JCPC 2020/0051

IN THE JUDICIAL COMMITTEE
ON APPEAL FROM THE COURT OF APPEAL OF THE
REPUBLIC OF TRINIDAD AND TOBAGO

B E T W E E N:

JAY CHANDLER

Appellant

and

THE STATE

Respondent

CASE FOR THE APPELLANT

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Introduction

1. On 17th August 2011, the Appellant was convicted of the murder of Kirn Phillip. He was sentenced to death on the same day. There was no sentencing hearing before the trial judge to determine whether, in the circumstances of the case and having regard to the Appellant's particular circumstances, the death penalty was the appropriate sentence. There was no sentencing hearing because the trial judge had no choice but to sentence the Appellant to death. This is because section 4 of the Offences Against the Person Act provides that: "Every person convicted of murder shall suffer death."

2. With leave, the Appellant appeals against the sentence of death imposed upon him. He says that the mandatory death penalty is unlawful because it violates his constitutional rights.

3. He says that it violates his rights to the protection of law and not to be deprived of life except by the due process of law, guaranteed to him by sections 4(a) and 4(b) of the Constitution of Trinidad and Tobago, precisely because he was deprived of the right to say why death was not the appropriate sentence. For that reason as well, he says, the sentence of death is a cruel and unusual punishment imposed on him in violation of section 5(2)(b) of the Constitution which forms part of the due process of law and the protection of the law to which he is entitled. For the first proposition he relies on the decision of the Caribbean Court of Justice ("the CCJ") in ***Nervais v R*** [2018] 4 LRC 545 and for the second on the unanimous decisions of this Board in ***Roodal v State of Trinidad and Tobago*** [2005] 1 AC 328 and ***Matthew v State of Trinidad and Tobago*** [2005] 1 AC 433.

4. He says as well that the mandatory death penalty violates his right to equality before the law guaranteed to him by section 4(b) of the Constitution. This is so because the law imposes the death sentence on all persons convicted of murder despite the vast variety of circumstances in which the offence of murder may be committed and the different degrees of moral culpability which may be associated with the particular crime.

5. However, he is unable to pursue any of these aspects of his case unless your Lordships overrule your previous decision in ***Matthew v State of Trinidad and Tobago*** [2005] 1 AC 483. In that case, the Board by a majority of 5 to 4 held that while the mandatory death penalty was a cruel and unusual punishment in violation of section 5(2)(b) of the Constitution, it was protected from the consequences of such inconsistency by section 6(1) thereof. It is the Appellant's case that ***Matthew v State*** should now be considered to have been wrongly decided.

6. The Appellant also says that the mandatory death penalty violates the separation of powers doctrine because it constitutes an impermissible legislative usurpation of a power which properly belongs to the judiciary. This was not a point which was decided in ***Matthew***. The argument based on the separation of powers doctrine

which was rejected in that case was that the mandatory death penalty, taken in conjunction with the constitutional provisions which vested power in the Advisory Committee on the Power of Pardon to commute the death sentence, effectively vested judicial sentencing power in the Executive.

7. The Appellant says further that the mandatory death penalty is contrary to the rule of law because it arbitrarily and unfairly deprives the Appellant of his right to life and it fails to provide the Appellant with adequate safeguards against irrationality, unreasonableness, fundamental unfairness and the arbitrary exercise of power. He relies in this regard primarily on the decisions of the CCJ in ***Nervais v R*** and ***McEwan v Attorney General of Guyana*** [2019] 1 LRC 608.

8. The Appellant says finally that the mandatory death penalty is inconsistent with section 1 of the Constitution which declares Trinidad and Tobago to be a sovereign democratic, three features of which are the separation of powers, the rule of law and equality before the law.

9. On the assumption that the mandatory death penalty violates the separation of powers doctrine, the rule of law and section 1 of the Constitution, or any of them, the Appellant respectfully submits, it is not saved by section 6(1) of the Constitution. To the extent that ***Matthew*** remains good law, section 6(1) only saves existing law from the consequences of inconsistency with sections 4 and 5 of the Constitution. It does not protect existing law which derogates from unwritten principles of the Constitution, such as the separation of powers and the rule of law, or provisions other than sections 4 and 5.

Structure of these submissions

10. The Appellants will first develop his submissions that the mandatory death penalty violates sections 4(a) and (b) and 5(2)(b), (e), (f)(ii) and (h) of the Constitution, and the unwritten principles of the separation of powers and the rule. He will then trace

the development of savings law clauses under the Trinidad and Tobago Constitution culminating in the decisions of the Board in ***Matthew*** and the CCJ in ***Nervais*** and ***McEwan***. He will then contend that ***Matthew*** is to be treated as wrongly decided, either entirely or to the extent that section 6(1) does not protect the mandatory death penalty because it is inconsistent with principles or provisions outside of sections 4 and 5. The Appellant will argue finally that ***Matthew*** ought to be overruled in whole or in part.

The mandatory death penalty is inconsistent with the Trinidad and Tobago Constitution

11. The Appellant contends that the mandatory death penalty embodied in section 4 of the Offences Against the Person Act

    i) violates the right to the protection of the law and not to be deprived of life except by the due process of law, guaranteed by section 4(a) and (b) of the Constitution because it

        a) is a cruel and unusual punishment prohibited by section 5(2)(b); and

        b) denies persons convicted of murder the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations and to such procedural provisions as are necessary for giving effect and protections to that right, protected by section 5(2)(e), (f)(ii) and (h);

    ii) violates the right to the protection of the law guaranteed by section 4(b) of the Constitution because it authorises an arbitrary penalty;

iii) violates the right to equality before the law guaranteed by section 4(b) of the Constitution because it unjustifiably imposes the same penalty on persons not similarly circumstanced;

iv) violates the separation of powers doctrine because it constitutes an impermissible usurpation of judicial power by the legislature;

v) violates the rule of law, which is an unwritten principle of the Constitution, because it infringes the separation of powers and authorises an unequal and arbitrary penalty;

vi) violates section 1 of the Constitution because it violates the principle of equality before the law, the rule of law and the separation of powers which are essential features of a sovereign democracy.

Cruel and unusual punishment

12. The relevant portions of sections 4 and 5 are as follows:

> "4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:
>
> *(a)* the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;
>
> *(b)* the right of the individual to equality before the law and the protection of the law…
>
> 5. (1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.
>
> (2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not—

…
(b) impose or authorise the imposition of cruel and unusual treatment or punishment …

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right— …

(ii) to a fair and public hearing by an independent and impartial tribunal; …

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

13. It is trite that section 5(2) spells out in greater detail, though not exhaustively, what is included in the expression "due process of law" and "the protection of the law" in section 4(a) and (b) – see ***Thornhill v Attorney-General of Trinidad and Tobago*** [1981] AC 61, 70B; ***Commissioner of Prisons v Seepersad*** [2021] UKPC 13. Thus, the right to the protection of law and the right not to be deprived of life or liberty except by due process of law, protect against the imposition of punishments which are cruel and unusual.

14. It is also trite law that the mandatory death penalty is a cruel and unusual punishment. This was the unanimous decision of the nine member Board in ***Matthew*** (at [12] & [36]). The reasons why the mandatory death penalty is considered to be a cruel and unusual punishment were given by your Lordships' Board in ***Reyes v The Queen*** [2002] 2 AC 235 and centre around the absence of any opportunity given to a person convicted of murder to say why the death penalty should not be imposed upon him, thereby denying him his basic humanity. As Lord Bingham said in Reyes ([43]):

"To deny the offender the opportunity, before sentence is passed, to seek to persuade the Court that in all the circumstances to condemn him to

death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity …"

15. It is accordingly submitted that the mandatory death penalty infringes sections 4(a) and (b) of the Constitution.

The right to be heard

16. The right to due process of law protects "rights of a procedural nature, fair trial rights, in particular (though not exclusively) the right to procedural fairness" – ***Commissioner of Prison v Seepersad*** [2021] UKPC 13, [30]. As Lord Millet said in ***Thomas v Baptiste*** [2000] 2 AC 1, 21 H-22E, the due process of law "invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law …" In this regard, the right to protection of the law covers the same ground – ***Seepersad*** [51]; ***Attorney General of Barbados v Joseph and Boyce*** [2006] 69 WIR 104, [64], [67-70]. That they both guarantee the right to a fair trial is confirmed by section 5(2)(e) & (f)(ii) of the Constitution which prohibits any law which deprives a person of the right to a fair hearing in accordance with the principles of fundamental justice and guarantees the right to a fair criminal trial.

17. The right to be heard applies as much to the question of the guilt or innocence of a person charged with a criminal offence, as to the penalty which should be imposed upon a finding of guilt. A person convicted of murder who is denied the opportunity of persuading a court that the death penalty is disproportionate or inappropriate is denied fundamental justice.

18. Whether the mandatory death penalty is in breach of the right to a fair trial was not a matter considered by the Board in ***Matthew***, or in any of the other Caribbean cases that have come before the Board concerning the constitutionality of a mandatory death sentence. More recent authorities have considered the other ways in which the mandatory death penalty violates constitutional rights.

19. In ***Nervais***, the Caribbean Court of Justice held that the mandatory death penalty infringed the right to a fair trial. The President, Sir Dennis Byron, speaking for the majority, said [49]:

> "The right to protection of the law or due process includes the right to a fair trial. Having said that, we do not believe that the trial process stops at the conviction of the accused. Sentencing is a congruent component of a fair trial. So too is mitigation. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of a fair trial must be accorded to the sentencing stage too and also includes the right to appeal or apply for review by a higher court prescribed by law. The right to a fair trial as an element of protection of the law is one of the corner stones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse. We therefore find the mandatory nature of s 2 of the OAPA places it in violation of the right to protection of the law as guaranteed by s 11(c)."

20. There have been similar pronouncements by numerous other judicial bodies.

21. In ***Downer v Jamaica*** Report No. 41/00, 13 April 2000 at [237], the Inter-American Commission on Human rights found that there had been a violation of the right to a fair trial under Article 8 of the American Convention because of the mandatory imposition of a death sentence:

> "[T]he Commission concludes that the State has violated the rights of the victims under Article 8(1) to a hearing with due guarantees by a competent, independent and impartial tribunal in the substantiation and defense of the criminal accusations against them. The victims were not provided with the opportunity to make representations and present evidence to the trial judge as to whether their crimes permitted or warranted the ultimate penalty of death, and were therefore denied the right to fully answer and defend the criminal accusations against them."

See also ***Baptiste v Grenada*** Report No. 38/00, 13 April 2000, (at [116]); ***Edward v the Bahamas*** Report No.48/01, 4 April 2001.

22. Similarly, in ***Kigula v Republic*** [2009] UGSC 6, at p. 41, the Ugandan Court of Appeal said:

> "A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the Court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial."

See also ***Kafantayeni v Attorney General*** Constitutional Case No. 12 of 2005 (27 April 2007), High Court of Malawi; ***Mutiso v Republic*** Criminal Appeal No. 17 of 2008 (30 July 2010), Kenyan Court of Appeal; ***Muruatetu v Republic*** Petition 15 of 2015, 14 December 2017 (at [48]), Kenyan Supreme Court.

23. It is respectfully submitted that the mandatory death penalty infringes the right to due process of law and the protection of the law on this ground as well.

The protection of the law and arbitrariness

24. It is respectfully submitted that the mandatory death penalty violates the right to the protection of the law because it arbitrarily authorises the imposition of the severest of sentences.

25. The right to the protection of the law has been the subject of sustained development by the Caribbean Court of Justice which has been endorsed by your Lordships' Board.

26. In ***AG v Joseph & Boyce*** [2006] 69 WIR 104 the right to the protection of the law was described as being "so broad and all pervasive that it would be well nigh impossible to encapsulate in a section of the constitution all the ways in which it may

be invoked or can be infringed." However, their Honours did venture to give some pointers as to what the right might entail. Thus, de la Bastide P and Saunders J adopted Lord Diplock's broad definition of the protection of law as referring to "a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England" ***– Ong Ah Chuan v Public Prosecutor*** [1981] AC 648*,* 670G-H. They also adopted Lord Millet's elucidation of the right to the "due process of law" which they said was equally applicable to the "protection of the law." In ***Thomas v Baptiste*** [2000] 2 AC 1, p. 22, Lord Millet said:

> "In the Lordships' view, "due process of law" is a compendious expression in which the word "law" does not refer to any particular law and is not a synonym for common law or statute. Rather, ***it invokes the concept of law itself and the universally accepted standards of justice observed by civilised nations which observe the rule of law***… The clause thus gives constitutional protection to the concept of procedural justice." (Emphasis added)

27. In the same case, Wit J began his own tentative exploration of the ambit of the protection of the law which, as it turns out, was eventually adopted by the Court. He said (at para 20):

> "The multi-layered concept of the rule of law establishes, first and foremost, that no person, not even the Queen or her Governor-General, is above the law. It further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and arbitrary exercise of power. It is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive "due process of law" and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect. ***The right to protection of the law requires therefore not only law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. It also requires the availability of effective remedies.*** These requirements are inherent in the Barbados Constitution." (Emphasis added)

28. In ***Juanita Lucas v Chief Education Officer*** [2015] CCJ 6 (AJ). Saunders and Wit JJCCJ returned to the project. Saunders JCCJ said (at [138]):

> "The right to the protection of the law is broad and pervasive. The right is anchored in and complements the State's commitment to the rule of law. The rule of law demands that the citizenry be provided with access to appropriate avenues to prosecute, and effective remedies to vindicate, any interference with their rights. ***The citizen must be afforded "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power". The right to protection of the law may successfully be invoked whenever the State seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial.*** There is therefore likely to be a breach of the right whenever a litigant is absolutely compelled to seek vindication under the Constitution for infringement by the State of a fundamental right. But even where no other fundamental right is impacted, the right to protection of the law may also be implicated when there is a violation of due process and a denial of the citizen's expectations of fairness, procedural propriety and natural justice. One must quickly caution, however, that since the law usually provides avenues to pursue these latter violations, not every instance of them may be escalated up to a *constitutional* breach." (Emphasis added)

For his part, Wit JCCJ said (at [175]):

> "***The right to protection of the law forms part of the rule of law***. It guarantees every person in the State whose rights have been infringed or who has been wronged otherwise a right to an effective remedy by due process or due course of the law. As remedies have to be obtained from duly constituted courts or tribunals, the right must also entail a right of proper access to those courts and tribunals. Clearly, the normative framework and inherent logic of a constitutional democracy require these courts and tribunals to be independent and impartial; these also require them in principle to give anyone before them a fair hearing and to dispense justice within a reasonable time or without undue delay." (Emphasis added)

29. However, the CCJ was quick to make clear that the right to the protection of the law was not limited to, although it manifestly included, the right of access to court to vindicate rights and uphold obligations. In ***The Maya Leaders Alliance v Attorney General of Belize*** [2015] CCJ 15 (AJ), a seven member panel of the Court held unanimously (at [47]):

> "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental

> notions of justice and the rule of law. ***The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property.*** It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. ***However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, "adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."*** The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the State may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy." (Emphasis added)

30. In ***Maharaj v Prime Minister (Trinidad and Tobago)*** [2016] UKPC 37 and in ***Commissioner of Prisons v Seepersad*** [2021] UKPC 13, your Lordships' Board examined this line of cases with approval and treated it as applicable to the protection of the law under the Constitution of Trinidad and Tobago. In ***Seepersad***, your Lordships held that the right had been violated because of the arbitrary behaviour of the state.

31. It is respectfully submitted that the mandatory death penalty violates the right to the protection of the law because it arbitrarily and unfairly deprives the Appellant of his basic constitutional right to life, it fails to offer him adequate safeguards against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power, it deprives him of the procedural fairness demanded of natural justice, it is contrary to fundamental notions of justice and it violates universally accepted standards of justice observed by civilised nations which observe the rule of law.

32. The authorities holding the mandatory death penalty to be in violation of the right not to be subject to a cruel and unusual punishment are replete with statements which support the propositions in the previous paragraph. The fact that the sentence

of death is imposed without giving the man whose life is to be taken an opportunity to show cause why he is not deserving of the ultimate and final penalty is pivotal in the court's identification of the arbitrariness with which the mandatory death penalty is irrevocably infused. The courts have made clear that the arbitrary nature of the mandatory death penalty stems from the universal experience that the crime of murder is committed in a variety of circumstances of differing moral culpability which make the indiscriminate application of the sentence of death inherently unfair and unjust. In ***Reyes v R*** [2002] 2 AC 235, Lord Bingham noted (at para 11):

> "It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous."

As the Royal Commission on Capital Punishment elaborated (ibid):

> "Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all."

33. It is the reality that the perpetrators of the crime of murder are not equally morally blameworthy which makes the indiscriminate application of the death penalty to everyone, irrespective of their particular circumstances, arbitrary and incompatible with core principles of fundamental justice. This is a recurring theme in the

judgments of courts which have struck down the mandatory death penalty, as exemplified in the following passages:

Per Sir Dennis Byron CJ (as he then was) in ***Spence v The Queen and Hughes v The Queen*** (unreported, 2nd April 2001), at paras 43-44:

> "(43) The experience in other domestic jurisdictions, and the international obligations of our states, therefore suggest that ***a court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining whether the death penalty can and should be imposed***, ***if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process***.
>
> (44) ***In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards***, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."(Emphasis added)

In the same case, Saunders JA (Ag) (as he then was) said:

> "(215) The mandatory death penalty in these two countries, as presently applied, robs those upon whom sentence is passed of any opportunity whatsoever to have the court consider mitigating circumstances even as an irrevocable punishment is meted out to them. ***The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence***. …
>
> (216) ***It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case.*** It is my view that where punishment so excessive, so disproportionate *must* be imposed upon such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman." (Emphasis added)

Per Stewart J in ***Woodson v The State of North Carolina*** (1976) 428 US 280, 303-305:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> This Court has previously recognised that '[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender'. ... Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence have been viewed as a progressive and humanizing development ... While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

Per Chandrachud CJ in ***Mithu v State of Punjab*** [1983] 2 SCR 690, 704, 707, 713:

> "But, apart from that, a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair ... The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. ***So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without***

involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive." (Emphasis added)

Per the Inter-American Commission on Human Rights in ***Downer and Tracey v Jamaica*** (Report No. 41/00, 13 April 2000), at para 212:

"Based upon a study of these various international and domestic jurisdictions, it is the Commission's view that a common precept has developed whereby ***the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment.*** Mitigating circumstances requiring consideration have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender's conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender." (Emphasis added)

34. Your Lordships' attention is drawn to Lord Diplock's rejection of the argument in ***Ong Ah Chuan*** that the mandatory death sentence for drug trafficking was arbitrary because it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. He said (at p. 674):

"Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. ***But Article 12 (1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.***

In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good Samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of

> the law and is the long-established constitutional way of doing so in Singapore as in England." (Emphasis added)

The section 12(1) referred to by Lord Diplock provided that "All persons are equal before the law and entitled to the equal protection of the law."

35. However, in both ***Reyes v R*** and ***Watson v R*** [2005] 1 AC 472, your Lordships' Board noted (at para 45 in ***Reyes*** and para 29 in ***Watson***) that ***Ong Ah Chuan*** was decided at a time when the international jurisprudence on the mandatory death penalty was still in a rudimentary state. In ***Watson***, a unanimous nine member panel of your Lordships' Board reiterated the arbitrary nature of the mandatory death penalty. Lord Hope said (at paras 33-34):

> "But these points of difference do not remove the fundamental objections to the mandatory death sentence which lay at the heart of the decisions in Reyes, Hughes and Fox. As Lord Bingham put it in Reyes, para 43, the core of the right which section 7 of the Constitution of Belize exists to protect is that no human being should be treated in a way that denies his basic humanity. To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated. There are no limits to the variety of circumstances which may lead a man to commit homicide. The crime of which he has been convicted may turn out to have been far more serious that he foresaw or contemplated: R v Powell (Anthony) [1999] 1 AC 1, 14, per Lord Steyn. Attempts to confine the mandatory death sentence to those categories of murder that are most reprehensible will always fail to meet these objections...
>
> In this case too basic humanity requires that the appellant should be given an opportunity to show why the sentence of death should not be passed on him. If he is to have that opportunity, it must be open to the judge to take into account the facts of the case and the appellant's background and personal circumstances. The judge must also be in a position to mitigate the sentence by imposing, as an alternative, a sentence of imprisonment. The mandatory sentence flies in the face of these requirements, as it precludes any consideration of the circumstances."

36. In their judgment in dissent in ***Boyce & Joseph v R***, Lord Bingham et al recounted developments at the international level in relation to the mandatory death penalty as they related to the obligations which Barbados had undertaken and noted that there

was then pending before the Inter-American Court of Human Rights a request for an advisory opinion by the Inter-American Commission in relation to Barbados' amendment to its Constitution attempting to immunise the mandatory death penalty from constitutional challenge (see [81]). Since then, the Inter-American Court of Human Rights has determined in ***Boyce et al v Barbados*** (Series C No. 169, November 2007, paras 46-63) that the mandatory death penalty in Barbados violates the Convention right not to be arbitrarily deprived of life (Art 4(1)). This ruling was upheld and followed by the Court in ***Dacosta Cadogan v Barbados*** (September 24th 2009). In ***Boyce***, the Court said (at paras 57-58):

> "57... ***A lawfully sanctioned mandatory sentence of death may be arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime***. Section 2 of the Offences Against the Person Act in Barbados lawfully sanctions the death penalty as the one and only possible sentence for the crime of murder, and the law does not allow the imposition of a lesser sentence in consideration of the particular characteristics of the crime (*supra* pars. 49-61), or the participation and degree of culpability of the defendant.
>
> 58. In this regard, the Court has previously held that to consider all persons responsible for murder as deserving of the death penalty, "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." (Emphasis added)

37. Further, in ***Cadogan***, the Court held that the mandatory death penalty also infringed the Convention right to a fair trial guaranteed by Article 8. The Court said (at para 60):

> "With regard to the Commission and representatives' allegations that the mandatory death penalty in Barbados is also in violation of Article 8 of the Convention, the Court already declared, as in previous cases, that the strict observation of certain due process rights and procedures are essential in evaluating whether the death penalty has been imposed arbitrarily."

