IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal Nos. BBCR2017/002
BB Criminal Appeal No. 7 of 2014

BETWEEN

JABARI SENSIMANIA NERVAIS **APPELLANT**

AND

THE QUEEN **RESPONDENT**

AND

CCJ Appeal No. BBCR2017/003
BB Criminal Appeal No.

BETWEEN

DWAYNE OMAR SEVERIN **APPELLANT**

AND

THE QUEEN **RESPONDENT**

[Heard together on 25th day of January 2018]

Before The Right Honourable and the Honourables	**Sir Dennis Byron, President** **Mr Justice Saunders** **Mr Justice Wit** **Mr Justice Hayton** **Mr Justice Anderson** **Mme Justice Rajnauth-Lee** **Mr Justice Barrow**

Appearances

Mr Douglas L Mendes SC, Mr. Andrew O G Pilgrim QC, Ms Naomi J E Lynton and Ms Kamisha Benjamin for the Appellants

Mr Anthony L Blackman, Deputy Director of Public Prosecutions (Ag), Ms Krystal C Delaney, Senior Crown Counsel and Neville Watson, Crown Counsel for the Respondent

JUDGMENT

of

The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton, Rajnauth-Lee and Barrow

Delivered by
The Honourable Sir Dennis Byron

And

JUDGMENT

of

The Honourable Mr. Justice Anderson

Delivered on the 27th day June 2018

JUDGMENT OF THE RT. HONOURABLE SIR DENNIS BYRON, PRESIDENT AND THE HONOURABLE JUSTICES ADRIAN SAUNDERS, JACOB WIT, DAVID HAYTON, MAUREEN RAJNAUTH-LEE AND DENYS BARROW

Introduction

[1] On 21st February 2012 the First Appellant, Jabari Sensimania Nervais ("Nervais"), was convicted of the murder of Jason Burton and sentenced to death in accordance with section 2 of the Offences Against the Persons Act ("OAPA"), Cap 141. The Court of Appeal, comprising Mason, Burgess and Goodridge JJA, dismissed his appeal against conviction and sentence on 17th May 2017. Nervais sought special leave from this Court to appeal, as a poor person, his conviction and sentence. He contended that the learned Justices of Appeal erred when they found that his conviction was safe and that the mandatory nature of the death penalty was constitutional.

[2] On 28th May 2014, the Second Appellant, Dwayne Omar Severin ("Severin") was convicted of the murder of Virgil Barton and sentenced to death in accordance with section 2 of the OAPA. The Court of Appeal, comprised of Sir Marston Gibson, Chief Justice, Mason and Goodridge JJA, dismissed his appeal against conviction and sentence on 17th May 2017. Severin also sought special leave of this Court to appeal, as a poor person, his conviction and sentence. He too contended that his conviction was unsafe and that the mandatory death penalty was unconstitutional.

[3] When the applications for special leave came before us, we were satisfied that they raised issues of great general and public importance. Accordingly, special leave to appeal and leave to appeal as a poor person were granted respectively to Nervais and Severin. During the Case Management process, the parties agreed, and it was ordered by the Court, that the appeals in relation to the convictions of Nervais and Severin would be heard separately and, given the similar challenge to the mandatory death penalty, the appeals against sentence heard together. The appeals against conviction were dismissed and we now turn to the appeals against sentence.

Issues to be determined

[4] After consideration of the oral and written submissions of the parties before us, we concluded that these appeals against sentence raise four broad issues to be determined by this Court. Namely:

a. Is section 11 of the Constitution separately enforceable?
b. Does section 2 of the OAPA breach section 11 (c) of the Constitution?
c. To what extent, if at all, can section 2 of the OAPA be modified to bring it into conformity with the Constitution?
d. Whether section 2 of the OAPA breaches section 15 (1) or 18 (1) or 12(1) of the Constitution?

Before discussing each in turn, we will set out the background against which these issues must be determined.

Background

[5] Section 2 of the OAPA provides: *"Any person convicted of murder shall be sentenced to, and suffer, death."* This has been presented as a highly complex and controversial matter. But the issue for resolution in this case may be simplified to whether it is legally permissible for the use of the word "shall" in section 2 of the OAPA to be modified to "may". In this context, it should be noted that this case is not about whether the death penalty is constitutional or not. It is about the circumstances under which it can be imposed. This follows on a longstanding observation which has been universally accepted. The proposition is that the conduct for which, and circumstances under which a person would be liable to conviction for murder varies enormously with varying degrees of culpability. The corollary is that not everyone convicted of murder deserves to be executed and the courts should be required to consider each case

separately and apply a sentence that is proportionate to the individual case. That is why the question is phrased whether it is legally permissible for the sentencing provision stipulating that the judge "shall" sentence to death to be read instead as "may" sentence to death the convicted murderer.

[6] Justice Mason delivered the judgments on behalf of the Court of Appeal in both the Nervais and Severin matters now before us. In both cases, in addition to submissions made on behalf of the Appellants, the late Mr. Charles Leacock QC, then DPP of Barbados, had submitted on behalf of the State, that the imposition of the mandatory death penalty for all convictions of murder in Barbados, without mitigation and individual sentencing, was patently unconstitutional. He recommended that the court should strike down the mandatory death penalty and make it discretionary. The court felt constrained to reject these submissions, "despite the fact that the mandatory death penalty is inconsistent with and in violation of the international human rights law ratified by Barbados because, while the mandatory death penalty is inhuman and degrading punishment within the meaning of the Constitution, it is provided for in a law that predated the Constitution and is thereby afforded immunity from judicial challenge." [1]

[7] That ruling of the Court of Appeal applied the decision of the majority of the Privy Council in *Boyce and Joseph v The Queen* ("Boyce and Joseph"),[2] which will be considered in some detail later in this judgment. The court stated that it considered itself bound by that decision unless and until it was overruled by the Caribbean Court of Justice ("CCJ"), relying on paragraph 18 of the CCJ decision in *Attorney General and Others v Joseph and Boyce*[3] ("AG v Joseph and Boyce") where this Court outlined its approach to judgments of the Judicial Committee of the Privy Council ("Privy Council"). The Court accepted that decisions made by the Privy Council, in relevant cases, while it was the final Court of Appeal for Barbados, were binding on Barbados unless and until they are overruled by this Court. Mason J specifically applied that opinion. However, the CCJ had only been established in 2005 and did not start with a body of jurisprudence. In the years that have elapsed since then the jurisprudence of the Court has been steadily developing. This requires evolution and change in relation to the approach to the decisions from the Privy Council. There are

[1] Nervais v The Queen BB 2017 CA 9, 84
[2] [2004] UKPC 32
[3] [2006] CCJ 3 (AJ)

cases where the jurisprudence emanating from the CCJ differs from and is inconsistent with decisions made by the Privy Council while it was the final appellate court for Barbados. In such cases, even in the absence of a specific overruling of that decision of the Privy Council, it must be open to the courts in Barbados to apply the jurisprudence emanating from the CCJ.

[8] There were at least two wings to the proposition that Leacock QC presented to the Court of Appeal. One was that the mandatory imposition of the death penalty, without any opportunity to individualise the sentence to fit the particular circumstances of the offence and the offender, contravened the provisions of the Constitution. There was abundant authority to support his argument. But the Court of Appeal ruled that these principles were subordinate to section 26 of the Constitution itself ("the savings clause") as mentioned at para [10] and set out at [51] below.

