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 RESPONDENT

References are given as **XX**, which is the page number of the Record and electronic bundle page, and **YY** which is the line or paragraph number where this is available

A. INTRODUCTION

Overview of the Respondent's position

1. On the face of it, this is another case about the death penalty. But as was the case in *Boyce v The Queen* [2005] 1 AC 400 and *Matthew v The State* [2005] 1 AC 433, the ramifications of the Appellant's submissions extend much further – a very important point which the Respondent respectfully emphasises notwithstanding the anxious scrutiny which, inevitably, and rightly, the mandatory death penalty demands.

2. If accepted, the Appellant's argument opens the door to the review and modification of all "*existing laws*", despite the clear terms (as the Respondent submits, they are and as the majority in *Boyce* and *Matthew* found them to be) of section 6 of the Constitution. Apart from the fact that such an intention is unlikely given the need for an orderly transition to a new Republic, if it *had* been the intention, it could easily have been achieved by the insertion of appropriate words in the Constitution itself, rather than by recourse to a convoluted argument, which depends not on the Constitution (the supreme law) but a process of construction by reference to a section of the enacting statute.

3. Furthermore, if accepted, the Appellant's argument has potential ramifications for amendments made to "*existing laws*" for contemporary purposes: because section 6 also insulates enactments which alter existing law but do not derogate from any fundamental right guaranteed by Chapter 1 of the Constitution in a manner in which or to an extent to which the existing law did not do so.

4. It is respectfully submitted that the savings clause in section 6 is of fundamental importance in the structure of the 1976 Constitution, and (as held by the majority in *Boyce* and *Matthew*) it would be wrong to give it a strained or artificial construction so as to render it inapplicable to laws such as section 4 of the Offences against the Person Act ("OAPA"). Not only would this potentially lead to a substantial body of laws being rendered invalid or uncertain, and thus undermine the rule of law, and undermine the good government and due administration of Trinidad and Tobago, but the whole purpose of section 6 of the Constitution (which was evidently to avoid such uncertainty and resulting challenges to the existing law) would then be defeated. Section 6 is drafted in such absolute and clear terms for this very good reason; and any alteration to it is a matter for the detailed consideration of Parliament.

5. Moreover, to adopt a fluid, or 'living instrument', approach to section 6 would not only be a contradiction in terms (a law expressly designed to preserve existing laws in 1976 cannot mean anything different now to what it meant in 1976), but would amount to a usurpation of the constitutional powers of Parliament. Under the Constitution, it is Parliament, and not the courts, which is entrusted with the power to change the Constitution, and to change existing laws, such as the mandatory death penalty, which has stood since at least 1842. Compare, for the importance of the courts not trespassing into matters of social policy which are for Parliament, for example, *R v Clegg* [1995] 1 AC 482 at 500G and the Latimer House Guidelines and related protocol.[1] Taken shortly, it is not open to the courts to adopt an interpretation of the savings clause which has the effect of transferring this power to themselves.

[1] See also *C (A minor) v DPP* [1996] AC 1 at 21C and 28C; *Palling v Cornfield* (1970) 123 CLR 52, 58-9 (Barwick CJ), 68 (Owen J); and *Bellinger v Bellinger* [2003] 2 AC 467 at [37].

6. It is respectfully submitted that the Appellant's argument overlooks or, at any rate, risks obscuring an obvious but critical point, namely that, whilst it is the role of the judiciary to ensure laws are in conformity with the Constitution, this can only be done where laws are not in conformity with the Constitution, or the Constitution permits the judiciary to perform this task. The Respondent submits that the effect of section 6 of the Constitution is to render the mandatory death penalty in conformity with the Constitution; this being so notwithstanding the fact, as was held in *Boyce* and *Matthew*, that it infringes section 5(2)(b) of the Constitution when read in isolation.

7. Whatever may be the deficiencies of the Constitution from a contemporary human rights perspective, the power to change it was reserved to the people of Trinidad and Tobago, acting in accordance with the procedure prescribed by the Constitution for its amendment. As Lord Hoffman said in *Boyce* at [29], "*That is the democratic way to bring a Constitution up to date.*" These words were echoed by Lord Hope in *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472 at [54] where he argued that the solution to the jurisprudential difficulties presented by general savings clauses lay not with the courts, but with the region's parliaments which had the power to remove these clauses from the Constitution. See further, Lord Hoffman in *Matadeen v Pointu* [1999] 1 AC 98 at [108] where he cited with approval Kentridge AJ in the South African Constitutional Court in *State v Zuma* [1995] (4) BCLR 401, 412: *"if the language used by the law giver is ignored in favour of a general resort to 'values', the result is not interpretation but divination".*

8. It is respectfully submitted that respect for the rule of law so dictates, especially in the relatively new constitutional democracies of the Caribbean; and that a careful balance must be maintained between judicial intervention and judicial restraint, so that the courts do not usurp the right of an informed electorate to shape a system of laws which is best suited to it. And, though perhaps obvious, it should not be overlooked in this regard that the Constitution was enacted by the legislature of the new democratic Republic of Trinidad and Tobago, not as a result of any colonial process. Far from section 4 of the OAPA involving any breach of the separation of powers, with respect, it would be inimical to the separation of powers for the Court to intervene as the Appellant suggests it should. See further, Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157D-H.

The Appellant's grounds of appeal

9. The Appellant's grounds of appeal against sentence are set out in the Statement of Facts and Issues at [**R1/260/24-29**]. The Appellant's written Case however seeks to add additional grounds based on section 4(b) (right to equality before the law and the protection of the law); section 5(2)(e) (right not to be deprived of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of rights and obligations) and section 5(2)(h) (right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms). The Respondent submits below that the arguments now raised for the first time on sections 4(b), 5(2)(e) and 5(2)(h) are entirely new points which the Appellant should not be allowed to raise on appeal but addresses them without prejudice thereto.

Structure of the Respondent's Case

10. The Respondent's Case addresses the Appellant's grounds, by reference to the agreed issues, in the order in which they are set out in the Statement of Facts and Issues [**R1/261-262**]. The Respondent will first explain why the Board should not reconsider its judgment in *Matthew*. In so doing, the Respondent will develop its submissions as to why the recent decisions of the Caribbean Court of Justice ("CCJ") in *Nervais v The Queen* [2018] CCJ 19 and *McEwan v Attorney General of Guyana* [2019] 1 LRC 608, upon which the Appellant's case is founded, do not provide a sufficient reason for the Board to depart from *Matthew*. The Respondent will then explain why the reasoning of the majority in *Matthew* was correct and that section 6 of the Constitution precludes the Appellant from advancing an argument that section 4 of the OAPA is inconsistent with any of the rights and freedoms protected by sections 4 and 5 of the Constitution. The Respondent will argue finally that there is nothing inconsistent with section 1 of the Constitution and/or the separation of powers in Parliament legislating to prescribe that the penalty for murder shall be death.

B. ISSUE 1: SHOULD THE BOARD RECONSIDER ITS JUDGMENT IN *MATTHEW v THE STATE?*

11. In *Nervais*, the CCJ held the mandatory death penalty to be a violation of rights protected under the Constitution of Barbados. In reaching this decision, the CCJ departed from the Board's judgment in *Boyce*, in which the Board held, by a five to four majority, that the mandatory death penalty for murder in Barbados was an "*existing law*" for the purposes of the savings clause in section 26 of the Barbados Constitution and was thus preserved from constitutional challenge. In the light of *Nervais*, the Appellant contends that "*it is only right that the Board now re-visit the issue of the lawfulness of the mandatory death penalty in Trinidad and Tobago*" [**R/209/14.4**]. The Appellant also relies heavily on the CCJ's judgment in *McEwan*, which concerned the constitutionality of a pre-independence law in Guyana, which makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose.

12. It is submitted that *Matthew* should not be reconsidered for the following six reasons.

First reason: *Matthew* was a decision of a board of nine which restated the law and has been followed ever since

13. Even in normal circumstances, special reasons would have to exist in order to justify the Board in departing from one of its previous decisions (see, e.g., the majority judgment in *Gibson v Government of the United States of America* [2007] 1 WLR 2367 at [25], and the minority judgment at [38]-[39]). But, *Matthew* was decided by an enlarged board of nine convened especially to resolve doubts which the Board entertained about *Roodal v The State* [2005] 1 AC 328 when the appeal in *Boyce* first came up for hearing shortly afterwards and to decide whether *Roodal's* case should be followed not only in Trinidad and Tobago but also in other Caribbean states in which similar questions arose and where likewise there was a right of appeal to the Board (see *Matthew* at [29]). The enlarged Board therefore considered cases from three jurisdictions, Trinidad and Tobago, Jamaica and Barbados.

14. As Lord Hoffman for the majority said in *Matthew* at [9]:

> "The purpose of the combined hearing was to arrive at a definitive ruling which could be applied to all constitutions having similar provisions in countries for which the Privy Council is the final court of appeal."

15. Therefore, as Lord Rodger put it later in *Johnson v The Attorney General of Trinidad and Tobago* [2009] UKPC 53 at [19]: *"There can be no question of the Board re-opening those hard-fought decisions - and, indeed, counsel for the appellants did not suggest that it should"*.

16. No considerations similar to those that led to the hearings in *Matthew* and *Boyce* by an expanded Board apply in the present case. The fact that the CCJ has chosen not to follow the decisions of the Judicial Committee in *Matthew* and *Boyce* does not alter the fact that the relevant savings clause has been considered twice at the highest level: first in *Roodal* and then, exceptionally, by an expanded Board in *Matthew* (at which time a similar clause in the Barbados Constitution was also considered in *Boyce*). Moreover, since then, the decision in *Matthew* has been considered and followed in numerous cases over a long period (some 17 years) – a further relevant factor when considering whether or not to follow a previous decision (even if it is considered clearly wrong): see *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, at p.993, per Viscount Dilhorne, cited by the majority in *Gibson*. If, as is submitted below, the reasoning of the CCJ in the decisions relied on by the Appellant is unconvincing (the Respondents would respectfully say clearly wrong), the position is *a fortiori.*

17. Further, *Matthew* simply restated the law on the relevant savings clause in section 6 of the Constitution as it had always been understood before *Roodal* since 1976, and, as noted, it has been repeatedly followed in Trinidad and Tobago since 2004. Thus, it has been followed not only in all the cases of murder where no particular legal issue arose, but also in those which did give rise to such an issue. See, in particular, *Miguel v The State* [2012] 1 AC 361 at [51], and *Pitman v The State* [2018] AC 35 at [47].

18. In both cases, following *Matthew*, the savings clause was held to apply to murder under section 4 of the OAPA, but in the case of *Miguel* it was held not to save a statute passed after 1976 which sought to reintroduce the felony murder rule; and in *Pitman* it was held

that its mandatory effect was moderated in cases of mental impairment by the impact of section 4A of the OAPA 1985, which introduced the defence of diminished responsibility, as a consequence of which mental impairment (even if not raised as a defence) would have to be taken into account by the Mercy Committee acting under sections 87 to 89 of the Constitution. But the premise in both cases was the same: the savings clause applied to the mandatory sentence provided for by section 4 of the OAPA.

19. Likewise, the ruling in *Matthew* on savings clauses has been followed by the Judicial Committee in other types of case as well. See *Johnson v The Attorney General* - a case on police service regulations, and *Seepersad v The Attorney General of Trinidad and Tobago* [2013] 1 AC 659 - a case on the Children Act 1925.