38. In this light, the Appellant contends that the mandatory death penalty violates the right to the protection of the law because:

i) it deprives the Appellant of the right to make representations to the Court as to why his life ought not to be taken;

ii) it treats the cool-blooded, merciless, unrepentant, and sadistic mass murder in the same way it treats someone who assists in ending the life of a terminally ill loved one and is accordingly arbitrary, capricious and irrational in its application;

iii) in so doing, it violates the basic principle that undergirds a just and fair criminal justice system, that the punishment must meet the crime;

iv) for all of the above reasons, it violates universally accepted standards of justice observed by civilised nations which observe the rule of law.

Equality before the law

39. Section 4(b) guarantees the right to equality before the law. It requires that the law itself be equal – ***Webster v Attorney General of Trinidad and Tobago*** [2015] ICR 1048, [15] – and is engaged where the law itself is discriminatory – ***Central Broadcasting Services Limited v Attorney General of Trinidad and Tobago*** [2006] 1 WLR 2891, [20].

40. A law will deny equal protection where it unjustifiably subjected persons in comparable positions to different treatment. But equally, it would deny equality before the law where it unjustifiably treats persons in different situations in the same way – ***Webster*** [20].

41. The European Court of Justice summarised the position in ***Eman v College van burgemeester en wethouders van Den Haag*** (Case C-300/04) [2006] ECR I-8055, (at [57]) in this way:

> " … the principle of equal treatment or non-discrimination … requires that comparable situations must not be treated differently and that different

> situations must not be treated in the same way unless such treatment is objectively justified."

42. In ***Thlimmenos v Greece*** (2000) 31 EHRR 411, [44], the same Court put it this way:

> "The right not to be discriminated against … is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

43. In ***Reyes***, your Lordships Board emphasised the variety of circumstances in which murders are committed: "It covers at one extreme the sadistic murder of a child for purposes of sexual satisfaction, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat" [11]. As the Royal Commission on Capital Punishment (1949 – 1953) (Cmd 8932), whose report Lord Bingham referenced in ***Reyes***, pointed out (at [21]):

> "there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder."

44. For some categories of murder, the Commission concluded (at [23]), "it would be monstrous to inflict the death penalty."

45. It is respectfully submitted that a law which requires the death penalty to be 'suffered' by all persons convicted of murder, despite the varying degrees of culpability, denies equality before the law by its failure to recognise that there are many cases where the death penalty would be wholly disproportionate and inappropriate. Using the language of inequality, Stewart, Powell and Stephen JJJ in ***Woodson v North Carolina*** 428 US 280 (1976), 304, said:

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of

> death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

46. Saunders JA (as he then was) put it more simply in ***Spence v R*** and ***Hughes v R*** (unreported) 2nd April 2001 (Criminal Appeals Nos. 20 of 1998 and 14 of 1997) (quoted at [33] in Reyes):

> "It has always been considered a vital precept of just penal law that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case."

47. By providing for the same penalty for everyone convicted of murder, despite the variety of circumstances in which murders may be committed, and despite the yawning differences of culpability between one convicted murderer and another, the mandatory death penalty violates the right to equality before the law.

The savings law clause

48. The Appellant recognises and repeats that the decision of your Lordships' Board in ***Matthew*** stands in his way of persuading your Lordships to find that the mandatory death sentence imposed in him violates his section 4 and 5 rights and ought accordingly to be set aside. In his submissions below, the Appellant will say why your Lordships ought to find that ***Matthew*** was wrongly decided and to overrule that decision.

The separation of powers

49. The Appellant respectfully submits that the mandatory death penalty constitutes an impermissible intrusion by the legislature on the judicial function and accordingly violates the separation of powers.

50. This point was not dealt with by your Lordships in ***Matthew*** although it was fully argued. In ***Matthew***, as in ***Boyce v R*** [2005] 1 AC 400, the argument that the mandatory death penalty violated the separation of powers had two strands. The first was that the legislative act of mandating the fixed penalty of death was itself an encroachment on judicial power – see [2005] 1 AC 433, at pp. 441 E to 442 D. The second was that the mandatory death penalty effectively transferred the judicial sentencing function to the Executive which, through the Advisory Committee on the Power of Pardon established under the Constitution, determined the actual sentence which the condemned man would serve – see p. 442 D-F. However, the majority in ***Matthew*** only dealt with and rejected the second argument.

51. The argument was described in Lord Hoffman's judgement in ***Matthew*** in this way (at [27]):

> "Mr Fitzgerald's third argument was that the mandatory death penalty is contrary to the principle of the separation of powers. The decision as to whether the sentence should be commuted or the sentence carried into execution is vested in the President by section 87 of the Constitution, acting on the advice of the Advisory Committee constituted under section 88. The President, as the executive authority (section 74), is thereby exercising a sentencing function which properly belongs to the judiciary."

And it was rejected for the following reasons (at [28]):

> "As their Lordships observed in *Boyce v The Queen* [2005] 1 AC 400, the principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided. Most constitutions have some overlap between legislative, executive and judicial functions. The only question for their Lordships is whether the mandatory death penalty is in accordance with the actual Constitution of Trinidad and Tobago. As the Constitution itself makes express provision for the exercise of the power of commutation by the President and preserves the mandatory death penalty, their Lordships do not think there is some other principle by which these laws can be invalidated."

See the comparable arguments in ***Boyce*** at p. 407, and the description and rejection of the argument at [68-70].

52. The same argument was also made in ***Watson v The Queen*** [2005] 1 AC 472, at p. 477 B-F, but because it was held in that case that the mandatory death penalty was not an existing in law in Jamaica and therefore not saved by the savings law clause, their Lordships did not think it necessary to deal with the separation of powers argument at all – see [48].

53. However, the view that the mandatory death penalty violates the separation of powers doctrine was rejected in obiter dicta in the judgment of Dálaigh CJ in the Supreme Court of Ireland in ***Deaton v Attorney General*** [1963] IR 170, 182-183:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the respondents' argument breaks down. The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the same offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain. Traditionally, as I have said, this choice has lain with the courts. Where the legislature has prescribed a range of penalties the individual citizen who has committed an offence is safeguarded from the executive's displeasure by the choice of penalty being in the determination of an independent judge. The individual citizen needs the safeguard of the courts in the assessment of punishment as much as on his trial for the offence."

54. In ***Hinds v The Queen*** [1977] AC 195, 225-226, Lord Diplock, in a further obiter dicta, endorsed this view:

> "The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law … The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to

> regulate the conditions under which the punishment is carried out. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence—as, for example, capital punishment for the crime of murder."

55. In ***Roodal v State of Trinidad and Tobago*** [2005] 1 AC 328, a minority of your Lordships' Board, expressly endorsing these two passages, rejected Roodal's argument that the mandatory death penalty violated the separation of powers. According to them (at [109]):

> "What is constitutionally unacceptable is that the legislature should prescribe the sentence that is to be imposed on any particular individual. There is nothing inconsistent with the separation of powers, however, in Parliament legislating to prescribe the penalty that is to be imposed for a particular offence."

They observed (at [110]) that although Lord Diplock's comment on capital punishment for the crime of murder was *obiter*, it had stood for over 25 years and they saw "no reason to question the Board's view that fixing a mandatory death sentence for murder is an exercise of the legislative function which does not offend against the separation of legislative and judicial powers inherent in the Caribbean constitutions."

56. The majority in ***Roodal*** (at [33]), on the other hand, like the majority in ***Watson***, saw no need to consider the separation of powers argument having regard to their findings that the mandatory death penalty was a cruel and unusual punishment which was not saved by section 6(1) of the Constitution.

57. Since then, Lord Diplock's dicta in ***Hinds*** was applied by the Court of Appeal of Trinidad and Tobago in ***Francis v State*** *(2014)* 86 WIR 418, [12-13], [195-198] in finding that a mandatory minimum penalty of a fine of $100,000 and 25 years' imprisonment for the offence of possession of a dangerous drug for the purposes of trafficking, did not violate the separation of powers doctrine.

58. But, the Caribbean Court of Justice has gone decidedly in a different direction. In ***Zuniga v Attorney General of Belize*** [2014] 5 LRC 1, at [61], the Court signalled its intention to approach laws which imposed mandatory sentence with wariness:

> "It is a vital precept of just penal laws that the punishment should fit the crime (per Saunders JA (Ag) in the combined cases of *Hughes v R, Spence v R* [2002] 2 LRC 531 at [216]). The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. As stated by Holmes JA in *State v Gibson* 1974 (4) SA 478 (A) at 482, a mandatory penalty 'unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person'."

59. Saunders JCCJ went further in ***August v R*** [2018] 3 LRC 552, declaring his preparedness to find that mandatory sentences violated the principle of separation of powers. He said (at [135] & [139]):

> "[135] In my opinion, the separation of powers principle is implicated whenever Parliament prescribes a mandatory sentence. The Legislature has every right to establish maximum penalties for legislated offences or even to set a reasonable sentencing range within which judges retain flexibility. That responsibility is consistent with the separation of powers. Within such maximum penalty or reasonable sentencing range, however, judges should be entitled to return sentences they consider to be in keeping with the nature and circumstances of the offence, the history and characteristics of the offender and such other considerations as it is legitimate for them to weigh. For Parliament to eliminate all such discretion and decide for itself what is an appropriate sentence in each and every case is problematic. The court's sentencing responsibility is reduced to 'rubber-stamping' the dictates of the Legislature in a realm the Constitution reserved for the judicial branch. This impairs the judicial process and compromises judicial legitimacy and independence…
>
> [139] Judges can and should be trusted to give fit sentences. They are best placed and experienced at apportioning the degree of responsibility of each particular offender. As the list of cases in the previous paragraph shows, judges may consider a life sentence appropriate for some cases, but they should not be constrained to hand down such a harsh sentence

> when it can be said at the outset, with certainty, that the penalty will be seriously disproportionate in other cases. As was stated in the Canadian case *of Smith v R*102, it is that certainty, and not just the potential, that causes such a legislated penalty to be inhumane and, in my view, a violation of the separation of powers."

60. Justice Saunders' view held sway in ***Nervais***. The CCJ held unanimously that the mandatory death penalty violates the separation of powers doctrine. According to the majority (at [70]):

> "The mandatory nature of the death penalty is antithetical to the separation of powers doctrine. It reduces the court's sentencing role to 'rubber-stamping' the dictates of the Legislature. Sentencing is a role which the Constitution specifically reserved for the Judiciary. The mandatory element impairs the judicial process and compromises judicial legitimacy and independence."

61. It was on this basis alone that Anderson JCCJ agreed with the final disposition of the appeal. According to him (at [75]):

> "a more elegant explanation for the impermissibility of legislating for the imposition of the mandatory death penalty is the judicial monopoly of the power to sentence, which is protected by the doctrine of separation of powers."

He elaborated in the following passages (at [109] & [112]):

> "[109] … The courts have exclusivity of judicial power to sentence. The separation of powers protects the independence of the courts in carrying out this function. There is no direction in the *Constitution* that the courts *must* impose the mandatory death penalty; rather that direction is found in s 2 of the OAPA which is saved by the Constitution. The constitutional prescription is that the courts cannot 'hold' s 2 to be unconstitutional or inconsistent with the rights in ss 12–23. However, whilst the court cannot constitutionally find s 2 to be unconstitutional or inconsistent with the Bill of Rights, the court is not obliged, and cannot be obliged, to obey its dictate and thus to mandatorily impose the death penalty. The court is protected from this legislative edict by the separation of powers ...
>
> [112] Whatever may be the merits of the distinction by the Privy Council, the fact is that the judicial power to impose an appropriate sentence, based on considerations of fairness and the cruelty of the punishment, cannot be constrained by the legislative direction to impose an inappropriate sentence. The Privy Council asserted that power, wittingly

> or otherwise. Whilst a constitutional provision may forbid the courts to hold a pre-existing law to be unconstitutional or inconsistent with the Bill of Rights, the separation of powers forbids the Legislature from compelling the Judiciary to impose a sentence that is cruel and inhumane, and one that is widely held to be contrary to fundamental human rights norms accepted by civilized countries adhering to the rule of law. This is the case whether the human right in question crystallised before or after Independence."

62. It is the Appellant's respectful submission that the decision of the CCJ in ***Nervais*** in this regard ought to be followed. It should be seen as a culmination of a gradual shift away from the anodyne treatment of the mandatory death penalty which was commonplace in some quarters when Lord Diplock made his pronouncement in ***Hinds***. Since then, the mandatory death penalty has been held to be unconstitutional precisely because it takes away the judicial power to determine whether death is the appropriate sentence in the particular case.

63. The separation of powers is an unwritten principle of the Constitution of Trinidad and Tobago. In the seminal decision of the Privy Council in ***Hinds v R*** [1977] AC 195, at 212–213, Lord Diplock said in relation to the Jamaican Constitution:

> "… a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a Legislature, an Executive and a Judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislation powers by the Executive or of judicial powers by either the Executive or the Legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the Judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the Executive and by the Judicature respectively …
>
> All constitutions on the Westminster Model deal under separate Chapter headings with the Legislature, the Executive and the Judicature. The

> Chapter dealing with the Judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government … What … is implicit in the very structure of a constitution on the Westminster Model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, even though this is not expressly stated in the Constitution …"

64. This statement was expressly endorsed by the Privy Council in relation to the Constitution of Trinidad and Tobago in ***Ferguson v Attorney General of Trinidad and Tobago*** [2016] 2 LRC 621, at [14]-[15]. In ***Seepersad v Attorney General of Trinidad and Tobago*** [2013] 1 AC 659, Lord Hope of Craighead observed (at para [10]):

> "The separation of powers is a basic principle on which the Constitution of Trinidad and Tobago is founded. Parliament cannot, consistently with that principle, transfer from the judiciary to an executive body which is not qualified to exercise judicial powers a discretion to determine the severity of the punishment to be inflicted upon an offender. The system of public law under which the people for whom the Constitution was provided were already living when it took effect must be assumed to have evolved in accordance with that principle."

65. In ***Ferguson***, your Lordships held (at [23]) that:

> "Legislation impinges directly on judicial proceedings if the statute itself amounts to the exercise of an inherently judicial power. This may, for example, be because it determines innocence or guilt or the penalty to be imposed …"

66. For this proposition, Lord Sumption cited the following passages from the judgments of Brennan CJ, Gaudron J and McHugh J in ***Nicholas v R*** (1998) 193 CLR 173:

> Per Brennan CJ
>
> "15. … the court exercises the judicial power of the Commonwealth by the making of its judgment or order. Subject to the Constitution, the Parliament can prescribe the jurisdiction to be conferred on a court but it cannot direct the court as to the judgment or order which it might make in exercise of a jurisdiction conferred upon it…

16. One of the exclusively judicial functions of government is the adjudgment and punishment of criminal guilt as the joint judgment in *Chu Kheng Lim* pointed out:

> "There are some functions which, by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to and 'could not be excluded from' the judicial power of the Commonwealth. That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive."

Per Gaudron J

> "74. In my view, consistency with the essential character of a court and with the nature of judicial power necessitates that a court not be required or authorised to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law. It means, moreover, that a court cannot be required or authorised to proceed in any manner which involves an abuse of process, which would render its proceedings inefficacious, or which brings or tends to bring the administration of justice into disrepute."

Per McHugh J

> "112. The distinction between an infringement and a usurpation of judicial power is of little, if any, practical importance but, speaking generally, an infringement occurs when the legislature has interfered with the exercise of judicial power by the courts and an usurpation occurs when the legislature has exercised judicial power on its own behalf. Legislation that removes from the courts their exclusive function "of the adjudgment and punishment of criminal guilt under a law of the Commonwealth" will be invalidated as a usurpation of judicial power…"

67. It is submitted that the mandatory death penalty regime as it operates in Trinidad and Tobago violates the separation of powers inherent in the Constitution. The violation arises from the legislature requiring the judiciary to impose a fixed penalty

irrespective of the merits of the individual case. The dicta of Lord Diplock in ***Hinds*** that there is nothing inconsistent with the proper exercise by Parliament of its legislative power in it prescribing the fixed penalty of death for all those convicted of murder is no longer tenable having regard to significant developments in international human rights law and domestic constitutional law. It is inconsistent with the separation of powers for the legislature to require the judiciary to impose a death penalty that is cruel and unusual punishment, by reason of its disproportionality in an individual case. Moreover, it involves the removal of a quintessentially judicial function from the judiciary in respect of the most extreme penalty. It deprives the judiciary of the power to match the penalty to the gravity of the individual's crime in the manner that is now required by international human rights law and the norms enshrined in section 5(2)(b) of the Constitution.

68. As Ferguson makes plain, the principle of the separation of powers places limits on the legislative powers of Parliament. These include the prohibition on the passing of ad hominem and ex post facto legislation (***Liyanage v The Queen*** [1967] 1 AC 259); the prohibition on the transfer from the judiciary to executive of the discretion to determine the severity of punishment in an individual case (***Hinds*** (1977) AC 195 at p. 220); and an emerging prohibition, culminating in the decision of the CCJ in ***Nervais***, on the legislature requiring the judiciary to impose a punishment that is grossly disproportionate or which amounts to the removal of an essential judicial function from the judiciary. Apart from the judgments of the CCJ in ***Nervais*** and of Saunders JCCJ in ***August***, this further prohibition can be derived from Australian cases such as ***Sillery v The Queen*** (1981) 35 ALR 227, and ***Kable v DPP for New South Wales*** (1996) 138 ALR 577; and from dicta in the South African case of ***S v Dodo*** 2001 (5) BCLR 423 which is founded on the separation of powers and/or "rule of law" doctrine.

69. In ***Liyanage v The Queen***, your Lordships' Board recognised that it is possible for legislation to (p. 283):

> "constitute an unjustifiable assumption of judicial power by the legislation, ***or*** an interference with judicial power, which is outside the legislature's competence and ***is inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution orders.***" (Emphasis added)

70. It is accepted that in ***Liyanage*** the assumption of an interference with judicial power stemmed from the *ad hominem* and *ex post facto* nature of the legislation under challenge. In other words, it was properly an instance of the legislature passing a law designed to determine the outcome of one particular case. However, their Lordships did not seek to confine their ratio in such narrow terms. It is submitted that it is of significance that their Lordships chose to condemn a potentially wider category of legislation: that which amounts to an "unjustifiable assumption of… or interference with judicial power".

71. Further, the questions asked of counsel for the Respondent in the course of his submissions indicate that their Lordships had wider concerns. Lord Pearce, at p. 275, put the following proposition:

> "If you are right in saying that there can be interference with the process of the judiciary, although the appointment of the judiciary is protected, there is really no limitation to the lengths to which interference with the judiciary can go. Could you direct all the judges to find all their prisoners guilty by Act of Parliament, or not to find any contravention of the statute void?"

72. It is true that, in the past, the orthodox view, as expressed in ***Deaton*** and ***Hinds*** was that the prescription of a mandatory penalty (including the death penalty) for all those convicted of a particular crime was something that the legislature could do without violating the principle of the separation of powers. It is respectfully submitted that this statement of principle may continue to have application in relation to fixed penalties of a certain level. It may even continue to be applicable to punishments of imprisonment in general. But it has no application to the death penalty now that

it has been clearly established by decisions of domestic constitutional courts and international human rights bodies that the mandatory death sentence offends against two fundamental norms – the prohibition against inhuman and degrading punishment and the prohibition against the arbitrary deprivation of life. It is implicit in these findings and indeed, it is the common factor to all recent decisions, whether based on inhuman and degrading treatment or the right to life, that it is the absence of a judicialised determination of the appropriateness of the death penalty that is the fundamental objection. This is nothing less than a finding that a legislative scheme requiring mandatory death sentencing arbitrarily deprives the judiciary of a function that they must perform if the death penalty is to be properly imposed, and that such a scheme removes from the judiciary an essential judicial function.

73. Against that background, the Appellant relies on the following three propositions to support his submission that the ***Hinds*** principle should not continue to apply to the death penalty:

(i) Firstly, the recognition in practice and case law that not everybody convicted of murder deserves to die. This undermines the very legislative justification for the mandatory death penalty since the ratio of the legislation can no longer be that the mandatory death penalty is appropriate because everybody convicted of murder deserves to die. In the absence of such legislative intent, the mechanism whereby it is determined when the death penalty is appropriate in an individual case becomes of crucial significance. Unless this task is performed by the judiciary, it means the quintessentially judicial function of selecting the appropriate penalty is exercised by the legislature;

(ii) Secondly, the development of constitutional and international human rights case law which has condemned the mandatory death penalty as cruel and unusual punishment and as an arbitrary deprivation of life precisely because it deprives judges of all discretion. The legislature is forcing judges to impose what is, in some cases, cruel and unusual or grossly disproportionate punishment.

(iii) Thirdly, the development of constitutional case law which recognises that it can violate the separation of powers doctrine to require a judge to impose a disproportionate penalty, or to abrogate a core judicial function.

a. Recognition that not everybody convicted of murder deserves to suffer death

74. There is only one justification for the legislature instituting, and maintaining, a mandatory death penalty for all those convicted of murder: It is the theory that everybody convicted of murder does, in the view of the legislature, deserve to suffer death. Once that rationale has been abandoned, there is no longer any justification for the retention of the mandatory death penalty by the legislature (c.f. in the context of mandatory life imprisonment for murder, the reasoning of Lord Mustill in ***ex parte Doody*** [1994] 1 AC 531 at p. 556).

75. But it is now established beyond doubt that not everyone sentenced to death deserves to suffer death for the crime of murder [see ***Reyes*** paras 11-16 and 29]. If it was ever the intention of the legislature that every murderer should be executed, that has long since been abandoned. In Trinidad and Tobago for the period 1961-1988 executions were carried out in 29 out of the 51 cases which were referred to the Advisory Committee on the Power of Pardon. In the other cases, the prisoners were mostly released within 15 years. In three cases the prisoners were released within 5 to 6 years. [The Prescott Commission's Report on the Death Penalty in Trinidad and Tobago (1990), Appendix 3 – cited in ***Roodal*** para. 6].