[9] In 1966 Barbados became an independent nation, with a body of laws derived from the United Kingdom that included the imposition of a mandatory sentence of death upon a conviction of the crime of murder. By that time English citizens had benefitted from major criminal justice reforms including the abolition of the death penalty passed by the British Parliament via the Murder (Abolition of the Death Penalty) Act 1965 which had not been extended and applied to Barbados[4].

[10] Section 1 of the Constitution of Barbados evinced an important result of independence by declaring that the Constitution is the supreme law of Barbados and, subject to the provisions of the Constitution, any other law that is inconsistent with it, shall be void to the extent of the inconsistency. The Constitution also contained section 26 which has been described as a "savings clause" because it was considered to preserve the validity of existing laws, that were in force on the date the Constitution came into force, which were inconsistent with sections 12 to 23, the protection of fundamental rights provisions of the Constitution. The interpretation and application of these provisions have proven to be complicated for the Privy Council as evidenced by the decision of *Boyce and Joseph* where there were significant differences of opinion resulting in a split decision of 5 to 4. Having said that, all judges in that case considered that the imposition of the mandatory death penalty contravened the

[4] Saul Lehrfreund, International Legal Trends and the Mandatory Death Penalty in the Commonwealth Caribbean 1 Oxford U. Commw. LJ. 171 (2001)

provisions of section 15(1) of the Constitution[5]. But the majority felt that section 26 of the Constitution prevented them from making that declaration.

[11] It may be that the division of opinion arose because there was more than one school of thought on the content of the fundamental human rights provisions in the Constitution and this was to some extent referenced in paragraph 32 by Lord Hoffmann in *Boyce and Joseph*. He underscored that there was the view expressed by Lord Devlin in *Director of Public Prosecutions v Nasralla*[6] and Lord Diplock in *de Freitas v Benny*[7] that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with sections 12 to 23 was possible, implying that the constitutional provisions did not afford any protections that were not enjoyed under the colonial rule and were aimed only at preventing the newly independent parliaments from scaling back on rights already in existence under the colonial regime. The other view as expressed by Lord Hope in *Watson v The Queen (Attorney General for Jamaica intervening)*[8] was that the purpose of the section was to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy. Once the concept of transition is invoked the established position could not be intended to endure in perpetuity, but only for the temporary purpose of transition.

[12] The second wing was that Barbados had already accepted that it had an obligation to modify its legislation to remove the mandatory imposition of the death penalty in conformity with international law provisions by which it was bound. The State of Barbados is a member of the Organization of American States. It ratified the American Convention of Human Rights ("the Convention") on 11th May 1981 and accepted the jurisdiction of the Inter-American Court ("IACHR") on 5th June 2000.

[13] In 2007, the IACHR in the case of *Boyce et al. v Barbados*[9] ruled *inter alia* that through the imposition of the mandatory sentence of death on Boyce et al, the State of Barbados was in breach of the Convention. The IACHR found that the "failure of Barbados to amend or invalidate section 2 of the Offences Against the Person Act so as to bring its laws into compliance with the American Convention constituted a *per*

[5] Supra (n.2) [27], [78]
[6] [1967] 2 AC 238
[7] [1976] AC 239
[8] [2005] 1 AC 472 [46]
[9] Judgment of November 20, 2007 (Preliminary Objection, Merits, Reparations and Costs)

se violation of Article 2 of the Convention" and that Section 26 of the Constitution effectively denied citizens in general, and the alleged victims of violation in particular, the right to seek judicial protection against violations of their right to life.[10]

[14] In 2009 the same court, in the case of *Dacosta Cadogan v Barbados*,[11] again found *inter alia* that Barbados was in breach of its obligations under the Convention as it related to section 2 of the OAPA and section 26 of the Constitution and made similar remedial orders.

[15] In its order monitoring compliance with judgments in *Boyce* and *Cadogan* of November 21, 2011 the IACHR referred to the fact that Barbados had accepted and given undertakings to the court to comply with the rulings of the court. At paragraph 10 of the order it stated

> "With respect to the *Boyce* case, the State reported that it had decided to abolish the mandatory aspect of the death penalty. To this end, the State indicated that it intended to institute legislative changes and that it would forward evidence of these changes to the Court as soon as they became available. However, in its report on compliance with the *Da Costa Cadogan* Judgment, the State indicated that a "Committee to Study the Ramifications of Repealing Section 26 of the Constitution" (hereinafter, "Committee") had been formed in order to consider, *inter alia*, the legislative changes necessary to repeal the mandatory death penalty. In a meeting held on October 14, 2010, the Committee considered three draft bills.[12]"

[16] In compliance with the orders of the IACHR Case 12645: *Tyrone Dacosta Cadogan v Barbados*, the Cabinet of Barbados[13] determined that the mandatory imposition of the death penalty in respect of the offence of murder should be abolished; and section 2 of the Offences Against the Person Act, Cap. 141 be amended specifically to abolish the mandatory imposition of the sentence of death for offence of murder. Subsequently, the Constitution (Amendment) Act, 2014 and the Criminal Procedure (Amendment) Act, were introduced in the House of Assembly on 7th November 2014. In their statement of "objects and reasons" the bills stated respectively:

> "This Bill would alter the *Constitution of Barbados* in order to
> (a) remove the provision authorising a mandatory sentence of death in section 15;

[10] Ibid, 127
[11] Judgment of September 24, 2009 (Preliminary Objections, Merits, Reparations, and Costs)
[12] The "Constitution (Amendment) Bill, 2010," the "Offences Against the Person (Amendment) Bill, 2010," and the "Penal System Reform (Amendment) Bill, 2010."
[13] Cabinet Note (2014) 73/AG.2, M.P. 2800/8/9/8 Vol. I, January 30, 2014

(b) amend section 26 to redefine the effect of existing law in relation to the fundamental rights provisions; and
(c) refine the exercise, by the Governor-General, of the Prerogative of Mercy. And

"This Bill would amend the *Offences Against the Person Act*, Cap. 141 to abolish the mandatory imposition of the penalty of death for the offence of murder."[14]

[17] The State of Barbados made similar undertakings to this Court as long ago as 2009, in the case of Clyde Anderson Grazette ("Grazette"). After Grazette's appeal against conviction for murder was dismissed on 6th February 2009[15], the Court granted special leave to Grazette to appeal against the mandatory death sentence imposed on him. On 4th May 2009, the Court issued a Consent Order adjourning the hearing of the appeal against sentence "pending compliance by the Government of Barbados with so much of the decision of the Inter-American Court of Human Rights [delivered on 20 November 2007 in *Boyce and others v Barbados* as relates to the abolition of the mandatory sentence of death for murder and the immunizing effect of section 26 of the Constitution of Barbados in respect of "existing laws".

