



Easter Term
[2022] UKPC 19
Privy Council Appeal No 0051 of 2020

JUDGMENT

Jay Chandler (Appellant) v The State (Respondent)
(No 2) (Trinidad and Tobago)

**From the Court of Appeal of the Republic of Trinidad
and Tobago**

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lady Arden
Lord Sales
Lord Hamblen
Lord Stephens
Lord Hughes
Sir Nigel Davis

JUDGMENT GIVEN ON
16 May 2022

Heard on 2 and 3 November 2021

Appellant

Edward Fitzgerald QC

Douglas Mendes SC

Rajiv Persad

Amanda Clift-Matthews

(Instructed by Simon Muirhead & Burton LLP (Newman Street))

Respondent

Howard Stevens QC

Tom Poole QC

Fyrd Hosein SC

Hannah Fry

(Instructed by Charles Russell Speechlys LLP (London))

LORD HODGE:

1. On 17 August 2011 the appellant, Jay Chandler, was convicted of murder. He was sentenced to death by hanging, which is the mandatory sentence for murder in Trinidad and Tobago. Section 4 of the Offences Against the Person Act 1925 (“the 1925 Act”) provides: “Every person convicted of murder shall suffer death”.

2. On 12 December 2013 the Court of Appeal (Weekes, Soo Hon and Narine JJA) upheld both his conviction and his sentence. He was granted permission to appeal against conviction to the Board and sought unsuccessfully to have medical and psychiatric evidence admitted which had not been led at trial but which, he argued, tended to show that he might have had a defence of diminished responsibility at trial. On 12 March 2018 the Board issued a judgment dismissing his appeal against conviction (*Chandler v The State (Trinidad and Tobago)* [2018] UKPC 5). In this appeal he mounts a constitutional challenge to the mandatory death sentence with the permission of the Board.

3. The appellant’s sentence has been commuted to one of life imprisonment and the Board observes that the state in Trinidad and Tobago has not executed anybody since 1999, in part because of delays in the appellate process. But the law remains unchanged, and the mandatory death penalty could provide legal authority to the government to execute any person convicted of murder. As explained below, the Board has decided to review its prior decision on the constitutional validity of the mandatory death penalty in the light of recent jurisprudence of the Caribbean Court of Justice (“the CCJ”) which has departed from earlier judgments of the Board.

(i) The murder

4. The crime of which the appellant was convicted occurred on 8 October 2004. The appellant and Kirn Phillip were remand prisoners at Golden Grove Prison, Arouca. The appellant lunged at Mr Phillip when they were in a holding area of the prison and chased after him with a metal object which was later discovered to be an improvised knife. Mr Phillip suffered a stab wound to his chest. Prison officers subdued the appellant. Mr Phillip was taken to the Arima Health Facility but was pronounced dead on arrival.

(ii) The legal background

5. The principal constitutional question raised on this appeal is the question whether the mandatory death penalty for murder is contrary to the Constitution which Trinidad and Tobago adopted in 1976 (“the 1976 Constitution”) when the state became a republic, on the ground that the 1976 Constitution required that the 1925 Act be modified to remove the mandatory death sentence for murder and to replace it with a discretionary death sentence so that the court could take account of the particular circumstances of the killing.

6. The Constitution of 1962, which was set out in Schedule 2 to the Trinidad and Tobago (Constitution) Order in Council 1962 (“the 1962 Order”), came into effect when Trinidad and Tobago became an independent nation. The 1962 Constitution declared in section 1 the fundamental rights and freedoms which existed in the state. Section 2 provided that, subject to sections 3, 4 and 5 of the Constitution, no law shall abrogate, abridge or infringe any of those recognised rights and freedoms. Section 3 of the 1962 Constitution contained a saving provision for existing law. It stated that sections 1 and 2 of the Constitution “shall not apply” in relation to any law that was in force at the commencement of the 1962 Constitution. The 1962 Order contained, in section 4, a modification clause which provided that the existing laws “shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order”.

7. The 1976 Constitution was enacted by the legislature of the independent Trinidad and Tobago in the Constitution of the Republic of Trinidad and Tobago Act 1976 (“the 1976 Act”). Section 5 of the 1976 Act provides:

“(1) 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.”

Section 2 of the 1976 Act defines “existing law” as “a law that had effect as part of the law of Trinidad and Tobago immediately before the appointed day”. The appointed day was 1 August 1976, which was the day on which the 1976 Constitution came into operation by Proclamation of the Governor General.

8. The 1976 Constitution is set out in Schedule 2 to the 1976 Act. The preamble, which precedes the substantive legal provisions of the Constitution, confirms among other things that the nation is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms and the dignity of the human person. The preamble also records the people's assertion of their belief in a democratic society and their wish to make provision for ensuring the protection of fundamental human rights and freedoms. Section 1 of the Constitution provides:

“The Republic of Trinidad and Tobago shall be a sovereign democratic state.”

Section 2 of the Constitution provides that the Constitution is the supreme law of Trinidad and Tobago and that any law that is inconsistent with the Constitution is void to the extent of the inconsistency.

9. The constitutional provisions that are most relevant to the principal challenge mounted in this appeal are sections 4, 5 and 6 of the 1976 Constitution which the Board sets out so far as relevant. Section 4 provides:

“It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law ...”

10. Section 5 of the Constitution provides:

“(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms herein before recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not - ...

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

(f) deprive a person charged with a criminal offence of the right - ...

(ii) to a fair and public hearing by an independent and impartial tribunal ...”

11. These constitutional protections are subject to the saving of existing law in section 6 of the Constitution. Section 6 provides:

“(1) Nothing in sections 4 and 5 shall invalidate -

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right. ...

(3) In this section -

‘existing law’ means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1) ...”

The relationship between sections 4 and 5 on the one hand and section 6 on the other is the principal issue on this appeal.

12. It is not in dispute that a mandatory death sentence for murder laid down in section 4 of the 1925 Act is a cruel and unusual punishment. Section 2 of the 1976 Constitution would therefore invalidate it because it would contravene section 5(2)(b) of the 1976 Constitution unless section 6 of the Constitution applies to save it as existing law. As discussed below, it is important to recall that section 6 of the 1976 Constitution has preserved many laws which existed before the adoption of that Constitution as well as the mandatory death penalty.

13. As more fully explained below, the constitutional validity of a mandatory death sentence for murder has come before the Board on a number of occasions in recent years. In 2002 the Board ruled on an appeal on this issue from Belize in *Reyes v The Queen* [2002] UKPC 11; [2002] 2 AC 235 (“*Reyes*”). In 2003 the Board again addressed the issue in an appeal from Trinidad and Tobago in *Roodal v State of Trinidad and Tobago* [2003] UKPC 78; [2005] 1 AC 328 (“*Roodal*”). In 2004 the Board heard an appeal on the issue from Barbados in *Boyce v The Queen* [2004] UKPC 32; [2005] 1 AC 400 (“*Boyce*”). As more fully described below, as a result of doubts expressed as to the correctness of the decision in *Roodal*, the Board convened a panel of nine judges to rehear *Boyce* and hear a further appeal from Trinidad and Tobago in *Matthew v State of Trinidad and Tobago* [2004] UKPC 33; [2005] 1 AC 433 (“*Matthew*”) and an appeal from Jamaica in *Watson v The Queen* [2004] UKPC 34; [2005] 1 AC 472. In this appeal the Board is asked to review the decision which it reached in *Matthew*.

(iii) The jurisprudence of the Board on the mandatory death penalty

14. In *Reyes* the Board addressed the mandatory death penalty for murder by shooting in the Criminal Code of Belize. The Board, in an opinion delivered by Lord Bingham of Cornhill, unanimously held that because the character of, and the degree of moral guilt associated with, the offence of murder by shooting could vary widely, there would be circumstances in which the death penalty for such offences was excessive and disproportionate. The mandatory death penalty denied the person convicted of that offence of the opportunity to seek to persuade the court, before sentence was passed, that the death penalty was disproportionate and inappropriate having regard to the facts and circumstances of the particular case including the convicted person’s individual circumstances, and it precluded the court from considering the humanity of condemning him to death. It therefore subjected the convicted person to inhuman or degrading punishment or other treatment incompatible with the right afforded to him by section 7 of the Constitution of Belize. No issue concerning the saving of existing laws arose in that appeal because the

Constitution of Belize (in section 21), unlike many Commonwealth Caribbean Constitutions, was expressly transitional, as it preserved existing laws for only five years after Independence Day, which was 21 September 1981.