20. It is of course true that *Matthew* was a decision by 5 to 4, but that is not a material factor (if anything the reverse). See *Fitzleet Estates v Cherry* [1977] 1 WLR 1345 at 1349, *Gibson* at [22] and [37], and *Hunte and Khan v The State* [2015] UKPC 33 at [65] and [82].

21. More importantly, the decision of the majority in *Matthew* was that the appellant's arguments in that case on the savings clause were *"completely untenable"* and *"arbitrary to the point of absurdity"* (see [5], and cf. [5] of *Boyce*), a conclusion which the Respondent respectfully adopts in answer to the Appellant's points in this case (which are essentially just a re-run of the unsuccessful arguments in *Matthew*, at any rate as regards the proper construction of section 6 of the Constitution).

22. All the same points apply to the Appellant's separation of powers argument. This was rejected not only by the majority in *Matthew*, but also the minority who stated that it did not give the appellant in that case an independent ground of appeal. (See [27]-[28], and [62], and cf. [68]-[70] of *Boyce*.) If not unconstitutional and/or susceptible to modification because of the effect of section 6 of the Constitution, section 4 of the OAPA cannot be held to infringe the separation of powers (as to which, see further the Respondent's arguments below).

23. Further, it had always been understood before *Matthew* that section 4 of the OAPA did not infringe the separation of powers as reflected in sections 87 to 89 of the Constitution, and this aspect of the decision has also been followed ever since. See, for example, *Lendore v The Attorney General of Trinidad and Tobago* [2017] 1 WLR 3369 at [17], and [37]-[38], and *Pitman* at [50], which noted the availability of judicial review of the President's power of pardon and held as follows:

> "In the opinion of the Board, the existence of independent judicial control over the process provides sufficient constitutional safeguard for the cases under consideration [i.e. concerning those with mental impairment], and it is axiomatic that there is no systemic unconstitutionality where existing processes are capable of providing sufficient constitutional safeguard."

24. For these reasons alone, it is respectfully submitted that there can be no question of the Judicial Committee now revisiting its decision in *Matthew*.

Second reason: *Nervais* is not binding on the Privy Council

25. True it is, the CCJ in *Nervais* has departed from the related case of *Boyce*, but that is not a sufficient reason for the Board to depart from *Matthew*. After *Boyce*, Barbados chose to remove itself from the jurisdiction of the Privy Council as its supreme court and to submit itself instead to the jurisdiction of the CCJ. The Board in the present case is clearly not bound by the CCJ's judgment in *Nervais*, which concerned the Constitution of Barbados.

26. The CCJ is of course entitled to develop its own jurisprudence. In *Attorney General Barbados v Boyce and Joseph* [2006] CCJ 1 (AJ) the CCJ held at [18]: *"We shall naturally consider very carefully and respectfully the opinion of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court."*

27. But in *Nervais* itself, the CCJ commented at [7] that the development of its jurisprudence would require *"evolution and change in relation to the approach to the decisions from the Privy Council."*

28. However, if the CCJ develops its jurisprudence in a way which is in conflict with well-established and binding Privy Council authority, that is not a sufficient reason, of itself, for the Board to revisit that authority. This is particularly so where, unlike Barbados, the people of Trinidad and Tobago have decided not to substitute the jurisdiction of the CCJ for that of the Privy Council, which remains the apex court of Trinidad and Tobago. As to this, it is respectfully submitted that Lord Hughes' observations regarding the European Court of Human Rights and features of its jurisprudence that must be born in mind when considering the persuasiveness of its decisions in Trinidad and Tobago, as set out in *Lendore* at [60]-[61], apply with equal force to the CCJ and the persuasiveness of its decisions in Trinidad and Tobago. Two points. First, as Lord Hughes noted at [60], criminal law and procedure, and penal policy in general, are areas in which accepted practices are particularly liable to diverge as between different jurisdictions, where patterns of criminality, social attitudes to crime and the practical implications of penal policy may not be the same. Second, there is no commonality in Caribbean jurisprudence. The Appellant's case must be examined against the specific statutory and constitutional provisions which are peculiar to Trinidad and Tobago.

Third reason: *Nervais* turns on a point which does not arise in Trinidad and Tobago

29. As correctly noted by the Appellant, the decision of the majority of the CCJ in *Nervais* was premised on the argument that section 11 of the Constitution of Barbados gave rise to a free-standing right to life, liberty, the security of the person and the protection of the law, which, it was held, was not subject to the savings clause in section 26 of that Constitution. Therefore, as the mandatory death penalty infringed this free-standing right, it was *ipso facto* unconstitutional, and section 26 had no application. See in particular the judgment of the majority at [20]-[42]. (Whilst at [51]-[59] the majority address the savings clause they do not engage with the arguments considered at length in *Boyce* and *Matthew*, see further below.)

30. However, in Trinidad and Tobago, there is no room for any such argument, as the Constitution has a different structure. The material part of the preamble provides that:

> "Whereas the People of Trinidad and Tobago …

> (e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms.
>
> Now therefore the following provisions shall have effect as the Constitution of the Republic of Trinidad and Tobago".

31. Clearly, there can be no question of this preamble operating as a self-standing right independent of sections 4 and 5 of the Constitution so as to give the Appellant a similar way round section 6 as the majority of the CCJ found was provided by section 11 of the Barbados Constitution, nor has this been suggested. And any such suggestion would be untenable, as it would render section 6 otiose (a point that the majority in *Nervais* do not deal with – see ¶41 below).

32. Furthermore, the equivalent of section 11 in the Constitution of Barbados (as it was interpreted by the CCJ) is section 4 in the Constitution of Trinidad and Tobago (the recognition and declaration of rights and freedoms). Whilst, however, section 11 of the Constitution of Barbados is not subject to the savings clause in section 26 thereof, section 4 of the Constitution of Trinidad and Tobago is expressly subject to the savings clause in section 6 thereof.

33. This underscores a crucial point in this case, namely that the focus must be on the specifics of the Constitution of Trinidad and Tobago, rather than generalities concerning savings clauses (cf. the approach of the majority in *Nervais* at [53], [55], [58] and [59]), which vary widely throughout the Caribbean and appear in over forty per cent of the constitutions of the world.[2] Cf. per Lord Steyn at [22] in *Roodal*, "*Generalising about the effect of [provisions in the Constitution and 1976 Act which govern the position of existing laws] in different contexts is to be avoided. An intense focus on the particular provisions applicable in Trinidad and Tobago, in the context of the specific problem before the Board, is necessary.*"

34. The Appellant refers to savings clause in various Caribbean constitutions without acknowledging the difference in their wording and therefore their scope. For example,

[2] *Constitutional Dialogue: Rights, Democracy, Institutions*, Chap. 11 – Cambridge University Press, 2019.

some savings clauses are general in nature,[3] protecting all laws existing at the time of the constitution's adoption, or specific or partial, protecting only certain specified laws;[4] some savings clauses may be temporary, lapsing after a few years, or form part of the permanent features of the constitution;[5] and some savings clauses only protect written enactments from constitutional challenge.[6] The point is this: whilst there are similarities between the various Caribbean constitutions, their particular provisions may lead to fundamentally different results on similar issues.

Fourth reason: *Nervais* treats the savings clause as a peripheral issue

35. It is evident that the main focus of the majority judgment in *Nervais* concerns the argument on section 11 of the Constitution of Barbados. It is respectfully submitted that such focus inevitably shapes the approach of the majority to the savings clause.

36. The issues to be determined in *Nervais* were set out by the CCJ at [4]: (i) Is section 11 of the Constitution separately enforceable? (ii) Does section 2 of the OAPA breach section 11(c) of the Constitution? (iii) To what extent, if at all, can section 2 of the OAPA be modified to bring it into conformity with the Constitution? (iv) Whether section 2 of the OAPA breaches sections 15(1) or 18(1) or 12(1) of the Constitution?

37. Consideration whether the legislation in question (section 2 of the Barbados OAPA) was inconsistent with a provision of the Constitution, which was expressly subject to the savings clause, was thus not considered an issue by the majority. The majority's analysis of the savings clause is 'through the back door' (at [50]): *"Although section 11 is not so limited by section 26, sections 12(1), 15(1), and 18(1) which the Appellant have relied on are so limited. As such, we propose to address the section 26 argument first before turning to the issue of modification."*

[3] See e.g., Trinidad and Tobago Constitution, section 6; Barbados Constitution, section 26; Guyana Constitution, section 152.
[4] See e.g., Botswana Constitution, section 19(2) and (3) (protecting the disciplinary law of the disciplined forces from invalidation).
[5] Belize was the only Caribbean state to include a transitory rather than permanent savings clause. Section 21 of the Belize Constitution provides, "*Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Part.*"
[6] See e.g., the Barbados and Guyana Constitutions which save only existing "*written law*" (Barbados Constitution, section 26 and Guyana Constitution, section 152). In contrast, the Trinidad and Tobago Constitution saves all existing law, including the common law (Trinidad and Tobago Constitution, section 6).

38. The main effect of this approach is that the savings clause is given peripheral and, with respect, superficial treatment. The savings clause is disposed of in the majority's judgment in just nine paragraphs. On any view, it was not subject to the same level of scrutiny and reasoning as it was by the nine-member Board in *Boyce* and *Matthew*. Moreover, it would seem clear that the conclusion of the majority is driven not by an intense focus on the relevant constitutional provisions but, with respect, an unwillingness to accept the conclusion, as the majority saw it, that the rights and freedoms guaranteed by the Constitution should be denied *"forever"* or *"in perpetuity"*: see the majority judgment at [53], [55], [58] and [59]; and see further below.

39. There is no clear and obvious reason why the majority's conclusion in *Nervais* regarding savings clause should be preferred to that in *Boyce* and *Matthew*. There is no new argument regarding savings clauses which was not already considered in *Boyce* and *Matthew*; there is simply a difference of opinion on the same arguments and, as noted, little reasoning to support the CCJ's view.

Fifth reason: *Nervais* is unconvincing

40. It is respectfully submitted that the reasoning of the majority in *Nervais* is unconvincing.

41. First, the argument based on section 11 is inconsistent not only with the decision in *Boyce* (where the argument was not even run), but also with the Board's decisions on materially identical provisions in the Maltese, Dominican, Jamaican and Bahamian Constitutions (see, respectively, *Olivier v Buttigieg* [1967] 1 AC 115 at 128, *Blomquist v Attorney General of the Commonwealth of Dominica* [1987] AC 489 at 499, *Campbell-Rodriques v Attorney General of Jamaica* [2007] UKPC 65, esp. at [7]-[12], and *Newbold and others v Commissioner of Police* [2014] UKPC 12, esp. at [27]-[33]). There is simply no precedent for this argument in the jurisprudence of the Privy Council. Further, it renders the savings clause in section 26 otiose. It is respectfully submitted, so far as material, that the dissenting judgment on this point of Winston Anderson J at [76]-[91] of *Nervais* is unanswerable.

42. Second, there is no attempt in any of the judgments to deal with the issue of *stare decisis*, or to explain why it was that the CCJ regarded itself as free to depart from the Board's

decision in *Boyce* without addressing the issue. In particular, they do not address the point that that decision had been made by a Board of nine specifically to resolve the issue of how to interpret the savings clauses in the Barbados and other Constitutions. Of course, it is for the CCJ to develop its own jurisprudence, but if it does so without reference to the principle of *stare decisis* in dealing with Privy Council decisions, there is all the less reason for the Board to revisit its own decisions on the same or similar points.

