

Nova Law Review

Volume 30, Issue 3

2006

Article 4

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Seminar Articles by Dennis Morrisson, Q.C.,
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THE TRADE WINDS OF JUDICIAL ACTIVISM: AN INTRODUCTION TO THE 2004–2005 GOODWIN SEMINAR ARTICLES BY DENNIS MORRISON, Q.C., AND THE HONOURABLE MIA AMOR MOTTLEY, Q.C., M.P.

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In Fall 2004, Nova Southeastern University Shepard Broad Law Center hosted a Goodwin Seminar series entitled *Trade Winds in Caribbean Law: Evolution of Legal Norms and the Quest for Independent Justice*.¹ Since the conclusion of the Goodwin Seminar in November 2004, there have been two significant developments in the Commonwealth Caribbean. First, the Caribbean Court of Justice (“CCJ”) was inaugurated on April 16, 2005 in Port of Spain, Trinidad. Second, the CARICOM Single Market and Economy (“CSME”) was launched on January 30, 2006.

With these two important first steps, both the CCJ and CSME will undoubtedly continue their development. Two countries, Barbados and Guyana, already have access to the CCJ as a final court of appeal while other countries, such as Jamaica, are still implementing the legal changes necessary to avail themselves of the CCJ’s appellate function. The first sitting of the CCJ took place on August 8–9, 2005. In addition, the CCJ has original jurisdiction in the interpretation of the Revised Treaty of Chaguaramas, including matters related to the CSME. On January 1, 2006, six countries—Jamaica, Barbados, Belize, Guyana, Suriname and Trinidad and Tobago—joined the CSME, which will be fully implemented by December 2008.² These long-awaited and highly anticipated developments have set a promising course for the Commonwealth Caribbean.

It is not yet clear, however, whether the CCJ will engage in judicial activism in death penalty cases in the Caribbean. Within death penalty discourse in the Caribbean, judicial activism posits the concept of national sov-

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1. For a summary of this Goodwin seminar series, see Jane E. Cross, *Introduction for the Goodwin Seminar Articles: Trade Winds in Caribbean Law—Evolution of Legal Norms and Quest for Independent Justice*, 29 NOVA L. REV. 131 (2005).

2. *Six Join Caribbean Single Market*, BBC Caribbean.com, Jan. 3, 2006, http://www.bbc.co.uk/caribbean/news/story/2006/01/printable/060103_newcaricommembers.shtml.

ereignty and cultural imperatives against an expansive view of evolving international human rights. Moving into four decades and more of independence, Commonwealth Caribbean nations seek to strike a sometimes precarious balance between their own national identities and their observance of a dynamic mass of international obligations.

Both Mr. Dennis Morrison and Minister Mia Mottley, in their respective articles, explore the role of judicial activism in the Caribbean Commonwealth. Mr. Morrison examines judicial activism by the Judicial Committee of the Privy Council (Privy Council) in three case studies dealing with the Privy Council's treatment of the death penalty. Minister Mottley examines the judicial activism of regional and international human rights tribunals in determining whether states are breaching their treaty obligations. Mr. Morrison expresses admiration for the Privy's Council efforts to infuse emerging human rights concepts into death penalty cases. Minister Mottley notes with concern that the imposition of outside cultural values by applying emerging international norms creates tensions within Caribbean nations as they seek to protect and safeguard the rights of their citizens. These distinct approaches to judicial activism show the interplay of international, regional and domestic concerns as the Commonwealth Caribbean nations strive to consolidate their independent, national sovereign personae regarding human rights.

Mr. Dennis Morrison is the author of the article entitled *The Judicial Committee of the Privy Council and the Death Penalty in the Commonwealth Caribbean: Studies in Judicial Activism*.³ He was appointed Queen's Counsel in 1994, is currently a partner and head of the litigation department at the law firm DunnCox, and serves as a Judge of the Court of Appeal in Belize. He has also served as chairman of the Council of Legal Education, president of the Jamaican Bar Association, and a member of the Jamaica Council for Human Rights.

Mr. Morrison has degrees from the University of the West Indies, Cave Hill, Barbados and Norman Manley Law School in Jamaica. As a Jamaica Rhodes Scholar, he attended Balliol College, Oxford University. He has also lectured at Norman Manley Law School in the areas of the laws of evidence, hire, purchase and sale of goods, and the rights and obligations of the legal profession.