15. In *Roodal* the Board addressed the effect of the saving of existing law in section 6 of the 1976 Constitution. The state conceded and the Board did not question the premise that the mandatory death penalty for murder in section 4 of the 1925 Act constituted cruel and unusual punishment. The state conceded and the Board did not question that the mandatory death penalty, other things being equal, would be invalidated by section 2 read with section 5(2)(b) of the 1976 Constitution and could be saved only if section 6(1) applied. The majority of the Board (Lord Bingham, Lord Steyn and Lord Walker of Gestingthorpe) in a judgment delivered by Lord Steyn, held (i) that the change in language of the saving provisions from “shall not apply” in section 3 of the 1962 Constitution to “shall not invalidate” in section 6(1) of the 1976 Constitution altered the law (para 25) and (ii) that section 6 came into operation only if it were not possible to use section 5 of the 1976 Act to modify a law to make it conform to the 1976 Constitution by reading it down, by reading in text or by severance (para 26). The majority, therefore, modified section 4 of the 1925 Act to provide a maximum penalty rather than a fixed penalty.

16. In a powerful dissent, which was later upheld by the Board in *Matthew*, Lord Millett and Lord Rodger of Earlsferry rejected the argument that the change in wording in section 6(1) of the 1976 Constitution from that in section 3 of the 1962 Constitution fundamentally altered the protection of existing laws. Under the 1962 Constitution, which was the Constitution that representatives of Trinidad and Tobago chose to adopt when their country became independent, the rights in sections 1 and 2 were circumscribed by the existing laws of the country. This had the advantage of providing for stability and defined the scope and limits of those rights, some of which were declared in very broad terms (paras 67-68). When the Constitution was amended in 1976 to enable Trinidad and Tobago to become a republic, Parliament did not adopt the recommendation of the Constitution Commission that the scheme of rights should adopt the pattern of the European Convention on Human Rights and have no savings clause. Instead, Parliament retained the model of the Canadian Bill of Rights 1960 which the 1962 Constitution had adopted. The new Constitution provided for the conversion of the country from a constitutional monarchy to a republic. It contained a new provision (section 2) making the 1976 Constitution the supreme law of the state and stating that any law that is inconsistent with the 1976 Constitution is void to the extent of the inconsistency. But otherwise the alterations were relatively minor (paras 70-74). The change in wording of the savings provision from “shall not apply” to “shall not invalidate” reflected the introduction of section 2 in the 1976 Constitution (paras 78-81). Section 4 of the 1925 Act was an existing law and therefore valid under the 1962 Constitution and remained valid under the 1976 Constitution (para 82). The

majority had adopted the wrong starting point by starting with section 5(1) of the 1976 Act. The supreme law of the state was the 1976 Constitution and section 5(1) of the Act was to be applied to modify a law only if the law was not in conformity with the 1976 Constitution and required to be brought into conformity. The court had to consider all the relevant provisions of the 1976 Constitution, including section 6(1)(a), when assessing whether there was such conformity. This accorded with settled law in the jurisprudence of the Board, including the recent opinions in *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259 and *Fox v The Queen* [2002] UKPC 13; [2002] 2 AC 284 (paras 85-89). If the majority were correct, that would have the perverse consequence that the greater the incompatibility, the less was the chance of putting it right (para 92).

17. In *Roodal* the majority did not need to address and expressed no view on the appellant's arguments that the mandatory death sentence was contrary to the principle of the separation of powers (para 33). The minority considered those submissions briefly. They rejected the challenge that the role of the Advisory Committee on the Power of Pardon, which was set out in sections 87-89 of the 1976 Constitution, could be unconstitutional (para 107). The minority also rejected the submission that the principle of the separation of powers between the legislature and the judiciary was breached by section 4 of the 1925 Act, holding that legislation by Parliament prescribing a fixed penalty to be imposed on all persons found guilty of a defined offence was a legislative function and was not inconsistent with the separation of powers (paras 108-109).

18. In view of the disagreement among members of the Board on an issue of such significance to the citizens of Trinidad and Tobago and those of other Caribbean countries which had similar constitutional provisions and were subject to its jurisdiction, and after doubts were expressed in the first hearing of the appeal in *Boyce* about the correctness of the decision in *Roodal*, the Board convened an enlarged panel of nine members to hear the appeals in *Matthew* and *Boyce* and an appeal from Jamaica which was thought to involve similar issues. This was in order to make a definitive ruling on the subject. The Board handed down the decisions in *Matthew* and *Boyce* on the same day and the reasoning of the members of the Board is essentially the same in each opinion.

19. In *Matthew* and *Boyce* the Board, by a majority of five to four, decided not to follow the Board's decision in *Roodal*. The majority in those appeals comprised Lord Hoffmann, Lord Hope of Craighead, Lord Scott of Foscote, Lord Rodger and Zacca J, and the minority Lord Bingham, Lord Nicholls of Birkenhead, Lord Steyn and Lord Walker. In both appeals Lord Hoffmann delivered the majority judgment or opinion.

20. *Boyce* was concerned with the question whether the mandatory penalty for murder was compatible with the right under section 15(1) of the Constitution of Barbados (the “Barbadian Constitution”) not to be subjected to inhuman or degrading punishment and whether the mandatory penalty was saved as an existing law by the savings clause in section 26 of the Barbadian Constitution, which provides that no existing law “shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23”. The Board held that the mandatory death penalty would not have been compatible with section 15(1) of the Barbadian Constitution in the absence of the savings clause. The statutory provision that created the mandatory penalty, section 2 of the Offences against the Person Act 1994, was a re-enactment of a provision in the Offences against the Person Act 1868 and was held by the majority to be protected as an “existing law” for the purpose of the savings clause in the Barbadian Constitution.

21. Mr Keir Starmer QC, for the appellant, argued that the power of modification contained in section 4(1) of the Barbados Independence Order 1966 (the “1966 Independence Order”), which brought the Barbadian Constitution into effect, enabled the judges to modify existing laws to make them compatible with the Barbadian Constitution and that the savings clause took effect to preserve the validity of existing laws that were inconsistent with the Barbadian Constitution only to the extent that the relevant provision could not be modified.

22. The majority of the Board rejected this submission. The reasoning of the majority, the substance of which they repeated in *Matthew*, was as follows. The Barbadian Constitution is the supreme law of Barbados. The statements of fundamental rights are stated in general and abstract terms, which the judges have to apply to concrete problems. As the text of a Constitution is a living instrument, judges in performing that task may have to re-examine periodically the application of the provisions of a Constitution to contemporary life. But not all provisions in a Constitution allow themselves to be adapted to changing attitudes and changes in society as the broadly worded statements of fundamental rights do. Some provisions are concrete and specific; and a savings clause that protects existing laws is one such provision.

23. The appellant’s submission, in the view of the majority of the Board, resulted in an arbitrary and irrationally incomplete mechanism for preserving existing laws. In para 38 Lord Hoffmann stated:

“Their Lordships find it hard to imagine why the framers of the Constitution should have wished to install such an arbitrarily incomplete mechanism for securing conformity

between existing laws and sections 12 to 23. That all existing laws should have to conform to principles of fundamental rights would have been understandable. That all existing laws should be exempt is explicable. But that the question should depend upon the mode of expression or conceptual unity of the particular law defies rational explanation. It would immunise only those laws which for linguistic or conceptual reasons could not be brought into conformity by anything which could be described as modification or adaptation.”

24. Further, the interpretation which the appellant advanced would be ultra vires the statutory powers conferred upon The Queen by section 5 of the Barbados Independence Act 1966, by which the 1966 Independence Order was made. Section 5 of the Act conferred a power to provide a Constitution and to make transitional, incidental and supplementary provisions. The power of modification found in section 4(1) of the 1966 Order for which the appellant contended would largely destroy the savings clause in section 26 of the Barbadian Constitution and could not be described as transitional, incidental or supplementary. The Barbadian Constitution, which was agreed by representatives of the people of Barbados, is the supreme law. Section 26 of the Barbadian Constitution reserved to the Parliament of Barbados the power to decide whether to change any existing law to conform to the fundamental rights provisions of sections 12 to 23 of the Barbadian Constitution. There was no power to modify laws which otherwise would be valid. Section 26 made it clear that there was no lack of conformity. Lord Hoffmann (para 51) stated:

“If the power of modification is to apply, there must be lack of conformity not just with one subsection of the Constitution but with the Constitution as a whole.”

25. The majority also rejected the appellant’s argument that, in contrast with section 3(1) of the 1962 Constitution of Trinidad and Tobago, section 26 of the Barbadian Constitution, which, as the Board has said (para 20 above), provided that no existing law “shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23”, did not prevent there being a lack of conformity. It merely prevented the courts from holding that there was such inconsistency and until the courts made such a declaration, the power of modification was available to address the lack of conformity. The majority held that section 26 of the Barbadian Constitution and the savings clauses in the 1962 and 1976 Constitutions of Trinidad and Tobago were intended to have the same effect, which was to give complete immunity to existing laws.