43. Third, regarding the savings clause, a primary reason for the rejection by the majority in *Nervais* of the majority's judgment in *Boyce* and *Matthew* appears to be related to the rationale of the savings clause. Thus, commenting on *Boyce*, the majority noted at [11]: *"It may be that the division of opinion arose because there was more than one school of thought on the content of the fundamental human rights provisions in the Constitution and this was to some extent referenced in paragraph 32 by Lord Hoffman in Boyce and Joseph."*

44. However, the rationale of the savings clause was tangential to the majority's judgment in *Boyce* and cannot be characterised as the central reason for the division of opinion of the Board. See the majority judgment in *Boyce* at [33]: *"It is however unnecessary to devote too much time to speculating about the thought-processes of the framers of the Constitution because, whatever may have been their reasons, they made themselves perfectly clear. Existing laws were not to be held inconsistent with sections 12 to 23 and therefore could not be void for inconsistency with the Constitution."* As a result of the focus on the rationale of the savings clause, the majority's judgment in *Nervais* fails, with respect, to grapple with the wording of the clause and the multifaceted reasoning of the majority judgments in *Boyce* and *Matthew*. Rather, as noted, the approach of the majority appears driven by an apparent unwillingness to accept the conclusion, as they (wrongly) saw it, that the rights and freedoms guaranteed by the Constitution should be denied *"forever"* or *"in perpetuity."* See further, Lord Hoffman in *Matadeen* at [108].

45. Fourth, the majority's approach in *Nervais* to interpretation appears to rest on a false assumption, namely that the process that led to the adoption of Caribbean constitutions diminishes the weight to be attached to their text and erodes their democratic legitimacy: see the majority judgment at [53], [55], [58] and [59]. First, two of the Constitutions – Trinidad and Tobago in 1976 and Guyana in 1980 – were re-enacted post-independence

and cannot, therefore, be accused of being tainted by the influence of the Colonial Office. Second, the link between the process of constitution making and democratic legitimacy has been subject only to very limited scrutiny.[7] And it does not follow that the degree of public participation, which in any event varied from country to country across the Caribbean, is the sole, or even the best, criterion for judging the democratic legitimacy of the region's constitutions. Third, by questioning the democratic legitimacy of Caribbean constitutions, the CCJ risks undermining the whole interpretative process.[8]

46. Fifth, the majority in *Nervais* consistently overlooks that the intention and effect of the savings clause in section 26 of the Barbadian Constitution was <u>not</u> to trap Barbados "*forever*" into existing laws, such as the mandatory penalty for murder, but to leave the question of whether to change them, and if so in what way, to the democratically elected Parliament. That is a rational and understandable scheme for any legislator. Parliament can amend the wording of the existing law or amend the Constitution by an Act of Parliament. See, for instance, the majority judgment in *Matthew* at [6] and in *Boyce* at [56]; and contrast the majority's judgment in *Nervais* at [11], [57]-[59], and [63]-[65]. The primary agent for constitutional change should be the legislature as this upholds and promotes democratic legitimacy. As *O'Brien* contends:

> *"Moreover, the criticism of the failings of the region's legislatures should not be allowed to overshadow entirely the republican virtues of the amendment procedures to be found in each of the region's constitution – special legislative majorities or referendum, or a combination of both – and their potential to enhance democratic participation, in a way that amendment by means of judicial interpretation alone cannot do.*[9]*"*

47. Further, the judiciary's limited role as an agent for constitutional change is a result of the clear wording of the Constitution which Parliament chose to adopt. See the majority judgment in *Boyce* at [55]: *"It is in any case difficult to address an argument that the law should be updated and not left 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 section 12 to 23."*

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[7] Ginsburg, Elkins and Blount, "*Does the Process of Constitution-Making Matter?*" (2009) 5 Ann.Rev. Law Soc. Sci 201, 215.
[8] Derek O'Brien, "*The Interpretation of Commonwealth Caribbean Constitutions, Does Text Matter*" (2020) p.555-581 at 577.
[9] O'Brien *(supra)*, p.578.

48. Sixth, in *Nervais* at [53] the majority suggests that judges in an independent Barbados being forever prevented from determining whether the law inherited from the colonial government conflicts with fundamental provisions of the Constitution of Barbados, is inconsistent with *"the concept of human equality which drove the march to independent status."* Be that as it may, it is respectfully submitted that any suggestion that the interpretation of the savings clause by the majority in *Boyce* and *Matthew* does not reflect the clear legislative intent of the Parliament of Trinidad and Tobago is not supported by the wording of the Constitution, substantive reasoning or evidence. In fact, Lord Millett and Lord Walker in the dissenting judgment in *Roodal* at [93] state that, *"such indications as there are of Parliament's intention in enacting section 6 of the Constitution confirm a straightforward interpretation"* and refer to the Official Report of the debate in the Senate on 23 March 1976 (Hansard, cols 754-756). In reply to a proposal to amend clause 6, Senator Prevatt, speaking for the government said, *"Maybe I should explain what the provisions which we have here are intended to achieve. We have existing laws which I suppose we will all agree should be saved. We must have some law with which we could go into the new Constitution. So we agreed that laws we have should be saved. If we save the law, what we are saying is that if we re-enact it without alteration, more or less, it is the same law, then it will remain valid. If the laws in any way derogate from any rights as you have it now (existing law), then provided you do not go and derogate any further it will remain there. This is the intention we have in 6(1)"* (emphasis added).

49. Seventh, it is respectfully submitted, that the failure to address point 5 above undermines the CCJ's conclusion in *Nervais* that it was entitled to intervene because section 26 was merely a "*transitional provision*" (at [55]). In *Watson*, Lord Hope at [46] concluded that once a law was adapted, changed or modified by Parliament, subject to the exception in the savings clause, the judiciary may then review such law for consistency with fundamental rights in the Constitution. The savings clause in Trinidad and Tobago (and the Respondent respectfully submits Barbados) can only be considered "*transitional*" in the sense that its purpose was to facilitate an orderly transition to a republic, and that it is open to Parliament to intervene at any stage (and the law is not therefore ossified); but until Parliament decides to intervene, it is not for the court to take over this power for itself. As Lord Hoffmann explained in *Matthew* at [3]: *"[The Constitution] is simply not susceptible to a construction, however, enlightened or forward-looking, which would enable one to say that section 6(1) was merely a transitional provision which somehow*

and at some point in time had become spent. It stands there protecting the validity of existing laws until such time as Parliament decides to change them." In addition, there is no comparison to be made with the Constitution of Belize, as the savings clause is expressly limited to a five-year duration. It is respectfully submitted that there is a difference between facilitation of transition from a colonial power to the newly independent democracy and a transitional arrangement in form and substance which is applicable only for a certain duration of time.

50. Eighth, regarding the majority judgment in *Nervais* at [58], the savings clause does not give ordinary legislation prominence over the Constitution (whether in Barbados or in Trinidad and Tobago). The ordinary legislation is not given 'prominence'; rather it is not inconsistent with the Constitution by virtue of the savings clause. In other words, it is expressly preserved by the Constitution. In the alternative, even if the ordinary legislation can be said to be given prominence over the fundamental rights in the Constitution, this is by reason of the savings clause in the Constitution itself as the supreme law. A broad analogy can be drawn with the pre-Brexit position between parliamentary sovereignty and the supremacy of European Union law. The priority enjoyed by European Union law in the United Kingdom was the product of an exercise of parliamentary sovereignty. In comparison, any priority given to ordinary legislation is a product of the savings clause in the Constitution, enacted by the democratic Republic of Trinidad and Tobago.

51. Finally, as to the minority judgment of Winston Anderson J who, (unlike the majority) found in favour of the appellant on the ground that the mandatory penalty infringed the doctrine of the separation of powers, the Respondent repeats the points it has made above (i.e. the point was conclusively settled in *Matthew*, and has been followed ever since in subsequent cases), and refers to its submission on the issue of separation of powers below.

Sixth reason: the CCJ's reasoning in *McEwan* is likewise unconvincing and should not be followed by the Board

52. First, *McEwan* concerns a different subject matter and constitutional provisions. Unlike *Boyce*, *Matthew*, and *Nervais*, *McEwan* does not concern the constitutionality of the

mandatory death penalty. *McEwan* concerns the constitutionality of a pre-independence law in Guyana which makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose.

53. Also, *McEwan* concerns different constitutional provisions to the previous cases. The issues to be determined in *McEwan* were whether the law violated the right to equality and non-discrimination; the right to freedom of expression; and the rule of law given the vagueness of the terms used in the pre-independence law.

54. The submissions in respect of the first reason *Matthew* should not be reconsidered, as set out at ¶¶13-24 above, apply, with even more force, to *McEwan*.

55. Second, the CCJ's analysis of whether they were prevented by the savings clause from testing the constitutionality of the relevant pre-independence law at [35]-[60] of *McEwan* is unconvincing.

56. The CCJ's reasoning in *McEwan* repeats the majority's judgment in *Nervais*. For example, the conclusions that the savings clause is a transitional arrangement ([36]) and that judges being precluded from finding a pre-independence law inconsistent with fundamental rights severely undermines constitutional supremacy ([39]) are simply repetition and the submissions made above as to why such arguments are unconvincing in *Nervais* are repeated.

57. Moreover, the CCJ's 'holistic' approach to the savings clause has no regard to the express language adopted in the savings clause. The CCJ's reasoning is that *"the Constitution must be read as a whole"* and interpreted *"in a manner faithful to its essence and underlying spirit"*. However, it is respectfully submitted that such constitutional analysis cannot be conducted with a wholesale disregard for the language in the savings clause itself, especially when the meaning is clear. Respect must be paid to the language which has been used. See *Minister of Home Affairs v Fisher* [1980] AC 319 per Lord Wilberforce at 328-329; *Reyes v the Queen* [2002] 2 C 235 per Lord Bingham at [26]; *Pinder v the Queen* [2003] 1 AC 620 per Lord Millett at [14]-[15]; *Roodal* per Lord Millett and Lord Rodger at [77]; and *Boyce* per Lord Hoffman at [56] and [59].

58. Third, the *"four broad and interlocking approaches courts can take to ameliorate the harsh consequences of the application of the savings law clause"* expounded by the CCJ at [42]-[60] of *McEwan*, and which form the building blocks of the Appellant's case, are either inapplicable in the present case or unconvincing. Taking each in turn, the Respondent makes the following submissions.

The First Approach: Restrictive interpretation and application [46]–[49]

59. First, the CCJ, relying on Lord Wilberforce's celebrated statement in *Minister of Home Affairs v Fisher* at 328-9, that a generous interpretation should be preferred of a statement of fundamental rights and freedoms in a Constitution, the CCJ at [46] state that a restrictive interpretation and/or application of savings clauses is always warranted. However, Lord Wilberforce's words are addressed to a court which has to decide between two possible interpretations of a definition of fundamental rights. The interpretation of the effect of section 6 of the Constitution of Trinidad and Tobago put forward by the Appellant here is not a possible interpretation (see the discussion of the Appellant's modification argument at ¶¶84-100 below). Accordingly no question arises of a choice between narrow and generous interpretations.