Mr. Morrison begins his article by providing background on the role of the Privy Council and the impetus for the establishment of the CCJ. Near the end of this section he concludes that:

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

[t]he recent successful challenge in Jamaica to the constitutionality of local legislation designed to give effect to the Agreement and the Protocol demonstrates that, despite the inauguration of the Caribbean Court of Justice on April 16, 2005, the governments and the people of the region may yet be some distance away from the complete achievement of abolition of appeals to the Privy Council.⁴

With that assessment, Mr. Morrison turns to the focus of this article—the role of the Privy Council opinions in the area of capital punishment.

Before starting his case study of Privy Council and three important death penalty case studies in the Caribbean, Mr. Morrison provides background on the history and support for the death penalty in the Caribbean. He observes that despite the international movement to abolish the death penalty and opposition to the death penalty within the Caribbean, “the death penalty remains, and is likely to remain for some time, the penalty for murder throughout the region.”⁵ Next, Mr. Morrison provides a summary of the International Bill of Rights as it relates to the death penalty issue. He then explains that the International Bill of Rights was enshrined in the Independence Constitutions of Commonwealth Caribbean nations. In these sections, Mr. Morrison masterfully provides the legal, historical, and political context for the examination of the treatment of the death penalty in three sets of Privy Council cases he has selected for study.

In structuring his case study, Mr. Morrison selects cases that touch upon critical topics in Commonwealth Caribbean concerning constitutional limitations on death penalty enforcement. Using these cases, he shows the evolving trend of the Privy Council to set aside its own earlier decisions as it attempts to reconcile constitutional construction with evolving international norms on the death penalty. He aptly identifies three areas in which the Privy Council has reversed prior rulings on the death penalty.

In the first topic, “The Carrying Out of a Sentence of Death—The Impact of Delay,” Mr. Morrison explains how the Privy Council departed from its decision in *Riley v. Attorney General*⁶ with its subsequent holding in *Pratt v. Attorney General*.⁷ In *Riley*, Mr. Morrison focuses on the Privy Council’s holding that delays in death sentence execution are not contrary to constitutional prohibitions against inhuman or degrading treatment.⁸ Mr. Morrison

4. *Id.* at 405.

5. *Id.* at 406.

6. [1983] 1 A.C. 719 (P.C.) (appeal taken from Jam.).

7. [1993] 43 W.I.R. 340, [1994] 2 A.C. 1 (P.C.) (appeal taken from Jam.).

8. Morrison, *supra* note 3, at 414.

then remarks that a decade later when the Privy Council addressed the same issue in *Pratt*, the Privy Council reversed *Riley* by holding that a delay of more than five years in the execution of a death sentence provides a compelling basis for showing a violation of the very same constitutional prohibitions. He ends this study by indicating that one regrettable reaction to *Pratt* was the decision by the Governments of Jamaica and Trinidad and Tobago to withdraw from the Optional Protocol to the International Covenant on Civil and Political Rights.

In his second case study on “Procedural Fairness and the Prerogative of Mercy,” Mr. Morrison reviews the rationale that led the Privy Council to overrule *de Freitas v. Benny*⁹ and of *Reckley v. Minister of Public Safety and Immigration (No. 2)*¹⁰ with its holding in *Lewis v. Attorney General*.¹¹ As Mr. Morrison explains, *de Freitas* provided that a convicted person did not have a right to be shown materials submitted or to be heard when a Head of State is being advised on “the [P]rerogative of [M]ercy.”¹² Mr. Morrison notes that the Privy Council upheld its decision in *de Freitas* some twenty years later in *Reckley*, but four years after *Reckley*:

the Privy Council concluded in *Lewis* that [*d*]e *Freitas* and *Reckley* should be overruled and that a petitioner for mercy should have access to the material to be placed before the ‘Mercy Committee,’ as well as the right to make representations to the Committee, whether in writing, as would normally be the case, or orally.¹³

Mr. Morrison concludes that these cases demonstrate the Privy Council’s tendency to freshly scrutinize existent precedent to incorporate principles of fairness.

With the final case study, Mr. Morrison explores “The Mandatory Death Penalty.” Starting with *Ong Ah Chuan v. Public Prosecutor*,¹⁴ Mr. Morrison notes that the Privy Council had not entertained a constitutional challenge to the mandatory death penalty in Singapore. He then notes that in two subsequent cases, *Reyes v. The Queen*¹⁵ and *Watson v. The Queen*,¹⁶ the

9. [1976] A.C. 239 (P.C.) (appeal taken from Trin. & Tobago).

10. [1996] 1 A.C. 527 (P.C.) (appeal taken from Bah.).