[18] The parties in the case at bar did not take advantage of the opportunity provided during the case management process, to file a joint paper *inter alia*, on the State of Barbados' position on the abolition of the death penalty. However, information was presented on the incidence and implementation of sentences of death between 2000 and 2017. This has revealed *inter alia* that during that period, 31 persons were sentenced to death. Not one was executed. During that same period, 27 inmates who were sentenced to death for murder had their sentences commuted to life imprisonment and of those, 24 have had the remainder of their sentences remitted and have been released from prison.[16]

[19] It is indisputable that the Government of Barbados has acknowledged that the mandatory sentence of death under section 2 of the OAPA and the immunising effect of section 26 of the Constitution violate its obligations under international law. Nor does anyone dispute that Barbados has given undertakings to the IACHR and to this court to rectify these violations and has commenced the process of rectification through legislation already tabled in Parliament. All of this has been reflected in the

[14] Reference to the website of the House of Assembly shows that these bills had their second reading on 27/01/15.
[15] [2009] CCJ 2 (AJ), [1] & [48]
[16] Letter from Privy Council of Barbados dated 2/1/18

consistent performance of the Barbados Privy Council in the commutation of the mandatory death sentence whenever imposed. It is against this backdrop that we now turn to discuss the issues identified at [4] above.

Is section 11 of the Constitution separately enforceable?

[20] The Crown argued that the Appellants were not entitled to rely on the right to the protection of law guaranteed by section 11 of the Constitution of Barbados because the section is a preamble and did not confer any enforceable rights. The Crown relied on a line of authorities of which the most recent decision is *Newbold v Commissioner of Police & Ors.*[17] This was a case dealing with the Bahamas' Constitution. It contained provisions similar to sections 11, 24 and 26 of the Barbados constitution. Lord Mance summarized his position:

> "In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of art 15. It also ignores the word 'Whereas' and the recital in art 15 that it is 'the subsequent provisions of this Chapter' which 'shall have effect for the purpose of affording protection of the aforesaid rights'.
> Finally, it ignores the clear implication of the restriction of the right of redress under art 28 and the restriction of the saving of existing laws from challenge to cases of alleged contravention of arts 16-27. If art 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. Similarly, to read art 15 as an enacting provision would undermine and make pointless art 30(1), the clear aim of which was that fundamental rights otherwise provided by the Constitution should not prevail over any contrarily expressed 'existing law'. The Board therefore considers that art 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights." [18]

[21] In arriving at this conclusion, Lord Mance referred to *Campbell-Rodriques v A-G*[19] which was delivered by Lord Carswell to support his assertion that the Jamaican courts up to and including the Privy Council had rejected the argument that the fundamental rights provision, identical to those in Bahamas, "conferred separate and independent or freestanding rights that could be relied upon to provide redress not available under the subsequent provisions of Ch III of the Jamaican Constitution."[20] He was also of

[17] (2014) 84 WIR 8
[18] Ibid, [33]
[19] [2007] UKPC 65, [2008] 4 LRC 526
[20] Ibid, [28]

the view that *Olivier v Buttigieg*[21] was "earlier authority to the same effect on a similarly-worded article in the Constitution of Malta."

Rejecting the preambular point

[22] The reasoning above attributes an unusual meaning to the word "preamble." A preamble as defined by Halsbury[22] as "a preliminary statement of the reasons which have made the passing of statute desirable, and its position is located immediately after the title and date of issuing the presidential assent." This is a reliable and acceptable definition of the word. The location of section 15 in the Constitution of the Bahamas and section 11 in the Constitution of Barbados militates against them being categorised as a preamble. Neither of these sections was a preliminary statement at the commencement of the Constitution. They were in the substantive portion. Concentrating on Barbados, although equally applicable to the Bahamas, this point is made more poignant by the fact that the Barbados Constitution has a preamble located before section 1. It is a preliminary statement which embodies the fundamental values and the philosophy, on which the Constitution is based, and the aims and objectives, which the founding fathers of the Constitution enjoined the people of Barbados to strive to achieve and recites certain historical facts. It is pertinent to recall at least part of its content:

> "And Whereas the rights and privileges of the said inhabitants were confirmed by articles of agreement, commonly known as the Charter of Barbados, had, made and concluded on 11th January, 1652 …
> And Whereas with the broadening down of freedom the people of *Barbados have ever since then not only successfully resisted any attempt to impugn or diminish those rights and privileges so confirmed, but have consistently enlarged and extended the*m:
> Now, therefore, the people of Barbados
> *(a)* proclaim that they are a sovereign nation founded upon principles that acknowledge the supremacy of God, the dignity of the human person, their unshakeable faith in fundamental human rights and freedoms and the position of the family in a society of free men and free institutions;
> …
> *(e) desire that the following provisions shall have effect as the Constitution of Barbados—*

[23] Is it possible that their Lordships might have meant that in addition to the preamble to the Constitution, a chapter of the Constitution could have its own preamble? This is not a normal feature of drafting statutory instruments and in relation to the

[21] [1966] 2 All ER 459
[22] Halsbury's Law of England, 3rd Edition, Vol. 31, p.370.

Constitution of Barbados which has 10 chapters there is no other chapter where any such suggestion could be made. Chapter 1 has only one section, and in chapter 7, the opening section is entitled "interpretation". There is therefore no reason to "suppose" that section 11 in Chapter III (headed 'Protection of Fundamental Rights and Freedoms of the Individual') was intended to be a preamble. This view is buttressed when one considers, that in its final statement at subsection (e), of the preamble declared; *the following provisions shall have effect as the Constitution of Barbados.* This clearly included section 11 and does not allow its peremptory dismissal as being of no relevance to the enforcement of the fundamental rights and freedoms it declares. This becomes even more apparent by reviewing the words of the section.

Section 11 of the Constitution

[24] Section 11 provides:

> "11. Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the individual rights and freedoms of others and for the public interest, to each and all of the following, namely-
> *(a)* life, liberty and security of the person;
> *(6)* protection for the privacy of his home and other property and from deprivation of property without compensation;
> (c) the protection of the law; and
> *(d)* freedom of conscience, of expression and of assembly and association,
> the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[25] The language of section 11 is not aspirational, nor is it a preliminary statement of reasons which make the passage of the Constitution, or sections of it desirable. The section is in two parts. The first part commences with the word "whereas", a word which it is contended implies that the section is merely preambular and ends at the end of sub-paragraph (d). This part gives effect to the statement in the preamble which states that the people have had rights and privileges since 1652 and these have been enlarged since then. It declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous

terms. It is the only place in the Constitution that declares the rights to which every person is entitled.

[26] In their article, "*Constitutional comparisons by a supranational court in flux: The Privy Council and Caribbean bills of rights*" [23] Tracy Robinson and Arif Bulkan demonstrated the irrationality of attributing a meaning to the word "whereas" which would make section 11 impotent. They pointed out that the origins of the judicial debate on the preamble point are the cases of *Olivier v Buttigieg,*[24] from Malta, and *Société United Docks v Government of Mauritius*[25]from Mauritius. In *Olivier v Buttigieg* Lord Morris had to consider the constitution of Malta which had an opening paragraph in the section on fundamental rights similar to Barbados. He commented

> *"*It is to be noted that the section begins with the word "Whereas." Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow." [26]

[27] However, it must be noted that he accepted that the section must be given declaratory force independently and he did not decide that it was only a preamble. He described it as being mainly in the nature of a preamble. However, in the cases where the preamble point has been utilized his remarks are cited in support of the proposition that the use of the word "whereas" is an indication that the provision is merely preambular and not substantive.