26. In paras 53-59, the majority addressed the criticism that their approach was too literalistic and did not give effect to the established principles of constitutional construction, which treat a Constitution as a living instrument. In short, in contrast with general concepts which invite being given a contemporary content by judges, section 26 was wholly specific and concrete; the Barbadian Constitution left it to the Parliament of Barbados to decide whether existing laws should be amended to conform to the fundamental rights provisions in sections 12 to 23.

27. The majority also rejected the argument based on the separation of powers, that the constitutional power of the executive to commute a death penalty involved the Barbados Privy Council exercising a power of sentencing which was a judicial function. The argument was rejected because the power of commutation in death sentence cases was expressly codified in section 78 of the Barbadian Constitution.

28. In *Matthew*, the main argument, which Mr Edward Fitzgerald QC advanced on behalf of the appellant, was that section 5 of the 1976 Act, which brought the 1976 Constitution into effect but was not part of the 1976 Constitution itself, required existing laws to be modified to comply with sections 4 and 5 of the 1976 Constitution and that that conformity could be achieved by deeming the death penalty to be discretionary. The majority rejected this argument, repeating the reasoning which they had set out in their opinion in *Boyce*. They held that the argument was inconsistent with the status of the 1976 Constitution as the supreme law of Trinidad and Tobago (para 5). Reading the 1976 Constitution without reference to the 1976 Act, there was no basis for holding that the mandatory death penalty was invalid for lack of consistency with sections 4 and 5 of the 1976 Constitution (para 18). Like the dissenting minority in *Roodal*, they rejected the idea that the change of wording in the savings clause of the Constitution from “shall not apply” in the 1962 Constitution to “shall not invalidate” in the 1976 Constitution involved any change of meaning (para 19). Thirdly, adopting their reasoning in *Boyce*, the majority emphasised the irrational and arbitrary consequences of giving effect to the appellant’s interpretation of the modification provision in the 1976 Act: the ability to modify a provision would depend upon the form of a provision rather than its substance (para 21). Lord Hoffmann stated (para 22):

“a rational scheme results from construing the power of modification, however broad, to be directed to the preservation of those parts of an existing law which are consistent with the Constitution. In such a case, if the form of the legislation is that some part can be retained, the remedy is modification under section 5(1) to remove the part which is offensive. If the whole is offensive, it is invalidated. In either

case, it is only the offensive provisions which are struck down and this is done on the basis of substance rather than form.”

This purpose was clear from the language of section 5(1) (paras 22-23).

29. The majority in *Matthew* also rejected the appellant’s arguments based on section 68 of the Trinidad and Tobago Interpretation Act 1962, an argument which the Board does not need to consider in this appeal.

30. The majority in both *Boyce* and *Matthew* also rejected the appellants’ arguments on the separation of powers in the context of arguments about executive clemency. In *Boyce* (para 70) the Board described as “extravagant” the submission that the principle of the separation of powers overrode the terms of a Constitution. Lord Hoffmann stated:

“To say that a Constitution is based upon the principle of the separation of powers is a pithy description of how the Constitution works. But different Constitutions apply this principle in their own ways and a court can concern itself only with the actual Constitution and not with what it thinks might be an ideal one. All that matters is whether the mandatory death penalty and executive clemency are in accordance with the Constitution of Barbados. In their Lordships’ opinion, they are.”

Similarly, in *Matthew* (para 28) the majority observed that “the principle of the separation of powers is not an overriding supra-constitutional principle but a description of how the powers under a real Constitution are divided.”

31. In so holding, the majority recognised that the consequence for Trinidad and Tobago is that the statute book would sanction a cruel and unusual punishment which was not consistent with the interpretation of the human rights Treaties to which the state was a party. The majority anxiously considered whether there was an interpretation which would avoid that result but concluded that there was not. The savings clause for existing law in the 1976 Constitution was not merely a transitional provision which had become spent; the abolition of the mandatory death penalty was, as the 1976 Constitution intended it to be, a matter for the Parliament of Trinidad and Tobago.

32. The jurisprudence of the Board on the constitutional validity of a mandatory death sentence following the judgment in *Matthew* and the opinion in *Boyce* can be summarised thus:

(i) The 1976 Constitution, which the 1976 Act brought into effect, is the supreme law of Trinidad and Tobago. If anything in the 1976 Act had been intended to modify or qualify some provision of the Constitution, it would have been included in the Constitution itself.

(ii) The savings clause, which is contained in the 1976 Constitution and which is not a transitional provision, makes existing laws conform with the Constitution by disapplying sections 4 and 5 of the Constitution to such laws.

(iii) The Parliament of the independent Trinidad and Tobago decided in 1976 not to dispense with the savings clause which has this effect.

(iv) The power in section 5 of the 1976 Act to modify a law to make it conform to the 1976 Constitution is available only where the law in question is not in conformity with the Constitution. The 1976 Act does not give the courts power to modify a law whose validity is preserved by the Constitution.

(v) Otherwise, there would be the perverse result that the only existing laws which would be saved by the savings clause would be those which could not be modified because (a) they were the most incompatible with the 1976 Constitution or (b) because the mode of expression of the legal provision was such as would prevent modification.

(vi) The living instrument doctrine enables broadly worded statements of fundamental rights to be adapted to reflect changing attitudes and changes in society; but not all provisions in a Constitution are of that nature. The meaning and purpose of a savings clause which preserves existing law does not change over time.

(vii) Giving priority to a modification clause in the 1976 Act over the savings clause in the 1976 Constitution would in large measure destroy the effect of the savings clause which is part of the supreme law of the state and which reserves to the legislature the power to determine whether and if so how to change any existing law to conform with the fundamental rights articulated in the 1976 Constitution and changing social attitudes.

(viii) The scope of the doctrine of the separation of powers between the legislature and the judiciary depends on the arrangements within a particular Constitution. In Trinidad and Tobago, legislation by Parliament prescribing a fixed penalty to be imposed on all persons found guilty of a defined offence is a legislative function and is not inconsistent with the separation of powers.

(iv) The jurisprudence of the Caribbean Court of Justice

33. More recently, the CCJ has, as it is entitled to do, declined to follow the Board's judgment in *Matthew* in an appeal from Barbados, *Nervais v R* [2018] CCJ 19 (AJ); [2018] 4 LRC 545, and in an appeal from Guyana, *McEwan v Attorney General of Guyana* [2018] CCJ 30 (AJ); [2019] 1 LRC 608.

34. In *Nervais*, the CCJ heard and upheld appeals from Barbados against mandatory death sentences under section 2 of the Offences Against the Person Act 1868 ("the 1868 Act"). Byron P delivered the detailed leading judgment with Saunders, Wit, Hayton Rajnauth-Lee and Barrow JJCCJ. In that judgment the CCJ recorded that the state of Barbados had accepted the ruling of the Inter-American Court of Human Rights that the mandatory death penalty was a breach of the American Convention on Human Rights and had introduced legislation to remedy that breach of international law. The first issue which Byron P addressed was whether section 11 of the Barbadian Constitution, which declared the fundamental rights and freedoms of the individual at the start of Part III of the Constitution, was a preamble or was separately enforceable. Byron P and the majority rejected the submission by the Crown that section 11 was a preamble, arguing that the preamble that preceded section 1 of the Barbadian Constitution performed that role. They held that section 11 was separately enforceable; it was an enacting section and included "protections not referenced in those subsequent sections" (para 36). One of the individual rights and freedoms which section 11 recognised was "the protection of law" (section 11(c)) which had a scope beyond the specific protections provided in section 18 of the Barbadian Constitution, which set out certain provisions to secure the protection of the law. The savings clause in the Barbadian Constitution (section 26) protected existing laws from being held to be inconsistent with sections 12 to 23 of that Constitution. Those sections prohibited the breach or secured the protection of each of the fundamental rights set out in Chapter III. The savings clause did not affect section 11. Section 26 should be construed narrowly because it was a derogation from fundamental rights and freedoms (para 39). Section 11(c) was separately enforceable and its application to existing laws was not excluded by the savings clause.

35. The second question was whether the mandatory death penalty in section 2 of the 1868 Act breached section 11(c) of the Barbadian Constitution. This involved a

consideration of the ambit of the right to protection of the law. Byron P referred to the CCJ's jurisprudence on this question and concluded that the protection of the law was to be equated to due process. He stated (para 45):

“The right to protection of the law is the same as due process and connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.”