76. It is submitted that this settled practice of commuting a significant proportion of capital sentences indicates longstanding recognition by the Respondent state that the death sentence is not merited in every case of murder. This is further illustrated by the fact that in ***Roodal*** and ***Matthew***, the Respondent did not seek to challenge the correctness of the finding of your Lordships' Board in ***Reyes*** that the mandatory death sentence is inhuman and degrading punishment. This is the context in which

the mandatory death penalty regime falls to be tested as a proper exercise of legislative powers consistent with the separation of powers.

77. Once it is accepted that not everyone convicted of murder deserves to die, it follows that some mechanism is required to determine when the penalty is deserved and when it is not. But this very act of selection is the classic sentencing function of matching the individual's culpability to the appropriate penalty (Lord Diplock in ***Hinds*** at p. 227a citing ***Deaton***), which in turn is a core judicial function (Lord Bingham in ***R (Anderson) v SSHD*** [2003] 1 AC 837 at para 13). The application of such a law without this type of mechanism is inhuman and degrading [***Reyes***]. In other words, it is the absence of a judicialised hearing to determine the appropriateness of the death penalty in the individual case which renders the mandatory imposition of the death penalty a cruel and unusual punishment. It is the same absence which renders the mandatory death penalty a violation of the separation of powers doctrine.

b. Development of Constitutional and International human rights case law on the need for judicial discretion

78. The Appellant further relies on the developments in contemporary standards that have led to the condemnation of the mandatory death penalty as constituting cruel and unusual punishment and as bringing about the arbitrary deprivation of life because it leaves no discretion on judges imposing the death penalty. It is true that, until ***Nervais***, condemnation has so far been by reference to those distinct human rights norms. When these norms clearly apply and are clearly enforceable (because they are not thought to have been disapplied by savings clauses, or where savings clauses are irrelevant because of the international nature of the forum), then prohibitions on cruel and unusual punishment, and the prohibition on arbitrary deprivation of life, have proved a more direct means of declaring the illegality of the mandatory death regime. But implicit in the judgments condemning the mandatory death penalty by reference to those more simple and direct norms is a further finding that the regime wrongly deprives the judiciary of a quintessential judicial function that is necessary if the death penalty is to be legitimately retained at all.

79. Thus, the whole emphasis in the decisions of the American and Indian courts (***Woodson v North Carolina*** (1976) 428 US 280; ***Mithu v State of Punjab*** [1983] 2 SCR 690), those of the Inter American Commission and Court (***Sewell v Jamaica*** 27 December 2001; ***Hilaire v Trinidad and Tobago*** (2002) 16 BHRC 34), and of your Lordships' Board in ***Reyes*** has been on the necessity of there being judicial consideration of the appropriateness of the death penalty in individual cases before the penalty is imposed see The Inter-American Commission in ***Downer and Tracey v Jamaica*** 13 April 2000, Report No 41/00 (at para 212):

> "Based on a study of these various international and domestic jurisdictions, it is the commission's view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition sine qua non to the rational, humane and fair imposition of capital punishment." (Emphasis added)

80. It is submitted, therefore, that a law mandating judges to apply the mandatory death penalty does not merely remove from the judiciary their usual sentencing discretion (as is the case with lesser mandatory penalties). It requires them to impose a sentence that, at least in many cases, is so disproportionate it amounts to cruel and unusual punishment. This is to require judges to be the administrators of universally recognised injustice. It is submitted that such a requirement is not merely inconsistent with normal judicial functions. It amounts to their complete inversion. And it violates the doctrine of the separation of powers.

c. Specific caselaw supporting the proposition that mandatory sentencing can violate the separation of powers

81. The Appellant turns to the caselaw, pre-dating ***Nervais***, recognising that it can constitute a violation of the separation of powers doctrine to require a judge to impose a disproportionate penalty, or to abrogate a core judicial function.

82. In the Australian case of ***Sillery v The Queen*** (1981) 35 ALR 227, the High Court of Australia considered the interpretation of a statute which appeared to impose a mandatory sentence of life imprisonment with hard labour for hijacking. In response to the Government's submission that unfairness could be cured by executive clemency Murphy J. said at para. 11:

> "The Crown argued that although the penalty of life imprisonment would be excessive for some of the offences covered, Parliament intended to leave those to be dealt with by the application of executive discretion to reduce the penalty by remission of whole or part of the sentence. This suggestion is very dangerous to civil liberty. It would mean the judicial sentence would be a sham, and the real sentence would be by the Executive. This goes much further than the traditional exercise of executive clemency. ***It raises a question of whether legislation so construed would violate the constitutional separation of powers***." (Emphasis added)

83. More recently, in ***Kable v Director of Public Prosecutions*** (NSW) 138 ALR 577, the High Court of Australia held legislation to be invalid on grounds that it required "the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process." [p.608]. Section 5(1) of the Community Protection Act 1994, gave judges power to order a specified person to be detained if satisfied, amongst other things, that it was appropriate for public protection. The majority of the Australian High Court held that such a power of preventative detention, not consequent on any finding of criminal guilt, was so "repugnant to or inconsistent with" the judicial process as to be incompatible with the judicial functions enshrined in Chapter III of the Constitution:

> "Chapter III of the Constitution [that which specifies the powers of the judiciary] impliedly prevents the parliament of a State from conferring powers on the Supreme Court of a State which are repugnant to or inconsistent with the exercise by it of the judicial power of the Commonwealth." [p.609].
>
> "The integrity of the courts depends on their acting in accordance with the judicial process". [p.615].

> "Neither Parliament [Federal or State]… can legislate in a way that permits the Supreme Court while exercising federal judicial power to disregard the rules of natural justice or to exercise legislative or executive power. Such legislation is inconsistent with the exercise of federal judicial power." [p.622].

84. It is true that the decision in ***Kable***, like ***Liyanage***, was not taken in the context of mandatory sentencing. But it is submitted that both decisions provide authority for the wider principle that the Constitutional establishment of an independent judiciary places limitations on the power of the legislature to abrogate core judicial functions. See the analysis of GFK Santow, Justice of the Supreme Court of New South Wales, in "*Mandatory Sentencing: A Matter for the High Court*?" (2000) 74 ALJ 298, cited by Lord Steyn in ***Anderson***, p. 546.

85. In the South African case of ***Dodo v The State*** 2001 (5) BCLR 423 (CC), the Constitutional court considered a challenge to a statute providing for life imprisonment save in substantial and compelling circumstances for certain types of aggravated murder. The court upheld the statute as compatible with the Constitution partly because it did provide for exceptions and therefore the exercise of some judicial discretion. But, in the course of his judgment, Ackermann J recognised that it would be inimical to the rule of law and the Constitutional state for the legislature to oblige the judiciary to impose a punishment wholly lacking in proportionality or contrary to the Bill of Rights (at [26]):

> "In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by section 12(1)(e) of the Constitution, or to a fair trial under section 35(3)."

86. This appears to recognise that there is a viable independent challenge to legislation that has the identified vice of gross disproportionality on the basis that it is incompatible with the rule of law. And that is merely another way of recognising that it violates the separation of powers. Moreover, it was recognised that before the South African Bill of Rights came into force, challenges based on the compulsion of a judge to pass a disproportionate sentence could be, and were, formulated as separation of powers challenges [***S v Toms; S v Bruce*** 1990 (2) SA 802 (AD)].

87. The negation of judicial functions in the context of mandatory fixed penalties has been further analysed by the English Court of Appeal in light of Article 6(1) ECHR. In ***International Transport Roth GmbH v SSHD*** [2003] QB 728, the Court of Appeal held a fixed penalty scheme under section 32 of the Immigration and Asylum Act 1999 to be in breach of Article 6(1) ECHR on the grounds that it provided for the imposition of a significant fine on individuals without possibility of mitigation in circumstances where, in Simon Brown LJ's view, the absence of sentencing discretion was likely to lead to the imposition of disproportionate sentences (at [47]):

> "The hallowed principle that the punishment must fit the crime is irreconcilable with the notion of a substantial fixed penalty. It is essentially, therefore on this account… that I would regard the scheme as incompatible with Article 6. What in particular it offends is the carrier's right to have his penalty determined by an independent tribunal… Sentencing is, like all aspects of the criminal trial, a function that must be conducted by an independent tribunal. If, as I would hold, the determination of liability under the scheme is properly to be characterised as criminal, then ***this fixed penalty cannot stand unless it can be adjudged proportionate in all cases having regard to culpability involved***." (Emphasis added)

88. Laws LJ dissented from the judgment of the majority that the scheme was in breach of Article 6(1), on grounds that, in his view, the scheme was properly classified as civil rather than criminal in nature. Nonetheless he observed (at [103]) that:

> "Lord Lester for the Roth claimants submitted in terms that the imposition of an excessive fixed penalty breaches the principle of legality, depriving affected persons of their right of access to an independent and impartial

> court under Article 6(1), because any court dealing with such a regime would have no power to look into the proportionality of the sanction. If the argument's context were that of a fault-based criminal offence, this submission would possess much force."

89. It is true that these comments were made in the context of Article 6(1) rather than under the doctrine of the separation of powers. But they further highlight the incompatibility of extreme fixed penalty schemes with the core judicial function of the administration of justice. As Law LJ said (at [106]):

> "Where a court is required to administer a system which is irretrievably barbarous (to take an extreme case), it makes no sense to speak of due process, nor therefore of the rule of law."

90. With the assistance of these authorities it is possible to formulate a principle which your Lordships' Board is invited to adopt and apply: It is that it constitutes a violation of the separation of powers doctrine, (and the rule of law), for the legislature to require judges to impose a mandatory death penalty on all those convicted of murder when that will inevitably mean that they have to impose a sentence that is, in some situations, cruel and unusual, or grossly disproportionate. Further, it will violate the separation of powers doctrine because the effect of the legislation is to deprive the judiciary of the core judicial function of fitting the death penalty to the individual crime and the individual offender in the way that is required by both Constitutional norms and international human rights law.

91. It is respectfully submitted that sentencing is a core judicial function. While the separation of powers does not preclude some degree of legislative participation in the fixing of penalties or in the control of judicial sentencing discretion, the mandating of the ultimate penalty of death for all murders, irrespective of the degree of culpability, crosses the otherwise imperceptible line which protects judicial power from intrusion by the legislature and ensures adherence to the rule of law. The penalty of death is unlike all other penalties. The crime of murder is unlike all other offences in the vast variety of circumstances in which it may be committed and the varying degrees of culpability and lack of morality which may accompany it. In a

society based upon the rule of law and equal protection of the law, it falls to the judiciary and the judiciary alone to determine the appropriate cases in which the ultimate and irreversible penalty is to be imposed. A mandatory penalty of lesser severity might pass the separation of powers test and comport with the legislature's interest in the severity of sentence. The death penalty is in a class of its own. Determining who should live and who should die should in the first instance be the exclusive responsibility of an independent and impartial judiciary.

92. The Appellant accepts that the separation of powers doctrine accommodates some degree of legislative prescription of penalties for criminal conduct. The legislature has a legitimate interest in determining whether particular conduct should be punished by a severe penalty. The legislature may, for example, fix a mandatory minimum penalty for an offence leaving it to the judiciary to determine the appropriate penalty, either equal to or greater than the minimum, which would suit the circumstances of the case. However, there comes a point where the fixing of a mandatory penalty goes beyond what is considered to be the legitimate exercise of legislative power for the peace order and good governance of the nation, and tranches upon the exercise of the judicial power to determine the appropriate sentence for a particular case. The mandatory death penalty is such a case. Given the fact that the mandatory death penalty is both a mandatory minimum and the maximum sentence at the same time, it robs the judiciary of all input in the determination of the appropriate sentence. Further, given the vast variety of circumstances in which murder may be committed, the fixing of the one, ultimate penalty, for every case, goes beyond the mere expression of the seriousness with which the legislature treats the offence, and altogether usurps the judicial function of selecting the punishment to fit the crime.

93. Put differently, a fixed penalty will only accord with the separation of powers where, because of the serious nature of the offence or the limited array of circumstances in which it can be committed, the penalty is seen to be proportionate in all cases. This is what Simon Brown LJ was getting at when he said in ***International Transport***

Roth GmbH v SSHD that a fixed penalty "cannot stand unless it can be adjudged proportionate in all cases having regard to culpability involved." Law LJ was expressing the same thought when he said in the same case (at [106]) that: "Where a court is required to administer a system which is irretrievably barbarous (to take an extreme case), it makes no sense to speak of due process, nor therefore of the rule of law."

The rule of law

An unwritten principle of the Constitution

94. It is respectfully submitted that the rule of law is an unwritten principle of the Constitution of Trinidad and Tobago and provides an independent basis upon which laws may be rendered invalid.

95. In ***McEwan v Attorney General of Guyana*** [2019] 1 LRC 608, the CCJ held (at [51]) that the rule of law, along with the separation of powers and judicial independence, is a core constitutional principle of the Constitution of Guyana. It held further (at [85]) that the "rule of law requires that legislation which is hopelessly vague must be struck down as unconstitutional". On this basis, among others, the CCJ struck down a colonial vagrancy law which criminalised cross-dressing. Further, because the rule of law is a core constitutional principle, the savings law clause in the Guyanese Constitution which applied only to specified fundamental rights provisions, did not protect the cross-dressing law even though it pre-existed the first Guyanese written constitution [51].

96. In ***Belize International Services Limited v Attorney General of Belize*** [2021] 1 LRC 36, Jamadar JCCJ identified unwritten principles as an uncontroversial feature of Caribbean Constitutions.

> "[304] … clues as to what is constitutive of the basic and fundamental features, principles, and values of Belizean constitutionalism, are not limited to the literal content of the Constitution as text *per se*. Some are predictably unwritten, to be discerned from overall structure, context, and content, albeit of the Constitution itself, as well as from broader historical,

> cultural, and socio-legal contexts. Constitutional common law, as developed by independent Caribbean Judiciaries (as the third arm of Government) and elsewhere, has also discovered and revealed structural and substantive features and values that constitute this basic 'deep' structure. Three are now uncontroversial – the separation of powers, the rule of law (as including both due process and protection of the law), and, the independence of the judiciary (with the associated power of judicial review in relation to both constitutional and administrative actions)."

97. The Trinidad and Tobago Constitution has also been held to contain justiciable unwritten constitutional principles. As the authorities cited above indicate, the separation of powers doctrine is one of them. The principle of judicial independence is another.

98. In ***Surratt v Attorney General of Trinidad and Tobago*** [2008] 1 AC 655, a majority of your Lordships' Board rejected a claim that the separation of powers doctrine was violated by the vesting of jurisdiction to hear complaints of discriminations in a Tribunal, the members of which did not enjoy the same protection as judges of the High Court. The separation of powers doctrine was held not to have been violated because the new jurisdiction vested in the Tribunal was not "so characteristic of a Supreme Court, that, it is implicit … that it must be exercised by a judiciary enjoying exactly the same protection as a High Court judge".

99. Having so held, your Lordships nevertheless went on to consider whether "the protection enjoyed by the tribunal is sufficient to afford the necessary degree of independence of the legislature and executive". There is no provision in the Trinidad and Tobago constitution declaring that a body exercising judicial power must enjoy a "necessary degree of independence". This was a justiciable principle which the Board found to be implicit in the Trinidad and Tobago Constitution.

100. Similarly, in ***Re Provincial Court Judges*** [1997] 3 SCR 3, the Supreme Court of Canada held (at [83]) that judicial independence is an unwritten constitutional principle which applies to all Canadian courts, not just the superior courts of the country.

101. The question is whether the rule of law is also a core, justiciable, albeit unwritten principle of the Constitution of Trinidad and Tobago and if so, whether the mandatory death sentence violates that unwritten principle.

102. It is first to be noted that, in the preamble to the Constitution, after the affirmation (in [a]) that "the Nation of Trinidad and Tobago is founded upon principles that acknowledges … faith in fundamental rights and freedoms", it is recognised (in [d]) that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law." The People of Trinidad and Tobago then declare (in [e]) their "desire that their Constitution should enshrine the above-mentioned principles."

103. Secondly, this Board has recognised that the unwritten principle of the separation of powers is an essential component of the rule of law and treated the rule of law as a distinct constitutional principle. In ***Ferguson v Attorney General***, your Lordships held (at [16]) that the "separation of powers is an aspect of the rule of law" and that section 4 of the Constitution "gives effect to individual rights founded on the rule of law." "Direct interference with judicial proceedings," your Lordships declared (at [23]), "is usually contrary to the separation of powers and the rule of law". Further, your Lordships held (at [25]), that "Legislation which alters the law applicable in current legal proceedings is capable of violating the principles of the separation of powers and the rule of law by interfering with the administration of justice." Similarly, the Board expressly treated the rule of law as a separate justiciable constitutional principle when it said (at [26]) that targeting identifiable people or groups of people "is the least that must be shown if it is contended that a statute which merely alters the law violates the principles of the separation of powers or the rule of law by impinging on the judicial function."

104. Similarly, in ***Re Provincial Court Judges***, the Supreme Court of Canada asserted (at [10]) that one "social goal served by judicial independence is the maintenance of the rule of law."

105. In ***Re Manitoba Language Rights*** [1985] 1 SCR 721, the Supreme Court of Canada held that the rule of law is an unwritten principle of the Canadian Constitution. The Court said (at pp. 750-751):

> "The constitutional status of the rule of law is beyond question. The preamble to the *Constitution Act, 1982* states:
>
> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law. (Emphasis added)
>
> ***This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure***" (*per* Rand J., *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act, 1982*, and its implicit inclusion in the preamble to the *Constitution Act, 1867* by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".
>
> Additional to the inclusion of the rule of law in the preambles of the *Constitution Acts* of 1867 and 1982***, the principle is clearly implicit in the very nature of a Constitution***. The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. ***The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law***. While this is not set out in a specific provision, the principle of the rule of law is clearly a principle of our Constitution.
>
> This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our Constitution…
>
> It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. First, none is to be found in express provisions of the *British North America Acts* or other constitutional enactments. Second, all have been perceived to represent constitutional requirements that are derived from the federal character of

> Canada's Constitution. Third, they have been accorded full legal force in the sense of being employed to strike down legislative enactments. Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax (supra)* case at p. 591, that "There are no Canadian constitutional law precedents addressed directly to the present issue...". (Emphasis added.)
>
> In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference*, *supra*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law."

106. In ***Reference Re Secession of Quebec*** [1998] 2 SCR 217, the Supreme Court of Canada (at [49]) described the unwritten principles of the Constitution, including the rule of law, as "the vital unstated assumptions on which the text is based. "It would be impossible, the Court said (at [51]), "to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood." Moreover, the Court recognised the constitutional force of the unwritten principles. The Court said [54]:

> "Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the *Manitoba Language Rights Reference*, *supra*, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada"."

107. The Court identified democracy as one of the underlying, unwritten principles of the Canadian Constitution. But democracy itself, was dependent on the rule of law. The Court said (at [67]):

> "The consent of the governed is a value that is basic to our understanding of a free and democratic society. ***Yet democracy in any real sense of the word cannot exist without the rule of law***. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. ***A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle***. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values." (Emphasis added)

As the Court emphasised [78]:

> "Viewed correctly, constitutions and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined."

108. Specifically with regard to the underlying principle of the rule of law, the Court said (at [70]):

> "The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the *Patriation Reference*, *supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

109. The basis upon which the Canadian Courts have accepted the existence of unwritten constitutional principles in general, and the rule of law in particular, may be summarised as follows:

i) The Canadian Constitution "has emerged from a constitutional order whose fundamental rules are not authoritatively set down in a single document, or a set of documents", ***Re Provincial Court Judges*** [92];

ii) The preamble to Constitutional Act 1867 articulates the political theory which the Constitution embodies and "recognises and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act 1867." The preamble is "the means by which the underlying logic of the Act can be given the force of law.", ***Re Provincial Court Judges*** [95];

iii) The principle is implicit in the very nature of the Constitution, ***Re Manitoba Language Rights*** [1985] 1 SCR 721, 750.

110. It is respectfully submitted that on all three accounts the rule of law is a core unwritten principle of the Constitution of Trinidad and Tobago. Our constitutional jurisprudential history indicates that there are fundamental values of the constitution, separation of powers and the independence of the judiciary, which are not authoritatively set down in the Constitution itself. Secondly, the preamble specifically invokes the concept of the rule of law and expresses the desire that it be enshrined in the Constitution. And thirdly, the rule of law is implicit in the very nature of the Constitution. Indeed, it would be difficult to imagine constitutional rule without the rule of law. This is confirmed by the many references to the rule of law as the inspiration for the development of the rights to due process and the protection of the law and the separation of powers and judicial independence.

111. It is therefore respectfully submitted that your Lordships should adopt the ruling of the CCJ in ***McEwan*** to find that the rule of law is a justiciable core principle of the Constitution of Trinidad and Tobago.

The contents of the rule of law

112. There are three aspects of the rule of law which are relevant to Appellant's case of this appeal: the separation of powers, equality before the law and the protection against arbitrary state action.

113. As already noted, the authorities are replete with references to the separation of powers as being a subset or a necessary concomitant of the rule of law. For reasons already given, it is respectfully submitted that the mandatory death penalty is in violation of the separation of powers doctrine and therefore the rule of law.

114. It is respectfully submitted as well that an essential component of the rule of law is the principle of equality before the law. Lord Bingham described equality as "not merely a salutary doctrine but a pillar of the rule of law itself." ***The Rule of Law*** (2007) 66 Cambridge Law Journal 67, p. 75. Dicey himself identified equality before the law as one of the principles of the rule of law. Indeed, it appears that most if not all scholars, identify equality before the law as one of the essential features of the rule of law – see ***Mark Ellis – Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of justice*** – 72 University of Pittsburgh Law Review – 191

115. It is respectfully submitted that an essential feature of the rule of law must be equality before the law. Indeed, inequality is the antithesis of the rule of law.