60. Second, the CCJ's comparison with *Hughes v the Queen* [2002] 2 AC 259 is, with respect, misguided because *Hughes* was concerned with the immunising effect of a partial savings clause. Schedule 2, paragraph 10 of the Saint Lucia Constitution Order 1978 provided that, "*Nothing contained in ... any law shall be held to be inconsistent with ... section 5 of the Constitution <u>to the extent that the law in question authorises</u> the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 ..."* (emphasis added). Accordingly, it was open to the Board to hold that since the legislation in question required rather than merely authorised the imposition of the death penalty, the partial savings clause did not apply. The present case is concerned with the general savings clause in section 6 of the Constitution. Section 6 has no comparable limitations to the partial savings clause in *Hughes* and therefore a similar interpretation to *Hughes* is not applicable.

61. This reasoning reinforces the point made at ¶33 above, that the Board should focus on the language of section 4 of the OAPA and section 6 of the Constitution and be cautious of applying broad analogies drawn with the ratio of previous case law; 'the devil is in the details'.

62. Third, in *McEwan* it was a critical part of the CCJ's reasoning that the law in question had been repeatedly amended post-independence to impose harsher penalties. This led the CCJ to conclude that these amendments altered the law so that it was no longer an existing law and was not protected by the savings clause ([48]–[49] and [60]). No such argument can be applied to the present case, nor is this argued by the Appellant.

63. In any event, it is submitted that for an existing law to lose its status as an existing law by amendment, the amendment must go to the law's essence: *Watson* at [44]-[45]. The essence of the impugned law was the criminalisation of cross dressing for an improper purpose, so that despite the introduction of harsher penalties over several amendments, it is respectfully submitted that it was not in fact open to the CCJ to find the law so altered that it was no longer to be regarded as an existing law. Tellingly, the issue of the circumstances under which an existing law loses its saved law status was not addressed by the CCJ in a meaningful way, nor was any case law cited in support of its rationale on this point.

The Second Approach: Only challenges to the listed human rights provisions are barred [50]-[53]

64. The CCJ held at [50] that Article 1 (characterisation of Guyana as an indivisible, secular, democratic sovereign state) and Article 40 (the right to a happy, creative and productive life) of Guyana's Constitution were "*outside the range*" of the savings clause, which applied only to laws alleged to be inconsistent with or in contravention of the fundamental rights and freedoms set out at Articles 138 to 149 of Guyana's Constitution. The Appellant relies on the CCJ's reasoning in support of his argument that the mandatory death penalty violates section 1 of the Constitution of Trinidad and Tobago and/or the separation of powers and on that basis is not saved by the savings clause in section 6(1). For the reasons set out in response to Issue 4 below, it is respectfully

submitted that the Appellant's argument is wrong and is not bolstered by the CCJ's judgment, which fails singularly to grapple with the reasons given by the majority in *Boyce* and *Matthew* for rejecting the separation of powers argument advanced by the appellants in those cases or the further points made by the Respondent in connection with Issue 4. As noted above, the argument was also rejected by the minority in *Matthew* who held that it did not give the appellant in that case an independent ground of appeal.

65. Furthermore, it is clear that the CCJ's conclusion on the savings clause in question was influenced heavily by the fact that a variety of rights were added to Guyana's Constitution following independence in 2003 and listed as Articles 149A to 149J. The CCJ held that these rights were qualitatively and temporally distinct from the fundamental rights and freedoms contained in Articles 138 to 149 and were outside the range of the savings clause ([52]-[53]). The CCJ stated at [53], "*It would be strange for proudly independent, republican Guyana to promote these new rights by inserting provisions in the Constitution that could be trumped by ordinary legislation enacted by a colonial legislature. To deny full judicial protection in respect of these new rights would render useless a substantial part of the entire constitutional reform process that sought to create a more democratic and inclusive society.*" No such argument can be applied to the present case, nor is this argued by the Appellant.

The Third Approach: International law implications [54]–[55]

66. Article 39(2) of Guyana's Constitution expressly mandates the courts to "*pay due regard to international law, international conventions, covenants and charters bearing on human rights*" when interpreting any of the fundamental rights provisions of the Constitution. Relying on Article 39(2), and noting that international law bodies have strongly repudiated savings law clauses because of their inconsistency with international human rights obligations, at [55] of their judgment the CCJ argue that there is an even greater onus on courts to interpret the savings clause in Guyana's Constitution as narrowly as possible so as to place the law in compliance with the country's international law obligations. It is respectfully submitted that the CCJ's reasoning does not assist the Appellant in the present case.

67. First, there is no equivalent to Article 39(2) in the Constitution of Trinidad and Tobago, and so this part of the CCJ's reasoning falls away.

68. Second, the only provision to whose interpretation international obligations might have relevance is section 5(2)(b), preventing cruel and unusual punishments. But the interpretation of that provision is not in dispute since the Respondent accepts that the mandatory death penalty in section 4 of the OAPA would infringe that right, if the right applied to existing laws. On the other hand, the savings clause in section 6(1)(a) is of general application: it covers all the various rights in sections 4 and 5. It makes no mention of the death penalty. The international obligations of Trinidad and Tobago in relation to the death penalty are therefore not a consideration which can affect its interpretation – or indeed the interpretation of the equally general section 5(1) of the 1976 Act.

69. Third, this canon of interpretation can apply, if at all, only where the natural meaning of the relevant constitutional provision is ambiguous. There is, however, no ambiguity in the present case. In the circumstances, any obligation to interpret the Constitution, so far as possible, so as to confirm to Trinidad and Tobago's international obligations does not bite. See further, the majority's judgment in *Boyce* at [25] and [54], *Matthew* at [24] and the minority in *Roodal* at [102].

The Fourth Approach: Modification of pre-independence law first before applying the savings clause [56]–[60]

70. Citing the minority judgment in *Boyce*, and relying "*in particular*" on its finding that post-independence amendments to the law in question had resulted in it losing its saved status, the CCJ held that the effect of the savings clause, read together with the modification clause contained in section 7(1) of the Guyana Constitution Act (i.e. the section akin to section 5(1) of the 1976 Act), was to permit 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. It is respectfully submitted that the reasoning of the CCJ suffers from the same defects as the reasoning of the majority in *Nervais* (see ¶¶40 *et seq* above).

71. In short, applying the modification power prior to analysing conformity with the Constitution is against the plain language of the Constitution; conflicts with established case law; and produces illogical results.

72. Pursuant to section 5(1) of the 1976 Act, existing laws *"shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."* The *raison d'etre* of the modification power is to bring laws into conformity with the Constitution. Therefore, the first stage in the analysis must be whether the existing law is in conformity with the Constitution or not. The question of conformity / inconsistency must logically be answered prior to the question of modification. See further the reasoning of the majority in *Boyce* at [37]–[42], the minority judgment in *Roodal* at [86]–[95], and the submissions below addressing Issue 2.

73. For all of the above reasons, it is respectfully submitted that *Matthew* should not be reconsidered.

C. ISSUE 2: IS SECTION 4 OF THE OAPA PRESERVED FROM CONSTITUTIONAL CHALLENGE BY SECTION 6 OF THE CONSTITUTION?

The effect of section 6

74. The 1976 Constitution provides by section 2 that the Constitution is the supreme law of Trinidad and Tobago and that any other "*law*" that is inconsistent with it is void to the extent of the inconsistency. By section 3(1) "*law*" includes "*any enactment*". Based on those provisions, read in isolation, to the extent that section 4 of the OAPA is inconsistent with the Constitution it is *prima facie* void. But section 6 of the Constitution provides that nothing in sections 4 and 5 of the Constitution (upon which the alleged inconsistency of section 4 of the OAPA with the Constitution depends) shall invalidate an existing law.

75. There is no dispute that section 4 of the OAPA is an existing law as defined by section 6(3) of the Constitution.

76. The effect of section 6 of the Constitution is that an "*existing law*" is not to be invalidated by anything in sections 4 and 5 of the Constitution. It cannot therefore be regarded as inconsistent with the Constitution by reason of anything in sections 4 and 5 and is not void to the extent of the inconsistency under section 2 of the Constitution. To put the point another way, section 6(1) makes an existing law constitutional, i.e. consistent with the Constitution, even though it would conflict with sections 4 and 5 if those sections applied to it.

77. Accordingly, the effect of section 6(1) is that section 4 of the OAPA cannot be invalidated by anything in sections 4 and 5. In other words, section 4 of the OAPA is not inconsistent with the Constitution and is therefore valid. 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 challenging section 4 of the OAPA (see, the majority judgment in *Matthew* at [14]).

78. Sections 4 and 5 of the Constitution, which are stated in broad terms, are to be read subject to the effect of section 6 and in some cases section 13 of the Constitution. The latter provides a mechanism by which acts may be passed even if inconsistent with sections 4 and 5, provided the requisite special majority is met and the act is reasonably justifiable, in other words proportionate. Parliament has therefore attenuated the remit of the Judiciary in interpreting section 4 and 5 by enacting sections 6 and 13. The effect of this is that any fundamental right identified in sections 4 and 5 has to be construed together with existing law and in some cases in light of section 13 to determine the full breadth of that right.

79. The Appellant raises arguments in his case that the savings clause in section 6 does not mean what it appears to say. It is respectfully submitted that the Appellant's arguments are a re-run of the arguments properly rejected by the majority in *Matthew* (and by the minority in *Roodal*) and ought to be rejected by the Board.

The difference in language between section 6(1)(a) of the 1976 Constitution and section 3(1) of the 1962 Constitution

80. The Appellant seeks to displace the Respondent's reading of section 6(1)(a) by referring to the difference in language between section 6(1)(a) of the 1976 Constitution and the corresponding provision (section 3(1)) of the Constitution of 1962). In truth, the Appellant's argument depends on the alleged significance of the difference in language.

81. Section 3(1) of the 1962 Constitution says that sections 1 and 2 "*shall not apply in relation to any [existing law]*".

82. Section 6(1)(a) of 1976 says "*Nothing in sections 4 and 5 shall invalidate – (a) an existing law…*". The reason for this change, the Appellant submits, is that sections 4 and 5, while not intended to invalidate an existing law, were intended to "*apply to*" it in some less drastic way. The true explanation of this change of language is, in the Respondent's submissions, less mysterious. The Constitution of 1962 contained no statement of the consequence of the appearance in any law – either an existing law or a post-Constitution law – of an enactment inconsistent with the Constitution. In order to protect existing laws, therefore, it was necessary to use general language, which would exclude any suggested consequence of such inconsistency. Hence the wording of section 3(1). The Constitution of 1976, by contrast, states in section 2 exactly what the consequence is to be: "*any other law that is inconsistent with this Constitution is void to the extent of the inconsistency*". In order to protect existing laws, therefore, it was appropriate specifically to exclude the one consequence which was expressed to follow on inconsistency, i.e. the voiding, or invalidating, of the "*other law*" to the extent of the inconsistency.

83. This, the Respondent respectfully submits, explains the language of section 6(1)(a). The language of section 3(1) of the Constitution of 1962 was changed simply because section 6(1)(a) appears in a context different from that of section 3(1). There was no intention to give to section 6(1)(a) an effect different from that of section 3(1). As Lord Hoffman observed in *Matthew* at [18]-[19]:

> "… 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.
>
> 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"."

And see also the reasoning of the minority in *Roodal* at [78]-[79].