The mandatory nature of the death penalty violated the right to protection of law guaranteed in section 11(c) because that right encompassed the right to a fair trial which extended to the process of sentencing (para 49).

36. The savings clause did not protect the mandatory death penalty. As the Board has observed, section 26 saved existing laws from being held to be inconsistent with or in contravention of any provision in sections 12 to 23 of the Barbadian Constitution. Byron P (paras 53-57) argued that it was the role of the judiciary, and not the executive or the legislature, to ensure that laws were in conformity with the Barbadian Constitution. Laws inherited from the colonial government which were in conflict with fundamental rights in the Constitution could not be protected so as to prevent judges from performing that role. Byron P stated (para 58):

“The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned.”

He rejected the idea that a savings clause could capture colonial laws and punishments “in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights” (para 59).

37. The third question which the judgment addressed was whether and to what extent section 2 of the 1868 Act could be modified to bring it into conformity with the Barbadian Constitution. Section 4 of the 1966 Independence Order provides:

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

Byron P referred to the judgment of Lord Bingham in *Bowe v R* [2006] UKPC 10; [2006] 4 LRC 241, and held that the existing laws were modified by the 1966 Independence Order by the time Barbados gained its independence on 30 November 1966. The modification provision in the 1966 Independence Order prevailed over the savings clause. He stated (para 68):

“We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution. This interpretation should be guided by the lofty aspirations by which the people have declared themselves to be bound. A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope has expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the court has the duty to construe such provisions, with a view to harmonising them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights.”

38. Accordingly, section 2 of the 1868 Act was ultra vires the right to protection of the law and was capable of modification as mandated by section 4 of the 1966 Independence Order (para 69).

39. For the sake of completeness, the judgment went on to consider other provisions of the Barbadian Constitution, which were section 12(1) (the right not to be deprived of life except in the execution of a sentence of the court in respect of a criminal offence), section 15(1) (the right not to be subjected to cruel and degrading punishment) and section 18(1) (the right to a fair trial). The mandatory nature of the death penalty was antithetical to the separation of powers as it involved the sentencing judge “rubber-stamping” the dictates of the legislature. It breached both section 12 and section 18. It also amounted to cruel and degrading treatment but, because the mandatory death penalty had been modified on independence in 1966 to make the death penalty discretionary, the statutory amendment of section 15 in 2002 to exclude from the scope of section 15 the legal infliction of punishment which was lawful before 30 November 1966 was not applicable.

40. In a concurring judgment Anderson JCCJ agreed with the outcome of the appeal but only on the ground that the mandatory death penalty breached the principle of the separation of powers and the judicial monopoly on the power of sentencing.

41. In *McEwan* the CCJ heard an appeal concerning the question whether the savings clause in the Constitution of Guyana protected an existing law against a constitutional challenge. The law was a provision of the Summary Jurisdiction (Offences) Act 1893 (the “cross-dressing law”), which made it an offence for a man to wear female clothing in a public place for an improper purpose. The constitutional challenge was on the grounds of non-discrimination, equality and freedom of expression. The CCJ unanimously allowed the appeal. The majority judgment of Saunders P, and Wit and Barrow JCCJ was delivered by Saunders P.

42. In para 41 of that judgment, after quoting from para 59 of *Nervais*, which the Board summarised in para 36 above, Saunders P stated:

“Law and society are dynamic, not static. A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest.”

43. Saunders P then set out “four broad and interlocking approaches” which the courts could take to ameliorate the harsh consequences of the savings clause. The first, which involved drawing on the jurisprudence of the Board as for example in *Spence v R* [2001] UKPC 35; [2002] 1 LRC 495 and *R v Hughes* [2002] UKPC 12; [2002] 2 AC 259, para 35, was to adopt a restrictive interpretation of the savings clause while adopting a generous interpretation of the provisions relating to fundamental rights. This meant that the courts below should have construed the savings clause in the Guyanese Constitution strictly. The cross-dressing law had been amended since the country obtained its independence in 1966 and it was proper to regard it as no longer being an existing law which the savings clause protected (paras 48-49).

44. Secondly, adopting that restrictive interpretation, the savings clause only protected laws that infringed the specific individual human rights which were specified in the clause. The savings clause did not prevent the courts from holding a pre-independence law to be invalid when it was contrary to an article of the Guyanese Constitution, such as the characterisation of the state as an indivisible, secular and democratic state or the right to a happy, creative and productive life, which was not one of the articles specified in the savings clause. The savings clause did not protect a pre-independence law which was inconsistent with the separation of powers, judicial independence and the rule of law. Nor did a savings clause apply in relation to rights which had been added to the Guyanese Constitution since independence (paras 50-53).

45. Thirdly, Saunders P invoked the well-established principle that the courts should, as far as possible, avoid an interpretation of domestic law that would place a state in breach of its international obligations. The law in Guyana went beyond that general principle as article 39(2) of the Guyanese Constitution, which required the courts to pay due regard to international law and conventions on human rights when interpreting the provisions of the Guyanese Constitution relating to human rights, had been interpreted as requiring the courts of Guyana to incorporate international human rights law into domestic law when interpreting those provisions of the Guyanese Constitution (para 55).

46. The fourth approach, which Saunders P described as “the most contentious” (para 45), was to apply section 7(1) of the Constitution of the Co-operative Republic of Guyana Act 1980 (the “1980 Constitution Act”), which mandated the modification of existing laws to bring them into conformity with the Act, first before applying the savings clause in the Guyanese Constitution itself. Saunders P referred to the Board’s decision in *Boyce* and the narrow margin of 5:4 by which the Board rejected this approach. The CCJ in *Nervais* had adopted the view of the minority of the Board in *Boyce*, holding that “the modification clause and the savings clause must be read

together so that pre-independence law is brought into conformity with the Constitution”.

47. In summarising the decision that the cross-dressing law was inconsistent with the fundamental rights laid out in the Guyanese Constitution and was not protected by the savings clause, the majority relied on each of the four reasons and in particular that the post-independence amendments to the provision had deprived it of the status of existing law (para 60).

48. In a concurring judgment Rajnauth-Lee JCCJ addressed and upheld the argument that the statutory provision creating the offence was unconstitutional on the ground that it was so vague as to violate the appellants’ right to the protection of the law under articles 40 and 144 of the Guyanese Constitution. She held that the vagueness of the wording in a criminal statute failed to give the individual fair notice of how to conduct himself in order to conform with the statute and facilitated arbitrary enforcement by public officials. Barrow JCCJ agreed with the majority judgment and emphasised the outdated nature of the legislative provision, which reflected Victorian and pre-Victorian values. Referring to the CCJ’s judgment in *Nervais*, he held that the savings clause in the Guyanese Constitution did not protect the statutory offence from a declaration of invalidity on the ground that the criminal provision was inconsistent with the Constitution.

49. Since the hearing of this appeal the CCJ has produced a further judgment in the case of *Marcus Bisram v Director of Public Prosecutions* [2022] CCJ 7 AJ (GY), which was an appeal from Guyana. The case concerned the constitutionality of (i) a direction by the Director of Public Prosecutions to a magistrate to reopen a preliminary inquiry into an allegation of murder after the magistrate had discharged the accused person, and (ii) the statutory provision which empowered the DPP to make that direction (section 72 of the Criminal Law (Procedure) Act 1893). In its judgment the CCJ held that the power to give such a direction was in breach of article 122A of the Guyanese Constitution which entrenched the principle of judicial independence and also was in breach of article 1 of the Guyanese Constitution which described Guyana as a “democratic sovereign state” and required the safeguarding of judicial independence. Section 72 was in breach of the unwritten constitutional principle of the separation of powers. The CCJ also re-affirmed its “modification first” approach in *Nervais*, ie that the modification provision in the 1980 Constitution Act should be applied before the court addressed the savings clause in the Constitution. The CCJ explained that reading the 1980 Constitution Act together with the Constitution itself enabled the courts to promote fundamental rights and freedoms. The court stated (para 63):

“Mechanically pitting the Constitution against its parent enactment in a binary fashion should be eschewed when inter-textual interpretation achieves unity of purpose and promotes the goals and spirit of the Constitution. Far from undermining the supreme law, modification first ennobles it by respecting and advancing the Constitution’s cherished ethos.”

50. The Board has granted permission to appeal in this case because of the judgments of the CCJ in *Nervais* and *McEwan* in order to consider whether the Board should now depart from its judgment in *Matthew*.