116. For the reasons already given, the mandatory death penalty is inconsistent with the principle of equality before the law.

117. The rule of law also eschews arbitrariness. This aspect of the rule of law has been developed by the CCJ in a number of its decisions on the scope and ambit of the protection of the law, already referred to above, which is itself based upon the Court's understanding of the rule of law.

118. It is respectfully submitted that the law imposing the mandatory death penalty authorises an arbitrary exercise of the state powers. It is plain, it is respectfully submitted, that a law which seeks to inflict the ultimate and irreversible penalty of death in a vast variety of circumstances and without any reference to the moral culpability of the criminal offender, is arbitrary in its effect and more so since there is no justification for such indiscriminate application. This argument has also been presented in detail above.

A sovereign democratic state

119. Trinidad and Tobago is declared in section 1 of its Constitution to be a sovereign democratic state. In the ***State v Khoyratty*** [2007] 1 AC 80, your Lordships' Board held that the idea of democracy involves a number of different concepts including that the people must decide who should govern them, that fundamental rights and freedom should be protected by an independent judiciary and that there be a separation of powers between the legislature, the executive and the judiciary. It is respectfully submitted that among the essential features of a democratic state are also the concepts of the rule of law and equality before the law.

120. Simply put, democracy is premised upon the existence of laws which protect the rights of the people to decide who should govern them and to protect their fundamental rights. A society without laws and with laws which fail to protect against the arbitrary exercise of power is not a true democracy at all.

121. Similarly, in order to ensure that the people may decide who should govern them there must be equality before the law. A society which discriminates against people who are similarly circumstanced is not a democracy at all.

122. It is respectfully submitted that a society in which the ultimate penalty of death is imposed without regard to the individual circumstances of each case or the moral culpability of the offender, and without the involvement of a member of the judiciary is not one which is deserving of the appellation democratic state.

123. In ***Francis v Attorney General***, the Court of Appeal of Trinidad and Tobago held that a mandatory minimum penalty of a fine and 25 years imprisonment for everyone convicted of possession for the purposes of trafficking was not reasonably justifiable in a society that has proper respect for the rights and freedoms of the individual. The Court said:

> "164. The removal of the judicial discretion, by the conjoint effect of ss 5(5) and 61 of the Act, results in serious hardship to offenders because of the court's inability to apply a sentence appropriate to the nature of the offence, the part played by the offender and circumstances in mitigation. Such considerations are fundamental to the proper exercise of justice in a democracy, whatever the system of law. They are founded in fairness and respect for the dignity of the human person, which is one of the bases upon which our nationhood was proclaimed. The removal of such considerations from the sentencing process erodes the fundamental right to liberty and cannot be justified in any society which has a proper respect for the dignity of the human person and the inalienable rights with which we all, as human beings, are endowed. Thus, in this case, a provision which indiscriminately applies a mandatory minimum penalty to all offenders, irrespective of the nature of the offence, the degree of culpability of the offender and the mitigating circumstances affecting the offender, rendering it likely that the offender may serve a total of 40 years' imprisonment for 1.16 kg of marijuana, is so grossly unfair and offensive of the fundamental principles of justice and the rule of law that it cannot be reasonably justifiable in a society which has a proper regard to the rights and freedoms of the individual…
>
> [272] The sentencing principles to which we have referred are universal to democracies, whatever the system of law. Indeed in some democracies they may be considered inalienable rights. The preamble to our Constitution sets out some of the bases on which our democracy is founded. In preamble (a) we as a people affirm that our nation is founded upon principles that acknowledge the Supremacy of God, faith in fundamental right and freedoms, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their creator. At preamble (d) we recognise that men and institutions remain free only when freedom is founded on respect for, inter alia, the rule of law.
>
> [273] These are fundamental precepts on which our democracy is founded. They inhere in our values as a people, imbue our spirit and are drawn from our belief in God's Supremacy and the Order he has ordained. Those precepts, inter alia, inform any interpretation of the

proviso in s 13(1) of the Constitution. It recognises that notwithstanding the 'permitted limitations and derogations in the Constitution', there must remain in any law an inherent respect for the fundamental rights and freedoms and the dignity of our humanity.

[275] The discretion accorded a trial judge in pronouncing sentence to consider the nature of the offence, the part played by the offender in the crime and circumstances in mitigation, is founded in fairness and respect for the dignity of the human person which is one of the bases upon which our nationhood was proclaimed. The removal from the sentencing process of such considerations can result in an offender serving a sentence over and above that which he deserves. So arbitrary a deprivation of liberty is a gross violation of *due process of law*. It cannot be justified in a society which has a proper respect for the dignity of the human person and the inalienable rights with which we, as human beings, are endowed.

[276] A provision which indiscriminately applies a mandatory minimum penalty to all offenders, irrespective of individual circumstances, without the opportunity to present a case in mitigation, leaving the offender likely to serve a total of 40 years' imprisonment for possession of a little over 1 kg of marijuana, is so gross and unfair and offensive to the fundamental principles of justice and the rule of law, that it cannot be reasonably justifiable in a society which has a proper respect for the rights and freedoms of the individual. The liberty of the subject is one of the fundamental rights which is very jealously guarded in most democracies. It is especially precious to us as a society with a colonial past and a history of slavery and indentureship, in which liberty had to be fought for or bought and for which so many of our ancestors paid with their lives. As our national anthem puts it we, as a nation are 'forged from the love of liberty'. As judges sworn to uphold the Constitution, we will guard it with every breath of our constitutional power.

[277] We find that s 5(5) of the Act when construed in light of s 61 of the Act, is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."

124. These passages bring together all of the themes discussed above in relation to the mandatory death penalty. They apply with even greater force and urgency to the ultimate penalty of death. If a mandatory penalty of a fine and imprisonment could attract such condemnation, it would follow that the Court of Appeal would equally condemn the mandatory death penalty as being anathema to "the proper exercise of justice in a democracy … founded in fairness and respect for the dignity of the

human person, which is one of the bases upon which our nationhood was proclaimed"; as being "so grossly unfair and offensive of the fundamental principles of justice and the rule of law"; as resulting in the arbitrary deprivation of life and is therefore "a gross violation of *due process of law*"; and as arbitrarily taking away the life of the subject which "is one of the fundamental rights which is very jealously guarded in most democracies" and "is especially precious to us as a society with a colonial past and a history of slavery and indentureship, in which liberty had to be fought for or bought and for which so many of our ancestors paid with their lives."

125. It is respectfully submitted that the mandatory death penalty is a law which is not reasonably justifiable in a society which has respect for the rights and freedoms of the individual, and is accordingly not one which is suited for a democratic society. The mandatory death penalty is therefore inconsistent with the declaration of Trinidad and Tobago as a sovereign democratic state and violates section 1 of the Constitution.

The non-applicability of the savings law clause

126. As the Appellant accepts, on the authority of ***Matthew***, the mandatory death penalty as an existing law is saved by section 6 from the consequences of inconsistency with sections 4 and 5 of the Constitution. However, section 6 does not save the mandatory death penalty from possible invalidation for inconsistency with the non-human rights provisions of the Constitution, that is to say, all provisions and unwritten principles other than sections 4 and 5. Since section 1, the separation of powers doctrine and the rule of law do not owe their existence to sections 4 and 5 of the Constitution, the mandatory death penalty is not saved by section 6 of the Constitution and stands to be modified, adapted, qualified or excepted pursuant to section 5(1) of the Constitution Act.

127. In ***Director of Public Prosecutions of Jamaica v Mollison*** [2003] 2 AC 411, your Lordships held that an existing law which permitted a juvenile convicted of murder to be sentenced to be detained at the Governor General's pleasure was inconsistent

with the separation of powers doctrine because it in effect vested in a member of the Executive the judicial power to determine the term of imprisonment of a criminal offender. Section 26(8) of the Jamaican Constitution provided that nothing contained in an existing law shall be held to be inconsistent with any of the provisions of Chapter III of the Constitution. Chapter III is the chapter containing the fundamental rights and freedoms guaranteed under the Constitution. Your Lordships held that

> "15 … Since the respondent's challenge did not depend primarily on incompatibility with any provision of Chapter III of the Constitution, section 26(8) could not be relied on by the Director to defeat it … Section 26(8) … applies only to the provisions of Chapter III."

128. Without any reference to ***DPP v Mollison***, your Lordships came to the same conclusion in ***Johnson v Attorney General of Trinidad and Tobago*** [2010] 4 LRC 191. As your Lordships said (at [22]):

> "Section 6(1) of the Constitution applies only to ss 4 and 5 of the Constitution. An existing law is not to be invalidated by anything in those sections. But, if an existing law were inconsistent with some other provision of the Constitution, then, by virtue of s 2 of the Constitution, it would be void to the extent of the inconsistency. Section 5(1) of the Act comes in to deal with that situation and provides that the existing law is to be construed with such modifications etc as may be necessary to bring it into conformity with the Constitution. Subsections (2)–(5) make further provision to achieve the same general purpose. So, in that situation, the existing law is made constitutional by being construed in such a way as to make it conform to the Constitution."

129. It is significant that the opinion of the Board in ***Johnson*** was written by Lord Rodger. He had dissented in ***Roodal v State of Trinidad and Tobago*** [2005] 1 AC 328 against the majority decision that section 6 did not preclude modification under section 5(1) of the Constitution Act. He himself, in other words, recognised the limited reach of section 6 to existing laws which were inconsistent with sections 4 and 5 only.

130. ***DPP v Mollison*** was followed by the Caribbean Court of Justice in ***McEwan***. Their Honours confirmed that the savings law clause in Guyana, the counterpart to Jamaica's section 26(8), only protects existing law from modification or invalidation because of inconsistency with certain of the human rights provisions. Their Honours said (at [43]):

> "[43] Secondly, assuming again a full and literal application of the clause, the clause only saves laws that infringe the individual human rights stipulated in the clause itself. ***It does not preclude the court from holding a pre-independence law to be invalid if in fact the law runs counter to some constitutional provision that falls outside the specified individual human rights, i.e. in Guyana, Articles 138 to 149 (inclusive). Nor is the savings clause in play if core constitutional principles are violated by the existing law. In other words, only challenges to the stipulated human rights provisions are barred***." (Emphasis added)

131. It is important to note that in ***DPP v Mollison***, your Lordships were satisfied that the law under challenge was also incompatible with sections 19(1)(b) and 20(1), both of which are contained within Chapter III which was protected by the section 26(8) savings law clause. They were so satisfied because

> "A person detained during the Governor General's pleasure is deprived of his personal liberty not in execution of the sentence or order of a court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial court, because the sentencing of a criminal defendant is part of the hearing and in cases such as the present sentence is effectively passed by the executive and not by a court independent of the executive."

132. Thus, even though the law would have been saved from invalidation for inconsistency with section 19(1)(b) and 20(1) by virtue of section 26(8) of the Constitution, your Lordships held that the law was not saved from invalidation for inconsistency with non-human rights provisions.

133. Accordingly, while, following ***Matthew***, 'existing law' is saved by section 6 even though inconsistent with sections 4 and 5 of the Trinidad and Tobago Constitution, it is not saved where it is inconsistent with the non-human rights provisions of the Constitution, including core and unwritten principles. This is so even though the existing law may also be incompatible with sections 4 and 5 of the Constitution and for the same reasons.

134. Thus, if your Lordships find that the mandatory death penalty is inconsistent with section 1 of the Constitution, the separation of powers or the rule of law, it will not be 'saved' even though it may also be inconsistent to the right to due process of law, the protection of the law and equality before the law guaranteed by sections 4 and 5 of the Constitution.

135. It is important to note however that an existing law which is inconsistent with non-human rights provisions or unwritten principles of the Constitution is not for that reason alone subject to invalidation. In such a case, a court would be obliged to exercise its power under section 5(1) of the Constitution Act to modify, adapt, qualify or except the existing law to make it conform with the Constitution.

136. In ***Mollison***, your Lordships made clear that the purpose of the Jamaican section 4 'modification clause' (the equivalent of section 5(1) of the Constitution Act) was to 'save' existing law from invalidation. They said ([10]):

> "It seems clear that section 4 has two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their conformity with the Constitution and preclude successful challenge on grounds of constitutional incompatibility."

137. In that case, the Board exercised its power under section 4 to modify the law under challenge to provide that a juvenile convicted of murder be detained at the Court's (instead of the Governor General's) pleasure.

138. However, if on the rare occasion it were not possible to modify, adapt, qualify or except the existing law to ensure conformity with the Constitution, there would then be no alternative but to invalidate the law in compliance with section 2 of the Constitution. Section 2 provides that:

> "This Constitution is the supreme law of Trinidad and Tobago and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

139. This was made clear in the earlier decision of your Lordships in ***Attorney General of St. Christopher, Nevis and Anguilla v Reynolds*** [1980] AC 637. As Lord Salmon said on that occasion (at p. 655):

> "If the Court of Appeal were right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations 1967 invalid."

140. Invalidation of an existing law, however, is the remedy of last resort. A Court must first attempt to make it conform with the Constitution utilising the tools provided by section 5(1) of the Constitution Act. It is only where such modification, adaptation, qualification or exception proves to be illusive or otherwise unavailable, that section 2 of the Constitution will kick in to invalidate the existing law.

141. As shown in ***Reyes*** and ***Roodal***, however, it is possible to modify the mandatory death penalty to make it conform with the Constitution. This can be achieved by modifying section 4 of the Offences of the Person Act to read: "Every person convicted of murder <u>may</u> suffer death."

Should Matthew be overruled?

142. In this section of the Appellant's submissions, your Lordships will be invited to overrule your decision in ***Matthew*** and to find that the mandatory death penalty stands modified pursuant to section 5(1) of the Constitution Act 1976 to bring it into conformity with sections 4 and 5 of the Constitution.

143. Firstly, the history of the savings law clauses will be examined, along with the case law interpreting and applying them, culminating in the decisions of your Lordships' Board in ***Roodal***, ***Matthew*** and ***Boyce***, and followed by the decisions of the CCJ in ***Nervais*** and ***McEwan***.

144. Next, the Appellant will analyse the reasoning of your Lordships' Board in ***Roodal***, ***Matthew*** and ***Boyce*** and of the CCJ in ***Nervais*** and ***McEwan***, with a view to identifying the essential points of difference.

145. Thirdly, the Appellant will present his case on the proper construction of the savings law clauses applicable in Trinidad and Tobago and will say why your Lordships should find that ***Matthew*** is wrongly decided.

146. Lastly, the Appellant will submit that this is an appropriate case for a departure from your Lordships' ruling in ***Matthew***.

History of savings law clauses

147. Jamaica was the first Commonwealth Caribbean nation to win its independence. This was achieved by the passage of the Jamaican Independence Act in the Parliament of the United Kingdom on 19th July 1962. Pursuant to section 5 of the West Indies Act of 1962, the Jamaican Order in Council 1962 was made to bring the Jamaican Independence Constitution into effect. The Constitution was set out in a Schedule to the Order.

148. Both the Order in Council and the Jamaican Constitution addressed the subject of the continuation in force of existing law. Clause 4(1) of the Order in General provided:

> "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order."

Section 26(8) of the Constitution provided as follows:

> "(8) Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.
>
> (9) For the purposes of subsection (8) of this section a law in force immediately before the appointed day shall be deemed not to have ceased to be such law by reason only of—(a) any adaptations or modifications made thereto by or under section 4 of the Jamaica (Constitution) Order in Council 1962, or (b) its reproduction in identical form in any consolidation or revision of laws with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision."

149. The chapter referred to in section 26(8) included the fundamental rights and freedoms to which Jamaicans were to be entitled.

150. The intention of these provisions was to save existing laws from invalidation but they went about that task in different ways. Section 4(1) of the Order in Council required a court to bring existing law into conformity with the Constitution by modifications or adaptations; section 26(8) did so by preventing existing law from being held to be inconsistent with the human rights provisions of the Constitution. It is to be noted, however, that the existing law which was ‘saved’ by section 26(8) included a law

which had been adapted or modified pursuant to section 4 of the Order in Council to make it conform to the Constitution.

151. For convenience, clauses such as section 4(1) of the Jamaican Order in Council will be referred to hereafter as modification clauses, while clauses such as section 26(8) will be referred to as savings law clauses.

152. Trinidad and Tobago was the second Commonwealth Caribbean nation to win its independence. Its independence Constitution was also brought into being by an Order in Council made in 1962 pursuant to section 5 of the West Indies Act of 1962, to which the Constitution was attached as a schedule. Like the Jamaican Order in Council, section 4 of the Trinidad and Tobago Order in Council also addressed the saving of existing laws. It provided as follows:

> "Subject to the provisions of this section, the operation of the existing laws after the commencement of this Order shall not be affected by the revocation of the existing Order but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order."

153. The Constitution also dealt with the saving of existing laws but a formulation of words different from its Jamaican counterpart was used. Section 3 of the 1962 Constitution provided as follows:

> "Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution."

154. Sections 1 and 2 of the 1962 Constitution contained a full listing of the fundamental rights and freedoms which were to be guaranteed.

155. Barbados won its independence in 1966. An Order in Council issued pursuant to section 5 of the Barbados Independence Act 1966 brought the Barbadian

Constitution into force. It too was a schedule to the Order. Article 4(1) of the Order provides as follows:

> "Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order."

156. The corresponding savings law clause in the Barbadian Constitution is similar to the Jamaican version. Section 26(1) provides as follows:

> "26(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question—(a) is a law (in this section referred to as 'an existing law') that was enacted or made before 30 November 1966 and has continued to be part of the law of Barbados at all times since that day; (b) repeals and re-enacts an existing law without alteration; or (c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent."

Early construction of the savings law clauses

157. The effect of section 26(8) of the Jamaican Constitution was the subject of early determination by your Lordships' Board in ***Director of Public Prosecutions v Nasralla*** [1967] 2 AC 238. Your Lordships observed (at pp. 247-248):

> "Whereas the general rule, as is to be expected in a Constitution and as is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III. This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed. Accordingly section 26 (8) in Chapter III provides as follows:

> "Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions."

158. The effect of section 3 of the Trinidad and Tobago Constitution was considered by the Court of Appeal of Trinidad and Tobago in ***Beckles v Dellamore*** (1963) 9 WIR 299. Wooding CJ referred to section 3 (at p. 304) as 'exempting' existing law "from the protective restraints imposed by ss 1 and 2 of the Constitution."

159. In ***De Freitas v Benny*** [1976] AC 239, decided on 15th May 1975, your Lordships proceeded on the basis that section 3 had the same effect as section 26(8) of the Jamaican Constitution. As Lord Diplock said (at p. 244 F-H):

> "Chapter I of the Constitution of Trinidad and Tobago, like the corresponding chapter III of the Constitution of Jamaica (see *DPP v Nasralla* [1961] 2 AC 238), proceeds on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2 are already secured to the people of Trinidad and Tobago by the law in force there at the commencement of the Constitution. ***Section 3 debars the individual from asserting that anything done to him that is authorised by a law in force immediately before 31st August 1962 abrogates, abridges or infringes any of the rights or freedoms recognised and declared in section 1 or particularised in section 2***.
>
> Section 2 is not dealing with enacted or unwritten laws that are in force in Trinidad and Tobago before that date. What it does is to ensure that subject to three exceptions no future enactment of the Parliament established by chapter IV of the Constitution shall in any way derogate from the rights and freedoms declared in section 1." (Emphasis added)

160. Section 3 accordingly has always been considered to be a 'shut-out' provision. Existing laws cannot be scrutinised to determine whether they conform with the human rights provisions of the 1962 Constitutions because the human rights provisions were declared not to apply to existing law.

Application of the modification clauses

161. The power to construe with modifications has always been accepted to be a wide one. In the Court of Appeal in ***Roodal***, de la Bastide CJ (as he then was), gave a

summary of his review of the relevant authorities in a passage which was referred to with approval by Lord Bingham in ***Director of Public Prosecutions v Mollison*** (at [25]) and by Lord Hoffmann in ***Matthew*** (at [21]):

> "Having made this review of the authorities, we are now in a position to assess the purport and effect of s 5(1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being "construed", the type of "construing" which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent nor is it attributing to existing laws a meaning which, although not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by "construing". It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law. Mr Daly's submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn the clock back."

162. Nonetheless, it is clear that, both as a matter of practice and as a matter of theory, there are accepted limits to the remedial process of construction with modification beyond which the Court would be left with no alternative but to find certain statutory provisions or schemes as a whole invalid, if not otherwise restrained.

163. One of the earliest cases applying the modification clause was the decision of your Lordships' Board in ***Kanda v Government of Malaya*** [1962] AC 322. In that case, the Police Ordinance, an existing law, provided that the Commissioner of Police had the power to dismiss an Inspector. However, Article 135 (1) of the Constitution of the Federation of Malaya provided that no member of the police service "shall be dismissed ... by an authority subordinate to that which, at the time of the dismissal ... has power to appoint a member of that service of equal rank." By the conjoint effect of Articles 140(1) and 144(1) the power to appoint members of the police service was vested in a Police Service Commission. Applying a modification clause, the Board held that since there could not, at one and the same time, be two

authorities with concurrent power to appoint members of the police service, the Constitution must prevail and the existing law has to be applied with such modifications as might be necessary to bring it into accord with the Constitution. Accordingly, the necessary modification was that since the commencement of the Constitution it was the Police Service Commission and not the Commissioner of Police which had power to appoint and dismiss members of the police service.