11. [2001] 2 A.C. 50 (P.C.) (appeal taken from Jam.).

12. Morrison, *supra* note 3, at 416 (alteration in original).

13. *Id.* at 416–19.

14. [1981] A.C. 648 (P.C.) (appeal taken from Sing.).

15. [2002] UKPC 11, [2002] 2 A.C. 235 (appeal taken from Belize). Mr. Morrison also mentions two other cases decided at the same time as *Reyes*, *Regina v. Hughes* [2002] UKPC 12, [2002] 2 A.C. 259 (appeal taken from St. Lucia) and *Fox v. The Queen* [2002] UKPC 13, [2002] 2 A.C. 284 (appeal taken from St. Christopher & Nevis).

Privy Council examined the constitutionality of the mandatory death penalty in the Caribbean. As Mr. Morrison explains, the Privy Council in *Reyes* ruled that the mandatory imposition of the death penalty in Belize after a murder conviction without considering mitigating factors was unconstitutional because it constituted inhuman and degrading punishment. He observes that the Privy Council made a similar determination in *Watson* with regard to the constitutionality of the mandatory death penalty in Jamaica.

At the same time the Privy Council decided *Watson*, it upheld the constitutionality of the mandatory death penalty in two cases decided at the same time as *Watson*. The mandatory death penalties of Barbados and Trinidad and Tobago were upheld, respectively, in *Boyce v. The Queen*¹⁷ and *Matthew v. The State*¹⁸ due to the saving clause provisions in their constitutions that preserves the constitutionality of laws in effect prior to the enactment of their constitutions. The peculiarity of the *Watson* opinion becomes evident when Mr. Morrison refers to the dissent of Lord Nicholls in *Matthew*, which states in part that:

I do not believe the framers of these constitutions ever intended the existing laws savings provisions should operate to deprive the country's citizens of the protection afforded by rising standards set by human rights values. The savings clauses were intended to smooth the transition, not to freeze standards for ever. The constitutions of these countries should be interpreted accordingly, by giving proper effect to their spirit and not being mesmerised by their letter. A literal interpretation of these constitutions means that the law of Jamaica, a country which has taken steps to distinguish between different types of murders, is held to be unconstitutional, whereas the laws of Barbados and of Trinidad and Tobago, where no ameliorating steps have been taken, are held to be constitutional. This is bizarre.¹⁹

Mr. Morrison concludes that sentencing will now play a much greater role in capital murder cases in the Caribbean. Indeed, after Mr. Morrison completed his article, the Privy Council once again considered the constitutionality of the mandatory death penalty in the Bahamas. On March 8, 2006,

16. [2004] UKPC 34, [2005] 1 A.C. 472 (appeal taken from Jam.). Like *Reyes*, *Watson* is also one of a trilogy of cases decided by the Privy Council. The other two cases are *Boyce v. The Queen* [2004] UKPC 32, [2005] 1 A.C. 400 (appeal taken from Barb.) and *Matthew v. The State* [2004] UKPC 33, [2005] 1 A.C. 433 (appeal taken from Trin. & Tobago).

17. [2004] UKPC 32, [2005] 1 A.C. 400, 427 (appeal taken from Barb.).

18. [2004] UKPC 33, [2005] 1 A.C. 433, 452 (appeal taken from Trin. & Tobago).

19. *Matthew* [2004] UKPC 33, [2005] 1 A.C. at 470.

the Privy Council decided in *Bowe v. The Queen*²⁰ the mandatory death sentence imposed by the Penal Code of the Bahamas “should be construed as imposing a discretionary and not a mandatory sentence of death.”²¹

Mr. Morrison concludes his case study with the following statement:

These three case studies demonstrate the response of the Privy Council to the challenge of change in the area of human rights norms in the context of death penalty cases. They underscore the fact that for the law to preserve its relevance in this area it must be constantly responsive to the “evolving standards of decency that mark the progress of a maturing society.”²²

In the end, Mr. Morrison expresses his hope that the CCJ will adopt the Privy Council’s judicially active role “as independent guardians of the constitution.”²³

During the 2004 Goodwin Seminar, Minister Mottley delivered a speech entitled “Walking the Tightrope.” Minister Mottley is currently the Deputy Prime Minister. At the time she delivered this speech, Minister Mottley was the Attorney General and Minister of Home Affairs. In February 2006, she was appointed the Minister of Economic Affairs and Development. Throughout her political career, Minister Mottley has reached many milestones. She was elected to the Barbados Parliament in 1994 and was one of the youngest persons ever to be assigned a ministerial portfolio when she was appointed to the Ministry of Education, Youth Affairs and Culture. She is also the first woman to ever hold the position of Attorney General in Barbados. Before that, she was the youngest person ever to become Queen’s Counsel in Barbados. In 1996, she was elected General Secretary of the Barbados Labour Party.