(v) The parties’ submissions

51. The appellant’s principal argument is that section 4 of the 1925 Act is inconsistent with (i) the right to life and the right not to be deprived of life except by due process of law: section 4 of the 1976 Constitution, (ii) the right not to be subjected to inhuman or degrading punishment or other treatment: section 5(2)(b) of the 1976 Constitution, and (iii) the right to a fair and public hearing of a criminal charge by an independent and impartial tribunal: section 5(2)(f)(ii) of the 1976 Constitution. Mr Douglas Mendes SC and Mr Edward Fitzgerald QC for the appellant invite the Board to depart from the reasoning of the majority in *Matthew* that section 6 of the 1976 Constitution preserves the lawfulness of the mandatory death penalty despite its inconsistency with fundamental rights which that Constitution would otherwise protect. They argue that because the mandatory death penalty is unconstitutional and therefore unlawful, section 4 of the 1925 Act must be read as providing a discretionary death sentence.

52. The appellant’s counsel also seek to argue that the mandatory death penalty for murder contravenes section 1 of the 1976 Constitution because it breaches the separation of powers which underpin the democratic state and it breaches the principle of the rule of law. In short, it is argued that, by fixing the sentence which a judge must impose in every case irrespective of the circumstances of the offence, the legislature has usurped the judicial function and imposed an arbitrary punishment. They seek to argue that section 6 of the 1976 Constitution does not protect existing law against a challenge based on section 1 of the Constitution and that, as a result, section 4 of the 1925 Act falls to be modified under section 5 of the 1976 Act so that it is read as providing for a discretionary sentence of death for murder rather than a mandatory death sentence.

53. Counsel for the respondent state submit that the reasoning of the majority of the Board in *Matthew* was correct and that the Board should not depart from that ruling. They also submit that the arguments in para 52 above go beyond the matters on which the appellant has permission to appeal and do not properly arise on the appeal.

(vi) Analysis

54. For the reasons set out below, the Board is not persuaded that it should depart from the ruling which it made in *Matthew*. As the Board has stated, in that appeal and in *Boyce* the Board convened a nine-member panel to give a definitive ruling. Although the Board was divided 5:4 on those appeals, the majority judgment provides that definitive ruling.

55. The Board has a well-established approach that its task is to interpret the words of a Constitution and that judges are not to substitute for those words what they think the Constitution should be: *Roodal* (above) para 76 per Lord Millett; *Matadeen v Pointu* [1999] 1 AC 98, 108 per Lord Hoffmann. In *Roodal*, Lord Millett quoted at para 76 his advice in *Pinder v The Queen* [2002] UKPC 46; [2003] 1 AC 620 ("*Pinder*"), para 15, a passage which bears repetition as it neatly states the Board's approach to constitutional interpretation:

"A Constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn; not to substitute the judges' views where it should be drawn."

Lord Hoffmann's warning in *Matadeen v Pointu*, p 109, against reliance on general principles, such as equality of treatment, as justiciable principles in order to give judges the last word, also merits repetition:

“In this, as in other areas of constitutional law, sonorous judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how that principle is to be applied.”

The Board will return to this observation when it considers the argument about the separation of powers.

56. Adopting the approach that focuses on the wording of the Constitution does not mean that judges will come to the same view as to the meaning of a particular constitutional provision. The judgments in *Matthew* and *Boyce* provide ample evidence of such disagreements. But where an enlarged panel of the Board has been convened to give a definitive ruling in the face of judicial disagreement the principle of legal certainty dictates that there must be very strong reasons before the Board will depart from such a ruling.

57. The principle of stare decisis or standing by what has been decided is a fundamental principle of the common law. True it is that the Board is not formally bound by its own prior decisions: *The Rev C T Ridsdale v William Clifton* (1877) 2 PD 276, 306-307; *Gideon Nkambule v The King* [1950] AC 379 (“*Nkambule*”). But the Board has repeatedly affirmed that it attaches great weight to and will only reopen a prior decision with the very greatest hesitation: *Nkambule*, 397-398. The Board would need to be satisfied that the decision was wrong and that it lacked a satisfactory foundation. It is not enough that the Board as presently constituted might take a different view if considering the matter for the first time.

58. In *Lewis v Attorney General of Jamaica* [2001] 2 AC 50, 75 Lord Slynn of Hadley in delivering the opinion of the Board stated that the Board should be “very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so”. In that case, which concerned the death penalty and whether it was competent for the courts to review the lawfulness of the exercise of the prerogative of mercy, the majority of the Board departed from prior decisions because they were satisfied that the wrong approach had been adopted in the earlier cases. Lord Hoffmann, who dissented, took a similar approach towards departing from prior decisions. He drew on the practice of the Supreme Court of the United States, which has never considered itself to be rigidly bound by precedent, in analysing the circumstances in which the Board should depart from a prior decision. He quoted (p 89) from the judgment of O’Connor, Kennedy and Souter JJ in *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992) 505 US 833, 854:

“no judicial system could do society’s work if it eyed each issue afresh in every case that raised it ... Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”

That judgment of the US Supreme Court continued (p 864): “a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided”. Lord Hoffmann concluded, p 90:

“If the Board feels able to depart from a previous decision simply because its members on a given occasion have a ‘doctrinal disposition to come out differently’, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.”

59. The Board considers that the practice of the House of Lords and now the Supreme Court of the United Kingdom provides a useful analogy. In *Gibson v Government of the United States of America* [2007] UKPC 52; [2007] 1 WLR 2367 the Board drew on the practice of the House of Lords since 1966 in setting out the rational principles on which it approaches a request to depart from a previous decision: paras 25, 37-39. Since the House of Lords *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, the Supreme Court has been able to depart from its own or House of Lords precedent when it considers that it is right to do so. In exercising this power, the court accepts that the view of a present panel of Justices that a prior decision is wrong is not a sufficient reason for departing from that decision. More is needed. That extra thing may be that the decision under challenge is hampering the proper development of the law or has otherwise distorted the law. It may be because the earlier decision has given rise to uncertainty in the law: see, for example, *Murphy v Brentwood District Council* [1991] 1 AC 398, in which the House of Lords reversed its earlier decision in *Anns v Merton London Borough Council* [1978] AC 728. The House departed from the decision in *Anns* because it had been demonstrated to have the potential to be in conflict with established legal principles. It had been recognised as unsatisfactory and had generated “a vast spate of litigation” which had resulted in it being distinguished in later cases in the House of Lords and in the Court of Appeal: Lord Keith of Kinkell (p 471). Where an unsatisfactory ruling forces the courts repeatedly to search for distinguishing features in later cases and find grounds to make exceptions to that ruling, the result is an undesirable uncertainty. In short, departing from the decision in *Anns* was seen as necessary to re-establish a degree of certainty in the law.

60. The UK Supreme Court will normally decline to overrule a decision if the contentions which are advanced in a later appeal are the same as those advanced in the earlier case and there has not been a material change of circumstances: *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345, 1349 (“*Fitzleet Estates*”) per Lord Wilberforce.

61. Further, the court has recognised that there is less scope for reconsidering a decision on a question of statutory interpretation than there may be in relation to a decision involving a judicial exposition of the common law. Respect must be given to the words and purpose of the statutory provision and, where a court of final appeal has given an authoritative interpretation of such a provision, it will normally be for Parliament to change the law if that interpretation is thought to be incorrect. In *R v National Insurance Comr, Ex p Hudson* [1972] AC 944, 966, Lord Reid stated that it should only be in rare cases that the court should reconsider questions of statutory construction. Similar views were expressed in that case by Lord Morris of Borth-y-Gest, who thought that it was for Parliament to consider proposals for change (p 973), Lord Wilberforce (p 995), and Lord Simon of Glaisdale (p 1024), who considered that it had to be shown that the construction was causing administrative difficulties or individual injustice. Viscount Dilhorne (p 993) took a different view, seeing no reason why the court should be especially reluctant to correct an error in the construction of a statute; but that was a minority view. There is, in the Board’s view, a distinction to be drawn between the judicial exposition of the rules of the common law, which may be reformulated and developed by judges, on the one hand and statutory law on the other. As R A Posner stated, “Statutory law differs in that the statutory text ... is in some important sense not to be revised by the judges, not to be put in to their own words. They cannot treat the statute as a stab at formulating a concept.” (R A Posner, *The Problems of Jurisprudence*, p 248.)