164. In ***Beckles v Dellamore*** (1965) 9 WIR 299, the Court of Appeal of Trinidad and Tobago applied the modification clause to construe the Emergency Powers Ordinance as requiring the Governor-General, when declaring a state of emergency, to further declare that action had been taken or was immediately threatened of the nature and on the scale set forth in Section 2 of the Ordinance. Such a construction was held to be necessary in order to bring the Ordinance into conformity with Section 8 of the Constitution. (See pp. 306J-307A, 313A and 318D)

165. In ***Tannis v Robertson*** (1973) 20 WIR 560, section 67 of the House of Assembly (Elections) Ordinance 1951, an existing law, provided that a person found guilty of bribery, treating, undue influence or personation shall (in addition to any other punishment) be incapable during a period of seven years from the date of conviction of being elected a member of the Legislative Council or if elected before his conviction, of retaining his seat as such member. On the other hand, section 29(3) of the Constitution referred to only two situations in which persons may be subject to disqualification for membership of the House of Assembly and these were (a) where a person was convicted by any court of an offence prescribed by Parliament which was connected with the election of elected members of the House of Assembly and (b) where a person was reported guilty of such an offence by the court trying an election petition. Cecil Lewis CJ (Ag) was of the view (at p. 566) that section 67 of the Ordinance specifically provided for the first situation but that it did not in terms provide for the second. Accordingly, applying the modification clause he was of the view that section 67 had to be construed as though the second situation envisaged by section 29(3) of the Constitution were therein provided for

and accordingly the section would be amended by inserting the words in italics as follows:

> "Every person who is convicted of bribery, treating undue influence or personation …..or who *is reported guilty of any of these offences by a court trying an election petition* shall (in addition to any other punishment) be incapable during a period of *five* years from the date of conviction, or *of the report as aforesaid*–
>
> (a)...
>
> (b) of being elected a member of the *House of Assembly* or if elected before his conviction, *or before the making of the said report*, of retaining his seat as such member."

166. The early cases recognised, however, that in some cases it may not be possible to find an appropriate construction with modifications which would make an existing law conform to the Constitution. The consequence of being unable to do so was that the existing law became a candidate for complete invalidation.

167. This is implicit in the following extract from the judgment of Phillip J.A. in ***Beckles v Dellamore*** (1965) 9 WIR 299, at 317, in which he described the purpose of section 4(1) of the Trinidad and Tobago 1962 Order in Council in the following terms:

> "The manifest intention of these provisions is, in my judgment, to make every effort to prevent the implied repeal of existing laws and to secure the continuance of their validity in so far as it is possible to make them conform with the provisions of the Constitution."

168. Similarly, the Court of Appeal of the West Indies Associated States thought that it had before it such a situation in ***Charles v Phillips*** (1967) 10 WIR 423, at 432F and ***Herbert v Phillips*** (1967) 10 WIR 435. The Court was of the view that the power given to the Governor by section 3(1) of the Leeward Islands (Emergency Powers) Order in Council 1959 to make such laws as appear to him to be 'necessary and expedient' for securing, inter alia, the public safety during a period of public emergency, was not in conformity with section 14 of the Constitution which required that measures taken during such a period, should be 'reasonably justifiable' for

dealing with the situation. However, the Court was of the view that it was impossible to construe section 3(1) of the Order in Council to bring it into conformity with section 14 and that, accordingly, section 3(1) remained inconsistent with section 14. The result was that regulations made under it were invalid – see ***Charles v Phillips***, at 434 C-F and ***Herbert v Phillips***, at 448 C and 449 I.

169. Your Lordships would later uphold the Court of Appeal's position in ***Attorney General of St. Christopher, Nevis and Anguilla v Reynolds*** [1980] AC 637. As Lord Salmon said on that occasion (at p. 655):

> "If the Court of Appeal were right in concluding that no modification or adaptation or qualification or exception could bring the Order in Council into line with the Constitution, then they would have been plainly right in holding that the Order in Council was nugatory and the Emergency Powers Regulations 1967 invalid."

170. Similarly, in ***Maximea v Attorney General*** (1975) 21 WIR 548, the Court of Appeal of the West Indies Associated States could not reconcile by construction an Ordinance which vested in the Governor the power to bring a state of emergency to an end, with the relevant provision of the Constitution of Dominica by which a state of emergency could only be terminated by the votes of a majority of the members of the House of Assembly. As a consequence, the relevant section of the Ordinance was deemed to have been repealed (see p. 555).

171. The decided cases have also recognised that however wide the power of modification might be, it does not give the courts unlimited power. In ***San Jose Farmers Cooperation Society Limited v Attorney General*** (1991) 43 WIR 63, both Henry P and Liverpool JA accepted that there were limitations on the power of modification. According to Henry P (at p. 70):

> "[Section 21] does not, however, in my view, detract in any way from the power of a court either during the five year period or afterwards to construe an existing law `with such modifications, adaptations, qualifications and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc must be such only as are necessary and a court must be wary of usurping

> the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution."

Liverpool JA spoke to similar effect (at p. 86ff):

> "Section 134(1) of the Constitution is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution; and it is acknowledged that the Land Acquisition (Public Purposes) Act is an existing law. In my view, the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."

172. These passages were cited with approval by Lord Bingham in his judgment in ***Director of Public Prosecutions v Mollison*** (at [24]). In ***Matthew***, Lord Hoffmann (at [49]), accepted that the power of modification had substantive limits, as for example, "when it presents the court with choices which are more appropriately made by the legislature." For his part, Lord Bingham in Matthew (at [50]) said that:

> "The authorities show that the power to modify, which is found in many constitutions, has been exercised judiciously and creatively to achieve constitutional conformity where this is possible, while stopping short of impermissible judicial legislation."

173. Another limit on the power of modification is where the Court is unable to find a sensible construction which would make the offending law conform with the Constitution. In ***Rojas v Berllaque*** [2004] 1 WLR 201, Lord Nicholls said (at pp. 208-209):

> "In the usual course the process of construction involves interpreting a provision in a manner which will give effect to the intention the court reasonably imputes to the legislature in respect of the language used. The exercise required by these transitional provisions is different. The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution. There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution."

174. Your Lordships' Board has also frequently exercised the power of modification to effect substantive changes to existing law.

i) In ***Vasquez v R, O'Neil v R*** [1994] 3 All ER 674, having found an inconsistency between the Criminal Code and the Constitution of Belize relating to the burden of proving or disproving provocation, the Board relied on the modification clause in Belize to rectify the anomaly by construing the relevant provisions to provide that murder would be reduced to manslaughter if there were evidence which raised a reasonable doubt as to whether the accused had been deprived of the power of self-control by such extreme provocation given by the other person, and as though the prefatory words in the relevant provisions stated that notwithstanding the existence of such evidence as was referred to in another section, the crime of the accused should not thereby be reduced to manslaughter in the circumstances specified;

ii) In ***R v Hughes*** [2002] 2 AC 259, your Lordships excluded the words "other than death" from section 1284 of the St Lucian Criminal Code with the result that the penalty of death was a discretionary rather than the mandatory penalty for murder;

iii) Similarly, in ***Fox v R***, your Lordships modified section 2 of the 1873 Offences Against the Person Act which provided that "Whosoever is convicted of murder shall suffer death as a felon", to read, "whosoever is convicted of murder may suffer death as a felon", thereby rendering death a discretionary penalty;

iv) In ***DPP v Mollison***, your Lordships modified the law under challenge to provide that a juvenile convicted of murder was to be detained at the Court's (instead of the Governor General's) pleasure; and

v) In ***Rojas v Berllaque*** [2004] 1 WLR 201, there was a challenge to the constitutionality of a section 19(1) of the Gibraltar *Supreme Court*

Ordinance by which all men in Gibraltar between the ages of 18 and 65 were liable to jury service and compelled to serve if selected, whereas under section 19(2) although women within the same age bracket might volunteer, service was not compulsory. Your Lordships held that, by discriminating between men and women, the sections violated the right to a fair hearing by an impartial court contrary to section 8(8) of the Constitution. Section 19(1) was accordingly modified to make it apply to women and section 19(2) was omitted altogether.

The enactment of the 1976 Constitution

175. By section 38 of the 1962 Trinidad and Tobago Constitution, Parliament was empowered to alter any of the provisions of the 1962 Constitution as long as special majorities of at least two-thirds of the members of the House of Representatives and three-quarters of the Senate were obtained. The power of alteration included the making of different provisions.

176. In 1976, the Parliament of Trinidad and Tobago exercised this power to repeal the 1962 Constitution and replace it with the 1976 Constitution. It passed the Constitution of the Republic of Trinidad and Tobago Act No. 4 of 1976 ("the Constitution Act"). Section 3 thereof repealed the 1962 Order in Council and declared the 1976 Constitution to have "effect as the supreme law of the State in place of the former Constitution." The 1976 Constitution was contained in a schedule to the Constitution Act.

177. Section 5(1) of the Constitution Act, in terms similar to section 4 of the Order in Council, provides as follows:

> "Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Trinidad and Tobago (Constitution) Order in Council 1962 but 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."

178. The human rights provisions are now contained in sections 4 and 5 of the Constitution and are in almost identical terms to section 1 and 2 of the 1962 Constitution. Section 6 replaced section 3. It used a different formulation of words to 'save' existing law. Instead of the human rights provisions being made inapplicable to existing law, they were now rendered incapable of invalidating existing law. Section 6(1)) provides that:

> "Nothing in sections 4 and 5 shall invalidate—(a) an existing law; (b) an enactment that repeals and re-enacts an existing law without alteration; or (c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right."

The road to Matthew

179. On the 12th November 2001, your Lordships granted Balkissoon Roodal leave to appeal against the sentence of death imposed upon him so that he could challenge the constitutionality of the mandatory death penalty. Your Lordships remitted the matter for consideration by the Court of Appeal.

180. By the time that appeal came up for hearing, your Lordships had delivered judgment on 11th March 2002 in the trilogy - ***Reyes v R***; ***R v Hughes*** and ***Fox v R*** - determining that the mandatory death penalty is a cruel and unusual punishment. Your Lordships exercised the power of modification in those cases to make the death penalty one to be imposed in the discretion of the trial judge.

181. Before the Court of Appeal, it was argued that the mandatory death penalty was inconsistent with section 5(2)(b) of the Constitution and stood to be modified under section 5(1) of the Constitution Act. It was argued that section 6(1) did not preclude modification under section 5(1) because it only prevented a law from being invalidated by sections 4 and 5 of the Constitution. It was also argued that the mandatory death penalty violated the separation of powers doctrine. On 17th July 2002, the Court of Appeal dismissed Roodal's appeal, rejecting each of his

arguments. This set the stage for the appeal which was determined in Roodal's favour by a majority of your Lordships.

182. In the meantime, the appeal in ***Director of Public Prosecutions v Mollison*** was heard by your Lordships. Judgment was delivered on 22nd January 2003. As is recorded at [27], Mollison had put forward a "fall-back" argument along the lines of the argument which was eventually considered by your Lordships in ***Roodal***, ***Matthew*** and ***Boyce***. Lord Bingham, then speaking for Lords Slynn, Clyde, Hutton and Walker, described the argument as 'ingenious' and but also saw its force and attractiveness. He said (at [28]):

> "A modification which preserves the essential purpose of the challenged provision while achieving conformity with the Constitution is one that it would be legally desirable to make. The Board would not wish to reject this argument, in which it sees very considerable force, but since it is unnecessary for the respondent to succeed on it in order to resist the appeal no final view need be expressed."

183. Your Lordships heard arguments in ***Roodal v State of Trinidad and Tobago*** [2005] 1 AC 328 from 23rd to 25th June 2003 and delivered judgment on 20th November 2003. A majority of your Lordships held that the mandatory death penalty was inconsistent with section 5(2)(b) of the Constitution and modified it under section 5(1) of the Constitution Act to make it conform. Section 6(1) did not preclude such modification, the majority held, because section 6(1) only prohibited invalidation, not modification.

184. As recorded in the judgment of Lord Hoffman in ***Boyce*** (at [63]) and in ***Matthew*** (at [29]), not long after ***Roodal*** was decided, the appeal in ***Boyce*** came up for hearing on appeal from Barbados. At the first hearing, a majority of your Lordships "felt some disquiet at the prospect of having to give a ruling for Barbados which they felt to be wrong simply out of conformity with the earlier ruling" in ***Roodal***. It was therefore directed that the appeal be re-argued before an enlarged Board for the specific purpose of determining whether ***Roodal*** was wrongly decided.

185. The appeal in ***Boyce*** was heard together with the appeals in ***Matthew*** and ***Watson***. A panel of eight of Your Lordships, joined by Zacca J of the Jamaican Court of Appeal, heard the three appeals. Your Lordships delivered judgment on 7th July 2005. By a majority of 5 to 4, which included Zacca J, ***Roodal*** was found to be wrongly decided and overruled. It was determined that in Trinidad and Tobago, as in Barbados, the effect of the savings law clause was that the mandatory death penalty was valid under the respective constitutions. Zacca J's vote, the lone Caribbean voice, was plainly decisive.

The road to Nervais

186. By an agreement dated February 2001, 14 members of the Caribbean Community established the Caribbean Court of Justice with appellate and original jurisdiction. Thus far, Barbados, Belize, Dominica and Guyana have made the necessary amendments to their laws and signed on to the Court's appellate jurisdiction. The seat of the Court is located in Trinidad and Tobago. The Court was inaugurated in 2005.

187. In one of its first judgments, ***Attorney General of Barbados v Boyce and Joseph*** [2007] 4 LRC 199, delivered on 8th November 2006, the Court noted (at [18]) that "the main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue."

188. In the exercise of its appellate jurisdiction in an appeal from Barbados, the CCJ determined in ***Nervais v R*** that the mandatory death penalty violated the Barbados Constitution and was not saved by the savings law clause from modification under the Order in Council. In so doing, their Honours overruled your Lordships decision in ***Boyce*** in so far as it applied to Barbados. ***Nervais*** was then followed in ***McEwan*** on an appeal from Guyana.

The decisions in Roodal, Matthew, Boyce, Nervais and McEwan

189. The Appellant will next analyse the decisions of Your Lordships in ***Roodal***, ***Matthew*** and ***Boyce*** and of their Honours of the CCJ in ***Nervais*** and ***McEwan***.

Roodal

190. The central ratio of the majority judgment in ***Roodal*** is contained at paragraphs 25-32 of the judgment. It is as follows:

(i) Firstly, section 5(2)(b) of the Constitution can be invoked to test the conformity of existing laws with the substantive human rights requirements of sections 4 and 5 of the Constitution. That is because section 6(1) of the Constitution does not operate as a "shut out" provision in the way that section 3 of the 1962 Constitution did (at [25]). As a consequence, the old case law that held that existing laws could not be tested for conformity with the human rights provisions of the Constitution – including ***De Freitas v Benny*** – are of no further relevance (since they depended on the language of section 3 of the 1962 Constitution).

(ii) Secondly, section 5 of the 1976 Constitution Act confers authority to "construe with such modifications, adaptations, qualifications as may be necessary" any provision of the existing laws that is identified as not in conformity with the requirements of the Constitution, including sections 4 and 5, in order to bring the provision into conformity with those constitutional requirements (at [26]-[28]).

(iii) Thirdly, section 6 of the Constitution – which prohibits the wholesale "invalidation" of existing laws for non-conformity with section 4 or 5 of the Constitution – "only comes into operation to preclude invalidation of an existing law which has proved irremediable by resort to modification" (at [26]).

191. As pointed out by the majority, this interpretation of the interrelationship between section 5 of the Constitution Act and section 6 of the Constitution would operate practically in the following ways:

(i) It would enable the courts to construe section 4 of the 1925 Act, read in conjunction with Section 68 of the Interpretation Act, as providing not for a fixed penalty of death for murder but for a maximum penalty of death;

(ii) It would, however, not warrant a challenge to the death sentence as such (at [28]);

(iii) This would ensure that section 6 only operated to preserve existing laws from wholesale invalidation on grounds of non-conformity with the Constitution.

192. The result is to provide both for the general continuity of existing laws and their modification where necessary. There is therefore a two-stage process once any element of an existing law has been identified as not in conformity with the requirements of sections 4 and 5 of the Constitution:

(i) The <u>first</u> stage is to determine whether the non-conformity with the requirements of sections 4 and 5 of the Constitution can be removed by the process of "construing with modification" authorised by section 5 of the Constitution Act;

(ii) It is only at the second stage, if conformity with the requirements of the Constitution cannot be so achieved by the process of construction, that section 6 of the Constitution comes into play. It only operates to protect existing laws from complete invalidation by reason of inconsistency with section 4 or 5 of the Constitution.

193. The Board identified a number of benefits of this two-stage approach as applied to section 4 of the Offences Against the Person Act. They are as follows:

(i) It allows a generous interpretation to be given to section 5 of the Constitution, which is designed to protect the human rights of individuals ([26]);

(ii) It allows a narrow rather than broad construction to the restriction on the protection of human rights in the savings clause in section 6 of the Constitution ([26]);

(iii) It affords a "workable and benign technique to give a reasonable measure of protection to fundamental rights in a practical world where there are inevitably tensions between individual rights and good democratic government" ([27]);

(iv) It allows the constitutional power to modify existing laws in cases of non-conformity to play a dynamic but not extravagant role ([28]);

(v) It enables the Constitution to be interpreted so as to conform with Trinidad and Tobago's international obligations. That is because the alternative approach would leave the courts powerless to modify existing laws which were not in conformity with the requirements of international human rights law ([29] and [30]).

Matthew

194. The majority in ***Matthew*** were satisfied from the onset that the language and purpose of section 6(1) were clear ([2]). Section 6(1) was not a transitional provision which would somehow become spent at some point in time. Rather, "it stands there protecting the validity of existing laws until such time as Parliament decides to change them." ([3]) Since the mandatory death penalty contained in section 4 of the Offences against the Person Act was an existing law when the 1976 Constitution

commenced, the effect of section 6(1) was that it cannot be invalidated by anything in sections 4 or 5. Their Lordships continued (at [14]):

> "As the Constitution contains no other provisions which can affect its operation or validity, it follows that if one is concerned only to construe the Constitution as the supreme law of Trinidad and Tobago, there is no basis for challenge."

195. Their Lordships considered the argument made on behalf of Matthew which they recounted as follows (at [16]):

> **"**He submits that section 6(1) does not mean that sections 4 and 5 have no application to an existing law. It says only that those sections shall not "invalidate" such a law. This is by contrast with section 3(1) of the previous (1962) Constitution, which said that the equivalent sections should "not apply" in relation to any existing law. Mr Fitzgerald described that subsection as a "shut-out" clause which precluded any judicial examination of whether an existing law was in conformity with the sections declaring human rights and fundamental freedoms. But the fact that sections 4 and 5 cannot invalidate an existing law does not mean that the law is deemed to be in conformity with them. The court is still obliged by section 5(1) of the 1976 Act to modify the existing law to bring it into conformity with sections 4 and 5. The only thing that it cannot do is wholly to invalidate such a law."

196. Their Lordships rejected this submission, indicating that it was for much the same reasons as they rejected a similar submission in ***Boyce v The Queen*** [2005] 1 AC 400. They described it (at [17]) as being "inconsistent with the supremacy of the Constitution, irrational in its consequences and contrary to the language and purpose of section 5(1) of the 1976 Act."

197. In sum, their Lordships could find no difference in effect between the 1962 savings law clause which provided that the human rights provisions did 'not apply' to existing law, and the 1976 savings law clause which provides that nothing in the human rights provision shall invalidate existing law. According to their Lordships:

> "18 A reading of the Constitution, without reference to the 1976 Act, leaves no doubt that sections 4 and 5 are not intended to have any effect on existing laws. The only way in which the Constitution provides for

> those sections to affect any laws is by its express provisions for the invalidity of any laws inconsistent with them: by the provision for such laws being "void to the extent of the inconsistency" in section 2 and the provision in section 5(1) that "no law may" abrogate the declared rights and freedoms and the provision in section 5(2) that "Parliament may not" do the specified acts. This is the language of invalidity. When section 6(1) provides that nothing in sections 4 and 5 shall invalidate an existing law, it precisely mirrors the effect which sections 2, 4 and 5 would otherwise have.
>
> 19 Their Lordships see no significance in the change of language from "shall not apply" to "shall not invalidate". If there was any deep purpose in this change, a reader of the Constitution would find it remarkably obscure. The effect is exactly the same. If some reason is required, it probably lies in the language of the declaration of supremacy in section 2—"void to the extent of the inconsistency"—which was new to the 1976 Constitution and which the draftsman thought it convenient to mirror with the words "Nothing … shall invalidate"."

198. Indeed, as their Lordships made clear in ***Boyce***, they considered that the two iterations of the savings law clauses in the 1962 and 1976 Trinidad and Tobago Constitutions had the same effect as the corresponding provision of the Barbadian Constitution. Section 26(1) of the Barbadian Constitution provides that nothing in an existing law shall be held to be inconsistent with the human rights provisions. As their Lordships said in ***Boyce*** (at [52]):

> **"**Their Lordships do not accept these refined linguistic distinctions. Section 26 has the sidenote "Saving of existing law" and section 3(1) of the 1962 Trinidad and Tobago constitution has the sidenote "Saving as to certain laws". Likewise, the 1976 Trinidad and Tobago constitution includes section 6(1) under the heading "Exceptions for existing laws" and gives it the sidenote "Savings for existing law". All three constitutions were intended to have an effect which can be described in various ways, all of which come to the same thing. In the past the Board has been inclined to regard them as creating an irrebuttable presumption that the existing laws were in accordance with the fundamental rights protected by the Constitution: see *de Freitas v Benny* [1976] AC 239, 244. Another way of putting the matter is to say that they make existing laws immune from any form of challenge by reference to sections 12 to 23. But that immunity is complete."

199. It is against this backdrop of what they thought to be the uncompromising, immunising effect on existing law wrought by section 6(1) that their Lordships turned to consider whether there existed any power under the modification clause in section 5(1) of the Constitution Act to modify existing law to make it conform with sections 4 and 5. Their Lordships were satisfied that no such intention could be found in section 5(1) and that any such interpretation would produce irrational results and accordingly ought to be rejected.

