

The Death Penalty: A Colonial Relic?

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English Origins of the Caribbean Death Penalty

- In England, execution by hanging was historically widely used – especially in the era of the “Bloody Code” in the late 18th /early 19th century.
- At common law, the death penalty was mandatory for murder, regardless of mitigating circumstances.
- In England, the harshness of the rule was mitigated by the Infanticide Act 1922 and the Homicide Act 1957.
- England exported execution by hanging to its Caribbean colonies.
- England abolished the death penalty for murder in 1965, but it continued to be used in the Caribbean.



English Law and Slavery in the Caribbean

- With slavery came brutal laws aimed at controlling the slave population, including the use of the death penalty.
- In some colonies, the common law did not apply to slaves, and there were special "Slave Courts."
- Slavery was abolished by the Slavery Abolition Act 1833, but the plantocracy remained in control and the death penalty continued to be used.
- Black (2023) writes, "Following the ending of slavery [in Barbados], 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."





Cane Cutters.

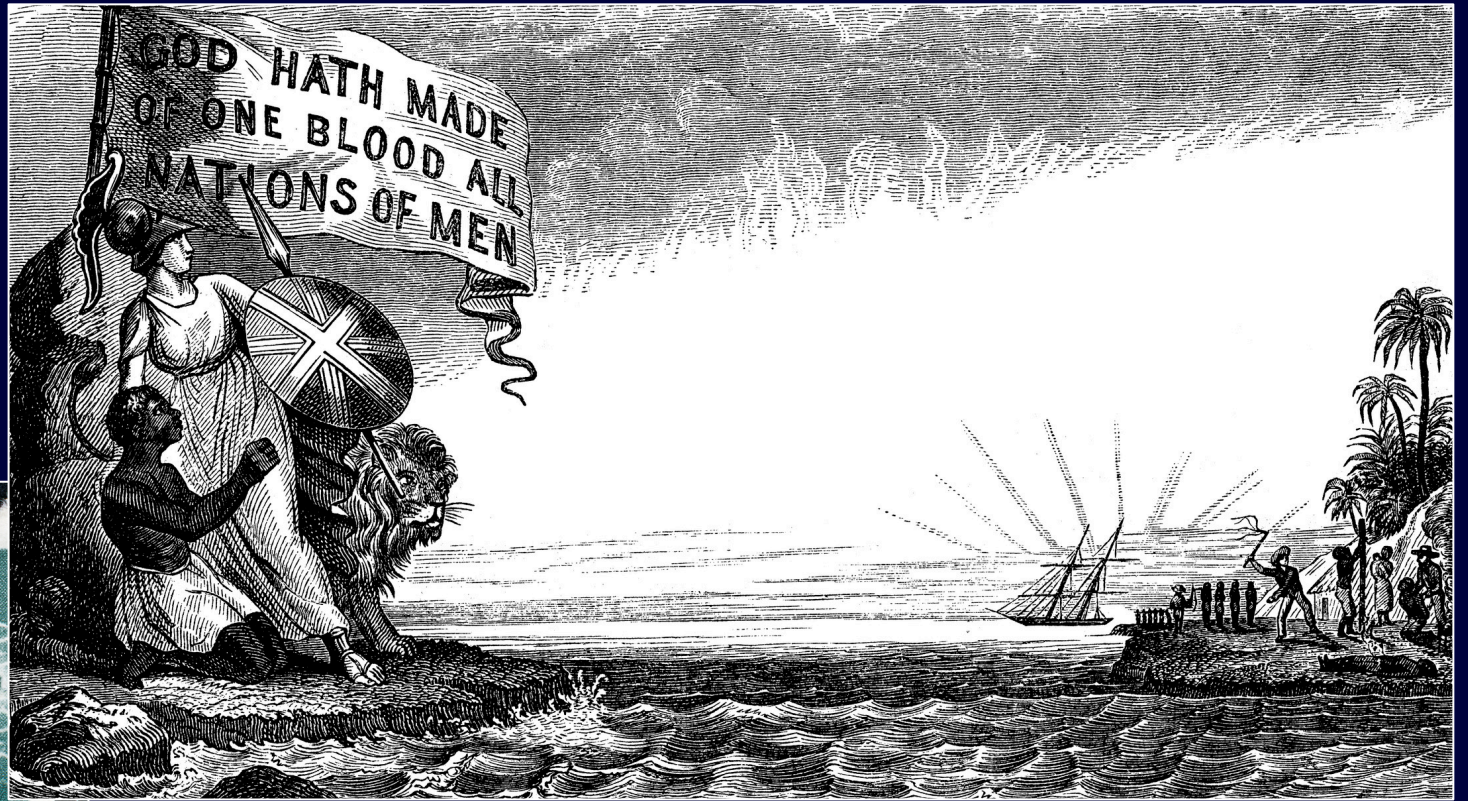
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Independence and Constitutions

