood in their constitutions.

But there was a snag, which was the savings clause. This was not an issue in *Reyes* because the Constitution of Belize does not have a savings clause, but it had to be confronted in the case of other Caribbean states. I discussed this issue in my previous lecture on the Caribbean Court of Justice, but I will summarise it again here. In *R v Hughes* [2002] UKPC 12 and *Fox v The Queen* [2002] UKPC 13 the Privy Council construed the savings clauses in St Lucia and St Kitts and Nevis. In both cases, they held that the savings clause did not immunise the mandatory death penalty from constitutional challenge. The reason for this lies in the precise wording of the savings clause. The St Lucia savings clause considered in *Hughes* read *"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of*

[8] Simmons, David AC. "Conflicts of Law and Policy in the Caribbean-Human Rights and the Enforcement of the Death Penalty-Between a Rock and a Hard Place." J. Transnat'l L. & Pol'y 9 (1999): 263

punishment that was lawful in Saint Lucia immediately before 1 March 1967". The Privy Council held that this did not protect the mandatory death penalty, because the impugned law did not merely authorise judges to impose the death penalty, it required them to do so.

But other constitutions, whose savings clauses were more broadly worded, presented a greater problem. In respect of Jamaica, the savings clause did not protect the mandatory death penalty from unconstitutionality in *Watson v The Queen* [2004] UKPC 34 because Jamaica had amended its death penalty statute since independence to create categories of capital and non-capital murder, so it was not an "existing law" to which the savings clause applied. In *Roodal v State of Trinidad and Tobago* [2003] UKPC 78 the Privy Council dealt with the savings clause of Trinidad and Tobago, which provided that an existing law could not be held to be inconsistent with or in contravention of fundamental rights. That was, self-evidently, much broader than the savings clauses considered in *Hughes* and *Fox.* The Privy Council found a workaround: they relied on section 5(1) of the Constitution Act 1976, the instrument which brought the Constitution into force, which provided that *"The existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."* They used this modification power to construe the mandatory death penalty as a discretionary death penalty.

This workaround by the Privy Council illuminates the often-complicated dance between constitutional text and judicial interpretation. When an explicit constitutional provision — such as a savings clause — comes in direct conflict with evolving norms and human rights standards, courts may find themselves navigating a labyrinth of legal, ethical, and public pressures. The utilization of a "modification power" in this context is not merely a judicial manoeuvre; it is a testament to the dynamic nature of constitutional law, especially when it intersects with matters as deeply contentious as the death penalty. However, there was a dramatic turnaround less than a year later in *Boyce v The Queen* [2004] UKPC 32 in which a nine-judge panel of the Privy Council overruled *Roodal* and upheld the constitutionality of the mandatory death penalty in Barbados on the basis of the broadly worded savings clause.

Although I have previously delivered a full lecture on the subject, I want to add a coda about the role of the Caribbean Court of Justice. The shift from the Privy Council to the Caribbean Court of Justice in some states doesn't merely signify the end of colonial judicial control but opens new questions about judicial legitimacy and public trust. When it comes to matters as polarizing as the death penalty, this shift can be seen as a quest for regional autonomy, albeit with varying degrees of public approval.

For some Caribbean politicians, a key motive for replacing the Privy Council with the Caribbean Court was a desire to break away from the Privy Council's restrictive jurisprudence on the death penalty. As Julian Knowles wrote in 2004, *"There is no doubt that the Court is intended, first and foremost, to speed up the rate of executions."* He said, rather unfairly with hindsight, that *"The Caribbean Court of Justice is therefore little more than a cynical political exercise, which has more to do with political expedience than with improving the quality of justice in the Caribbean."*[9]

Knowles's latter prediction has been proved wrong by subsequent events. As I highlighted in my lecture on the subject, the Caribbean Court in *Nervais v Regina* [2018] CCJ 39 (AJ) overruled the Privy Council decision in *Boyce* and held the mandatory death penalty in Barbados to be unconstitutional. The *Nervais* judgment is an impressive one, which I described in my lecture as an eloquent paean to high constitutional principle. In contrast, the Privy Council has recently pushed back in *Chandler v State of Trinidad and Tobago* [2022] UKPC 19, reaffirming *Boyce* and declining to follow *Nervais.* We are, therefore, now in a position where the Caribbean Court is more progressive than the Privy Council as regards the death penalty. If the purpose of the Caribbean Court was to speed up the rate of executions, then it has done the opposite.