200. As to intention, their Lordships said (at [20]):

> **"**If the Constitution itself shows a plain intention to preserve existing laws, their Lordships find it impossible to accept that Parliament, by enacting section 5(1) of the 1976 Act, can have created a mechanism outside the Constitution for undermining the effect of its provisions. It is true that such a provision, enacted by a sovereign Parliament, would not have been ultra vires in the same way that their Lordships considered the equivalent provision in the Barbados Independence Order 1966 (SI 1966/1455) would have been: see *Boyce v The Queen* [2005] 1 AC 400. But section 5(1) was a virtually word for word reproduction of Article 4(1) of the Trinidad and Tobago (Constitution) Order 1962 (SI 1962/1875) which brought the 1962 Constitution into effect and it is difficult to believe that it was intended to serve a different purpose."

201. The irrational consequences of the construction for which Matthew contended, their Lordships said (at [21]), were fully discussed in ***Boyce***. The irrational consequences were said to flow from Matthew and Boyce's acceptance that there may be some cases where it is not possible to find any language by which an existing law may be modified, adapted, excepted or qualified to make it conform with the Constitution. In such a case, the law would be saved by section 6(1) of the Trinidad and Tobago Constitution or section 26(1) of the Barbados Constitution. The example which was given by Matthew and Boyce was the death penalty itself, as opposed to its mandatory aspect. If it was inconsistent with the Constitution, there would be no language which could be used to make it conform. As their Lordships described the argument in ***Boyce*** (at [37]), "securing conformity with sections 12 to 23 stops short at total rejection of an existing law, however non-conforming." The survival of an

existing law therefore depended on the form in which it was expressed, and not its substance – ***Matthew*** [21].

202. It was this distinction which gave rise to irrational consequences. As their Lordships said in ***Boyce***:

> "38 Their Lordships find it hard to imagine why the framers of the Constitution should have wished to install such an arbitrarily incomplete mechanism for securing conformity between existing laws and sections 12 to 23. That all existing laws should have to conform to principles of fundamental rights would have been understandable. That all existing laws should be exempt is explicable. But that the question should depend upon the mode of expression or conceptual unity of the particular law defies rational explanation. It would immunise only those laws which for linguistic or conceptual reasons could not be brought into conformity by anything which could be described as modification or adaptation."

203. As an example of the irrational consequences which might be produced, their Lordships imagined (***Boyce*** at [39]) a case where a law was passed before the Constitution came into force providing that "Anyone convicted of burglary may be sentenced to a whipping of not more than ten lashes." The law was intended to supplement already existing punishments of imprisonment, fines and community service. On the assumption that flogging would be found to be a cruel and unusual punishment under the Constitution, section 26 would have made it impossible for a court to hold that the Act was inconsistent and void and, their Lordships assumed, it would not be possible to find any language to make it conform. The law would accordingly be saved.

204. Their Lordships then imagined (at [40]) that before the Constitution came into force, the law had been consolidated to provide that "Anyone convicted of burglary may be sentenced to: (a) imprisonment; (b) a whipping of not more than ten lashes; (c) a fine; (d) community service." In such a case, their Lordships surmised, the existing law could be modified to excise flogging as a punishment, leaving the remainder of the law intact.

205. With this example in mind, their Lordships commented (***Boyce*** [41]):

> "Their Lordships do not accept that any legislator in his right mind would intend the application or disapplication of fundamental human rights to turn upon such a distinction—whether the offending substantive provision was contained in a single statute or formed part of a larger code. That would really be to give priority to form over substance."

206. Their Lordships also rejected Matthew's argument that section 5(1) should be construed such as to permit modification of existing law to make it conform with sections 4 and 5 in order to give effect to international obligations and a judicial policy of keeping the Constitution up to date. They did so, they said (at [24]), for the reasons given in ***Boyce*** for rejecting a similar argument. Those reasons are as follows (***Boyce*** [54-55]):

> "54 Both the attractive force of international human rights law and the "living instrument" principle have already been touched upon in their proper places. Their Lordships repeat that they do not intend to put in doubt the principle that if it is reasonably possible to give domestic law a construction which will accord with international law obligations, the courts will do so. But the construction of article 4(1) for which Mr Starmer contends is unreasonable to the point of being perverse. There is no ambiguity about the matter.
>
> 55 The relevant provisions are completely specific. Section 26 says that (contrary to the general provisions of section 1) certain specifically defined laws ("existing laws") and their replacements (as defined) shall not be held inconsistent with sections 12 to 23. It follows that they cannot be void under section 1. And as the Constitution contains no provision apart from section 1 which affects the validity or requires the amendment of any law, it follows that all existing laws are to be unaffected by sections 12 to 23. In laying down this rule, the Constitution employs no general concepts which need or invite being given a contemporary content by the courts. The protected laws and the extent of their immunity from challenge are stated in the most concrete terms. It is in any case difficult to address an argument that the law should be updated and not left trapped in a time-warp when the plain and obvious purpose of section 26 is that the existing laws should *not* be judicially updated by reference to sections 12 to 23."

Boyce

207. In ***Boyce***, your Lordships also proceeded on the assumption that the language and purpose of section 26(1) were clear. Their understanding was that "if one simply reads the Constitution, there is no basis for holding the mandatory death penalty invalid for lack of consistency with section 15(1)" – [2].

208. The argument made on behalf of Boyce was that the power of modification under Article 4(1) of the Barbados Order in Council could be exercised consistently with section 26 because (at [35])

> "to modify is not to hold inconsistent. All that section 26 prohibits is a judicial declaration that an existing law is entirely inconsistent with those provisions. If the existing laws can be modified in a way which leaves something standing, section 26 moults no feather. On the other hand, if there are linguistic or conceptual reasons why nothing short of the total inconsistency of an existing law will satisfy sections 12 to 23, then the fundamental rights declared by those sections are defeated and the existing law remains valid."

209. As with the argument which was rejected in ***Matthew***, their Lordships considered any such construction of Article 4(1) to be "(a) irrational in its consequences, (b) beyond the powers conferred by the Act under which the Order was made, and (c) inconsistent with its language and purpose" (at [36]).

210. The reasons why their Lordships thought the construction of Article 4(1) advanced by Boyce was irrational have already been set out above.

211. Their Lordships' criticism that the proposed construction was beyond the powers conferred by the Act under which the order was made, was a reference to the powers conferred by section 5(4) of the Barbados Independence Act 1966 which provides that a Constitution Order made under section 5(1), providing a Constitution for Barbados, "may contain such transitional or other incidental or supplementary provision as appear to Her Majesty to be necessary or expedient." (at [45]).

212. Their Lordships thought, firstly, that even if Article 4(1) could be construed in the way Boyce contended, they would not be prepared to hold that it ousted what they thought to be the clear effect of section 26 of the Constitution. As Lord Hoffmann put it (at [44]):

> "The Constitution is the supreme law of Barbados and the Constitution discloses a clear and unqualified immunisation of all existing laws from constitutional challenge under sections 12 to 23. But the appellant claims that this immunisation is substantially counteracted by a provision in the imperial subordinate legislation which brought the Constitution into effect but formed no part of the Constitution itself. Even if this appeared to be the effect of the Order, their Lordships would be reluctant to hold that it took priority over the manifest scheme of sections 1 and 26 of the Constitution."

213. But, secondly, their Lordships were satisfied that if Article 4(1) were to be construed the way Boyce contended, the Order in Council would have conferred a power which was ultra vires the Independence Act. The power of modification contended for, Lord Hoffmann said (at [46]):

> "cannot possibly be described as transitional, incidental or supplementary. On the contrary, it goes to the very substance of the Constitution and largely destroys the effect of section 26. That section reserves to the Parliament of Barbados the power to decide whether any existing law should be amended or repealed to conform to sections 12 to 23. The delegates to the London conference who agreed on the Constitution would have been astonished to find that by reason of a provision subsequently inserted into the Order in Council, existing laws would survive inconsistencies with those sections only if they were sufficiently self-contained in language and concept."

214. As to the language and purpose of Article 4(1), Lord Hoffman was no less dismissive of Boyce's arguments. At its core, he simply saw no way of getting around what he thought to be the clear meaning and effect of section 26 of the Constitution which, to his mind, excluded any basis for modification under Article 4(1). He said:

> "51 Article 4(1) requires any modifications to existing laws to be "necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order". The part of the Order with which section 2 of the 1994 Act is said not to be in conformity is section 15(1)

> of the Constitution annexed in the Schedule. But this submission of lack of conformity requires one temporarily to avert one's eyes from section 26, which makes it clear that there is no possibility of lack of conformity between existing laws and section 15(1). If the power of modification is to apply, there must be lack of conformity not just with one subsection of the Constitution but with the Constitution as a whole. Mr Starmer says that section 26 does not go so far as to prevent there being lack of conformity with the Constitution. All it does is to preclude a court from *holding* that there is an inconsistency between the 1994 Act and section 15(1). Until the moment at which such a non-declaration is made, there is a lack of conformity which can be addressed by exercise of the power of modification. Mr Starmer contrasts section 26 with what he calls a "shut-out" clause such as section 3(1) of the 1962 Constitution of Trinidad and Tobago, which said that the fundamental rights sections should "not apply" in relation to any law in force at the commencement of the Constitution. That, he says, was altogether different."

215. In the passage quoted at paragraph 198 above, Lord Hoffman rejected what he referred to as "these refined linguistic distinctions." Section 26 had the same effect as a provision which made the human rights provisions inapplicable to existing law. It rendered existing law immune from challenge by reference to the human rights provisions and the "immunity is complete".

Nervais

216. It is perhaps an understatement to say that in ***Nervais*** the CCJ was profoundly impressed if not disturbed by the stain on the development of the region's constitutional jurisprudence represented by the view that section 26 of the Barbadian Constitution immunised existing law from scrutiny through a fundamental rights lens. "The proposition," Sir Dennis Byron PCCJ declared (at [54]), "that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status." His criticism of the immunity with which section 26 was said to clothe existing law was relentless:

> "[58] The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with

> unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned…
>
> [59] It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights.[59] This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent."

217. The Court also approached the question of the interplay between the modification clause in Article 4(1) of the Order in Council and section 26 of the Constitution against the backdrop of the acknowledgment by the Government of Barbados that "the mandatory sentence of death under section 2 of the OAPA and the immunising effect of section 26 of the Constitution violate its obligations under international law" (at [19]). In 2007, the Inter-American Court of Human Rights had ruled in the case of ***Boyce v Barbados*** (Judgment of 20 November 2007 (Preliminary Objection, Merits, Reparations and Costs)) that "the failure of Barbados to amend or invalidate section 2 of the Offences Against the Person Act so as to bring its laws into compliance with the American Convention constituted a *per se* violation of Article 2 of the Convention and that section 26 of the Constitution effectively denied citizens in general, and the alleged victims of violation in particular, the right to seek judicial protection against violations of their right to life" (at [13]). A similar ruling was made by the IACHR in ***Dacosta Cadogan v Barbados*** (Judgment of 24 September 2009 (Preliminary Objections, Merits, Reparations, and Costs).

218. It is with these considerations in mind that Sir Dennis approached the task of determining what obligation Article 4(1) of the Order in Council imposed on the Court. He first observed (at [63]) that Article 4(1) "prescribes a mandatory direction

to construe the existing laws to bring them into conformity" which applied to all existing law. "The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it," he said (at [63]).

219. But in recognition of the reputed purpose of section 26 to save existing law, he held that Article 4(1) and section 26 must be read together, with section 26 being given a narrow construction with a view to according Barbadians a full measure of the protection of human rights solemnly declared in the Constitution.

> "[64] Where any person alleges that an existing law has been contravened or is contravening or is likely to contravene any of the provisions of ss 12 to 23 in relation to him, the Court must read s 4(1) of the Independence Order together with s 26(1) of the Constitution. In 1975, Dr Alexis, in his article 'When is an Existing Law Saved?', expressed the point that:
>
> > 'To apply to such existing laws the savings clause in the Independence Orders is to make those laws conform with the constitutional instruments. To apply only the savings clause in the Constitution is to apply the existing laws replete with their repugnancy. It would appear that, if anything, the clause in the Orders was intended to control the one in the Constitutions. At the very least, both clauses should be read together.'
>
> …
>
> [68] We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution. This interpretation should be guided by the lofty aspirations by which the people have declared themselves to be bound. A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights."

McEwan

220. Like Trinidad and Tobago, Guyana's Parliament engaged in substantial constitutional reform resulting in the repeal of its independence Constitution and its replacement in 1980 with a new Constitution. This was achieved by the passage of the Constitution of the Co-Operative Republic of Guyana Act 1980, section 7(1) of which provides that:

> "Subject to the provisions of this Act, the existing laws shall continue in force on and after the appointed day as if they had been made in pursuance of the Constitution but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

221. Also like in Trinidad and Tobago, the actual Constitution is a schedule to the Act and contains a savings law clause. Unlike Trinidad and Tobago, the savings law clause is more akin to its Barbados counterpart. Article 152 provides that:

> "… nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Articles 138 to 149 (inclusive) to the extent that the law in question –
>
> (a) is a law (in this Article referred to as, an existing law') that had effect as part of the law of Guyana immediately before then commencement of this Constitution, and has continued to have effect as part of the law of Guyana at all times since that day;
>
> (b) repeals and re-enacts an existing law without alteration; or
>
> (c) alters an existing law and does not thereby render that law inconsistent with any provision of the said articles 138 to 149 in a manner in which, or to an extent to which, it was not previously so inconsistent."

222. Articles 138 to 149 contain various human rights provisions. According to the CCJ in ***McEwan*** (at [37]): **"**The broad effect of the savings clause, read literally by many, is that these human rights, so carefully laid out in the Constitution, must give way to the dictates of a pre-Independence law until and unless the legislature amends the

pre-independence law." As in ***Nervais***, however, the Court in ***McEwan***, in a judgment written by its current President, Saunders PCCJ, drew attention to the impact which such an interpretation has on the cause of human rights.

> "[39] By shielding pre-Independence laws (referred to as 'existing laws', because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism. The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be precluded from finding a pre-independence law, indeed *any* law, to be inconsistent with a fundamental human right. Simply put, the savings clause is at odds with the court's constitutionally given power of judicial review."

223. With this and similar statements made in ***Nervais*** in mind, his Honour sketched out four approaches which would be adopted in construing Article 152, three of which are relevant for our purposes. He said:

> "[41] … Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. That was this Court's approach in *A-G v Joseph*[14] when we held that, in order to assure a condemned man the right to the protection of the law, a constitutional ouster clause did not prevent the courts from inquiring into the decisions of the local Mercy Committee.
>
> [42] There are at least four broad and interlocking approaches courts can take to ameliorate the harsh consequences of the application of the savings law clause. Firstly, even if one were to apply the clause fully and literally, because of its potentially devastating consequences for the enjoyment of human rights, *the savings clause must be construed narrowly, that is to say, restrictively*…
>
> [44] Thirdly, application of the clause may result in placing the State on a collision course with its treaty responsibilities and it is a well-known principle that *courts should, as far as possible, avoid an interpretation of domestic law that places a State in breach of its international obligations.*

> [45] The fourth approach is the most contentious. But it has support from very distinguished jurists. It is that *courts should first apply the modification clause to the relevant pre-Independence law before attempting to apply the savings law clause*. We consider each of these approaches in turn."

224. For the first approach his Honour relied on the judgment of your Lordships' Board in ***R v Hughes*** [2002] 2 AC 25 in which it was held (at [35]) that derogations from constitutional guarantees "are ordinarily to be given strict and narrow, rather than broad, constructions." As Saunders PCCJ elaborated:

> "[46] A restrictive interpretation and/or application of the savings clause is always warranted. There is a simple reason for this. It is the duty of the court to adopt a generous interpretation of the provisions related to fundamental rights. As far as possible, full effect should be given to the guarantees promised to the citizen in those rights. Several judges have affirmed this essential principle that savings law clauses must be given a narrow construction."

225. As to the third, his Honour relied on decisions of the Inter-American Court of Human Rights which has repeatedly held that savings law clauses produce consequences that violate the American Convention on Human Rights by denying the right to seek judicial protection against violations of guaranteed human rights" (at [54]) – see ***Hilaire v Trinidad and Tobago*** IACHR Series C no 9, IHRL 1477, 21 June 2002, para 152(c), and ***Caesar v Trinidad and Tobago*** (2005) 21 BHRC 305, paras 115–117; ***Boyce v Barbados*** (Preliminary Objection, Merits, Reparations and Costs, 20 November 2007), paras 75–80. The correct approach, his Honour held (at [55]), was "to interpret the savings clause as narrowly as possible so as to place the law in compliance with the country's international law obligations."

226. As to the fourth approach, as the Court did in ***Nervais***, his Honour (at [58]) expressly preferred the approach adopted by the minority in ***Boyce***. He viewed the effect of the savings law clause, when read together with the modification clause, as permitting the court "to identify an inconsistency between an existing law and the

fundamental rights in the Constitution and to modify the inconsistency out of existence. The savings clause would only be needed where it proved utterly impossible to modify the existing law to make it conform with the Constitution."

The differences in approach

227. It is possible to identify the following differences in approach taken by the majority in ***Matthew*** and ***Boyce*** and by the CCJ in ***Nervais*** and ***McEwan***.

i) The CCJ deliberately attempted to read the modification and savings law clauses together in order to discern their true intent. The majority in ***Matthew*** considered the meaning of the savings law clause on its own and then with that meaning in mind sought to determine what the modification clause meant or more particularly whether there was any room for its operation;

ii) The CCJ applied a narrow construction to the savings law clauses and kept in mind at all times the extent to which a broad construction was destructive of the fundamental rights project. The majority in ***Matthew*** did not, expressly at least, seek to put a narrow interpretation on the savings law clauses but indeed gave them the widest scope possible;

iii) The CCJ applied the principle that so far as possible the Constitution ought to be construed in such a way as to allow compliance with international obligations. The majority in ***Matthew*** thought that the principle was inapplicable.

The Appellant's case

228. For largely the reasons set out in the majority judgment in ***Roodal***, the minority judgment in ***Matthew*** and the decisions of the CCJ in ***Nervais*** and ***McEwan***, the Appellant respectfully submits that ***Matthew*** was wrongly decided.

229. As submitted above, section 4 of the Offences Against the Person Act is inconsistent with sections 4(a) and (b), 5(2)(b) (e), (f)(ii) and (h) of the Trinidad and Tobago Constitution. Section 2 of the Constitution provides that any law that is inconsistent with it is void to the extent of the inconsistency. 'Law' is defined in section 3(1) as including any enactment having the force of law and therefore includes legislation enacted prior to the commencement of the Constitution. Since, as submitted, section 4 of the OAPA is inconsistent with sections 4(a) and (b), sections 5(2)(b), (e), (f)(ii) and (h), it is accordingly liable to be declared void to the extent of the inconsistency.

230. However, the power of the Supreme Court to strike down existing law is restricted by section 5(1) of the Constitution Act and section 6(1) of the Constitution. On the one hand, section 6(1) provides that nothing in section 4 and 5 shall invalidate an existing law. On the other, section 5(1) of the Constitution Act commands that existing laws be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

231. In construing sections 6(1) of the Constitution and 5(1) of the Constitution Act, full effect must be given to the language used and it must be borne in mind that "the Constitution does not mean whatever we might wish it to mean" – see ***Hughes***, (at [25]). But, because section 6(1) is an exception to the rights and freedoms recognised and declared in sections 4 and 5, it must be given a strict and narrow, rather than a broad, construction – ***Hughes*** (at [35]).

232. Unlike section 6(1), section 5(1) of the Constitution Act is not to be given a narrow construction. While the intent of section 5(1) is to save existing law from being declared invalid for inconsistency with the Constitution, and to that extent may be said to limit the full effect of the fundamental human rights provisions, it achieves this by a different process, the purpose of which is to bring the offending existing law into conformity with the Constitution. As Phillip JA said in ***Beckles v Dellamore*** (1965) 9 WIR 299, at 317, in relation to the 1962 modification clause:

> "The manifest intention of these provisions is, in my judgment, to make every effort to prevent the implied repeal of existing laws and to secure the continuance of their validity in so far as it is possible to make them conform with the provisions of the Constitution."

233. In truth, therefore, section 5(1) promotes rather than derogates from the fundamental rights and freedoms recognised and declared in the Constitution and ought to receive an interpretation similar to that which is accorded to the human rights provisions. That is to say, it must be given a generous and purposive construction – ***Minister of Home Affairs v Fisher*** [1980] AC 319, at 328; ***Attorney General of the Gambian v Jobe*** [1984] AC 689, at 700-701; ***Matadeen v Pointu*** [1999] 1 AC 98, at 108; ***Reyes***, at para 26; ***Commissioner of Prisons v Seepersad***, supra, at [21]-[22]. In fact, in ***Attorney General of Saint Christopher v Reynolds*** (1979) 43 WIR 108, at 118b, your Lordships held that a similar provision in the Constitution of Saint Christopher and Nevis was to be construed "with less rigidity and more generosity than other Acts." In ***San Jose Farmers' Cooperative Society Limited v Attorney General*** (1991) 43 WIR 63, at 88 Liverpool JA said that the modification power must be undertaken by the Courts with "bold spirits". Indeed, as the authorities cited above indicate, the power of modification has been exercised in a generous fashion.

234. As Lord Bingham summed up the correct approach in his dissent in ***Matthew*** (at [45]):

> "In contrast with the broad and liberal construction to be given to constitutional provisions generally, and in particular those directed to the protection of human rights, the proper approach to the interpretation of savings clauses should be strict and narrow."

235. In obedience to section 6(1) of the Constitution, the Supreme Court is directed not to invalidate an existing law which might be in conflict with sections 4 or 5. But, adopting a strict and narrow construction, it is important to observe what section 6(1) does not provide. It does not say that sections 4 and 5 of the Constitution <u>do not apply</u> to existing law. In this regard, section 6(1) is to be contrasted with section

3(1) of the 1962 Constitution which provided that sections 1 and 2 thereof (the equivalent of sections 4 and 5 of the 1976 Constitution) ***shall not apply*** to existing law, thereby excluding all possibility of even an examination of existing laws to determine their compatibility with the human rights provisions. As Lord Diplock noted in ***Maharaj v A.G. of Trinidad and Tobago (No. 2)*** [1979] AC 385, at 395H:

> "In view of the breadth of language used in section 1 to describe the fundamental rights and freedoms, detailed examination of all the laws in force in Trinidad and Tobago at the time the Constitution came into effect (including the common law so far as it had not been superseded by written law) might have revealed provisions which it could plausibly be argued contravened one or other of the rights or freedoms recognised and declared by section 1. Section 3 eliminates the possibility of any argument on these lines."