Power of modification in section 5(1) of the 1976 Act

84. The Appellant contends that, even if section 4 of the OAPA is not invalid as a result of sections 4 and/or 5 of the Constitution, it is nevertheless subject to modification under section 5(1) of the 1976 Act (i.e. the Act giving effect to the Constitution, which is scheduled to it.) For the reasons given by the majority in *Matthew* and *Boyce* (and the minority in *Roodal*), it is respectfully submitted that the Appellant's argument is wrong. First, it is at odds with the plain and ordinary meaning of section 6(1) of the Constitution. Second, it is contrary to the meaning that has been attributed to equivalent provisions in many Constitutions over many decades. Third, the Appellant's approach, which requires the court to consider modification in the event of inconsistency with sections 4 and/or 5 prior to the question of conformity / inconsistency with the Constitution as a whole would (i) rob the savings clause of all viable content and (ii) produce a perverse policy and potentially perverse results. Proceeding as the Appellant suggests is, with respect, to proceed back to front, as the majority put it in *Roodal*, at [85].

85. As Lord Rodger (delivering the judgment of the Board) held in *Johnson v Attorney General of Trinidad and Tobago* [2009] UKPC 53 at [20], the fundamental point made by the majority in *Matthew* was that the Constitution is supreme. That is said explicitly not only in section 2 of the Constitution but in section 3 of the Act. Since the Constitution is supreme, nothing in it is to be qualified by anything said in the Act, which is not supreme but subordinate to the Constitution. If the Act had been intended to modify or qualify some provision of the Constitution, it would have been included in the Constitution itself. See the majority judgment in *Matthew* at [17], read along with the

majority judgment in *Boyce* at [2]-[5]. It follows, as was held in *Johnson*, that section 5(1) of the 1976 Act is not intended to, and does not, override or qualify section 6(1) of the Constitution.

86. Section 5(1) of the 1976 Act provides:

> "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 Order-in-Council of 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".

87. It is clear that the qualification at the end of this sub-section ("*but the existing laws …*") can refer only to existing laws which are not in conformity with the 1976 Act. This means, not in conformity with the sections of the 1976 Act or with the Constitution scheduled to it, for the schedule is part of the Act; and "*not in conformity with the Constitution*" means not in conformity with the Constitution read as a whole. The latter words do not mean not in conformity with one section (for example, sections 4 or 5) of the Constitution read without reference to another section (section 6) limiting the former section's effect.

88. If an existing law is already in conformity with the Constitution, nothing is "*necessary to bring [it] into conformity*". In relation to that law, therefore, no power is exercisable under section 5(1) of the 1976 Act. Section 4 of the OAPA is not inconsistent with the Constitution. Conversely, it conforms with the Constitution, that being the effect of section 6(1) of the Constitution (see ¶76 above). It follows that there is no power under section 5(1) of the 1976 Act to construe section 4 of the OAPA with modifications, adaptations, qualifications or exceptions. The decision of the majority in *Matthew* (and the minority in *Roodal*) was correct on this point.

89. That being so, it is unnecessary to go further and define the scope of the power of modification in section 5(1) of the 1976 Act. But one obvious example of a situation where the power could be used was given by the minority in *Roodal* at [86]-[89]. Section 6(1) of the Constitution applies only to sections 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 section 2 of

the Constitution, it would be void to the extent of the inconsistency. Section 5(1) of the 1976 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.

90. The Respondent respectfully submits that the Appellant's modification argument places an impossible interpretation on section 5 of the 1976 Act and sections 4 to 6 of the Constitution. There is simply no power to modify an existing law under section 5(1) of the 1976 Act unless the existing law is not in conformity with the Constitution. The first question to be answered, therefore, is whether the existing law is or is not in conformity with the Constitution. If it is in conformity, no question arises of modifying it under section 5(1) of the 1976 Act.

91. In *Browne v The Queen* [2000] 1 AC 45, the Board considered the analogous provisions of the Constitution of St. Christopher and Nevis. Lord Hobhouse, delivering the judgment of the Board, said the task of the court was:

> "to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights" (at 50D-E – emphasis added).

See also *Kanda v Government of Malaya* [1962] AC 322 per Lord Denning at 333-334; *R v Hughes* at [48]–[51]; and *Fox v the Queen* [2002] 2 AC 284 at [10]–[11].

92. In the same way as the approach of the majority in *Roodal* (as held by the minority in that case at [90]), the Appellant's argument skips over that initial step which the cases, as well as the words of section 5(1), show is necessary – but which is fatal to his argument in the present case. The Appellant's argument proceeds on the basis that section 6(1) of the Constitution prevents sections 4 and 5 from invalidating an existing law but does not prevent them from causing an existing law to be not in conformity with the Constitution, and so opening the way for the operation of section 5(1) of the 1976 Act. Thus, apparently, the power of modification operates whilst the existing law is in some sort of

limbo, in a vacuum somewhere between invalidity (i.e. void for inconsistency, which but for section 6(1) would be the effect of section 2 of the Constitution) and conformity. The Respondent submits that this is an impossible view of sections 4, 5 and 6(1). There is no way in which section 6(1) can be interpreted to mean that sections 4 and 5 do not invalidate an existing law but do make it unconstitutional, and thereby susceptible to modification. The decision of the majority in *Matthew* was again correct on this point.

93. There is nothing surprising, or inconsistent with the purpose or intention of the Constitution, about the exemption of existing laws from challenge on the basis of the fundamental rights. So far from that, this exemption is an essential element of the scheme of the Constitution.

94. When fundamental rights are introduced into a country for the first time, there is always a question about the existing laws. Are they to be tested against the fundamental rights or not? When fundamental rights were introduced into Trinidad and Tobago in 1962, the answer given to this question was that the existing laws were to continue to be valid. This appears clearly from sections 1, 2 and 3 of the Constitution of 1962. These sections describe the nature of the constitutional scheme. It is declared in section 1 that the fundamental rights "*have existed and shall continue to exist*", and the section sets them out in very general and imprecise terms. They were particularised to some extent, but still not defined, in section 2. What gave them definition was the provision of section 3, that sections 1 and 2 should not apply to any existing laws. The rights and freedoms protected were those enjoyed immediately before the Constitution came into force.

95. This analysis of the Constitution was given by the Board in *Maharaj v AG of Trinidad and Tobago (No. 2)* [1979] AC 385, 395 (speaking of the Constitution of 1962):

> "In section 1 the human rights and fundamental freedoms which it is declared (by the only words in the section that are capable of being enacting words), 'shall continue to exist' are those which are expressly recognised by the section to 'have existed' in Trinidad and Tobago. So to understand the legal nature of the various rights and freedoms that are described in the succeeding paragraphs (a) to (k) in broad terms and in language more familiar to politics than to legal draftsmanship, it is necessary to examine the extent to which, in his exercise and enjoyment of rights and freedoms capable of falling within the broad descriptions in the section, the individual was entitled to protection or non-interference

> under the law as it existed immediately before the Constitution came into effect. That is the extent of the protection or freedom from interference by the law that section 2 provides shall not be abrogated, abridged or infringed by any future law, except as provided by section 4 or section 5.
>
> What confines section 2 to future laws is that it is made subject to the provisions of section 3. 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".

This passage was only repeating what had been said, also in relation to the Constitution of 1962, in *de Freitas v Benny* [1976] AC 239, 244-5; and that case referred to the earlier decision, on the corresponding provisions of the Constitution of Jamaica, in *DPP v Nasralla* [1967] 2 AC 238, 247-8.

96. When the present (1976) Constitution replaced that of 1962, section 2 was introduced, providing expressly that any law inconsistent with the Constitution was to be "*void to the extent of the inconsistency*"; the structure of the Constitution, however, remains unaltered. The protected rights and freedoms are set out as before in general and imprecise terms (now section 4), and section 5 corresponds to section 2 of the 1962 Constitution. There remains the critical function of giving definition to the rights and freedoms. As submitted, in the Constitution of 1962 this was performed by the provision of section 3, that sections 1 and 2 were not to apply to existing laws. In the Constitution of 1976 section 6(1)(a) corresponds to this, providing that nothing in sections 4 and 5 is to invalidate an existing law.

97. It is thus clear, in the Respondent's submission, that the scheme of the Constitution of 1962 was to declare that the fundamental rights and freedoms set out in section 1 already existed in Trinidad and Tobago and were to continue to exist. The consequence of the guarantee that those rights and freedoms were to continue to exist was that no future legislation was to abrogate or infringe any of them: section 2. The consequence of the declaration that those rights and freedoms already existed was that the existing laws defined the fundamental rights and freedoms and were not to be affected by them: section

3(1). This scheme has been recognised and confirmed by repeated judgments of the Board.

98. If in 1976 the intention had been to depart altogether from this scheme, to contemplate that the rights and freedoms set out in section 4 were not defined by the existing laws (or by anything else except the generalities of section 4) and might not have existed or been respected in Trinidad and Tobago before 1976, and to expose all the existing laws to challenge, examination and possible modification for inconsistency with section 4, the draftsman could not, the Respondent submits, have left the Constitution of 1962 so little altered. The "*recognised and declared*" provision at the beginning of section 1 would have had to be considerably amended. It is in fact repeated unaltered in section 4 of the 1976 Constitution. Section 3(1) of the 1962 Constitution, if it survived at all, would have required a much more radical change than the substitution of "*Nothing in section 4 and 5 shall invalidate*" for "*Sections 1 and 2 … shall not apply to*". In short, if the intention in 1976 was to say that all the existing laws were liable to be tested for consistency with the rights and freedoms as set out in sections 4(a)-(k), the declaration in section 4 that the fundamental rights and freedoms "*have existed*", and section 6, were simply misleading.

99. The Respondent submits that the Appellant's interpretation of section 5(1) of the 1976 Act and sections 4, 5 and 6(1) of the Constitution is inconsistent with the text, and inconsistent also with the clear intention of Parliament in 1976 to preserve the structure of the Constitution of 1962, which was based on the preservation of the existing laws and their exemption from challenge under the human rights provisions.

100. Finally, it is submitted that the Appellant's interpretation, which requires the court to consider modification in the event of inconsistency with the sections 4 and/or 5 prior to the question of conformity / inconsistency with the Constitution as a whole would (i) rob the savings clause of all viable content and (ii) produce a perverse policy and potentially perverse results:

(a) If a court can begin by construing existing laws with any modification necessary to bring them into conformity with any of the provisions of sections 4 and 5, by the end of that process the laws will indeed conform to them. In other words, the

function of section 6(1)(a) would be limited to saving laws which cannot be effectively modified by section 5(1);

(b) This would leave the purpose of section 6(1)(a) practically redundant in view of the wide ambit of section 5(1); and

(c) Further it would produce perverse results as the laws which could not be modified would be saved by the savings clause: *"instead of providing that laws which could not be modified should be invalid, Parliament singled them out from all the other existing laws and decreed that they alone were to enjoy a continued, unchanged, life under the Constitution. The worse the incompatibility with the Constitution, Parliament supposedly declared, the less the chance of having it put right*": *Roodal* at [92].

See further, *Matthew* at [17] and [21], *Boyce* at [37]-[41] and *Roodal* (per the minority) at [92].

International obligations

101. Trinidad and Tobago ceased to be a party to the American Convention on Human Rights on 26 May 1998. She was not a party, therefore, when the Appellant was convicted and sentenced on 17 August 2011. She has at all relevant times been a member of the United Nations and Organization of American States. Even if those circumstances create international obligations which in some cases might influence the interpretation of domestic laws of Trinidad and Tobago, that, in the Respondent's submission, has no relevance to this case.