[28] In *Société United Docks v Government of Mauritius* the Constitution of Mauritius contained an alternate formulation. Section 3 was in these terms:

> "*Fundamental rights and freedoms of the individual*. *It is hereby recognised and declared* that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely…[27]"

[23] (2017) 80 (3) MLR 379-411
[24] Supra (n.21)
[25] [1985] AC 585
[26] Supra (n 18) pg. 461
[27] Section 3 of the Constitution of Mauritius

[29] The difference is that the word "whereas" is replaced with the words "it is hereby recognized and declared that." Lord Templeman in giving the judgment on behalf of the Privy Council stated:

> "Their Lordships have no doubt that all the provisions of Chapter II, including section 8, must be construed in the light of the provisions of section 3. The wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. Section 3 recognises that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it is not to curtail the ambit of section 3. Prior to the Constitution, the government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies."[28]

[30] When one reviews the two sections in the Maltese and Mauritius Constitutions, did they really intend to impute such different meanings as has been attributed to them? It would seem to us that in the Maltese Constitution the word "whereas" could easily have been construed to mean "it is hereby recognised and declared that" or even simply "in light of the fact that". These are meanings normally attributed to the word "whereas". We would think that the meaning of the word should at least reflect its context. In this case the context would include the historical statement, in the preamble to the Constitution of Barbados, that the rights now declared were being enjoyed since 1652. The word "whereas" should have been construed as intending to convey that simple fact. We can find no justification for attributing a meaning which deprived the section of any binding effect.

[31] The second part of Section 11 provides that the following provisions, namely sections 12-23 shall have effect for the purpose of affording protection to *those* rights and freedoms subject to *such limitations* of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the rights conferred in section 11 does not prejudice the rights and freedoms of others or the public interest. The plain language of this part must rebut the contention of the Crown

[28] Supra (n. 22) per Lord Templeman pg. 599

and the reasoning of Lord Mance in *Newbold*[29] and the decisions on which he founded his conclusions. There is no need for linguistic finessing to conclude that the word "those" which precedes "rights", and the phrase "said rights" which are subjected to limitation, must refer to the rights declared in section 11 (a) to (d). This means that the provisions in sections 12–23 afford protection for those rights subject to the limitations they authorize. Without the foundation of those section 11 rights, sections 12-23 do not fulfill the aspirations and intentions of the constitutional provisions for the fundamental rights and freedoms.

[32] The CCJ has already decided that section 11(c) makes provision for the enforcement of the right to the protection of law separate and distinct from the provisions in section 18 which is the following section which deals with it. This was expressed in *A-G v Joseph and Boyce* in the joint judgment of de la Bastide PCCJ and Justice Saunders JCCJ. The case dealt with the right to the protection of law and the relationship of section 11(c) to section 18:

> "… In the case of the right to the protection of the law, however, it is clear that section 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that section 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18."[30]

[33] With the evolution of time this principle was again discussed in *Lucas v The Attorney General of Belize*[31] where Saunders JCCJ, albeit in dissent commented section 3 in Belize's Constitution that was similar to section 11 in the Barbados Constitution, contextualised, clarified and at times even supplemented the content of the detailed

[29] Supra (n.14)
[30] Supra (n. 3) [59]
[31] [2015] CCJ 6 (AJ)

provisions similar to sections 12-23[32]. The principle was then expanded and applied to the provisions for unconstitutional deprivation of property in *Maya Leaders Alliance et al. v The Attorney General of Belize*[33] finding that the section was an enacting provision. The Court found that:

> "The notion of deprivation of property is often discussed in the context of the compulsory acquisition of property. It is evident that compulsory acquisition which does not meet the conditions specified in section 17 undoubtedly amounts to arbitrary deprivation of property. However, there may be an arbitrary deprivation of property even where there is no compulsory acquisition. In other words, section 3 is not a mere preamble or introduction but rather is an enacting provision that recognizes and declares rights in property outside the boundaries contemplated by section 17."[34]

[34] The Court held at paragraph 41 that it would:

> "respectfully disagree that this narrow interpretation is properly to be given to the wide spectrum of rights entailed in section 3(a). Undue emphasis should not be placed on the location of the provision. It is the case that the detailed provisions of Part II of the Constitution must be construed in light of the provisions of section 3, but those provisions do not thereby curtail the ambit of the section. As noted above at [32] the wording of section 3 is not that of a mere preamble or introduction but rather that of an enacting provision."

[35] Reviewing section 11 of the Constitution of Barbados through the lens of this evolution we can describe it as an enacting section. The reasoning which was applied to the provisions for the protection of the law, 11 (c), and unconstitutional deprivation of property 11(b) is equally applicable to the other subsections. Take for example, the right contained in section 11 (a), which is the right to life, liberty, and security of the person. Section 12, which the side note identifies as dealing with the "protection of the right to life", deals only with the regulation of the intentional deprivation of life by legislation or a lawful act of war. In the world of today it would be inconceivable that the right to life can have no other meaning than that. Then there is section 13 where the side note of which refers to "protection of the right to personal liberty". The content of section 13 deals with the ways in which this right can be deprived by legislation; and the ways in which arrest and detention can be carried out without breach of the constitutional right proclaimed in section 11. There is no section with a side note reflecting the "protection of personal security" again declared by section 11, but section 14 deals with "protection from slavery and forced labour" and section 15

[32] Ibid [137]
[33] [2015] CCJ 15 (AJ)
[34] Ibid [32]

deals with "protection from inhuman treatment". It may be implied that these sections deal with personal security that is declared in section 11.

[36] It is true that the extent of the rights declared in section 11(a) have not been tested in litigation in Barbados or in the Caribbean. But it could not be perceived that the rights declared in section 11(a) would be incapable of being defined or protected except in the manner expressed in those following sections. One only has to look at the way in which the Indian Supreme Court[35] has addressed the concept of life and personal liberty. There could be no justification for the courts in Barbados or the Caribbean to be prevented from considering whether the rights conferred in section 11(a) include protections not referenced in those subsequent sections. This principle would equally apply to sub-paragraph (d) which deals with the very important fundamental right relating to freedom of conscience, bearing in mind that there is already decided authority in relation to sections 11 (b)[36] and (c).[37]

[37] In summary, section 11 declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados. Sections 12 – 23 afford protection to those rights and freedoms conferred by section 11 subject to such limitations of that protection as are contained in those provisions.

The effect of section 26 and 24 on section 11

[38] The Crown contends that the exclusion of section 11 from section 26 is indicative of section 11 being a preamble. Section 26 prescribes that nothing contained in or done under the authority of existing law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23. The literal and plain meaning of such a provision should be that the 'saving' effected by section 26 does not extend to section 11 and so the court is permitted to make decisions in relation to acts done in contravention of section 11. Instead, we are being invited to support reasoning to the effect that since section 11 was not mentioned in section 26 it must only mean that it did not contain independent justiciable rights. This reasoning is premised on the idea articulated by Lord Hoffmann in *Boyce and Joseph* that the colonial laws in force at

[35] See link to the treatment by the Indian courts https://www.quora.com/What-is-Article-21-in-the-Indian-Constitution
[36] See Maya Leaders Alliance et al v The Attorney General of Belize where a similar provision was addressed in the Belize Constitution
[37] Supra (n.3)

the time of independence must not be held to be invalid by the newly independent judiciaries.