62. That need for caution applies with great force to the interpretation of a Constitution in relation to those provisions which may not readily be given an updated interpretation by application of the “living tree” doctrine. This is evident from the jurisprudence of the Board. In *Attorney General for Ontario v Canada Temperance Federation* [1946] AC 193, 206 Viscount Simon stated that “on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects”. This is unsurprising because it is the Constitution itself which allocates powers to the different branches of government, whether between a federation and a province or between the legislative, executive and judicial branches of government. As Lord Millett stated in *Pinder*, the balance is drawn by the Constitution. See also Lord Hoffmann in *Matadeen v Pointu*. Respect for the allocation of power in a Constitution can, nonetheless, cause the Board to review an earlier judgment. Thus, in *Hunte v State of Trinidad and Tobago* [2015] UKPC 33 (“*Hunte and Khan*”), a case which addressed the question whether the

Board had jurisdiction to commute a death sentence on a criminal appeal against sentence, which did not involve an application for constitutional redress, the Board reversed prior decisions on this point which had created uncertainty and anomalies. The Board pointed out (para 68) that it was damaging to respect for the rule of law for the Board to continue to exercise a purported judicial power contrary to the provisions of the Constitution.

63. The fact that a court of final appeal has reached a decision by a bare majority may be strong evidence that both sides of the argument are tenable, but that does not weaken the authority of the majority decision. In *Fitzleet Estates* Lord Wilberforce explained (p 1349) that doubtful issues have to be resolved and “the law knows no better way of resolving them than by the considered majority of the ultimate tribunal”. He continued by stating that there must be more than doubts about the correctness of such opinion to justify departing from it.

64. The reasons why a court of final appeal must be very slow to depart from an earlier ruling are well known. One of the principal advantages of stare decisis is its contribution to legal certainty. It promotes the predictability of the law and assists the planning of human activity. In private law it assists the giving of legal advice and the settlement of disputes. It enables people to carry out commercial and other transactions with some confidence that their arrangements are not going to be undermined retrospectively. Similarly in public law and in criminal law it facilitates the giving of legal advice both to the organs of government and to citizens who are affected by the coercive power of government. It assists the citizen in understanding the circumstances in which he or she may be subjected to that power. By promoting continuity over time, it supports the rule of law in the sense that everyone, whether a citizen or an organ of government, is bound by rules fixed in advance.

65. Nonetheless, in the application of the principle of stare decisis the Board is mindful of what is at stake when a person is facing a sentence of death or the loss of liberty for a prolonged period of time. In *Lewis* (above) Lord Slynn stated (p 75) that where a man’s life was at stake, where the death penalty was involved, the Board should be prepared to depart from prior decisions if it were satisfied that the earlier cases had adopted the wrong approach. The House of Lords took a similar approach in a case concerning the competency of judicial review of the decisions of immigration officers which related to the detention and summary removal of illegal immigrants, emphasising that what was at stake was “a high constitutional principle affecting the liberty of the subject and the delineation of the respective functions of the executive and the judiciary”: *R v Home Secretary, Ex p Khawaja* [1984] AC 74, 125 per Lord Bridge of Harwich. Cases involving the death penalty are of the utmost importance, but the

Board must be satisfied that its prior decision involved a wrong approach before it can have any basis for overruling that decision.

66. It is necessary therefore to apply this jurisprudence to the decision in *Matthew*. In the Board's view there are several reasons why the Board should be very slow to overrule that decision. First, the question concerns the meaning of a savings clause which protects existing laws; it is not confined to the question of the mandatory death penalty. To hold that existing laws were modified in 1962 on the coming into effect of the 1962 Constitution when for many years the government and people of Trinidad and Tobago have conducted their affairs on the basis that there had not been such modification would be to introduce considerable uncertainty into the law. In Chapter 2 of his celebrated work, *The Morality of Law* (revised ed 1969), Lon L Fuller listed eight desiderata of a system of legal rules. The relevant desiderata are that retroactive laws should be avoided, that legal rules should be clear, that there should be constancy of law through time and that there should be the correct administration of the law. These desiderata are not rules of law, but they are statements of what is obviously desirable. For the Board to reverse the decision in *Matthew* would be to militate against these desirable features of the law and against respect for the rule of law.

67. The Board, other than in the now-overturned case of *Roodal*, has consistently adopted the approach to the interpretation of the savings clause which it upheld in *Matthew*. See, for example, *Johnson v Attorney General of Trinidad and Tobago* [2009] UKPC 53; [2010] 4 LRC 191, paras 13-15, 19-24 ("*Johnson*") (a case concerning discrimination against women) and *Seepersad v Attorney General of Trinidad and Tobago* [2012] UKPC 4; [2013] 1 AC 659, para 28 (a case concerning the review of the indefinite detention of young persons at the pleasure of the state). Lord Rodger stated the matter pithily in *Johnson* at para 13: "section 6(1) makes an existing law constitutional, ie consistent with the Constitution, even though it would conflict with section 4 if that section applied to it". Further, the Board, while recognising that the mandatory death penalty is a cruel and unusual punishment, has followed its decision in *Matthew* in later cases concerning that penalty. See, for example, *Miguel v State of Trinidad and Tobago* [2011] UKPC 14; [2012] AC 361, para 51 and *Pitman v State of Trinidad and Tobago* [2017] UKPC 6; [2018] AC 35, para 42.

68. The Board recognises the right of the CCJ to develop its own jurisprudence for the countries that are subject to its jurisdiction and that the CCJ is not bound to follow the Board's precedents. Further, as explained below, the Board does not question the outcome of the decisions in *Nervais* and *McEwan*, each of which could be distinguished from *Matthew*. Nonetheless, the Board is not persuaded by the judgments of the CCJ in *Nervais* and *McEwan* that *Matthew* was wrongly decided or that the law went in a wrong direction in that decision.

69. In *Nervais* the CCJ, by holding that section 11 of the Barbadian Constitution has legal effect and is separately enforceable, circumvented the savings clause which refers to specific sections of that Constitution but not to section 11. It is a tenet of the jurisprudence of both the Board and the CCJ that savings clauses are to be given a strict or narrow interpretation. The ruling that section 11 has legal effect was sufficient on its own to determine the appeal. As the savings clause of the Barbadian Constitution (section 26) did not protect the existing law from constitutional challenge under section 11 of that Constitution, the law could be modified under section 4 of the 1966 Independence Order. But in Trinidad and Tobago the 1976 Constitution does not have an equivalent provision to section 11 of the Barbadian Constitution similarly located in the Constitution outside the scope of the savings clause. Further, the argument in *Nervais* that a general savings clause of colonial laws curtailed the freedom of the citizens of an independent state from giving effect to an expanding appreciation of fundamental rights and freedoms must carry much less weight in Trinidad and Tobago as the 1976 Constitution was adopted by the independent state when it transitioned into a republic. It was a conscious democratic decision to preserve existing laws and not to convert the savings clause into a transitional provision. As the Board has mentioned, Parliament had the option of dispensing with a savings clause at that time and deliberately chose not to do so. By making that choice the legislature reserved to itself the responsibility for updating the laws of Trinidad and Tobago to reflect developing appreciation of fundamental rights and freedoms and changes in social values.

70. Two aspects of the CCJ's reasoning were at odds with the Board's jurisprudence but neither was essential to the decision in *Nervais*. The first aspect was the argument that one could apply the modification clause to an existing law before addressing whether it was protected by the savings clause from being in disconformity to the Constitution. The second aspect is the reliance on the doctrine of the separation of powers. The Board discusses those aspects below.

71. In *McEwan* the CCJ was able to exclude the operation of the savings clause on three bases which do not contradict the jurisprudence of the Board. First, the CCJ held that the amendment of the cross-dressing law since the Constitution came into effect removed its status as existing law. Secondly, the CCJ held that the cross-dressing law was contrary to rights which were added to the Constitution since Guyana gained its independence and that the savings clause did not protect the cross-dressing law from constitutional challenges which rely on such provisions. Thirdly, the judicial interpretation of article 39(2) of the Guyanese Constitution has involved the incorporation of international human rights law into the domestic law of Guyana. None of those arguments is open to the appellant in this appeal. The fourth approach, which was recognised as the most contentious, was taken from *Nervais* and involved applying

the modification clause of the Constitution Act before addressing the savings clause in the Constitution. The Board discusses this approach below.