102. As submitted at ¶¶69 above, international obligations may be relevant to the interpretation of domestic law when the domestic law can be interpreted either consistently or inconsistently with those obligations. The Respondent respectfully submits that this is not such a case. The question is whether section 4 of the OAPA is unconstitutional. That depends on the interpretation of the Constitution, in particular section 6(1). On this point, in the Respondent's submission, the Constitution admits of only one interpretation – with the result that that section 4 of the OAPA is not

unconstitutional. International obligations are therefore irrelevant. To go further, and to allow this canon of interpretation to change the natural meaning of the words of the Constitution would be to allow the executive, in its international treaty making, to change the Constitution. But the Constitution forbids this. The only body with power to change the Constitution is Parliament, and even then, only if it obtains the requisite majority: see sections 53 and 54 of the Constitution. The executive has no such power at all. A decision recognising such power would fundamentally violate the division of powers between the executive, parliament and the judiciary enshrined in the Constitution.

103. It is submitted that it is neither backward-looking nor unenlightened to recognise that international obligations, like the "living instrument" principle, cannot make a specific, concrete provision in a Constitution mean something that it does not. It is respectfully submitted that the minority's analogy in *Boyce* and *Matthew* with modification of legislation under the Human Rights Act 1998 gives insufficient weight to the fact that a written constitution is itself the supreme law. As Lord Hope put it in *Watson* at [53]: "*Their Lordships firmly believe that respect for the rule of law requires them to give effect to* [the existing laws clause]*, not to ignore it, when it says that existing laws are not to be held inconsistent with any of the provisions of Chapter III.*"

ISSUE 3: DOES SECTION 4 OF THE OAPA VIOLATE THE FUNDAMENTAL RIGHTS PROTECTED BY SECTIONS 4 AND 5 OF THE CONSTITUTION?

Overview of the Respondent's submissions

104. The Appellant complains (in summary) that the mandatory death penalty infringes the human rights provisions in sections 4 and 5 of the Constitution because it does not permit the court to take into account his individual circumstances and offence in determining whether the death penalty should be imposed.

105. As to this, the Respondent makes four submissions.

106. First, the Respondent accepts that the mandatory death penalty, as provided for in section 4 of the OAPA, *would* infringe the right not to be subjected to cruel and unusual treatment or punishment protected by section 5(2)(b) of the Constitution, *if* that right applied to

existing laws. However, as an existing law within the meaning of section 6 of the Constitution, section 4 of the OAPA cannot be invalidated (or declared void under section 2 of the Constitution) by reason of any inconsistency with the human rights provisions in sections 4 and 5 of the Constitution. As to this, see Issue 2 above. It is respectfully submitted that if the Board agrees with the Respondent, there is no need to go on and determine whether the mandatory death penalty infringes any of the other human rights provisions in sections 4 and/or 5 of the Constitution. See further ¶¶111-113 below. Indeed, since a number of the Appellant's arguments based on breach of fundamental rights are new there is all the more reason not to consider them when they have not been considered by the local courts (as to which see ¶106 immediately below).

107. Second, the Appellant's case raises new human rights arguments for which permission has not been given. In line with the general practice of the Judicial Committee, it is submitted that the Appellant should not be allowed to raise these new arguments for the first time on appeal. Moreover, the Appellant acknowledges that his human rights arguments alleging breaches of sections 4(b), 5(2)(e) and 5(2)(h) of the Constitution are new and were not arguments advanced by the appellants in *Roodal*, *Matthew* and *Boyce*. Accordingly, the issues raised by the new arguments were not addressed by the Court of Appeal of Trinidad and Tobago in *Roodal* or *Matthew* or by the Judicial Committee in any of the three cases. It is submitted that this underscores the rationale for not permitting the Appellant to advance these new arguments for the first time in his written case. See further ¶¶114-116 below.

108. Third, the mandatory death penalty does not infringe the right to due process protected by section 4(a). This is because:

(a) Section 4(a) declares, first, "*the right of the individual to life, liberty, security of the person and enjoyment of property*" and, secondly, "*the right not to be deprived thereof except by due process of law*". The second part is expressing, not an additional right, but a qualification of the right expressed by the first part. In other words, section 4(a) declares the right of the individual to life, liberty, etc., except to the extent that he is deprived thereof by due process of law. Section 4 of the OAPA is not therefore inconsistent with section 4(a) simply because it prescribes

the mandatory penalty for murder is death. The question is whether the imposition of the sentence of death is by due process of law.

(b) In this case, the Appellant's complaint is not that he has been denied due process because he has not been tried according to law and/or that the mandatory requirements of criminal procedure have not been observed; his complaint is that he has been denied the opportunity of persuading a court that the death penalty is disproportionate or inappropriate because the mandatory nature of the penalty does not permit the court to take into account the individual circumstances of an offender and the offence. This, however, is not an argument about a lack of due process but that the legislature, by enacting section 4 of the OAPA, has improperly interfered with judicial proceedings to the extent of purporting to exercise an inherently judicial power. And such argument fails for the reasons given by Lords Rodger and Millett in *Roodal* at [109]. Taken shortly, there is nothing unconstitutional and/or in breach of the separation of powers in Parliament legislating to prescribe that the penalty for murder is death.

(c) Accordingly, being sentenced to death in accordance with a constitutional law (i.e. a law that by virtue of section 6 of the Constitution remains valid in spite of inconsistency with section 5(2)(b)) following a criminal trial observing all of the requirements of natural justice and criminal procedure is not a denial of due process. See further ¶¶117-125 below.

109. Fourth, the Appellant's right to equality before the law and the protection of the law protected by section 4(b) has not been infringed in the present case. This is because:

(a) Having regard to the nature of the Appellant's complaint, the alleged infringement of section 4(b) of the Constitution covers essentially the same ground as his section 4(a) argument and fails for the same reasons.

(b) Further and in any event, taking into account the material facts and considerations which have a bearing on the question of whether the right protected by section 4(b) has been breached, in particular the effect of section 6 of the Constitution and the Board's judgment in *Matthew* which held that the mandatory death penalty in

Trinidad and Tobago is a cruel and unusual punishment and therefore inconsistent with section 5(2)(b) of the Constitution, there has been no breach of the Appellant's rights under section 4(b). In other words, the Appellant has been afforded adequate protection of the law.

110. Fifth, the Appellant's complaint that he has been denied the "*right to be heard*" and the "*right to a fair trial*", as particularised in sections 5(2)(e), (f)(ii) and (h) of the Constitution, depends, like his due process complaint, in substance on the same argument that section 4 of the OAPA violates the principle of the separation of powers, and fails for the same reasons.

First submission: no need to look beyond section 5(2)(b)

111. The Respondent's primary position is that the effect of the savings clause in section 6 of the Constitution is to preserve the validity of the mandatory death penalty provided by section 4 of the OAPA as explained above in Issue 2.

112. If the Respondent is unsuccessful on Issue 2, the Respondent's secondary position is that it is only section 5(2)(b) of the Constitution, the right not to be subjected to cruel and unusual treatment or punishment, which is infringed by the mandatory death penalty provided by section 4 of the OAPA. This is because section 4 does not permit the court to take into account the individual circumstances of an offender and the offence in determining whether the death penalty should be imposed: *Reyes*; *Hughes*; and *Fox*. In particular, see further, Lord Bingham in *Reyes* at [29]:

> "A law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 [the right not to be subjected to torture or to inhuman or degrading punishment or other treatment] because it fails to respect his basic humanity."

113. In the circumstances, even if the Board is against the Respondent on Issues 1 and 2, there is no need for the Board to consider the Appellant's wider human rights arguments advanced under Issue 3. In short, the Board does not need to go any further than it did in *Matthew* at [12]. In *Reyes* the Board found it unnecessary to express a conclusion on section 3 of the Constitution of Belize (which *inter alia* provided for the right to the

protection of the law); the reason it gave for this being the clear conclusion it had reached on section 7 – the equivalent provision to section 5(2)(b) of the Constitution of Trinidad and Tobago. Similarly, in *Hughes* the Board found it unnecessary to address the argument based on section 1 of the Constitution of St Lucia which *inter alia* provided for equality before the law and the protection of the law.

Second submission: the Appellant should not be permitted to raise new human rights arguments

114. The arguments now raised for the first time relying on sections 4(b), 5(2)(e) and 5(2)(h) of the Constitution are entirely new points that significantly and unfairly expand both the ambit of the issues to be decided and the nature of the grounds of appeal before the Board. In *Baker v The Queen* [1975] AC 774 at 788 the Board said that its usual practice was:

> "not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

115. It is respectfully submitted that this is not an exceptional case which would justify a departure by the Board from its usual practice. In fact, this is a paradigm case where it is desirable for the Board to have the considered views of the judges of the local courts on such sensitive and controversial human rights issues. As stated by Lord Hughes in *Lendore* at [61]: "*As far as the Board is concerned, particular importance will generally be attached to the views of the courts below before recognising any development of the law which is not warranted by the express terms of the Constitution or necessarily implicit in them.*" The position in the present case, it is submitted, is different to that in *Maharaj v Prime Minister (Trinidad and Tobago)* [2016] UKPC 37, where the Board allowed the appellant to advance a new constitutional argument alleging an infringement of section 4(b) of the Constitution because, in Lord Kerr's words, "*there is no reason to suppose the courts in Trinidad and Tobago would have adopted a different approach*" to the expansive approach to the protection of the law taken by the CCJ in *Attorney General of Barbados v Joseph and Boyce* [2006] 69 WIR 104 and *The Maya Leader's Alliance v*

Attorney General of Belize [2015] CCJ 15. In the present case, it cannot be assumed that the local Court of Appeal would have adopted the same expansive approach given the particular provisions applicable in Trinidad and Tobago and the fact that *Matthew* has been consistently followed in Trinidad and Tobago in all cases of murder since 2004.

116. Further, not only were the issues raised by the Appellant's new arguments not addressed by the Court of Appeal of Trinidad and Tobago in *Roodal* and *Matthew* or by the Judicial Committee in either of those cases or in *Boyce*, but the Judicial Committee has not considered them in any appeal from another jurisdiction. In fact, as noted at ¶113 above, in *Reyes* the Board found it unnecessary to express a conclusion on section 3 of the Constitution of Belize which *inter alia* provided for the right to the protection of the law; and in *Hughes* the Board likewise found it unnecessary to address the argument based on section 1 of the Constitution of St Lucia which *inter alia* provided for equality before the law and the protection of the law.

Third submission: there has been no denial of due process of the law

117. The meaning and reach of section 4(a) of the Constitution was most recently considered by the Board in *Commissioner of Prisoners v Seepersad* [2021] UKPC 13. Having taken note of the leading cases in which section 4(a) has been the subject of previous judicial consideration,[10] Sir Bernard McCloskey, delivering the judgment of the Board, stated at [30]:

> "[The Board] considers that these cases have an unmistakable central theme and orientation. In short, "due process" has generally been considered to protect rights of a procedural nature, fair trial rights, in particular (though not exclusively) the right to procedural fairness."

See also, in particular, *State of Trinidad and Tobago v Boyce* [2006] 2 AC 76 per Lord Hoffman at [13]-[14].