[39] The view that better accords with the protection of fundamental rights is that the Court is not prevented from holding that existing laws may be inconsistent with the fundamental rights and freedoms in section 11. There was no indication that section 11 was omitted inadvertently or by mistake. It is a general principle of constitutional interpretation that derogations from the fundamental rights and freedoms must be narrowly construed and there should be applied an interpretation which gives voice to the aspirations of the people who have agreed to make this document their supreme law should be applied. In the preambular context, the point was made that the people of Barbados have, over centuries, resisted attempts to derogate from those fundamental rights which they have entrenched in their written Constitution. This Court should give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms.

[40] There are similar reasons that confront the submissions regarding section 24. The Crown also contended that there was no jurisdiction to grant relief for the protection of the law under section 11 and reliance should have been placed on section 18, erroneously citing *Boyce*[38] in support of its submission. Section 24 (1) provides that "if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him … then, *without prejudice to any* other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress, and section 24 (2) contains a proviso that the High Court shall not exercise its powers under this subsection *if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law*.

[41] The highlighted passages show that the Constitution itself envisaged that section 24 of the Constitution was not the only method of bringing proceedings. It should be sufficient to indicate that this has already been decided in *A-G v Joseph and Boyce* where the argument that section 11(c) protection of the law, was a non-justiciable right because it was excluded from the redress clause (section 24) was rejected on the ground that, independent of section 24, the Court had an implied power or an inherent

[38] See Page 2850 of the Record of Appeal

jurisdiction to grant relief.[39] The words *without prejudice* in section 24(1) and the proviso, which immediately follows subsection 24 (2), underscore this point.

[42] For the reasons given above we find that section 11 is separately enforceable.

Does section 2 of the Offences Against the Person Act, 1994 breach section 11 (c) of the Constitution?

The ambit of the right to protection of the law

[43] This Court, starting with *A-G v Boyce and Joseph*, has examined the reach and content of the right to protection of the law. In a joint judgment[40], de la Bastide PCCJ and Saunders JCCJ explained that the protection of the law referred to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England, approving the view expressed by Lord Diplock in *Ong Ah Chuan v Public Prosecutor*.[41] They also found that 'due process of law' is a compendious expression in which the word 'law' does not refer to any particular law and is not a synonym for common law or statute. Rather, it invokes the concept of law itself and the universally accepted standards of justice observed by civilized nations which adhere to the rule of law.

[44] Wit JCCJ in *A-G v Joseph and Boyce* was of the view that: "The right to protection of law requires therefore not only law of sufficient quality, affording adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power. It also requires the availability of effective remedies."[42] Similar pronouncements were made by Saunders JCCJ in *Lucas v Chief Education Officer*.[43] Also in *The Maya Leaders Alliance v Attorney General of Belize*[44] where it was found that the right to protection of the law encompassed the State's international obligations. Wit JCCJ in *A-G v Joseph and Boyce* at paragraph 20 continued:

> "[20] The multi-layered concept of the rule of law establishes, first and foremost, that no person, not even the Queen or her Governor-General, is above the law. It further imbues the Constitution with other fundamental requirements such as rationality, reasonableness, fundamental fairness and the duty and ability to refrain from and effectively protect against abuse and the arbitrary exercise of power. It

[39] Supra (n.3) [41]
[40] Supra (n.3) [60]
[41] [1981] AC 648, 670G-H.
[42] Supra (n.3) [20]
[43] [2015] CCJ 6 (AJ)
[44] [2015] CCJ 15 (AJ)

> is clear that this concept of the rule of law is closely linked to, and broadly embraces, concepts like the principles of natural justice, procedural and substantive 'due process of law' and its corollary, the protection of the law. It is obvious that the law cannot rule if it cannot protect.

[45] The right to protection of the law is the same as due process which 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 death penalty

[46] The Appellants submit that section 2 of the OAPA violates the right to protection of the law because:

i. It deprives the Appellants of the right to make representations to Court as to why their lives should not be taken;

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

iii. It violates the basic principle that the punishment must fit the crime; and

iv. It violates universally accepted standards of justice observed by civilised nations that observe the rule of law.

[47] The mandatory death penalty has been found by international human rights bodies such as the International Covenant and Civil and Political Rights Committee ("ICCPR")[45] and the Inter-American Commission on Human Rights ("IACHR")[46] to be arbitrary and to have deprived individuals of the most fundamental human rights

[45] In (Eversley) Thompson v. St. Vincent and the Grenadines, Communication No. 806/1998, UNDoc. CPPR/C/70/D/806, the UN Human Rights Committee held that a mandatory death sentence violated the "most fundamental of the rights, the right to life" as guaranteed by the ICCPR. The Committee majority found that the implementation of a mandatory death sentence with no judicial consideration of the particular circumstances of either the offender or the offence was an arbitrary and therefore illegal deprivation of the right to life.

[46] Downer and Tracey v Jamaica (Report No. 41/00, 13 April 2000) at para 212; Baptiste v. Grenada, Case 11.743, Report No. 38/00 (Inter-Am. C.H.R., Apr. 13, 2000) OEA/ Ser.L /V/II.106 doc. 3 rev.,721.; Cadogan v Barbados.

without considering whether the death sentence as an exceptional form of punishment was appropriate in the particular circumstances of an individual's case.[47] The mandatory death penalty was considered in the Eastern Caribbean case of *Spence and Hughes v. The Queen*[48] where it was found that:

> "…a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.
>
> [44] In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty."

[48] In *Mithu v State of Punjab,*[49] the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and unjust." The Supreme Court of Kenya in *Francis Karioko Muruatetu & Wilson Thirimbu Mwangi v Republic [Writ Petition No.15 of 2015]* held that the mandatory death penalty violated fundamental rights and freedoms. In so doing the Court observed that:

> "…any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory death penalty runs counter to constitutional guarantees enshrining respect for the rule of law[50].

[49] In *Zuniga and others v Attorney General of Belize*[51], we observed that in relation to mandatory or mandatory minimum sentences courts should always examine such penalties with "a wary eye" as mandatory penalties deprive the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. The right to protection of the law or due process includes the right to a fair trial. Having said that, we do not believe that the trial process stops at the conviction of the

47 Derek O'Brien, The Death Penalty and the Constitutions of the Commonwealth Caribbean 2002 PUB. L. 678
48 Crim. App. Nos. 20 of 1998 and 14 of 1997, judgment rendered Apr. 2, 2001 (E. Carib)
49 Criminal Appeal No. 745 of 1980
50 Francis Karioko Muruatetu & Wilson Thirimbu Mwangi v Republic [Writ Petition No.15 of 2015], [58]
51 [2014] CCJ 2 (AJ)

accused. Sentencing is a congruent component of a fair trial. So too is mitigation. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of a fair trial must be accorded to the sentencing stage too and also includes the right to appeal or apply for review by a higher court prescribed by law. The right to a fair trial as an element of protection of the law is one of the corner stones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse. We therefore find the mandatory nature of section 2 of the OAPA places it in violation of the right to protection of the law as guaranteed by section 11 (c). Under section 1 of the Constitution where such "other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void." It follows that the death penalty is void only to the extent that it is mandatory, leaving it valid to the extent that it is merely permissive. In any event, however, the mandatory nature of the death penalty can be modified by another route.