Minister Mottley has also served as the chairman of the Regional Preparatory Committee for the establishment of the CCJ and the chairman of the Social Council of Barbados. She is also a member of the National Security Council of Barbados and the Barbados Defence Board. She is an attorney-at-law and graduated with a law degree from the London School of Economics with a specialty in advocacy. She is a barrister of the Bar of England and Wales.

In her speech, Minister Mottley examined “the impact of judicial activism on the nature of [Barbados’] obligations either already accepted or in

20. [2006] UKPC 10 (appeal taken from Bah.).

21. *Id.* ¶ 43.

22. Morrison, *supra* note 3, at 423–24 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

23. *Id.* at 424.

fact being considered by sovereign nations in the area of international law; in particular, international human rights law.”²⁴ Examining the role of the United Nations in human rights law, she notes that not only the structure, but also the cultural values of the developed world have influenced the judgments of international human bodies which in turn “have sought to redefine the obligations of states through re-interpreting those obligations under international treaty law in a manner that was never understood by the states at the time of the acceptance of the obligations, or indeed at the time of the reservations being submitted right before that time.”²⁵ She explains that the expansion of the definition of human rights has occurred due to the actions of judicial bodies and not by the state’s undertaking new obligations. This trend impinges on the rights of nations “to appropriately and properly plan for themselves and their citizens according to their norms, their customs and their respect for fundamental rights.”²⁶

Since Commonwealth Caribbean nations have a “healthy respect for human rights,”²⁷ these nations adopted constitutions and entered in to human rights conventions. Barbados, for example, signed the International Covenant of Civil and Political Rights and the American Convention of Human Rights. At the time of signing these treaties, however, Barbados indicated its “continued intention to apply the death penalty as is provided for in both the constitution of Barbados and the Offences Against Persons.”²⁸ Until very recently, Barbados has since its “existence as an independent state, since 1966, been regarded as a model adherent to human rights obligations.”²⁹

Minister Mottley notes that judicial encroachment on the construction of human rights obligations in the Caribbean are reflected in the decision by the Judicial Committee of the Privy Council in *Pratt*, a Jamaican case. As noted in the summary of Mr. Morrison’s article, the *Pratt* decision imposed a five-year time limit for executing death sentences in Commonwealth Caribbean states. Several years after this decision, the United Nations Human Right Committee reduced that limit by appropriately four months for Trinidadian cases. As an exercise of its own sovereignty, Barbados amended its constitution in 2002 to avoid the application of *Pratt* to Barbadian death penalty sentences. In the last few years, however, Barbados has had to contend with litigation on the issue of the “mandatory death penalty.”

24. Mia A. Mottley, *Walking the Tightrope*, 30 NOVA L. REV. 425 (2006).

25. *Id.* at 427–8.

26. *Id.* at 428.

27. *Id.*

28. *Id.* at 429.

29. Mottley, *supra* note 24, at 430.

The issue of the constitutionality of Barbados's mandatory death penalty went before the Privy Council in *Boyce*.³⁰ In that landmark case, a panel of nine judges sat to hear this case and two similar cases from Jamaica,³¹ and Trinidad and Tobago.³² The Privy Council found in a five-to-four ruling that the mandatory death penalty was preserved by the savings clause (section 26) of the Constitution of Barbados. Similarly, in *Matthew*, the Privy Council upheld the constitutionality of Trinidad and Tobago's mandatory death penalty, but in *Watson*, the Privy Council struck down Jamaica's mandatory death penalty because it was not preserved by the saving clause in the Jamaican Constitution given that the relevant statute had been amended since independence. Minister Mottley considers the *Boyce* opinion a reversal of "ten (10) years of political onslaught in the form of judicial activism."³³

Next, Minister Mottley addresses the term "mandatory death penalty." Although that term has been used in reference to the death penalty in Barbados, Minister Mottley notes that the use of pre-conviction defenses and resort to post-conviction mechanisms limit the application or execution of the death penalty. In addition, the Constitutional Amendment Act passed in 2002 will further strengthen the procedural safeguards for the accused. Despite the fact that Barbados is deemed to have a mandatory death penalty, Minister Mottley notes that "the statistics show that more often than not, since Independence, the sentence has been commuted rather than affirmed."³⁴

Even though the death penalty in Barbados has been found consistent with its domestic law, the death penalty is still being challenged under international law. In particular, within the Organization of American States, the Inter-American Commission on Human Rights has held that the mandatory death penalty is in contravention of the American Convention on Human Rights. After the 2002 Constitutional Amendment, Barbados was called before the Inter-American Commission by a British law firm with ties to the commission.