- During the 1960s, 1970s, and 1980s, most British Caribbean colonies became independent states and adopted constitutions with Bills of Rights.
- Caribbean constitutions expressly allowed for the death penalty.
- The Judicial Committee of the Privy Council remained their highest court – though some have since replaced it with the Caribbean Court of Justice.
- Many constitutions contained a “Savings clause” which, to a greater or lesser extent, immunizes laws from constitutional challenge where those laws pre-date the constitution.





The Privy Council and The Death Penalty

- Execution by hanging was immunised from unconstitutionality by Trinidad and Tobago's savings clause (*Boodram v Baptiste* [1999] 1 WLR 1709).
- But long delays in carrying out the death penalty were held to be unconstitutional (*Pratt and Morgan v Attorney General of Jamaica* [1994] 2 AC 1; *Guerra v Baptiste* [1996] AC 397; *Henfield v Attorney General of the Bahamas* [1997] AC 413).
- The Privy Council developed a complex jurisprudence on whether/when governments were obliged to wait for petitions to international human rights bodies before executing a prisoner (*Fisher v Minister of Public Safety and Immigration* [2000] 1 AC 434; *Thomas v Baptiste* [2000] 2 AC 1; *Higgs v Minister of National Security* [2000] 2 AC 228).



The Privy Council and The Death Penalty

- *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 held that a condemned person 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.



The Privy Council and The Death Penalty

- The mandatory (as opposed to discretionary) death penalty was held to be unconstitutional in Belize in *Reyes v The Queen* [2002] UKPC 11, as Belize did not have a savings clause.
- The wording of the savings clauses in St Lucia and St Kitts and Nevis did not immunise the mandatory death penalty from unconstitutionality in *R v Hughes* [2002] UKPC 12 and *Fox v The Queen* [2002] UKPC 13.



The Privy Council and The Death Penalty

- The savings clause did not immunise the Jamaican 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.
- *In Roodal v State of Trinidad and Tobago* [2003] UKPC 78 the Privy Council found a workaround for Trinidad and Tobago's broadly worded savings clause, holding that the modification power in section 5(1) of the Constitution Act 1976 allowed the mandatory death penalty to be construed as discretionary.
- But the Privy Council overruled *Roodal* in *Boyce v The Queen* [2004] UKPC 32 and affirmed the constitutionality of the mandatory death penalty in Trinidad and Tobago.



The Caribbean Court of Justice and The Death Penalty

- Some Caribbean politicians supported replacing the Privy Council with the Caribbean Court of Justice in order to remove legal roadblocks to executions.
- But, in fact, the Caribbean Court has been more progressive on the issue than the Privy Council – in *Nervais v Regina* [2018] CCJ 39 (AJ) it overruled the Privy Council decision in *Boyce* and held the mandatory death penalty in Barbados to be unconstitutional.



The Case Against the Death Penalty

- The Death Penalty is often proffered as a deterrent (see Ehrlich, 1973) but the evidence for a deterrent effect is in fact weak (see Fagan, 2006; National Research Council of the National Academies, 2012) and jurisdictions which abolish the death penalty don't see a spike in murder rates (Oliphant, 2022).
- Miscarriages of justice can occur (e.g. Andrew Malkinson, Sally Clark, Donna Anthony, Angela Cannings) and they are more common in the Caribbean where there is inadequate legal aid and an under-resourced legal system.
- Even those who are guilty often have considerable mitigating circumstances.





TRENTON PICKETS: Carrying signs protesting the death penalty, pickets parade in front of The State House in Trenton. Group gathered last night prior to the execution of Ralph J. Hudson of Atlantic City and urged the death penalty be ended. (A. P. Wirephoto.)



The Case Against the Death Penalty

- Lord Gifford KC: *"I am against [the death penalty] 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."*



The Case Against the Death Penalty

- Some Caribbean politicians argue that the movement to abolish the death penalty is a colonial imposition of European values on the Caribbean.
- But the death penalty is itself a colonial relic imposed by the British Empire.
- See Sachs J's judgment in *S v Makwanyane* [1995] ZACC 3 which makes a powerful anti-colonial case for abolishing the death penalty.