72. Turning to the two arguments on which the Board and the CCJ have reached differing views, the first concerns the relationship between the savings clause in a Constitution and the modification clause in the Act establishing the Constitution. In para 32 above the Board has summarised the position which the Board in *Boyce* and *Matthew* reached on, among other matters, the question of that relationship. In the Board's view, the interpretation which was laid down in *Boyce* and *Matthew* is consistent with the wording of the 1976 Constitution and, properly, gives priority to the Constitution as the supreme law of Trinidad and Tobago over the statute which enacted it. It also is consistent with the historical purpose of the savings clause when newly independent states adopted for the first time written Constitutions which contained generally worded statements of fundamental rights. The introduction of such Constitutions in the absence of a savings clause, or with a savings clause which took effect only after the existing law had been modified so far as was possible by judicial interpretation, would have called into question the interpretation and application of existing statutes and laws and have risked creating substantial legal uncertainty. The legal challenges that might have arisen in the aftermath of the adoption of a written Constitution would have covered many areas of life and imposed a great burden on the courts to re-establish a degree of legal certainty. To take but three examples which have come before the Board from Trinidad and Tobago in recent years, challenges could have been made as to the constitutionality of (i) the law of defamation in the face of the protection of the expression of political views (*Panday v Gordon* [2005] UKPC 36; [2006] 1 AC 427), (ii) the Police Service Commission Regulations 1962 and the Statutory Authorities Service Commission Regulations 1968 in the face of the prohibition of discrimination by reason of sex in relation to the right to equality before the law (*Johnson*), and (iii) the Public Health Ordinance 1940 in the face of the protection of freedom of assembly (as in the appeals which the Board has recently heard: *Dominic Suraj v Attorney General* and *Attorney General v Vijay Maharaj*). In the absence of an effective savings clause, at least as a transitional measure to enable the legislature to adapt existing laws to the new Constitution, the potential for such challenges was legion. If the correct interpretation since 1962 had been one of "modify first", the savings clause would have been deprived of almost all utility.

73. In the Board's view there is force in the suggestion that savings clauses served a historical purpose in avoiding the legal uncertainty which the unqualified introduction of a written Constitution would have entailed. In Belize, the savings clause was only for a transitional period of five years; in other countries, including Trinidad and Tobago, no time limit was imposed on the savings clause, but the purpose of avoiding legal uncertainty was the same. The "modification first" approach is open to the criticism

that it ignores the historical context in which the savings clauses were enacted in the 1962 and 1976 Constitutions and in the Constitutions of other Caribbean nations. Further, there is surely force in the Board's observation, summarised in para 32(vi) above, that the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in section 4 of the 1976 Constitution which, in accordance with the living instrument doctrine, can adapt to changes in a society's understanding of those rights and freedoms. In the Board's view, the problems caused by the preservation of laws that were enacted in a different time do not entitle the Board to overlook the historical purpose of the savings clause.

74. While the difference of opinion within the Board, which the appeals in *Matthew* and *Boyce* confirmed, and the jurisprudence of the CCJ show that there were and are tenable arguments on both sides, the Board is satisfied that it cannot be said that the majority in *Matthew* were wrong in their decision.

75. The second argument concerns the doctrine of the separation of powers. On this question the Board has repeatedly taken the view that the doctrine of the separation of powers is not an overriding principle that exists independently of a Constitution but is implicit in a Constitution having regard to the powers of the judiciary, the legislature and the executive which are laid down expressly or by implication in a Constitution. The 1976 Constitution deals separately with the principal institutions of the state. Chapter 3 relates to the President, Chapter 4 to Parliament (including the power in section 53 to make laws for the peace, order and good government of Trinidad and Tobago), Chapter 5 to executive powers (including the Advisory Committee on Power of Pardon: sections 88 and 89), Chapter 6 to the Director of Public Prosecutions and the Ombudsman, and Chapter 7 to the judiciary.

76. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] UKPC 6; [2003] 2 AC 411 ("*Mollison*") Lord Bingham discussed the separation of powers under a Westminster Constitution and stated (para 13):

"Whatever overlap there may be under Constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies': *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, 890-891, para 50."

77. More recently, in *Ferguson v Attorney General of Trinidad and Tobago* [2016] UKPC 2; [2016] 2 LRC 621, para 14, Lord Sumption described the Constitution of Trinidad and Tobago as providing separately “for the exercise and functions of the principal institutions of the state: legislature, executive and judiciary.” In para 15, he spoke of the “qualified separation of powers” in a Constitution on the Westminster model such as that of Trinidad and Tobago and quoted Lord Hope in *Seepersad v Attorney General of Trinidad and Tobago* (above) who stated at para 10:

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

78. In Trinidad and Tobago this separation of judicial power from legislative or executive power is the product of the 1976 Constitution itself. One must construe provisions of the 1976 Constitution and legislation in a manner that is consistent with the separation of powers set out expressly or by implication in the Constitution. As the Board has often stated, including in *Pinder and Matadeen v Pointu*, one looks to the Constitution to see where the boundary between judicial power on the one hand and the legislative and executive powers on the other has been drawn. That line may not be explicitly stated, but the roles of the different branches of government may be discerned by the established understanding of those roles which forms the legal context in which the Constitution was adopted. What is not legitimate is to erect a principle of the separation of powers as a higher legal norm above the Constitution. The question to be asked in the current appeal is whether the 1976 Constitution prohibits Parliament from enacting a mandatory punishment to be inflicted on all persons who commit a particular crime. The answer is that it does not. But for the savings clause, the mandatory death penalty would infringe section 4 of the 1976 Constitution. But that is a different matter.

79. What has been recognised as constitutionally unacceptable is that a legislature should prescribe the penalty that is to be imposed on any particular individual. See, for example, the advice of the Board in *Liyanage v The Queen* [1967] 1 AC 259, 287-290 and the Board’s judgment in *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 WLR 3369 (“*Lendore*”), para 16. There is nothing inconsistent with

the separation of powers in the 1976 Constitution and in many other Constitutions on the Westminster model for the legislature to prescribe by legislation the penalty to be imposed for a particular offence. Lord Millett made this point in *Roodal*, in which at para 109 he quoted from the judgment of Ó Dálaigh CJ in the Supreme Court of Ireland in *Deaton v Attorney General* [1963] IR 170, who stated (p 182):

“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. ... 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 according to the circumstances of the particular case, then a choice of penalty falls to be made. At that point the matter has passed from the legislative domain.”

The Board, in an opinion delivered by Lord Diplock, has expressed similar views in *Hinds v The Queen* [1977] AC 195, a Jamaican appeal. Lord Diplock applied Ó Dálaigh CJ’s words to Constitutions on the Westminster model. In relation to the power which the Constitution vested in the judiciary he stated (p 213) that it is

“implicit in the very structure of a Constitution on the Westminster model ... that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, even though this is not expressly stated in the Constitution: *Liyanage v The Queen* [1967] 1 AC 259, 287-288.”

Turning to the role of the legislature Lord Diplock stated (p 226):

“In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted on all

offenders found guilty of a defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.”

See also *Ali v The Queen* [1992] 2 AC 93, 101-102; *Mollison* para 12; and *Palling v Corfield* (1970) 123 CLR 52, 58 (High Court of Australia).

80. The separation of powers also works to prevent judges from arrogating to themselves powers vested in another branch of government. The Board’s decision in *Hunte and Khan* (above) is an example of the application of that principle which led the Board to overturn its earlier opinions in *Matthew and Ramdeen v State of Trinidad and Tobago* [2014] UKPC 7; [2015] AC 562 because it was satisfied that the Board by commuting the death sentence on a criminal appeal had taken to itself a power which it did not possess under the Constitution: Lord Toulson (para 68) and Lord Neuberger (para 76).

81. The difficulty which the argument of the appellant’s counsel faces is that the fixing of a penalty to be applied to every person convicted of a particular offence is an inherently legislative power. The Board was unanimous in *Matthew* in rejecting the argument that the mandatory death penalty was contrary to the principle of the separation of powers: see the Board’s judgment delivered by Lord Hoffmann at para 28 and the minority’s judgment at para 62. See also *Lendore*, paras 16 and 17. In the view of the Board that allocation of power in relation to sentencing between the judiciary and the legislature is not altered because the penalty is the mandatory death penalty, where such a penalty is not otherwise invalidated by the Constitution. The separation of powers is not a free-standing, legally enforceable principle that exists independently of and above a Constitution. It is a principle that has informed the drafting of a Constitution and operates through the terms of a Constitution. In other words, it is a principle which is relevant to the interpretation of the 1976 Constitution but provides no basis independent of the Constitution for invalidating legislation.

82. The Board is therefore not persuaded that the approach to the separation of powers, which the Board set out in *Matthew* and other cases, is wrong.

83. The appellant has sought to raise before the Board for the first time, arguments that the mandatory death penalty breaches other rights in sections 4 and 5 of the Constitution. In particular, it is argued that the penalty breaches section 4(a) which is an individual's right not to be deprived of life except by due process of law, and section 4(b), which is the right of an individual to equality before the law and the protection of the law. It was also submitted that the penalty breaches several of the provisions in section 5 which prevent Parliament from depriving a person of the right to a fair hearing (section 5(2)(e)), from depriving a person of the right to a fair and public hearing by an independent and impartial tribunal (section 5(2)(f)(ii)), and from depriving a person of the right to "such procedural provisions as are necessary for the purpose of giving effect and protection" to the rights and freedoms which the Constitution has recognised and declared in Chapter 1 (section 5(2)(h)). It is not necessary for the Board to address those arguments as to whether, absent the savings clause, the mandatory death penalty would contravene any of those provisions. The short answer is that those provisions, like the prohibition against the imposition or authorisation of cruel and unusual punishment (section 5(2)(b)), do not apply to invalidate the mandatory death penalty because of the protection of existing law in section 6 of the 1976 Constitution.