236. Section 6(1) stops well short of either disapplying the human rights provisions in relation to existing laws or prohibiting them from being determined to be inconsistent with the Constitution. What section 6(1) does do, and this is all that it does, is prohibit the Court from invalidating an existing law which might abrogate, abridge or infringe section 4 or 5. It does not prevent a court from scrutinising existing law for compliance with sections 4 and 5. And it does not prohibit the Court from finding such a law to be inconsistent with sections 4 and 5.

237. In this regard, the Appellant respectfully commends the following passage from the judgment of Lord Bingham in ***Matthew*** (at [49]):

> "The *Oxford English Dictionary* defines the transitive verb "invalidate" as meaning "to render invalid; to destroy the validity or strength of (an argument, contract, etc); to render of no force or effect; esp to deprive of legal efficacy; to make null and void". This definition reflects ordinary usage. Thus section 6(1) provides that nothing in sections 4 and 5 shall render invalid or destroy the validity or strength of or render of no force or effect or deprive of legal efficacy or make null and void any existing law. But these meanings are, in our opinion, directed to total invalidity. This again reflects ordinary usage. If a passport is invalidated it will be null and void for all purposes. If a ticket is invalidated you cannot travel on it. If a credit card is invalidated it cannot be used. Thus whereas section 2 provides that any law other than the Constitution that is

> inconsistent with it is void to the extent of the inconsistency, section 6 provides that nothing in section 4 and 5 shall render an existing law null and void, devoid of all force and effect, wholly invalid. This does not preclude the application of section 5(1) of the Act, requiring an existing law to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with sections 4 and 5 of the Constitution where this can be done without annulling the existing law. To read the provisions in this way is to give effect to the principles of construction set out above in a way which the interpretation favoured by the majority does not."

238. Having found an existing law to be inconsistent with the Constitution, the Supreme Court ***must not*** then proceed to invalidate the existing law, because that course of action is prohibited by section 6(1), but it ***must*** heed the command of section 5(1) of the Constitution Act to construe the existing with such modifications, adaptations, qualifications and exceptions as to bring it into conformity with the Constitution. As Lord Bingham put it in ***Matthew*** (at [41]):

> "… sections 4 and 5 cannot be relied on to make an existing law null and void, or to deprive it of all legal efficacy, but … section 5(1) of the Act can be used to modify existing laws so as to bring them into conformity with the Constitution so long as such modification does not render the existing law null and void or deprive it of all legal efficacy."

239. Putting the argument the other way around, section 5(1) of the Constitution Act requires the Supreme Court to construe section 4 of the OAPA in such a way that the penalty of death is not mandatory for murder. That way, section 4 is brought into conformity with the rights to due process of the law, to the protection of the law and not to be subjected to cruel and unusual punishment etc. Such a construction would only be precluded if there were some other provision in the Constitution which forbids the scrutiny of section 4 to see if it conforms with the human rights provisions. A clause which made the human rights provisions inapplicable to existing law would have that effect. Section 6(1) does not do that. It precludes invalidation only. But because existing law can be brought into conformity with the Constitution by construction under section 5(1), no question of invalidity will ordinarily arise. It is only if it is impossible to find a construction which will make an existing law conform with

the human rights provisions that section 6(1) will come into play. In such a case, its effect would be to save the existing law from invalidation and preserve it in its pristine form. For example, on the assumption that the death penalty itself (as opposed to the mandatory nature of it) violates the right to life or the right to equality of treatment, as has been held in other countries, it would not be possible to construe it in such a way as to bring it into conformity with the Constitution. The death penalty is either unconstitutional or it is not. Rather than being declared void under the supreme law clause, however, the death penalty is saved from invalidation by section 6(1).

240. It is respectfully submitted that the dramatic change in the formulation of the savings law clause from the strident declaration of inapplicability of the human provisions in the 1962 Constitution, to the less comprehensive prohibition against invalidation in the 1976 Constitution, signifies a change in approach which embraces judicial review of existing laws for compatibility with the human rights provision.

241. By 1976, the framers of the Constitution must be taken to have been aware that the formulation contained in section 3(1) of the 1962 Constitution had the effect of protecting existing law from all scrutiny for compliance with the human rights provisions – vide ***de Freitas v Benny***, supra. Although under the 1962 Constitution, there was an equivalent of section 5(1) of the Constitution Act in section 4(1) of the 1962 Order in Council, construction thereunder to bring existing law into conformity with the fundamental rights and freedoms could not be carried out because section 3(1) of the 1962 Constitution made those rights and freedoms inapplicable to existing law. Existing law was presumed to conform with the fundamental human rights provisions and, therefore, construction with modification under section 4(1) of the 1962 Order in Council was a non-starter. Lord Bingham made this point in his dissenting judgment in ***Matthew*** (at [37]):

> "There was thus (in section 1) a presumption of past and a promise of future enjoyment of the listed rights, but (in section 3) an absolute exclusion of laws in force on the commencement of the Constitution ("existing laws") from the scope of sections 1 and 2. It is plain that sections 1 and 2 could not be relied on to challenge an existing law since

> sections 1 and 2 did not apply to any existing law. Thus the presumption of compliance was conclusive and irrebuttable, and the Board so held in *de Freitas v Benny* [1976] AC 239 and *Maharaj v Attorney General of Trinidad and Tobago (No 2)* [1979] AC 385. It follows that the power conferred by Article 4 of the Trinidad and Tobago (Constitution) Order 1962 could never be invoked to rectify an existing law said to be inconsistent with sections 1 and 2 of the Constitution, for the reason already given: that those sections did not apply to existing laws."

242. Accordingly, if it was the intention of the framers of the 1976 Constitution to maintain the *status quo*, it would have been the easiest thing simply to reemploy an equivalent of section 3(1) of the 1962 Constitution, in much the same way that the human rights provisions contained in sections 1 and 2 of the 1962 Constitution were repeated almost verbatim in sections 4 and 5 of the 1976 Constitution. In fact the framers used the "shall not apply" formula in two places in the Constitution – section 65(8) and 66C(1). The fact that they chose not to use it in the savings law clause suggests an intention to pursue some other objective. Lord Bingham also made this point in ***Matthew*** (at [48]):

> **"**In the 1976 Constitution, however, the wording of the savings clause was changed. The wording of section 3 ("Sections 1 and 2 of this Constitution shall not apply") was discarded and replaced in section 6 ("Nothing in sections 4 and 5 shall invalidate"). The State contends that this change of wording was intended to effect no change of meaning. We find this unconvincing. If a form of words has acquired a clear and settled meaning and the draftsman wishes to reproduce that meaning in a later statute, he uses the same form of words again. It is suggested that the new wording was a response to section 2, the supremacy clause, of the new Constitution, and we accept that it may well have been. But if it had been intended that sections 4 and 5 of the new Constitution should not apply to an existing law, there could have been no reason for not saying so."

243. Likewise, the framers must be presumed to have been aware that the absence of a savings law clause of any incarnation would have exposed all existing law to being declared void for inconsistency with the human rights provisions under the supreme law clause. This was the position later adopted in Canada and South Africa. The inclusion of section 6(1) in the 1976 Constitution and section 5(1) in the 1976 Constitution Act clearly indicates the rejection of this option.

244. The framers must also be assumed to have been aware that section 5(1) of the Constitution Act could be employed to effect substantial changes in existing law, as had happened on occasion in relation to equivalent clauses prior to 1976 – vide ***Beckles v Dellamore***, and the line of cases referred to above. And they must be assumed to have been aware, further, that where it proved impossible to construe an existing law so as to bring it into conformity with the Constitution, the existing law could be declared invalid – vide ***Charles v Phillips***, ***Herbert v Phillips***, and ***Maximea v Attorney General***, supra. The combination of section 5(1), permitting construction with modifications etc., and section 6(1), prohibiting invalidation but not making the human rights provisions inapplicable to existing law, displays an intention to subject existing laws to modification by construction to bring them into conformity with the human rights provisions, but nevertheless preserving the existing law in respect of which it is impossible to find a construction which would bring it into conformity with the Constitution.

245. In this way, the framers of the 1976 Constitution have managed to craft a position halfway between the one, later adopted in Canada, of exposing all existing law to invalidation, and the one embodied in the 1962 Trinidad and Tobago of making existing law absolutely immune from any review for inconsistency with the human rights provisions. The mid-way position, which is preferred by the majority in ***Roodal***, by the minority in ***Matthew***, and now by the CCJ in ***Nervais*** and ***McEwan***, is to preserve existing law with such modifications, adaptations, qualifications and exceptions as would bring them into conformity with the human rights provisions, or in their original form where such construction proves elusive.

246. The Appellant contends that section 4 of the OAPA violates his section 4 and 5 rights. He does not ask this Honourable Board to declare section 4 to be invalid by reason of such inconsistency. He could not ask that this be done because section 6(1) of the Constitution prohibits invalidation of an existing law by reason of inconsistency with sections 4 and 5. What he does ask is that the Board exercise its power under section 5(1) of the Constitution Act to construe section 4 in such a way

as to make death a penalty to be imposed in the discretion of the Court. If he is right in saying that section 4 is inconsistent with the fundamental rights provisions then this Honourable Board must comply with his wishes since section 5(1) mandates that existing law be construed with such modifications as may be necessary to bring it into conformity with the Constitution. The main question therefore is whether the Appellant is right in saying that section 4 does not conform with the Constitution.

247. In answering this question, this Honourable Board must consider all of the provisions of the Constitution which bear upon that question. Thus, it must examine the fundamental rights provisions and any other provision in the Constitution which might lead to a conclusion which defeats the Appellant's contentions.

248. On the face of it, section 4 is in conflict with sections 4(a) and (b) read with sections 5 (2)(b) (e), (f)(ii) and (h) of the Constitution. The question therefore is whether there is any other provision which precludes such a finding. The majority in ***Matthew*** held that section 6(1) has that effect. If it does, the Appellant's arguments on this point must fail. If it does not, the Appellant's arguments must succeed and a modification of section 4 must be made.

249. On the face of it, section 6 does not preclude a finding that section 4 is in conflict with the fundamental rights provisions. It does not in terms say that existing law conforms with the fundamental rights provisions. And it does not say that the fundamental rights provisions do not apply to existing law. The latter formulation was readily available to the framers of the 1976 Constitution but they chose not to utilise it. What section 6(1) says is that the fundamental rights provisions shall not invalidate existing law. The most obvious effect of section 6 is that an existing law which fails to conform with the fundamental rights provisions is nevertheless not invalidated by reason of such non-conformity. If that is so the existing law nevertheless remains a law which fails to conform with the Constitution and accordingly remains a candidate for modification under section 5(1). Section 5(1) requires construction with modification to remove any such non-conformity.

250. The interpretation of section 6(1) which the majority appears to have adopted is that because of section 6(1), an existing law which does not conform with the human rights provisions is nevertheless not in danger of invalidation and accordingly the need to modify under section 5(1) does not arise. Put differently, the purpose of section 5(1) is to construe with modifications in order to avoid invalidation. As such, once invalidation is precluded the power to construe with modification cannot be invoked. This interpretation requires a construction of section 5(1) which identifies its purpose as the avoidance of invalidation. However, on its face, section 5(1) simply requires construction with modification in order to avoid non-conformity.

251. The other interpretation of section 6(1) which the majority in ***Matthew*** appears to have adopted is that it actually transforms an existing law which in reality is inconsistent with the Constitution into one which positively conforms with the Constitution. But this requires reading into section 6 words which are not obviously there.

252. Even if either of these two interpretations were available they would result in giving section 6(1) a broad rather than a narrow interpretation and at the same time would involve giving section 5(1) a narrow rather than a broad interpretation. Settled principle, on the other hand, requires just the opposite. By contrast, consistent with such principle, the interpretation for which the Appellant contends involves a generous interpretation of section 5(1) and a narrow interpretation of section 6(1).

253. Respectfully, this is the only way to reconcile the two commands issued by the Parliament of Trinidad and Tobago when it enacted the Constitution Act. The first is the command in section 5(1) to construct existing law with the necessary modification etc. to make it conform with the Constitution. Read by itself, the court is required to modify the mandatory death penalty into a discretionary penalty. The second command is in section 6(1). The court is commanded not to invalidate existing law because of anything in sections 4 and 5. Construing section 6(1) narrowly, modifying existing law to make it conform with the Constitution, obviates

the need for invalidation and permits the court to obey the section 6(1) command as well.

254. It is respectfully submitted that reading section 5(1) of the Constitution Act and section 6(1) of the Constitution together in such a way as to harmonise their respective commands is consistent with the approach taken in ***Nervais*** and ***McEwan*** and by the minority in ***Matthew***. It is respectfully also now the correct approach. It is the correct approach because it accords with the three key principles of construction which are applicable to written constitutions:

    i) that laws (including the Constitution itself) must be construed in such a way as to promote fundamental rights and freedoms. Where therefore the Constitution can be interpreted in two ways, one which furthers constitutional rights and the other which does not, the former is to be preferred;

    ii) likewise, where the Constitution is subject to two interpretations, one which is consistent with international obligations and the other which is not, the former is to be preferred; and

    iii) provisions in the Constitution which restricts constitutional rights must be construed narrowly, and those which further constitutional rights must be construed generously.

255. As to the first principle, in ***George Worme and Grenada Today Limited v The Commissioner of Police*** [2004] 2 AC 430, the question was whether on a charge of criminal libel under of the Grenadian Criminal Code the burden of proof was on the prosecution to establish that the material published by the defendant was untrue. The offence was only committed if the material was published unlawfully and section 256 provided, in effect, that a publication was lawful if published on a privileged occasion. An occasion was absolutely privileged if the material published was true and for the public benefit. Applying the principle in ***Woolmington v Director of***

Public Prosecutions [1935] AC 462, your Lordships concluded that the burden of proof was on the prosecution. Their Lordships then continued (at [27]):

> "All this involves nothing more than the application of well-established principles of criminal law and procedure to this particular situation. But further support for this approach is to be found in section 8(2)(a) of the Constitution under which everyone charged with a criminal offence shall be presumed innocent until he is proved guilty. Although that provision does not prevent the legislature placing the burden of proof of certain facts on the defendant in an appropriate case, there would indeed be an inroad into the presumption if sections 256 and 257 were interpreted in such a way that a defendant could be convicted of criminal libel under section 253 while there remained a reasonable doubt whether he had acted unlawfully: *R v Whyte* (1988) 51 DLR (4th) 481, 493 per Dickson CJC, cited with approval by Lord Steyn in *R v Lambert* [2002] 2 AC 545, 570, at para 35. ***Where possible, legislation should be interpreted in such a way that it is consistent with the Constitution.*** The interpretation which their Lordships would in any event be disposed to adopt tends to make the relevant provisions conform to section 8(1)(a) of the Constitution." (Emphasis added)

256. In ***Public Service Appeal Board v Omar Maraj*** [2011] 3 LRC 616, your Lordships held (at [29]) that in construing provisions in a law which amended the Constitution, your Lordships "should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them."

257. As will be seen momentarily, the formulation of the test is almost identical to that applied in relation to international obligations. But it is submitted that an even more intense effort ought to be made to find an interpretation which conforms to the supreme law of the land enacted by the constitutional law making body.

258. There are now before your Lordships' Board two competing views by respectable jurists on the proper reconciliation of the modification and saving law clauses. The one which currently prevails in Trinidad and Tobago, is that of the majority of your Lordships in ***Matthew***. Its effect is to immunise provisions of the law which were in force when the 1976 Constitution commenced and which are known to violate the fundamental rights provisions of the Constitution. One such law which is preserved intact is the mandatory death penalty. Another is the method of execution by

hanging – ***Boodram v Baptiste*** [1999] UKPC 30. Another is a law which discriminates against married female public officers – ***Johnson v Attorney General*** [2010] 4 LRC 191.

259. The other view, which is held by the minority in ***Matthew*** and the Caribbean Court of Justice in ***Nervais*** and ***McEwan*** is that section 5(1) and section 6(1) are to be read together such that existing laws are not exempted from scrutiny for compliance with the human rights provisions. Rather the human rights provisions are respected by construing existing law with such modification as may remove the human rights violations.

260. In accordance with the approach recommended in ***Worme*** and ***Omar Maraj***, the latter interpretation is to be preferred.

261. It is apparent that in ***Matthew***, Lord Hoffmann disabled himself from considering the application of this principle of construction. From the onset, he indicated that section 6(1) was clear and brooked no construction other than the one which he put favoured. Indeed, he considered that the competing construction put forward by the Appellants and accepted by the minority was irrational in its consequences and indeed thought that no legislator "in his right mind" would adopt such an interpretation (***Boyce***, [41]). It has now transpired that the views of the minority in ***Matthew*** which the majority considered beyond the pale have now been accepted by the Caribbean Court of Justice.

262. It is significant in this regard to recall that the CCJ was set up to forge a Caribbean jurisprudence. Whatever the views of your Lordships might be on this appeal, therefore, accepted canons of constitutional constructions point your Lordships in the direction of accepting the views of the CCJ and of your own number which are consistent with the promotion of and do not derogate from the fundamental rights and freedoms of the Trinidad and Tobago Constitution.

263. The second principle of constitutional construction is that laws, including a Constitution, ought to be construed in such a way as to accord with the international obligations of Trinidad and Tobago. These principles are not in dispute. They were accepted by the majority in ***Roodal*** ([29] – [30]) and by all of your Lordships in ***Boyce*** ([25-26]). Lord Bingham in ***Matthew*** (at [55]) referred to the "common ground that if a provision of a state's domestic law is ambiguous and permits of two interpretations, one of which will accord with the state's international obligations and the other of which will involve a violation of those obligations, a court will so far as possible adopt that interpretation which will accord with the state's international obligations." Lord Hoffman (***Boyce***, at [25]) referred to "the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations." But he was quick to add that "so far as possible" means that "if the legislation is ambiguous ("in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty]") … the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty."

264. It is accepted by all that the interpretation of the Trinidad and Tobago Constitution which the majority in ***Matthew*** preferred puts Trinidad and Tobago in breach of its international obligations. But the reason why Lord Hoffman felt himself unable to apply this principle to favour the argument put forward by Matthew and accepted by the minority in ***Matthew*** are set out in [54] of his judgment in ***Boyce***:

> "Their Lordships repeat that they do not intend to put in doubt the principle that if it is reasonably possible to give domestic law a construction which will accord with international law obligations, the courts will do so. But the construction of article 4(1) for which Mr. Starmer contends is unreasonable to the point of being perverse. There is no ambiguity about the matter."

265. He dismissed the same argument in ***Matthew*** for these reasons – see ***Matthew*** [24].

266. It may have been understandable at the time that the majority in ***Matthew*** was hard pressed not to apply a principle of construction which depended upon the acceptance of the reasonableness of a construction of domestic law which they had just rejected. Having found that Matthew's proposed construction of section 5(1) and section 6(1) was not sustainable, it would have been unusual for the Board to nevertheless grant him the relief sought because his arguments were accepted by the minority.

267. However, the fact is that the views of the minority have now be accepted by the CCJ as the better way to interpret Caribbean Constitutions in order to give better protection to fundamental rights and freedoms. There is accordingly a reasonable construction of the Trinidad and Tobago Constitution which will avoid Trinidad and Tobago being in breach of its international obligations. At best, section 5(1) of the Constitution Act and section 6(1) of the Constitution create an ambiguity which in accordance with settled principles is to be resolved in a way which is consistent with this country's international obligations.

268. In ***Matthew***, while Lord Bingham was confident that his interpretation of the modification and savings law clauses was correct, he nevertheless was prepared to concede (at [55]) that section 5 of the Constitution Act and sections 2 and 6 of the 1976 Constitution were ambiguous, "as evidenced by the difference of opinion between ourselves and the majority and between the majority and the minority in *Roodal*." As a consequence, he thought it "relevant to explore the international obligations of Trinidad and Tobago in relation to the issue before the Board." This he did (at [55]-[58]), ending with an examination of the decision of the Inter-American Court of Human Rights in ***Hilaire, Constantine & Benjamin v Trinidad and Tobago*** (Ser C) No 94 (2002), 21 June 2002 in which that Court held (at [108]) that section 4 of the OAPA violates the prohibition against the arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Inter-American Convention. The Court assumed that section 6 of the Constitution immunised the mandatory death

penalty from challenge in our domestic court and for that reason also held (at [152c]) as follows:

> "The Offences against the Person Act is incompatible with the American Convention and thus any provision that establishes that Act's immunity from challenge is likewise incompatible, by virtue of the fact that Trinidad and Tobago, as a party to the Convention at the time that the acts took place, cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations."

269. In the premises, Lord Bingham concluded (at [59]) that the effect of reversing ***Roodal*** would be to put the Trinidad and Tobago in breach of its international obligations. It is respectfully submitted that ***Matthew*** ought to be overruled in order to permit Trinidad and Tobago to be in compliance with its international obligations.

270. The third canon of construction is that section 6(1) is to be construed narrowly, while section 5(1) is to be construed generously – ***Hughes*** (at [35]); ***McEwan*** (at [46]). The reconciliation of section 5(1) and section 6(1) which the minority in ***Matthew*** achieved and the CCJ has accepted as the proper approach to the Barbadian and Guyanese Constitutions give effect to these approaches. Regrettably, Lord Hoffman erred in failing even to consider the application of this approach to the construction of the savings law clauses. The principle stated in ***Hughes*** is not even mentioned in in his judgment in ***Matthew***. Instead, he adopted a construction of section 6(1) which can only be described as generous. In his view, section 6(1), which provides simply that sections 4 and 5 were not to invalidate existing law, had the same effect as section 3 of the 1962 Constitution which made the corresponding sections 1 and 2 inapplicable to existing law – see ***Matthew*** [19]; ***Boyce*** [52]. In fact, in ***Johnson v Attorney General*** [2010] 4 LRC 191, Lord Rodger, who was in the majority in ***Matthew***, considered that section 6(1) had an expansive meaning beyond that which is suggested by the words used. He said (at [13]):

> "The effect of s. 6(1) is that "existing law" is not to be invalidated by s. 4 of the Constitution and is not to be regarded as inconsistent with the Constitution by reason of anything in s.4. To put the point another way, s 6(1) makes an existing law constitutional, ie., consistent with the Constitution even though it would conflict with s. 4 if that section applied to it."