Despite this development, Barbados remains committed to remaining a party to the American Convention on Human Rights. Minister Mottley notes that both Jamaica and Trinidad and Tobago chose to move away from the convention after their mandatory death penalties came under scrutiny. Minister Mottley states that:

30. [2004] UKPC 32, [2005] 1 A.C. 400, 410 (appeal taken from Barb.).

31. *Watson v. The Queen* [2004] UKPC 34, [2005] 1 A.C. 472, 480–81 (appeal taken from Jam.).

32. *Matthew v. The State* [2004] UKPC 33, [2005] 1 A.C. 433, 446 (appeal taken from Trin. & Tobago).

33. Mottley, *supra* note 24 at 433.

34. *Id.* at 434.

[t]he Government of Barbados feels fundamentally that we have worked too long and too hard to promote and to respect human rights norms and laws for us to be the victim of a form of judicial activism that constitutes a virtual amendment to the treaty as opposed to an interpretation of it.³⁵

Accordingly, Barbados has consistently maintained that its death penalty has not breached its treaty obligations or any customary international law.

Minister Mottley explains that judicial activism is more appropriate in a national arena where there are appropriate checks and balances. In democratic countries, legislatures can remedy “judicial usurpation of the legislature’s role.”³⁶ Without discussion of this issue in international fora, judicial activism in an international setting may also have domestic implications. If international treaty obligations continue to make incursions into domestic issues, states may seek to limit the executive power to enter into such agreements. Minister Mottley points to debates concerning the use of corporal punishment and same-sex marriages as topics that might create tensions between human rights and cultural concerns.

Minister Mottley also broaches the possible problems for developing nations that might be required to make additional expenditures in order to guarantee new human rights asserted by international organizations. She noted that while Barbados provides free education to the tertiary level, free access to prescription drugs and subsidized public transportation, enshrining such rights in the Constitution of Barbados “would present tremendous difficulties for us as a small state which has an inherent vulnerability not only to international economic shocks but also to natural disasters.”³⁷ These concerns were noted at a meeting of the Law Ministers of the Small States of the Commonwealth that Minister Mottley attended in November 2005. In particular, Minister Mottley quotes the meeting’s communiqué which stated that “[t]here was anxiety in particular over the assertion of new human rights, which emerge not from considerate action by all states but from organizations with no democratic mandate.”³⁸ In addition, the communiqué also stated that the:

Ministers discussed the role of human rights courts in the interpretation and scope of human rights. They recognized that State

35. *Id.* at 436.

36. *Id.* at 437.

37. *Id.* at 16.

38. Mottley, *supra* note 24 at 440.

power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to any global body.³⁹

Minister Mottley suggests the need for regional discourse to address human rights issues. She also proposes a regional dialogue on the development of a Caribbean Human Rights Convention. She also notes that establishment of the CCJ creates a mechanism for the enforcement of such a convention and asserts that the CCJ might be more sensitive to the “mores and customs of the region.”⁴⁰ Minister Mottley predicts that the human rights dialogue will continue to play a dominant role in the Caribbean region and the Commonwealth for at least the next ten years. She ends her article by clarifying that:

We are not blasting or bashing human rights or human rights organizations. However, by the same token, we are not going to lie prostrate while people reinterpret the obligations of our States in a way that causes us to be deemed non-compliant without our active participation or agreement. This is the tightrope that we must walk.⁴¹

The articles by Minister Mottley and Mr. Morrison, taken together, show two distinct views, but complementary views, on judicial activism in the Commonwealth Caribbean. While both recognize the importance and the implications of the death penalty decisions, each article presents a different reaction to the introduction of emerging human rights norms in the Caribbean. In doing so, they highlight the texture of the dialogue in the Commonwealth Caribbean on death penalty issues. Both are concerned with upholding human rights in the Caribbean context, but place emphasis on either the adoption of prevailing cultural constructs or the adaptation to evolving. In the end, human rights in the Commonwealth will undoubtedly strike a balance between the two concerns and perhaps provide a model for other smaller and developing nations.

39. *Id.*

40. *Id.* at 441.

41. *Id.* at 442.