118. However, in the present case the Appellant does not complain about procedural fairness or, indeed, any aspect of the conduct of his trial. Nor is there any suggestion that the

[10] *Thomas v Baptiste* [2000] 2 AC 1 per Lord Millett at 21H-22E; *State of Trinidad and Tobago v Boyce* [2006] 2 AC 76 at [13] and [16]; *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190 per Lord Brown at [88]; *Ferguson v Attorney General* [2016] UKPC 2 at [14] and [18].

criminal justice protections to which the Appellant was entitled were denied in any way. The Appellant's complaint is that he has been denied the opportunity of persuading a court that the death penalty is disproportionate or inappropriate because the mandatory nature of the penalty does not permit the court to take into account the individual circumstances of an offender and offence. Properly analysed, this is a complaint that the legislature, by enacting section 4 of the OAPA, has improperly interfered with judicial proceedings to the extent of purporting to exercise an inherently judicial power. This complaint is without merit for the following reasons.

119. There is nothing inconsistent with the separation of powers in Parliament legislating to prescribe the penalty that is to be imposed for a particular offence. The position was explained by Ó Dálaigh CJ in the Supreme Court of Ireland in *Deaton v Attorney General* [1963] IR 170 at 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."

120. See further *Whelan v Minister of Justice* [2012] 1 IR 1, in which the Supreme Court of Ireland held that the imposition of a mandatory life sentence for murder was not incompatible with the Constitution. The Court's reasoning is worth repeating in full:

> "[45] While it is undoubtedly the case that the crime of murder may be committed in a myriad of circumstances and the degree of moral blameworthiness will vary accordingly, such as where it is committed in

> particular heinous circumstances, nonetheless the crime itself, by its very nature, has always been considered at the highest level of gravity among all forms of homicide or other crimes against the person, whatever the circumstances. Again, that is the reason why the most serious of deterrents is provided by the law.
> …
>
> [49] The court is satisfied, as O Dalaigh C.J. explained in that case [*Deaton*], that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirement of justice with regard to the punishment of the offence specified.
>
> [50] In this case however s.2 of the Act of 1990 applies to the crime of murder. For the reasons already indicated that crime has always and legitimately been considered to be one of profound and exceptional gravity and, in the court's view, one for which the State is entitled to impose generally a punishment of the highest level which the law permits."

121. *Whelan* was referred to in the recent Supreme Court of Ireland decision of *Ellis v Minister for Justice and Equality & Ors* [2019] IESC 30 at [59]:

> "[59] […] As has been determined in *Lynch & Wheelan*, it may be permissible for the Oireachtas to specify a mandatory penalty which is to generally apply to all convicted of the offence irrespective of the circumstances of the committal of the offence or the personal circumstances of the offender. In such circumstances, the selection of the penalty in accordance with law is fixed by the Oireachtas and the Court is obliged to select that penalty. That is not in breach of the separation of powers."

122. The rule is not that Parliament must leave the choice of sentence to the court, but rather that if the choice is left to the court, rather than being fixed by Parliament, then it must be the court that exercises that choice and not some other body or person. As Lords Rodger and Millet said in *Roodal* at [109], what is constitutionally unacceptable is that the legislature should prescribe the sentence that is to be imposed on any particular individual.

123. The Board endorsed the approach in *Deaton* in *Hinds* per Lord Diplock at 225-226, *Ali v The Queen* [1992] 2 AC 93 per Lord Keith at 101-102 and *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 per Lord Bingham at [12].

124. Applying the above reasoning to the present case; there is no breach of the separation of powers because the legislature is entitled to specify a mandatory penalty for the crime of murder, given its profound and exceptional gravity. See further Issue 4 below and *Matthew* at [27]-[28], *Boyce* at [68]-[71], and Lords Rodger and Millett in *Roodal* at [105]-[109].

125. Accordingly, the Appellant, having been sentenced to death in accordance with a constitutional law, following a criminal trial observing all of the requirements of natural justice and criminal procedure, has not been denied due process of the law. See *Ferguson v Attorney General of Trinidad and Tobago* [2016] UKPC 2 per Lord Sumption at [35] and *Seepersad* at [42]-[44].

Fourth submission: there has been no infringement of the Appellant's section 4(b) rights

126. First, the Appellant's complaint that section 4 of the OAPA infringes his right to protection of the law and equality before the law depends essentially on the same argument, *viz*, that section 4 of the OAPA violates the principle of the separation of powers, and fails for the same reasons as his due process complaint.

127. Second, a breach of section 4(b) does not follow from the fact that section 4 of the OAPA infringes section 5(2)(b) of the Constitution, provided that the judicial system of Trinidad and Tobago affords a procedure by which any person interested in establishing the invalidity of section 4 of the OAPA can obtain from the court a determination in that respect. Access to the courts for that purpose is itself "*the protection of the law*" to which all individuals are entitled under section 4(b). See *Attorney-General of Trinidad and Tobago v McLeod* [1984] 1 WLR 522 per Lord Diplock at 531.

128. In the present case, the Appellant had and has the benefit of the Board's finding in *Matthew* that the mandatory death penalty in Trinidad and Tobago is a cruel and unusual punishment and therefore inconsistent with section 5(2)(b) of the Constitution, albeit that the effect of section 6 of the Constitution is to insulate section 4 of the OAPA from a finding of inconsistency with the Constitution. This affords the Appellant protection of the law (to the fullest extent to which he is entitled to it) and moreover is a material

consideration for the Advisory Committee and President when considering whether to substitute a less severe form of punishment than the sentence of death.

129. The most recent judicial learning on section 4(b) of the Constitution found in *Commissioner of Prisoners v Seepersad (supra)* supports the foregoing analysis. Having reviewed the relevant cases in which section 4(b) has been considered,[11] the Board stated in *Seepersad* at [61] that where the court is required to determine whether there has been a breach of the protection of the law clause in section 4(b), it is necessary first to identify, and then evaluate, all material facts and considerations. The Board held that material in this context denotes those matters which have a bearing on the question of whether the right protected has been breached: "*This will in every case be a fact sensitive and case specific question*."

130. In determining whether the Appellant's right to "*the protection of the law*" was violated in the present case, it is submitted that two aspects of the "*law*" are of particular relevance. The first is section 4 of the OAPA, which prescribes that the penalty for murder shall be death. The second is the savings clause in section 6(1) of the Constitution. As explained in Issue 2 above, the effect of section 6(1) is that the Constitution recognises the validity of section 4 of the OAPA despite any inconsistency between its terms and the human rights provisions of sections 4 and 5 of the Constitution. It follows that section 4 of the OAPA is not invalid (i.e. void) by reason of containing something which by section 5 of the Constitution Parliament may not enact. It cannot be said, therefore, that section 4 of the OAPA is inconsistent with the Constitution, or is not in conformity with it. This results from an express provision of the Constitution itself (section 6), which, as declared in section 2, is the supreme law of Trinidad and Tobago. It is respectfully submitted that it is impossible to hold that the Appellant has been denied the protection of the law when the protection that is sought, namely a declaration that section 4 of the OAPA is unconstitutional, is expressly prohibited by the Constitution. And there has been no loss of any substantive benefit or protection as there was in *Seepersad* (see [64] of the judgment).

[11] *Attorney-General of Trinidad and Tobago v McLeod*; *Attorney General of Barbados v Joseph and Boyce*, which referred to Lord Diplock in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670G-H; *The Maya Leader's Alliance v Attorney General of Belize*; and *Maharaj v Prime Minister (Trinidad and Tobago))* per Lord Kerr at [40].

Fifth submission: the Appellant's alleged breaches of sections 5(2)(e), (f)(ii) and (h) do not give him a freestanding ground of complaint

131. The Appellant complains that he has been denied the right to be heard and the right of a fair trial, as particularised in sections 5(2)(e), (f)(ii) and (h) of the Constitution, by virtue of the fact that he has been denied the opportunity to persuade the sentencing judge that a lesser sentence other than death ought to be imposed. As with the Appellant's denial of due process complaint, this depends on the same argument that section 4 of the OAPA violates the principle of the separation of powers, and, with respect, fails for the same reasons.

ISSUE 4: DOES SECTION 4 OF THE OAPA, BY IMPOSING A MANDATORY DEATH PENALTY FOR MURDER, INFRINGE SECTION 1 OF THE CONSTITUTION OR THE PRINCIPLE OF THE SEPARATION OF POWERS OR THE RULE OF LAW?

Preliminary point on the scope of Issue 4

132. The Appellant's grounds of appeal contend that the mandatory sentence of death for murder infringes the doctrine of the separation of powers and section 1 of the Constitution which declares Trinidad and Tobago to be a sovereign democratic state (SFI ¶27 [**R1/261/27**]). This is because, the Appellant argues, sentencing is exclusively a judicial function, which cannot be "*commandeered*" by the legislature or executive [**R1/211/16.3**]. For the reasons set out below, it is submitted that this argument does not give the Appellant an independent ground of appeal and in any event is wrong in fact and law.

133. The Appellant's case adds an entirely new allegation that section 4 of the OAPA contravenes the rule of law, another argument for which permission has not been given and that has not previously been addressed by the Court of Appeal of Trinidad and Tobago and/or the Board. For the same reasons as those set out above in respect of the Appellant's new human rights arguments, it is respectfully submitted that the Board should not permit the Appellant to advance this new argument for the first time in his written Case. See ¶¶114-116 above. Further, and in any event, it is submitted that the

Appellant's new 'rule of law' argument does not add anything of substance to his separation of powers argument and should be rejected for the same reasons.

The separation of powers does not provide the Appellant with an independent ground of appeal

134. The Constitution of Trinidad and Tobago is a constitution of the Westminster type. Implicit in it, therefore, is the qualified separation of powers. It is qualified because the Westminster model has never required an absolute institutional separation between the three branches of the state. See *Hinds v The Queen (supra)* per Lord Diplock at 212-213 and *Ferguson v The Attorney General of Trinidad and Tobago* [2016] UKPC 2 per Lord Sumption at [15].

135. The separation between the exercise of judicial and legislative or executive powers has been described as a "*characteristic feature of democracies*": *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 per Lord Steyn at [50]; *Director of Public Prosecutions of Jamaica v Mollison* per Lord Bingham at [13]; and *Seepersad* per Lord Hope at [10].

136. However, as the majority of the Board in *Boyce* observed at [70], the qualified separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided (see also the majority judgment in *Matthew* at [28]). Even the minority of the Board in *Matthew* recognised at [62] that the principle of the separation of powers did not give the appellant in that case an independent ground of appeal. In other words, the doctrine of the separation of powers cannot be relied upon by the Appellant to restore to sections 4 and 5 of the Constitution the invalidating effect on section 4 of the OAPA which section 6 of the Constitution has already removed. This is because the qualified separation of powers implicit in the Constitution of Trinidad and Tobago must yield to the explicit provisions of the Constitution. In other words, the separation of powers cannot be used to circumvent the clear intention of Parliament expressed in section 6 of the Constitution. Sections 4, 5 and 6 of the Constitution all have equal standing as entrenched rules of the Constitution. Section 1 does not enjoy the same level of entrenchment. It follows that sections 4, 5 and/or the qualified separation of

powers implicit in the Constitution do not trump section 6 or devalue its plain effect. That is a decision for Parliament.