84. The appellant also seeks to raise an argument that section 1 of the 1976 Constitution, which declares Trinidad and Tobago to be "a sovereign democratic state" contains by implication a specific legal requirement that punishment should not be arbitrary and must fit the crime. This is an ambitious submission. The Board does not have the assistance of the courts of Trinidad and Tobago on the question whether that general declaration can provide any legal basis for a constitutional challenge to the mandatory death penalty. The Board would be very concerned to adopt what would be a radical development of the interpretation of the 1976 Constitution without the assistance of the views of those courts. In any event, the Board does not consider that the argument based on section 1 of the 1976 Constitution can add anything to the separation of powers argument which the appellant has advanced and which the Board has rejected.

85. In support of this submission Mr Fitzgerald referred the Board to its decision in *State of Mauritius v Khoyratty* [2006] UKPC 13; [2007] 1 AC 80 ("*Khoyratty*"). It is necessary to examine that case which is central to the section 1 challenge. In that case the Board upheld the judgment of the Supreme Court of Mauritius that section 1 of the Mauritian Constitution, which declared that "Mauritius shall be a democratic state", was breached by legislation which deprived people who had been arrested or detained on suspicion of having committed certain offences under the Dangerous Drugs Act 2000 of access to the court to determine whether they should be remanded in custody or granted bail pending trial.

86. The matter arose in the following way. The Mauritian Constitution was amended by the Constitution of Mauritius (Amendment No 3) Act 1991 (the “1991 Act”) to make it (in the words of the then-Prime Minister, Sir Anerood Jugnauth) “practically impossible” to amend section 1 of the Constitution by requiring that (i) a proposed Bill to amend it be approved in a referendum by not less than three quarters of the electorate and (ii) the Bill at final voting in the Assembly be supported by all the members of the Assembly. Section 5(3) of the Constitution required that an accused person be brought before the court so that the court could decide upon bail if he were not to be tried within a reasonable time. In 1994 Parliament passed an Act (the “1994 Act”) to amend the Constitution by excluding bail in relation to certain drugs offences which would be prescribed by Act of Parliament. The 1994 Act amending section 5 of the Constitution was passed by the vote of not less than three quarters of all the members of the Assembly as required by section 47(2) of the Constitution. But the passage of the 1994 Act did not comply with the deep entrenchment of section 1 which Parliament had introduced in the 1991 Act.

87. The Board agreed with the Supreme Court of Mauritius that the 1994 Act was in breach of section 1 of the Mauritian Constitution and was invalid as it had not complied with the constitutional procedures introduced by the 1991 Act. Lord Steyn, delivering the judgment of the Board, referred to the Board’s earlier decision in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 and stated (para 11) that while the judgment in *Ahnee’s* case did not afford the answer to the question under consideration, “it is relevant in emphasising (a) that Mauritius is a democratic state based on the rule of law; (b) that the principle of separation of powers is entrenched; and (c) that one branch of government may not trespass on the province of any other in conflict with the principle of separation of power.” He explained the significance of the section 1 declaration in these terms (para 12):

“The idea of a democracy 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.”

88. Lord Steyn reasoned as follows: (i) decisions on bail are intrinsically within the domain of the judiciary; (ii) section 1 was not a preamble but a legally enforceable provision; (iii) section 1 (and section 57(2), which provided for quinquennial Parliaments) had been deeply entrenched by the 1991 Act; and (iv) as a result, both

the purported constitutional amendment by the 1994 Act and the Dangerous Drugs Act 2000 which prescribed the offences for which bail was removed, were void because the Constitution had not been amended in accordance with the procedures introduced by the 1991 Act.

89. Lord Rodger (para 29) rejected the idea that section 1 meant nothing more than the sum of the provisions of the rest of the Constitution; it contained “a separate, substantial guarantee”. A hallmark of the modern idea of a democratic state was that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary, on the other. The section 1 guarantee was watered down because the Dangerous Drugs Act 2000 allowed accused persons to be locked up until the proceedings against them were terminated without any right to apply to the court for bail. But the purported constitutional amendment was void and so was the provision of the Dangerous Drugs Act 2000.

90. Lord Mance agreed with the judgment of the Board and Lord Rodger’s supplementary observations. The basic principle of the separation of powers was implicit in the Constitution. Removing the role of the court by imposing automatic detention involved the creation of a new scheme which would contradict the basic democratic principles of the rule of law and the separation of judicial and executive powers (para 36).

91. The focus of the Board’s judgments in *Khoyratty* was on the implicit recognition of the principle of the separation of powers in the legal guarantee that Mauritius is a “democratic state”. In the Board’s view, the distinction between *Khoyratty*, in which bail was recognised as being inherently a matter within the province of the judiciary, and the present appeal is that the fixing of a mandatory penalty for everyone who commits a particular offence is inherently a legislative matter. See paras 78-81 above.

92. Lord Mance’s reference to the principle of the rule of law leads to a consideration of Mr Fitzgerald’s submission that there is a justiciable principle of the rule of law, to which the Board now turns.

93. The appellant argues that the rule of law is a justiciable unwritten constitutional principle of the 1976 Constitution. Mr Fitzgerald points out that the preamble to the 1976 Constitution asserts not only the faith of the people in fundamental human rights and freedoms but also their recognition that freedom must be founded upon respect for moral and spiritual values and the rule of law. The preamble also records the people’s desire that the principles and beliefs are enshrined in the 1976 Constitution. He argues that the rule of law is implicit in the very nature of the Constitution. He cites

as characteristics of the rule of law (i) the separation of powers, (ii) the principle of equality before the law, and (iii) the eschewal of arbitrariness.

94. The Board is not persuaded that it is possible to erect the rule of law into a justiciable unwritten principle which can be separated and untethered from the specific provisions of the 1976 Constitution. The Board has already expressed its opinion on the separation of powers (paras 75-91 above). Just as the principle of the separation of powers arises by implication from the provisions of the 1976 Constitution, those provisions also are the source of the principle of the rule of law. The 1976 Constitution upholds the eschewal of arbitrariness and the principle of equality before the law in section 4(a) and 4(b), which provide:

“(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;”

See, for example, the judgment of the Court of Appeal of Trinidad and Tobago in *Francis v State of Trinidad and Tobago* (2014) 86 WIR 418, para 166. The principle of the rule of law must be considered in the context of the 1976 Constitution as a whole and the Constitution interpreted as a coherent whole. The aspects of the rule of law upon which Mr Fitzgerald relies are articulated in sections 4 and 5 of the 1976 Constitution. Those provisions are, as the Board has explained, disapplied by section 6 of the Constitution. It would undermine the coherence of the Constitution if that which section 6 has disapplied were nevertheless to be applied though the invocation of the principle of the rule of law.

95. The Board concludes that the acceptance of a justiciable principle of the rule of law that is untethered from the 1976 Constitution would contradict the fundamental provision (section 2) that the Constitution is the supreme law of Trinidad and Tobago and would militate against legal certainty.

Conclusion

96. In the Board’s view, the 1976 Constitution saves existing laws, including the mandatory death penalty, from constitutional challenge. The consequence of that is that the state of Trinidad and Tobago has a statutory rule which mandates the

imposition of a sentence, which will often be disproportionate and unjust. The sentence is recognised internationally as cruel and unusual punishment. The state does not dispute that characterisation. The 1976 Constitution leaves it to the President, having received ministerial advice, to substitute a less severe form of punishment in an appropriate case by exercise of the powers in section 87 of the Constitution.

97. The allocation of powers in the 1976 Constitution places on Parliament the burden of deciding when the existing laws which are protected by the savings clause should be amended or repealed to reflect changes in thinking about fundamental rights and freedoms and to accommodate changes in social and political values. The policy questions posed by the savings clause are not limited to the mandatory death penalty but apply also to other preserved laws which are inconsistent with the higher standards enshrined in section 4 of the 1976 Constitution.

98. Laws, which predate the creation of the 1976 Constitution and, but for the savings clause, would be exposed to constitutional challenge for breach of the fundamental rights and protections in section 4 or section 5 of the Constitution, will continue to exist only so long as Parliament chooses to retain them. It is striking that there remains on the statute book a provision which, as the government accepts, is a cruel and unusual punishment because it mandates the death penalty without regard to the degree of culpability. Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws.

99. The Board dismisses the appeal.