To what extent, if at all, can section 2 of the Offences Against the Person Act, 1994 be modified to bring it into conformity with the Constitution?

[50] The Crown contends that section 26, the savings law clause, prevents section 2 of the OAPA (as an existing law) from being held to be in contravention of sections 12 -23 of the Constitution. The Crown argues that the language of the section is explicit and unambiguous. In this regard, reliance is placed on the majority position in *Boyce and Joseph* in the Privy Council where their Lordships held that section 26(1) precludes the holding of anything contained in or done under the authority of any existing law to be inconsistent with the human rights sections of the Constitution, so that section 1 of the Constitution is, in relation to those sections, effectively ousted and the occasion for exercising the power to modify can, accordingly, never arise. However, we must disagree with this proposition. Although section 11 is not so limited by section 26, sections 12 (1) 15 (1) and 18 (1) which the Appellants have relied on are so limited. As such, we propose to address the section 26 argument first before turning to the issue of modification.

Section 26 - the general savings clause

[51] Section 26 states:

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

[52] In *Joseph and Boyce*, as discussed above, Lord Hoffmann reviewed the rationale for the general savings clause at paragraphs 31 and 32. To recapitulate, he contended that section 26 of the Barbadian Constitution is an exception to section 1, which provides that the Constitution is the supreme law of Barbados, and existing laws are to be immunised from constitutional challenge and must be held valid. He went on to explain that there were two possible rationales for this. One, being the view of Lord Devlin in *Director of Public Prosecutions v Nasralla,*[52] that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with the fundamental rights provisions was possible, and the other being the view of Lord Hope in *Watson,*[53] that this was a device in the interests of legal certainty to ensure an orderly transfer of legislative authority.

[53] The proposition that judges in an independent Barbados should be forever prevented from determining whether the laws inherited from the colonial government conflicted with the fundamental rights provisions of the Constitution must be inconsistent with the concept of human equality which drove the march to independent status. It is also inconsistent with historical fact. The eminent jurist, Dr. Alexis in his article "*When is "An Existing Law Saved?*[54]" opened with the truism

> "Many an independence leader has personal experience with the arbitrary powers afforded by some pre-independence laws. They would therefore have known that those laws conflicted with what they were writing into the Constitutions."

[54] Although he was addressing the executive power of the state, he demonstrated the manifest conflict between the existing laws and the constitutional provisions. The Constitutions reflected the transition from pre-constitutional dictatorial power to the

[52] [1967] 2 AC 238, 247-248
[53] Supra (n.8)
[54] (1976) PL 256

obligation to act with reasonable justification. In states where the composition of the executive and the legislature were often substantially the same, the attractiveness to the executive of inheriting the power formerly exercised by the colonial administration highlights the value of the concept of the separation of powers and the importance of the role of the judiciary in the interpretation and application of the constitutional regimes. Ensuring that the laws are in conformity with the Constitution cannot be left to the legislature and the executive. That is the role of the judiciary, and accordingly it is the right of every person to depend on the judiciary to fulfil that role.

[55] This truism was acknowledged by Lord Hoffmann himself in *Joseph and Boyce* at paragraph 27 in which he concluded that section 15(1) of the Barbados Constitution was inconsistent with the mandatory death penalty for murder prescribed in the pre-independence legislation. There he noted that:

> "[27] If their Lordships were called upon to construe section 15(1) of the Constitution, they would be of opinion that it was inconsistent with a mandatory death penalty for murder. The reasoning of the *Board in Reyes v The Queen [2002] 2 AC 235*, which was in turn heavily influenced by developments in international human rights law and the jurisprudence of a number of other countries, including states in the Caribbean, is applicable and compelling. But since this conclusion would almost certainly have come as a surprise to the framers of the Constitution, it is perhaps worth dwelling for a moment upon why it is nevertheless the correct interpretation of the subsection."

Yet, he concluded that judges in Barbados are prevented from saying that section 15 makes the mandatory death penalty unconstitutional and, consequently and more importantly, that every person in Barbados is denied the enjoyment of that fundamental right and freedom forever. The idea that this should not be "forever" was implicit in Lord Hope's commentary in *Watson*[55] in that he suggested that the savings clause was a transitional arrangement. As we have observed, transitional arrangements must have a time limit. One cannot be in transition for ever. The Belize Constitution addressed this by limiting the application of the savings clause for 5 years[56].

[56] Lord Hoffmann asserted, at paragraph 31, that the clear constitutional policy was that the Constitution is the supreme law with the exception that no existing laws are to be held to be inconsistent with section 12 -23 of the Constitution. He reasoned that:

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[55] Supra (n.8)

[56] F. Alexis suggested that the lessons learnt were gradually applied and by the time that Grenada became independent, its Constitution did not have a savings clause at all.

> "[31] If one reads section 26 together with section 1, it discloses a clear constitutional policy. Section 1, which applies to all laws past or future, states the general proposition that the Constitution is the supreme law and, in consequence, that any law inconsistent with the Constitution is to that extent to be void. Section 26 declares an exception to this general proposition. No existing written law is to be held to be inconsistent with sections 12 to 23. Existing laws are to be immunised from constitutional challenge on that ground. If they cannot be held void, it follows that they must be accepted as valid."

[57] There is a large body of jurisprudence[57] which perpetuated the view that the common law contained all the rights to which newly independent peoples could aspire. The inescapable conclusion being that the function of the bill of rights was to police post-independence laws, not past laws. This view does not sit well from the perspective of a former subjected people who are "Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory"[58] which includes the right to freely determine their political status and freely pursue their economic, social and cultural development. It is also inconsistent with the aspirations set out in the preamble to the Constitution at [22] above.

[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. Professor McIntosh in *Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002)*, commenting on section 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the "horror of this is brought home to the intelligent mind when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution."

[59] It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had

[57] See for example: Lasalle v AG (1971) 18 W.I.R. 379; Nasralla v DPP (1967) 10 W.I.R. 299
[58] http://www.un.org/en/decolonization/declaration.shtml

existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights.[59] This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.

Can section 2 of the Offences Against the Person Act be modified pursuant to Section 4 (1) 1966 Independence Order?

[60] The Crown argued that the Appellants are precluded from relying on section 4 of the 1966 Independence Order ("the Independence Order") because the Independence Order has been spent. However, the words of the Independence Order are clear and unambiguous. Section 4 of the Independence Order which specifically addresses existing laws provides:

> "Existing laws 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.
> 2. ...
> 3. The Governor General may by order made at any time before 30th November 1967 make such amendments to any existing law as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of the Barbados Independence Act 1966 and this Order or otherwise for giving effect to or enabling effect to be given to those provisions".