We can conclude that the legal position in the Commonwealth Caribbean region is now as follows. First, the death penalty in itself is constitutionally permitted. Second, however, the mandatory death penalty is unconstitutional, except where it has been preserved by a savings clause. Third, following *Nervais,* a savings clause would not now immunise the mandatory death penalty from constitutional challenge in those jurisdictions which have adopted the Caribbean Court as their highest court. Fourth, executing a person after

[9] Knowles, Julian B, "Capital punishment in the Commonwealth Caribbean: colonial inheritance, colonial remedy?", in Hodgkinson, Peter, and William A. Schabas, eds. Capital punishment: Strategies for abolition. Cambridge University Press, 2004

a long delay is normally likely to be unconstitutional.

The death penalty enjoys strong support among many people in the Commonwealth Caribbean. As we have seen, while the parameters of the death penalty have been much litigated, there is no doubt that the death penalty itself remains constitutional in principle. Yet when we examine the moral and political arguments for the death penalty and consider them against the available evidence, they don't stack up. Let's look at why.

The main practical argument often proffered for the death penalty Is deterrence. After all, the argument goes, some Commonwealth Caribbean jurisdictions have high murder rates, and problems with gang violence. Isn't the death penalty necessary as a deterrent?

The reality, however, is that the evidence of the death penalty's efficacy as a deterrent is unconvincing. In 1973 Dr Isaac Ehrlich published an influential and highly controversial paper which argued, using econometric methods, that executions in the United States deter murders.[10] However, Ehrlich's study has been much criticised. There have been numerous empirical studies over the subsequent decades, producing widely varying and indeed contradictory conclusions.

In 2006, Dr Jeffrey Fagan published a robust critique of the various studies purportedly showing that executions had a deterrent effect. He identified numerous errors and omissions in the methodologies of these studies. He said, *"The new deterrence literature fails to provide a stable foundation of scientific evidence on which to base law or policy."* He went on to say *"…The fragility of the new deterrence evidence, a function of the fundamental empirical and theoretical errors in this body of work, raises concerns greater than simply just 'doubt:' the conclusions in this body of work are wrong, there is no reliable evidence of deterrence. The only scientifically and ethically acceptable conclusion from the complete body of existing social science literature on deterrence and the death penalty is that it [is] impossible to tell whether deterrent effects are strong or weak, or whether they exist at all."*[11]

Similarly, a comprehensive review of the evidence was carried out in 2012 by a committee of the National Research Council of the National Academies in the United States. The committee reached the conclusion that *"Research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide."*[12] So in other words, there are good reasons to think that the empirical evidence we supposedly have is fundamentally flawed, and of no value in answering the question. We simply don't know to what extent the death penalty deters murder.

To be fair, scholars continue to disagree about this issue, and there continue to be some studies that purport to show a deterrent effect.[13] We do not have time for a detailed review of the literature. But given the real doubts about the rigour of research in this area, the point is that we simply don't know with any confidence whether the death penalty is a deterrent or not. There are good common-sense reasons to think that it may not be. After all, people who commit murder are often not in a rational frame of mind; they may be acting impulsively; they may be drunk, on drugs, or experiencing a mental health crisis; and they may not have knowledge of the law or the likely consequences of their act.

And although the correlation is not causation, we can see that jurisdictions which abolish the death penalty do not typically see their murder rates spike. For example, a recent study by Stephen Oliphant showed that there was no increase in homicide rates after death penalty moratoriums were imposed in the US states of

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[10] Ehrlich, Isaac, "The deterrent effect of capital punishment: A question of life and death," No. w0018. National Bureau of Economic Research, 1973

[11] Fagan, Jeffrey. "Death and deterrence redux: Science, law and casual reasoning on capital punishment." Ohio St. J. Crim. L. 4 (2006): 255

[12] National Research Council, Nagin, Daniel S. and Pepper, John V., "Deterrence and the death penalty," Washington, DC: National Academies Press, 2012

[13] See for example Yang, Bijou, and Lester, David, "The deterrent effect of executions: A meta-analysis thirty years after Ehrlich." Journal of Criminal Justice 36.5 (2008): 453-460, a meta-analysis of 104 studies which purportedly provides evidence for a deterrent effect, although the effect was only evident in certain types of studies.