271. Respectfully, in complete defiance of the principle that provisions which derogate from fundamental rights and freedoms are to be construed narrow, the majority in ***Matthew*** gave section 6(1) a generous, if not extravagant construction.

272. This point may be illustrated by the application to existing laws of the principle that legislation is to be construed so far as possible as being consistent with and not in derogation of fundamental rights and freedoms. Where the fundamental rights and freedoms in a Constitution apply to existing law, it would be possible to construe the existing in accordance with a meaning which the words used can bear and which are consistent with fundamental rights. Construing existing law in this way does not invalidate the existing law nor suggest that it was even inconsistent with fundamental rights. It is giving it a meaning which it can reasonably bear.

273. Where the fundamental rights and freedoms do not apply to existing law, as was the case under the 1962 Constitution, there would be no basis for applying this principle of construction. The choice between an interpretation which did and did not further constitutional rights would have to be made on another basis. Indeed, because the fundamental rights provision did not apply, it would not even be possible to determine whether any interpretation of the existing law was or was not consistent with the fundamental rights. This is the effect of construing section 6(1) as having the same effect as section 3 of the 1962 Constitution.

274. On the other hand, construing section 6(1) narrowly as only prohibiting invalidation and not making sections 4 and 5 inapplicable to existing law, would permit the applicability of this most benign and salutary principle of constitutional construction. The extravagant construction which the majority put on section 6(1) has however precluded such an exercise altogether.

275. It is respectfully submitted that the cannons of construction relied on above are consistent with and derive potency from the aspirations of the People as expressed

by the framers in the preamble to the Constitution. As noted above, the preamble affirms that the nation of Trinidad and Tobago was founded upon principles that acknowledged faith in fundamental rights and freedoms, recognises that "men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law", and declares the desire that the Constitution should enshrine the above-mentioned principles. It is in this context that section 6(1) of the Constitution and section 5 of the Constitution falls to be construed.

276. In ***Commissioner of Prisons v Seepersad***, your Lordships noted (at [24]) that the "exercise of construing both section 4(a) and section 4(b) will also be informed by the immediate context of these provisions", including the preambular aspirations that fundamental rights and freedoms and the rule of law been enshrined in the Constitution. Similarly, in ***Belize International Services Limited v Attorney General of Belize*** [2021] 1 LRC 36, Jamadar JCCJ highlighted the importance of the preamble as an essential interpretative tool.

> "[303] These preambular principles and values have been widely recognised and accepted as having jurisprudential functions, both interpretatively and substantively. In fact, in reading the Constitution as a whole, the Preamble adds essential context to and informs the meaning, intention and purpose of the entire constitutional text. To disassociate the two, is to ignore a basic principle of statutory interpretation, that the text is to be read, understood and interpreted in its entire context. Dissociating the two, therefore, disembowels the substantive text of its integrity and authoritative functionality."

277. Respectfully, the generous construction which the majority in ***Matthew*** put on section 6(1) disappointed the aspirations of the People as expressed in the preamble to the Constitution. Lord Bingham also attached significance to the preamble in this context. He said (***Matthew***, [46]):

> "We attach significance to the principles upon which, as declared in the preamble to the 1976 (as to the 1962) Constitution, the people of Trinidad and Tobago resolved that their state should be founded. This declaration, solemnly made, is not to be disregarded as meaningless verbiage or empty rhetoric. Of course, the preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when

seeking to interpret those provisions (see *Bennion, Statutory Interpretation*, 4th ed (2002), Section 246) and ***any interpretation which conflicts with the preamble must be suspect***." (Emphasis added)

Irrationality

278. It is respectfully submitted further that the criticisms made by the majority in ***Matthew*** of the arguments put forward on the Appellants' behalf, and implicitly of the judgment of the minority, are not warranted.

279. Respectfully, there is nothing irrational about reading section 5(1) of the Constitution Act and Section 6(1) of the Constitution together to modify existing law where it is possible to make it conform, but to leave it untouched and therefore protected by section 6(1) in what must be the rare case where construction by modification is not available. As Lord Hoffmann accepted, one of the limits of the modification power is where the choices which are available to make the existing law conform as such that they are better left to the legislature to resolve. As a matter of principle, there can be nothing irrational about a scheme which requires existing law which does not conform with the Constitution to be brought into conformity by the judiciary, but in the rare case, leaves it to the elected representatives to resolve.

280. In this context, the Appellant relies on the following passage from the judgment of Lord Bingham in ***Matthew*** (at [54]):

> "We find nothing strange in a provision which requires a court to construe an existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with a human rights instrument but prohibits it from annulling the law. It is not dissimilar from the approach prescribed by sections 4 and 6 of the New Zealand Bill of Rights Act 1990 and sections 3 and 4 of the United Kingdom Human Rights Act 1998. The initial stage of interpretation is close to what the Court of Justice of the European Communities had in mind in *Marleasing SA v La Comercial Internacional de Alimentación SA (Case C-106/89)* [1990] ECR I-4135, 4159, para 8:
>
> "in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to

> interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter …"
>
> The result of our construction is, we accept, to require the rectification of some disconformities while leaving others unrectified. Those which cannot be rectified will generally be matters which call for legislative deliberation and on which the court is not well-equipped to intervene; they will not necessarily be the most flagrant or obvious infractions of human rights: compare the observations of Lord Hope of Craighead in *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467, 486-487, paras 66-69. But we cannot regard this outcome as less rational, or less likely to have been intended, than a prohibition for an indefinite period of rectification of any disconformities, whether large or small."

281. Undoubtedly, it is possible to imagine the anomalous case where the ability of the courts to modify an existing law into conformity depends upon the form which the law takes. Lord Hoffmann was able to produce a hypothetical case in his burglary and flogging example which no doubt would raise eyebrows, if in fact such a case existed. As yet, no concrete case of this nature has been put forward.

282. In any event, with respect, Lord Hoffmann was incorrect to assume that there was no modification which could be made to a law which empowered the judiciary to order that a person guilty of burglary be flogged, in the discretion of the Court. Although such a law, on the Appellant's argument, would be saved from total invalidation by section 6(1), it would be possible to modify away the more offensive aspects of the flogging penalty by qualifying or excepting the judicial discretion to require, for example, that the burden be put on the prosecution to establish beyond a reasonable doubt that flogging is the only penalty which would meet the imperatives of a rational judicial sentencing policy, and that the other available penalties of a fine, imprisonment or community service are inappropriate in the circumstances of the case. In other words, the law could be modified to create a presumption in favour of the other penalties, with flogging being reserved for the exceptional case. It is to be noted that in those territories of the Commonwealth Caribbean where the death penalty has been held to be discretionary, the judiciary has developed sentencing guidelines along these lines. The presumption is life,

with death reserved for the worst of the worst cases where the prosecution establishes beyond a reasonable doubt that the offender is incapable of reform – see for example ***Pipersburgh & Anor v. The Queen*** [2008] UKPC 11; ***Trimmingham v R*** [2009] UKPC 25.

283. But even if such an anomalous case does exist, it is extravagant to describe the scheme which allows it to continue in force as irrational, or the legislators who put it into effect (including implicitly those in the minority in ***Matthew*** who ascribe that intention to the legislators) as having lost their minds. It is uncontroversial that the power of modification in as broad as it is wide and that it would only be the rare case where it is not possible to find a modification, adaptation, exception or qualification which would made existing law conform to the human rights provisions. The scheme as devised would therefore result in the vast majority of offending existing laws being made to conform, leaving it to the legislators to deal with this rare case. It could not possibly be irrational to devise a scheme, or to construe the modification and savings law clause in such a way, as to ensure the fulfilment of the promise of protection and furtherance of fundamental rights and freedoms contained in the preamble to the Constitution of Trinidad and Tobago.

284. In this context, reference is made to section 26(9) of the Jamaican Constitution which defined the existing law which was 'saved' by section 26(8) as including a law which had been modified or adapted under section 4(1) of the Order in Council. One interpretation of this provision is that the expectation of the framers of the Constitution was that the existing law which was 'saved' had already been modified to make it conform with the human rights provisions, a view which is consistent with ***Roodal***, the dissenters in ***Matthew*** and ***Boyce*** and the CCJ in ***Nervais*** and ***McEwan***. In ***Watson v R*** [2005] 1 AC 472, Lord Bingham thought that section 26(9) was to be interpreted in this way. He said (at [58]):

> "We draw attention to the recognition in section 26(9) of the Constitution of Jamaica (quoted by Lord Hope in para 19) that an existing law may have been the subject of adaptations or modifications made under as well as by Article 4 of the Jamaica (Constitution) Order 1962. Article 4(1)

> requires existing laws to be construed with such adaptations and modifications as may be necessary to bring them into conformity with the Constitution. It cannot therefore be said that Article 4 has no application to laws bearing on human rights and in force immediately before the appointed day. Had the draftsman intended such a result, he would have had no difficulty in expressing it, as has been done elsewhere in the Constitution. Thus subsections (4) and (6) of section 24 provide that subsection (1) and (2), prohibiting discrimination, "shall not apply" in the circumstances specified... Language could have been used which would have made it quite plain that the human rights provisions in Chapter III of the Constitution were not to apply to existing laws, but this was not done and we cannot regard the omission as inadvertent."

285. If this is a correct interpretation of the effect of section 26(9), the legislators may have been 'out of their mind' to create a scheme under which existing law would be modified to make them conform with the human rights provisions, leaving it possible that the most egregious violations which could not be modified to make them conform would be saved by section 26(8). But it appears that this was an irrationality they were prepared to live with.

Language and purpose

286. As regards the proper interpretation of section 5(1) of the Constitution Act, Lord Hoffmann for the majority in ***Matthew*** (at [20]) thought it impossible to accept that in enacting section 5(1) Parliament could have intended to "have created a mechanism outside the Constitution for undermining the effect of its provisions." The premise of this statement is contained in the opening words of the paragraph: "If the Constitution itself shows a plain intention to preserve existing laws."

287. If, as in 1962, the Constitution had provided that the human rights provisions did not apply to existing law, it would indeed be impossible to accept that the modification clause permitted courts to modify existing law to conform with those very provisions which the Constitution says do not apply to existing law. But section 6(1) does not say that sections 4 and 5 do not apply to existing law. It says that sections 4 and 5 shall not invalidate existing laws. It is only because Lord Hoffmann felt that section

6(1) was properly to be read in this way that his refusal to countenance that section 5(1) empowered the court to modify existing law to make it conform with sections 4 and 5 makes any sense.

288. Lord Hoffmann's error, it is respectfully submitted was twofold. Firstly, he failed to seek to find a narrow interpretation of section 6(1) and secondly, he failed to approach the construction of sections 5(1) and 6(1) by reading them together in order to discern the true intention of the legislators. This is the approach which the minority in ***Matthew*** and the CCJ in ***Nervais*** and ***McEwan*** took, and they were correct to do so.

289. The Parliament of Trinidad and Tobago, exercising their power under section 38 of the 1962 Constitution, enacted the Constitution Act to which the 1976 Constitution was attached as a schedule. The Act must be read as a whole to determine what Parliament's true intention was. There are four commands of significance. The first two are that the 1976 Constitution is supreme (section 3 of the Act) and that any law inconsistent with the Constitution is null and void to the extent of the inconsistency (section 2 of the Constitution). The effect of this is that, subject to severance of the inconsistent parts, existing law which fails to conform with any provision of the Constitution, including sections 4 and 5, would have to be invalidated. This is buttressed by section 5(1) of the Constitution which provides that "no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of the rights and freedoms … recognised and declared" in section 4. Section 5(1) is expressed to apply "Except as otherwise provided in this Chapter and in section 54." Section 54 empowers Parliament to alter the Constitution. Section 13, which is contained in the Chapter in which sections 4 and 5 are located (ie Chapter I), expressly permits the passage of legislation which is inconsistent with sections 4 and 5, as long as the law is passed in the manner and form provided in section 13, and provided that the law is not shown to not "be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."

290. Also contained in Chapter I, is Part III which provides for "Exceptions for Emergencies" and permits the passage of legislation which is inconsistent with sections 4 and 5 as long as the legislation is declared to have effect only during the period of the emergency, and "except in so far as its provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation that exists during that period."

291. Section 6(1) of the Constitution is also contained in Chapter I. It does not in express terms permit legislation which is inconsistent with sections 4 and 5. Nor does it permit any law to abrogate, abridge or infringe the provisions of sections 4 and 5. It provides only that sections 4 and 5 shall not invalidate existing law. What section 6(1) actually does can only be determined after having discerned what Parliament in 1976 intended by the fourth command contained in section 5(1) of the Constitution Act. That section commands the modification of existing laws to make them conform with the Constitution. There are accordingly two commands issued at the same time: one requiring existing law to be made to conform with sections 4 and 5 and the other protecting existing law from invalidation. These two provisions must necessarily be read together to determine what Parliament intended. But they are not to be read together and construed in a vacuum. They are to be considered in light of cannons of constitutional construction which have served the advancement of fundamental rights and freedoms: provisions (like section 6(1)) which restrict constitutional rights are to be construed narrowly; provisions (like section 5(1)) which promote constitutional rights and constitutionalism are to be construed broadly; so far as possible a construction which promotes constitutional rights ought to be adopted; and so far as possible a construction which allows Trinidad and Tobago to comply with its international constitutional rights ought to be preferred.

292. Respectfully, Lord Hoffmann disabled himself from applying these principles by his primary failure to attempt to read section 5(1) and section 6(1) together. Rather, without regard and indeed contrary to these cannons of construction, he first construed section 6(1) in isolation and gave it an extravagant, not a narrow

construction, which gave section 6(1) the same effect as the now discarded section 3(1) of the 1962 Constitution.

293. It is this same error which led him to conclude that a construction of the Barbadian Article 4(1) which would permit modification to bring it into conformity with the fundamental rights provisions would have been ultra vires the Barbados Independence Act. That would only be so if, construed separately, as Lord Hoffmann did, section 26(1) was properly to be interpreted as shutting out an assessment of the question whether existing law was inconsistent with the fundamental rights provisions.

294. Lord Hoffmann, (at [20]), also had difficulty believing that section 5(1) of the Constitution Act was intended to serve a different purpose from that served by section 4(1) of the 1962 Order in Council. But since section 3 of the 1962 Constitution precluded any modification under section 4(1) to bring existing law into conformity with the human rights provisions (which did not apply existing law), it is unhelpful to make any comparison between the two provisions. Lord Hoffmann was only able to justify such a comparison because he had already determined that section 6(1) had the same effect as the section 3 which it replaced.

Location of the modification clause

295. Respectfully, nothing can be made of the fact that section 5(1) is not contained in the Constitution Act itself. It is contained in the Act of Parliament passed with a special, constitutional majority, which itself contained the Constitution as a schedule. Parliament's intention can accordingly only be determined by reading all of the provisions together.

296. Lord Hoffmann's error in failing to read the modification clause and the savings law clause together is also exemplified in his treatment of the argument in ***Boyce***. He said (at [51]) that the submission that existing law should be modified first under the modification clause required "one temporarily to revert one's eyes from section 26, which makes it clear that there is no possibility of lack of conformity between existing

laws and section 15(1)." But that is because, without any regard to what is intended by the modification clause, and without applying a narrow construction to section 26 of the Barbados Constitution, he had already determined that section 26 was a shut-out provision.

297. For all these reasons, it is respectfully submitted that ***Matthew*** was wrongly decided, or should now be considered to be so in light of the decisions of the CCJ in ***Nervais*** and ***McEwan***.

Overruling Matthew

298. It is respectfully submitted that while it is accepted that the fact that ***Matthew*** is wrongly decided is not by itself a sufficient basis for overruling it, there are a number of reasons why it would be appropriate to do so in this case.

299. Firstly, a nine member panel of your Lordships' Board has been assembled specifically to determine whether in light of ***Nervais*** and ***McEwan***, ***Matthew*** ought to be overruled. This is the very reason which was given in ***Matthew*** ([29]) and ***Boyce*** ([62]) for overruling ***Roodal***, a decision which had only recently been given. As your Lordships said in ***Matthew*** (at [29]):

> "For these reasons their Lordships consider that *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328 was wrongly decided. Mr Fitzgerald submitted that it should nevertheless be followed. In the ordinary way, that would be right. It is not the practice of their Lordships to depart from a previous decision merely because the Board as later constituted thinks that it was wrongly decided. But the present enlarged Board was constituted for the purpose of deciding whether *Roodal's case* should be followed not only in Trinidad and Tobago but also in other Caribbean states which have similar constitutions and a right of appeal to the Privy Council. Their Lordships consider that it would be impossible to apply it to other countries merely for conformity with Trinidad and Tobago but equally impossible to declare that it was not the law in other countries but still formed part of the law of Trinidad and Tobago."

300. And in ***Boyce***, your Lordships in the majority put it this way (at [62]):

> "The conclusion which their Lordships have reached on Article 4(1) of the Order in Council is different from that which was reached in *Roodal v State of Trinidad and Tobago* [2005] 1 AC 328 by a majority of the Board on the equivalent provision in the statute which brought into force the constitution of Trinidad and Tobago. There are differences in the language of the two Constitutions and the two modification sections but their Lordships do not think that they are material. Mr Starmer urged the Board not to depart from the earlier decision and ordinarily there would be powerful arguments for not doing so. In this appeal, however, their Lordships sit as the final court of appeal for Barbados. The issue is one of great public importance, not only so far as it concerns the death penalty but because the effect of the *Roodal* decision was to lay open the whole of the pre-independence law of Barbados to challenge for lack of conformity with any of the provisions of sections 12 to 23. A majority of the Board at the first hearing of this appeal felt some disquiet at the prospect of having to give a ruling for Barbados which they felt to be wrong simply out of conformity with the earlier ruling for Trinidad and Tobago. For these reasons, the appeal was directed to be reargued before an enlarged Board for the specific purpose of deciding whether the *Roodal* decision was correct. In these highly exceptional circumstances, their Lordships consider that as they have reached the conclusion that *Roodal* was wrongly decided, they should give effect to that conviction in deciding this appeal. The consequences for the law of Trinidad and Tobago will be considered in the opinion delivered in *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, the appeal from that country which was heard together with this one."

301. Secondly, as these passages indicate, the decision in ***Roodal*** was reviewed so soon after it had been handed down because of concern which some of your Lordships had of applying to Barbados a ruling in relation to Trinidad and Tobago which your Lordships thought was wrongly decided. But for the potential impact on Barbados, therefore, ***Roodal*** would have been left untouched.

302. However, ***Boyce*** has now been overturned by the CCJ in relation to Barbados with the result that the approach taken in ***Roodal***, which was overruled in ***Boyce***, now applies to Barbados. In these exceptional circumstances, it would only be right to

reverse ***Matthew*** and restore ***Roodal*** if your Lordships are persuaded ***Matthew*** was wrongly decided.

303. Thirdly, the ruling in ***Matthew*** has continued to effect injustice in Trinidad and Tobago by keeping in force laws (such as the mandatory death penalty and laws which discriminate against women, as in ***Johnson***) which are contrary to fundamental principles on which the Constitution of Trinidad and Tobago is based. If ***Matthew*** is wrongly decided, it should be reversed in order to remove the constitutional taint.

304. Fourthly, the effect of ***Matthew*** is to uphold the mandatory death penalty. If ***Matthew*** is wrong, it should be overruled precisely because its effect puts lives at stake. In ***Lewis v Attorney General of Jamaica*** [2001] 2 AC 50, your Lordships departed from your previous decisions in ***de Freitas v Benny*** and ***Reckley No. 2*** [1996] ACT 527 on this basis. According to Lord Slynn for the majority (at p. 75b):

> "Their Lordships are accordingly compelled to consider whether they should follow these two cases. They should do so unless they are satisfied that the principle laid down was wrong—not least since the opinion in the *Reckley (No 2) case* was given as recently as 1996. The need for legal certainty demands that they should be very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so. But no less should they be prepared to do so when a man's life is at stake, where the death penalty is involved, if they are satisfied that the earlier cases adopted a wrong approach. In such a case rigid adherence to a rule of stare decisis is not justified."

305. Fifthly, the CCJ was established for the purpose of forging a Caribbean jurisprudence based upon our own appreciation of the imperatives of the fundamental rights provisions of Caribbean Constitutions. To the extent that Zacca J was included in the nine member panel in ***Matthew*** to provide a Caribbean point of view and thereby to provide legitimacy to your Lordships deliberations, the ground has substantively shifted. The Caribbean view is now that existing laws must be modified first before the application of savings law clauses.

306. Sixthly, as exemplified in ***Nervais*** and ***McEwan*** there have been significant developments in the law since ***Matthew*** was decided both as to the proper construction of the interplay between modification and savings law clauses, and as to the scope of the separation of powers principle, the rule of law as an unwritten principle of the Constitution, and the related applicability of section 1 of the Constitution declaring Trinidad and Tobago to be a sovereign democratic state. The separation of powers doctrine developed in these submissions, although canvassed in ***Matthew***, was not dealt with. And the arguments based on the rule of law and section 1 are new.

307. For all of these reasons, your Lordships are respectfully invited to overrule ***Matthew***.

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10 September 2021

JCPC 2020/0051

IN THE JUDICIAL COMMITTEE ON APPEAL FROM THE COURT OF APPEAL OF THE REPUBLIC OF TRINIDAD AND TOBAGO

B E T W E E N:

JAY CHANDLER

Appellant

and

THE STATE

Respondent

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