What was spent due to the effluxion of time was the Governor General's extraordinary law-making power to make any such amendments to existing laws as appeared to him to be necessary or expedient to bring the law into conformity with the Constitution[60]. The Independence Order gave the Governor General a year within which to exercise his discretion to make such amendments. Subsection 4(1) was not limited to the exercise of power by the Governor General which was specifically addressed in subsections (2) and (3) and did not impose any period of limitation on the more general

[59] Robinson, Bulkan and Saunders, Fundamentals of Caribbean Constitution Law, 237-238
[60] Section 4(3) of the Independence Order

power of construction that it mandated with the words "the existing laws shall be *construed*".

[61] In *Bowe and another v R*[61], Lord Bingham, giving the decision of the court, was confronted with the unusual situation that The Bahamas had had more than one Constitution. In the early Constitutions there was no savings clause. It was in the Constitution of July 1973 that the savings clause was included. In that circumstance, the Privy Council found that when a court had to consider the effect of the savings clause after it came into force, it had to do so subject to giving effect to the operation of the fundamental rights provisions in the Constitution before the savings clause was introduced into the new Constitution. This meant that it had to construe the law as modified prior to July 1973, in accordance with the provisions of the Independence Order, even though there had been no act of modification by any court or other authority. At paragraph 42 he said

> "if the appellant's case, based on principles established and authorities decided before 1973, is judged to be sound, should the appellant be barred from relief because the soundness of the case was not recognised at the time?... The task of the court is to ascertain what the law, correctly understood, was at the relevant time, unaffected by later developments, since that is plainly the law which should have been declared had the challenge been presented then…. It matters little what lawyers and judges might have thought in their own minds: in the context of a codified constitution, what matters is what the Constitution says and what it has been interpreted to mean. In 1973 there was no good authority contrary to the appellants' argument, and much to support it. In the final resort, the most important consideration is that those who are entitled to the protection of human rights guarantees should enjoy that protection. The appellants should not be denied such protection because, a quarter of a century before they were condemned to death the law was not fully understood."

[62] In this case, the relevant date would be the date on which Barbados gained independence, that is, 30th November 1966, because at that time, the law would have been modified by the Independence Order to bring it into conformity with the Constitution. It is this context that we are additionally ruling that the effect of section 26 of the Constitution has long been misunderstood to the extent that it was given priority over the mandate to modify contained in the Independence Order. As was noted by Lord Bingham in *Matthew v The State of Trinidad and Tobago*[62]

[61] [2006] UKPC 10
[62] [2005] 1 AC 433

> "The authorities show that the power to modify, which is found in many constitutions, has been exercised judiciously and creatively to achieve constitutional conformity where this is possible, while stopping short of impermissible judicial legislation."[63]

[63] Section 4 (1) of the Independence Order prescribes a mandatory direction to construe the existing laws to bring them into conformity.[64] The method of bringing into conformity is not limited to modification and adaptation, but it includes the wide powers of qualifications and exceptions. No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it. Of course, in exceptional cases a court must be sensitive to the warning in *San Jose Farmers' Co-operative Society Ltd v Attorney General*[65] that where the nature of the inconsistency with the Constitution is such that it cannot be modified without a usurpation of the legislative power it should leave that task to the legislature. Liverpool JA noted that the

> "[The modification clause] is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution; and it is acknowledged that the Land Acquisition (Public Purposes) Act is an existing law. In my view, the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the existing law and the Constitution is too stark to be modified by construction."[66]

[64] Where any person alleges that an existing law has been contravened or is contravening or is likely to contravene any of the provisions of sections 12 to 23 in relation to him, the Court must read section 4(1) of the Independence Order together with section 26(1) of the Constitution. In 1975, Dr. Alexis, in his article "*When is an Existing Law Saved*?[67]" expressed the point that:

> "To apply to such existing laws the savings clause in the Independence Orders is to make those laws conform with the constitutional instruments. To apply only the savings clause in the Constitution is to apply the existing laws replete with their repugnancy. It would appear that, if anything, the clause in the Orders was intended to control the one in the Constitutions. At the very least, both clauses should be read together."[68]

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[63] Ibid [50]
[64] Bowe v The Queen [2006] UKPC 10, [2006] 1 WLR 1623, [25]
[65] 1991) 43 WIR 63
[66] Ibid, pg. 86
[67] Francis Alexis, "When is an Existing Law Saved?" (1975) PL 256
[68] Ibid

[65] Bearing in mind that litigation could have been initiated after the passage of the Constitution to seek redress for conduct that occurred before its passage, or soon after its passage the section protected and saved from liability all those who acted in accordance with the law as it was at that time. The Court however in obedience to the mandate in the Independence Order must now construe the existing law to bring it into conformity with the Constitution. However, it is not simply to hold that things done under the authority of the existing law are inconsistent with the Constitution. This approach sits well with the reasoning Lord Hope on the point of legal certainty and orderly transition. The approach does not remove the imperial taint of the view that what was done under the colonial regime cannot be struck down, but it accords to the Society the comfort that the courts will not be prevented from ensuring that the laws conform to the supreme law of the Constitution and are not calcified to reflect the colonial times. The inescapable irony is that in most cases, the rules which it has been said we are bound to apply here in the Caribbean have long since been changed in England, while, on the view that has until now prevailed, we must remain trapped in the colonial past.

[66] Lord Hoffmann's discussion[69] of the *ultra vires* nature of section 4(1) of the Independence Order was predicated by his description of it as "eccentric". He acknowledged that the Independence Order would not be *ultra vires* if it contained "transitional or other incidental or supplementary" matters. Although he had previously acknowledged that Lord Hope had attributed a transitional rationale for the savings regime, he went on to find that the power "cannot possibly be described as transitional, incidental or supplementary." However, at paragraph 47 of *Boyce and Joseph*, he admits that there is a broad power of modification but stated that it would produce absurdity when the court cannot declare the law void.

[67] In paragraphs 51 and 52[70] Lord Hoffmann concludes that section 4(1) of the Independence Order cannot be used here to modify existing laws where necessary "to bring them into conformity with the Barbados Independence Act 1966 and this Order" because section 26 of the Constitution creates "an irrebuttable presumption that the existing laws were in accordance with the fundamental rights protected by the Constitution." This view undermines concepts of independence and sovereignty and

[69] Supra (n. 2) [44]
[70] Supra (n. 2) [51]

reflects his unacceptable idea that the colonial law as applied to the colonial subjects contained all the fundamental rights to which they were entitled. Yet in the same speech or judgment he demonstrated that the presumption is artificial as he expressed the opinion that the mandatory death penalty does not accord with the fundamental rights provisions of the Constitution.

[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 by.[71] A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution[72]. In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights.

Does section 2 of the Offences Against the Persons Act breach sections 12(1), 15 (1) and 18(1)?

[69] Having found that the mandatory nature of section 2 of the OAPA is *ultra vires* the right to protection of the law while also capable of modification, as mandated by section 4 of the Independence Order, the appeals could accordingly be determined on that basis alone. However, for the benefit of completeness, we now turn to consider sections 12(1), 15(1) and 18 (1) of the Constitution.