Illinois, New Jersey, Washington, and Pennsylvania.[14]

This ambiguity in empirical evidence raises a crucial question: if we lack conclusive proof regarding the death penalty's efficacy as a deterrent, should we err on the side of caution and not implement a punishment that is irreversible? This principle, often referred to as the 'Precautionary Principle,' argues for avoiding actions that, once done, cannot be undone, especially when the empirical data supporting such actions is inconclusive. When applied to the death penalty, the precautionary principle suggests that it might be wiser to adopt alternative sentencing options that can be rectified in the event of new evidence or wrongful convictions.

With this in mind, given the paucity of actual evidence that the death penalty deters murder, can we really justify killing human beings on the basis of a mere intuition that it ought to be a deterrent? My view is that we cannot.

Another argument for the death penalty is simple retributivism: the idea that a person who commits murder deserves to be killed. This is not an empirical claim, but a moral and philosophical one, and so we can't test it against the evidence. But there are a number of obvious problems with it.

The first problem is that, to state the obvious, not everyone who is convicted of a crime is actually guilty. This problem is of course not unique to the Commonwealth Caribbean. Here in England, we have had numerous atrocious miscarriages of justice over the years. The recent high-profile case of Andrew Malkinson, who served 17 years in prison after being wrongly convicted of rape in 2004, illustrates this. So too do the cases of the three women, Sally Clark, Donna Anthony and Angela Cannings, wrongly convicted of murdering their children on the basis of flawed statistical evidence.[15] The harm of being wrongly imprisoned for a crime one did not commit is of course incalculable. As Mr Malkinson's mother told the BBC, *"What has been done to him cannot be undone".*[16] But the harm is greater still when a person is executed for a crime they did not commit, in which case no power on earth can bring them back. Again, this isn't theoretical. Timothy Evans was executed in 1950 having been wrongly convicted of the murder of his wife and daughter, who were actually killed by the serial killer John Christie.[17]

The risk of wrongful execution poses not just an individual but also a systemic crisis of credibility for the justice system. When a system metes out an irreversible and ultimate punishment based on flawed or incomplete evidence, it not only fails the individual involved but also undermines public trust.

But the risks are even greater in the Commonwealth Caribbean, where legal aid for those charged with crimes is grossly inadequate and the legal system is under-resourced. As Margaret Burnham wrote in 2005, *"The increased use of the [death] penalty [in the Commonwealth Caribbean] in the 1980s induced a criminal justice crisis, for those jurisdictions did not have an adequate legal infrastructure to administer properly the increasing number of capital cases. Prison conditions were harsh and not suited to long-term death row incarceration. Lawyers and judges were ill-prepared to handle the cases, which are notoriously complex. Inadequate legal-aid programs left defendants at the mercy of poorly trained, junior lawyers who were not paid to assist their clients during critical pretrial and post-trial proceedings and were not provided with adequate forensic, investigative, or medical expertise. There was no right to legal assistance at the post-trial phase. In consequence, the integrity of the system was undermined as flawed convictions were overturned by appellate courts. In Belize, more than half of those sentenced to death won their appeals; some of these defendants were likely innocent. In a 2002 case from Jamaica, the Privy Council reversed a capital conviction for a Western Union office robbery and murder because the prosecution neglected to provide the defence with a videotape of the crime in progress that would have cleared* the defendant."[18]

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[14] Oliphant, Stephen N. "Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method." Criminology & Public Policy 21.4 (2022): 915-944

[15] The Observer, "I fought for Sally Clark and other cot death mothers. I'm still haunted by their fate," 20 November 2021 https://www.theguardian.com/uk-news/2021/nov/20/sally-clark-cot-death-mothers-wrongly-jailed

[16] BBC, "Andrew Malkinson's rape conviction washed after 20-year fight," 26 July 2023 https://www.bbc.co.uk/news/uk-england-manchester-66310919

[17] BBC, "The execution of Timothy Evans," 16 January 2012 https://www.bbc.co.uk/blogs/wales/entries/cdc56160-91eb-366d-ae0e-5d9c5a676fe2

[18] Burnham, op. cit.