137. Thus, the doctrine of the rule of law and the separation of powers have been modified in their purest form by the requirement that they must be interpreted subject *inter alia* to section 6. The plenitude of the constituent elements of the rule of law, including the separation of powers, varies according to the provisions of the relevant constitution and any savings clause in each Caribbean jurisdiction.

138. There is no unified set of principles which define a sovereign democratic state as provided for in section 1 of the Constitution. Section 1, as well as the structure of the Constitution, encompass several macro constitutional principles such as the rule of law, the separation of powers and the independence of the Judiciary. There is no minimum benchmark requirement which must be present in order to achieve the status of a sovereign democratic state. See further, *Matadeen*.

139. As well as being consistent with the judgments and reasoning of the Board in *Matthew* and *Boyce*, the foregoing analysis is supported by *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25 [2017] 1 WLR 3369 in which the Board held section 87 of the Constitution, concerning executive clemency, as an entrenched rule of the Constitution, was not inconsistent with the principle of the separation of powers. At [16], Lord Hughes stated:

> "There is no room for this process when the provision under consideration is itself an entrenched rule of the Constitution, as section 87 here is. The Constitution is, by section 2, the supreme law of Trinidad and Tobago. It itself defines the manner in which effect is given to the separation of powers. <u>There is no power in a court to go behind its explicit provisions by asserting some yet higher norm of legal theory</u>. The submission invites the Board to treat section 87 of the Constitution as unconstitutional." (Emphasis added)

140. The Appellant appears to rely upon the Board's decision in *State of Mauritius v Khoyratty* [2007] 1 AC 80 to support an argument that section 1 of the Constitution somehow elevates the qualified separation of powers to an overriding supra-constitutional principle, and asserts that the death penalty is inconsistent with the declaration of Trinidad and Tobago as a sovereign democratic state and violates section 1 of the

Constitution. If this is the Appellant's case, it is, with respect, a misreading of *Khoyratty* and wrong.

141. In *Khoyratty* the appellant state of Mauritius appealed against a decision of the Supreme Court of Mauritius that section 32 of the Dangerous Drugs Act 2000, which contained restrictions on the granting of bail in respect of specific drug offences, and section 5(3A) of the Constitution of Mauritius, insofar as it related to drugs offences (the combined effect of which was so as to remove from judges the power to decide on bail in specified cases), were void since they infringed the provision in section 1 of the Constitution that "*Mauritius shall be a democratic state*".

142. Of fundamental importance in *Khoyratty* was section 47(3) of the Constitution of Mauritius, enacted in 1991, which provides that a Bill for an Act of Parliament to alter the provisions of section 1 of the Constitution shall not be passed unless the proposed Bill has first been approved by three-quarters of the electorate in a referendum and has been supported at the final voting in the Assembly by all the members of the Assembly – described by Lord Steyn at [16] as *"an exceptional degree of entrenchment"*.

143. The critical question was aptly framed by Lord Rodger at [28], namely *"whether by purporting to insert section 5(3A) into the Constitution, section 2 of the 1994 Act had in substance sought … to alter the form of democratic state guaranteed by section 1 of the Constitution?"* (emphasis added). To put it another way, did the constitutional amendment alter the form of democratic state guaranteed by section 1? If this question was answered in the affirmative, such legislation could only be passed in accordance with the "*ultra-strict requirements of section 47(3)*" ([31]).

144. Therefore, in *Khoyratty*, the qualified separation of powers, as an abstract principle, was not relied upon as an independent ground for declaring pre-existing legislation inconsistent with the Constitution of Mauritius and therefore void. Rather, the deep entrenchment of section 1 of the Constitution was critical in the evaluation of the constitutionality of legislation passed after the Constitution which purported to alter the Constitution. It was held that the effect of the exceptional degree of entrenchment of section 1 was to preclude amendment of the Constitution, other than in compliance with the ultra-strict requirements of section 47(3), because, given the nature of the

amendment, it was contrary to the democratic principle and separation of powers underlying section 1. See Lord Steyn at [15]-[16] and [18]; Lord Rodger at [29]-[31]; and Lord Mance at [36].

145. Self-evidently the factual matrix, issues, argument and basis of the decision in *Khoyratty* were all far removed from the present case. The present case concerns not subsequent but pre-existing legislation and there is no question of any amendment of the Constitution; rather the question relates to the constitutionality of the pre-existing legislation which, the Respondent, submits, is expressly preserved by the Constitution itself: section 6(1). No question can possibly arise in such circumstances as to any breach of the separation of powers.

146. The Respondent makes three further points on *Khoyratty*, as follows.

147. First, section 1 of the Constitution of Mauritius is given "*special status*" and a heightened importance and prominence in the Constitution of Mauritius by virtue of the entrenchment provisions in section 47(3). As noted, this was critical to the decision of the Board in *Khoyratty*. There is no such similar provision in the Constitution of Trinidad and Tobago. See ¶136 above.

148. Second, Lord Steyn at [12] acknowledged that the idea of a democracy encapsulated in section 1 of the Constitution involves a number of different concepts:

> "The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary."

It is submitted that this is of a piece with the observation of the majority of the Board in *Boyce* at [70] that the qualified separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real constitution are divided. This is perhaps unsurprising given that Lord Steyn was in the minority in *Matthew* and recognised at [62] that the principle of the separation of powers did not give the appellant in that case an independent ground of appeal.

149. Third, the Appellant's apparent misreading of *Khoyratty* is inconsistent with the more recent authority of *Lendore v Attorney General of Trinidad and Tobago (supra)* where Lord Hughes made it clear at [16] that when considering the Constitution of Trinidad and Tobago the courts have no power to go behind the Constitution's explicit provisions by asserting some yet higher norm of legal theory.

Separation of powers: legislature and judiciary

150. The Appellant's contention that, by making the death sentence mandatory and so depriving the court of any discretion in fixing the appropriate sentence in the circumstances of the individual case, the legislature acted in breach of the principle of the separation of the powers of the courts and the legislature, is wrong for the reasons set out at ¶¶22-23 and ¶¶119-124 above.

Separation of powers: executive and judiciary

151. The Appellant's contention that, regardless of whether it is preserved as an existing law by section 6 of the Constitution, section 4 of the OAPA may nevertheless be inconsistent with the Constitution because the operation of the mandatory death sentence in practice amounts to a usurpation by the executive of the sentencing power of the judiciary, in breach of the principle of the separation of powers, is wrong for three main reasons.

152. First, the functions of the Advisory Committee, the Minister and the President under section 89 of the Constitution are not sentencing functions and the sentence remains that of the court. This is established by the decisions of the Board in *Jones v Attorney General of the Commonwealth of the Bahamas* [1995] 1 WLR 891 per Lord Lane at 897 and *Reyes* per Lord Bingham at 257. Consideration of whether a lawful sentence passed by a court should for some reason be remitted is an executive function, not a usurpation of the sentencing power of the judiciary.

153. Second, it is submitted that the qualified separation of powers implicit in the Constitution of Trinidad and Tobago must yield to the explicit provisions of the Constitution on the particular matter of the review and commutation of sentences (see *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294). The power of mercy conferred on the President,

acting on advice, which must be exercised in every capital case, is a constitutional power and cannot be inconsistent with the Constitution which confers it. It is the Constitution, not the principle of the separation of powers, which is the supreme law of Trinidad and Tobago: section 2 of the Constitution. See the majority of the Board in *Matthew* at [28]:

> "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 also *Lendore* per Lord Hughes at [16].

154. On this point, it is submitted that the Constitution mirrors the British constitution, which developed the doctrine of the separation of powers. The British constitution includes the prerogative power of the Crown to review and commute sentences passed by the courts. This power always existed – and still exists – side by side with the doctrine of the separation of powers. When the law of England and the law of Scotland provided for sentences of death, it was the established convention that a capital sentence must be reviewed by the responsible minister and could be carried out only if he decided not to advise that it be commuted. The provisions of the Constitution of Trinidad and Tobago which have replaced this prerogative power do no more than follow the Westminster model. Vesting this prerogative power in the President was, in essence, a matter of policy. If it had been intended by the framers of the Constitution to depart from this policy, and to outlaw mandatory capital sentences, it is surprising that the structure of the Constitution so closely reflects the traditional British model, which was itself developed against the background of the mandatory capital sentence.

155. Third, there are various ways in which judicial and legislative powers may operate within each other's sphere under Westminster model constitutions. The prerogative of mercy, formerly exercised by the Crown, is but one example. Another is the power of the Attorney General to stop a prosecution. While the principle itself may not be doubted, its application is pragmatic. In Trinidad and Tobago, some of the rights formerly protected by the principle of the separation of powers have been given more concrete expression in sections 4 and 5 of the Constitution.

156. The issue in the present case is whether section 4 of the OAPA is unconstitutional, not whether the exercise of powers conferred by sections 87 to 89 of the Constitution are constitutional (which plainly they are). Section 4 does not require the President to do anything, nor is its effect to refer anything to him. There is no analogy with the situation in *Ali v The Queen*. There is no question here of a judge or anyone else selecting a penalty in cases to which section 4 applies because the sentence which has to be passed in every case has been enacted by Parliament.

The rule of law

157. As stated above, the Appellant's complaint that he has been denied the opportunity of persuading a court that the death penalty is disproportionate or inappropriate because of the mandatory nature of the penalty is in reality an allegation that the separation of powers has been disregarded. As stated by Lord Sumption at [16] of *Ferguson (supra)*, the separation of powers is an aspect of the rule of law. In other words, the rule of law is an overarching principle that encompasses the Appellant's complaint: it does not give him an independent ground of appeal.

158. Moreover, it is submitted that the rule of law is upheld by the judiciary upholding the supremacy of the Constitution. See *Attorney General of Trinidad and Tobago v Dumas* [2017] 1 WLR 1978 per Lord Hodge at [15]. It is for precisely this reason that the Board should reject the Appellant's case and uphold the reasoning of the majority in *Matthew*. To do otherwise would be to undermine the supremacy of the Constitution and the rule of law.

ISSUE 5: SHOULD SECTION 4 OF THE OAPA BE READ AS PROVIDING FOR A DISCRETIONARY SENTENCE OF DEATH FOR THE OFFENCE OF MURDER AS OPPOSED TO A MANDATORY ONE?

159. If, contrary to the above submissions, the Board reconsiders *Matthew* and holds that there is a power to modify section 4 of the OAPA under section 5(1) of the 1976 Act, the Respondent would not oppose a construction of section 4 that provided for a discretionary

sentence of death for the offence of murder as opposed to a mandatory one, namely: "*Any person convicted of murder may be sentenced to, and may suffer, death*."

H. CONCLUSION

160. This case contains submissions consistent with the majority decision of the Board in *Matthew*. The Respondent respectfully submits that, upon full consideration of the relevant material, that decision was correct and should be followed. Accordingly, it is respectfully submitted that the sentence passed upon the Appellant was lawful, and this appeal should be dismissed, for the following (among other)

REASONS

(a) BECAUSE the sentence was prescribed by section 4 of the OAPA;

(b) BECAUSE that section is valid and in conformity with the Constitution;

(c) BECAUSE there is no power to modify that section under section 5(1) of the 1976 Act;

(d) BECAUSE that section does not infringe section 1 of the Constitution and/or the principle of the separation of powers and/or the rule of law;

(e) BECAUSE of the other reasons given in the majority judgment of the Board in *Matthew*.

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Bar of Trinidad and Tobago

HANNAH FRY

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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