This particular instance highlights another ethical dilemma: the responsibility of the prosecution in capital cases. In a system already fraught with inadequacies, can we be assured that the prosecution is always acting in the best interest of justice rather than securing a conviction? This further underscores the fragility of a system wherein life and death decisions can hinge on procedural oversights or withheld evidence.

Of course, the possibility of innocence is an easy argument against the death penalty. But a truly principled stance of opposition to the death penalty must also confront cases where there is no doubt about guilt. And I will not shy away from doing so. While murder is an atrocious act, it's important to recognise that human beings do not make free choices in a vacuum. We are the products of our environment. Many people who commit murder have suffered severe trauma; many are suffering from mental health issues; many have lived their whole lives in dire poverty; many have been caught up against their wishes in gang violence. In most real-life cases of murder, there are considerable mitigating circumstances. And even people who have committed murder can change their character fundamentally over the course of a lifetime.

The consideration of mitigating circumstances brings us to a complex area of ethical debate around retribution and justice. Do we have the moral authority to dismiss these factors and apply a one-size-fits-all punishment like the death penalty? If we accept that mitigating factors like trauma, poverty, and mental health can profoundly influence behaviour, then we must also accept that our penal system should be designed not merely to punish but also to understand and rehabilitate whenever possible.

The eminent barrister and former mentor of mine Lord Gifford KC eloquently expressed his own reasons for opposing the death penalty. *"I am against it because I believe it to be wrong for the State to kill except in necessary and immediate self-defence. I am against it because it encourages people to believe that violence and vengeance are proper responses to crime. I am against it because I believe in the possibility of the redemption of the human soul, and I have met many ex-death row inmates who have confirmed that belief. I am against it because in any system of justice, and especially in the under-resourced systems in our region, the innocent will be executed."*[19] He is right on all counts.

Finally, let's look at another key argument for the death penalty in the Caribbean: the idea that the death penalty reflects the values of Caribbean people, and that the movement to abolish it constitutes a colonial imposition of European values. This argument is often made by Caribbean politicians, but it is disingenuous. As we have seen, the death penalty as practised in the Caribbean, including the method of execution by hanging, is an artifact of British colonial rule. It is a deeply colonial institution.

Addressing the notion that the death penalty reflects local values and the counterargument that it is a colonial imposition allows us to confront a multifaceted issue: the way history, culture, and politics intertwine in the rhetoric around capital punishment. When considering the death penalty in the Commonwealth Caribbean, or indeed anywhere, it is imperative to decouple the practice from its historical and colonial legacies and examine it through the lens of modern ethics, human rights, and empirical evidence.

Lord Gifford mentions in his lecture that in South Africa, during the dismantling of apartheid, the Constitutional Court in *S v Makwanyane* [1995] ZACC 3 held the death penalty to be unconstitutional. This case deserves closer attention. In his masterly concurring judgment, Mr Justice Sachs highlighted that the death penalty was generally not used in the traditional African societies that inhabited what is now South Africa, except in cases of witchcraft. He said, *"The relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder."* He quotes a scholar who summed up the traditional attitude in a single sentence: *"Why sacrifice a second life for one already lost?"* In contrast, he highlighted that the Dutch colonists introduced *"Gruesome modes of execution designed to produce maximum pain and greatest indignity over the longest period of time,"* with torture being used until the end of the 18th century as an integral part of the judicial process.

This case, of course, concerned the culture and customs of South Africa rather than those of the Caribbean. But Mr Justice Sachs' point still holds true.

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[19] Gifford, Lord Anthony, "The death penalty: Developments in Caribbean jurisprudence." International Journal of Legal Information 37.2 (2009): 196-203.

As we draw this lecture to a close, let us revisit the fundamental reasons why the notion that “The state should be constitutionally entitled to kill people in the Commonwealth Caribbean” should be firmly rejected. Firstly, the death penalty fails to serve as a reliable deterrent against violent crimes. Secondly, it opens up a Pandora’s box of judicial errors that can never be corrected. Thirdly, it challenges the very tenets of human rights that form the backbone of any progressive society. Fourthly, it disproportionately punishes the most vulnerable among us. And lastly, it serves as a grim reminder of a colonial past that was based on the subjugation and dehumanization of people.

"*The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it*." - **Martin Luther King Jr**.

The death penalty as we know it today is a colonial imposition. Surely, it is time to end it.

References and Further Reading