[70] Section 12 of the Constitution addresses the right of an individual not to be deprived of life "save in the execution of the sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted." The mandatory nature of the death penalty is antithetical to the separation of powers doctrine. It reduces the

[71] Minister of Home Affairs v Fisher [1980] AC 319, 328-329
[72] See: Kanda v Government of The Federation of Malaya [1962] A.C. 322 per Lord Denning

court's sentencing role to 'rubber-stamping' the dictates of the Legislature. Sentencing is a role which the Constitution specifically reserved for the Judiciary. The mandatory element impairs the judicial process and compromises judicial legitimacy and independence. There can be no doubt that section 2 of the OAPA breaches section 12 (1) and, for reasons given at paragraph [49], it also breaches the right to a fair trial as prescribed by section 18 (1) of the Constitution.

[71] The mandatory sentence of death has also been found to be contrary to the right not to be subjected to cruel and degrading punishment as provided in section 15 (1) of the Constitution. However, section 15 has an inbuilt savings mechanism which immunises punishments and treatments existing prior to the enactment of the Constitution from constitutional challenge on the ground that it is inhuman or degrading punishment. Section 15 provides:

> "15.
>
> (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.
> (3) The following shall not be held to be inconsistent with or in contravention of this section:
> (a) the imposition of a mandatory sentence of death or the execution of such a sentence;
> (b) any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted;
> (c) the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on that person, in conditions, or under arrangements, which immediately before 5th September, 2002
> (i) were prescribed by or under the Prisons Act, as then in force; or
> (ii) were otherwise practised in Barbados, in relation to persons so in prison or so detained."

[72] At the trial, in his oral submissions, lead counsel for the Appellants, Mendes SC argued that if the Court found that section 26 of the Constitution did not preclude

section 2 of the OAPA from modification, then section 2 must be construed as having been modified prior to the 2002 amendment of section 15 of the Constitution. On that basis, section 15(3)(a) is otiose, as there is no mandatory sentence of death. Reliance was placed on *Bowe and another v R.*[73] We find merit in this argument. The mandatory death penalty for the crime of murder pursuant to section 2 of the Offences Against the Person Act of 1868 was modified in 1966 when Barbados became independent so that when it was reintroduced in the 1994 Act, what was saved was the discretionary sentence of death for the crime of murder. Thus, at the time of the 2002 amendment to section 15 of the Constitution, there was never a mandatory sentence of death for the crime of murder in Barbados. Accordingly, we accept counsel's submission that the 2002 amendment is inapplicable to these appeals and therefore we are of the view that it its unnecessary to rule on the constitutionality of the amendment, particularly in light of the fact that we have not received any submissions from the parties in this regard.

[73] We note however that in the wake of *Pratt and Morgan*[74] and that line of authorities, which effectively put a 5-year limit on the entire appellate process after which the death penalty must be commuted to life imprisonment on the basis that it breached section 15 (1) of the Constitution, the Government of Barbados took the deliberate step of amending section 15 of the Constitution. Section 15 (3) was inserted to reverse the effects of that line of authorities. The intent of this section was to preclude constitutional challenges on the basis that the execution of a condemned prisoner after 5 years from the date of conviction would be deemed inhuman and degrading.

[74] Section 48 of the Constitution empowers the Government of Barbados, subject to its provisions, to make laws for the peace, order and good government of the State. Section 49 of the Constitution also empowers the Government to "alter" Chapter III (the fundamental rights and freedoms), provided they receive the support in each House [of Parliament] by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting. The purport of section 49 is clear. While there is no explicit limitation on the power to amend as it is extremely wide and includes "a simple modification or an outright revocation with or without a replacement", [75] the concept of implying unwritten

[73] Supra (n.50)
[74] [1993] UKPC 1
[75] 49 (5) (b) references to altering this Constitution or any particular provision thereof include references

constitutional principles in the constitution in order to declare primary legislation unconstitutional was broached by this Court in *Bar Association v. The Attorney General of Belize* [76] where it was said at paragraph [50]:

> "Since *Hinds v R*, it is possible to imply unwritten constitutional principles in the Constitution in order to declare primary legislation unconstitutional. Therefore, by analogy it is difficult to disagree with obiter dicta of Mendes JA in Attorney-General of Belize v British Caribbean Bank Limited that unwritten constitutional principles may likewise limit the power of the National Assembly to amend the Constitution of Belize. However, even if there is such an implied power, for the reasons stated in relation to the Basic Structure Doctrine, the evidence in this case does not suggest any infringement of those unwritten constitutional principles."

Similarly, for reasons already expressed, it is not necessary to examine those principles in this case in order to pronounce on the constitutionality of the 2002 amendment.

JUDGMENT OF THE HONOURABLE JUSTICE WINSTON ANDERSON

Introduction

[75] I agree that the mandatory sentence of death cannot properly be imposed upon the Appellants but regret that there are aspects of the majority's reasoning to that decision with which I have difficulty. The majority's reasoning rests on two main premises: that section 11 of the Constitution of Barbados is independently enforceable; and that section 4 (1) of the 1966 Independence Order can be used to modify a law saved by section 26 of the Constitution. There are problems with both premises. I consider that a more elegant explanation for the impermissibility of legislating for the imposition of the mandatory death penalty is the judicial monopoly of the power to sentence, which is protected by the doctrine of separation of powers. For reasons that will appear, I also consider that this explanation is more consistent with ensuring respect for, and adherence to, the ongoing evolution in the protection of human rights.

Is Section 11 independently enforceable?

[76] Section 11 provides:

> "11. Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place

(i) to repealing it, with or without re-enactment thereof or the making of different provision in lieu thereof;
(ii) to modifying it (whether by omitting, amending or overriding any of its provisions or inserting additional provisions in it or otherwise); and
(iii) to suspending its operation for any period or terminating any such suspension.

[76] [2017] CCJ 4 (AJ)

> of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
> *(a)* life, liberty and security of the person;
> *(b)* protection for the privacy of his home and other property and from deprivation of property without compensation;
> (c) the protection of the law; and
> *(d)* freedom of conscience, of expression and of assembly and association,
>
> the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[77] The remainder of the Chapter consists of sections 12-27. Sections 12-23 elaborate the protection afforded to the rights and freedoms conferred by the Constitution. The side-notes are instructive: section 12 (protection of right to life); section 13 (protection of right to personal liberty); section 14 (protection from slavery and forced labour); section 15 (protection from inhumane treatment); section 16 (protection from deprivation of property); section 17 (protection against arbitrary search or entry); section 18 (provisions to secure protection of law); section 19 (protection of freedom of conscience); section 20 (protection of freedom of expression); section 21 (protection of freedom of assembly and association); section 22 (protection of freedom of movement); and section 23 (protection from discrimination on grounds of race etc.). Beyond the side-notes, each section makes detailed provision for the rights and freedoms conferred as well as limitations designed to ensure that the enjoyment of the rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[78] Section 24 provides the mechanism for enforcement of the protective provisions elaborated in sections 12-23. It suffices to quote the relevant portion of the first subsection:

> "24. (1) … if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

[79] Section 25 is concerned with defining periods of "public emergency" when specific rights[77] may be curtailed. Section 26 embodies the saving law clause. For present purposes, it suffices to quote the first subsection:

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

[80] Section 27, the final provision of the Chapter, is the interpretation section, which is not immediately relevant.

[81] What clearly emerges from this underlying structure is that section 11 of the Constitution was not intended to be enforceable independent of the remainder of the Chapter. Section 11 is a perambulatory declaration of the rights and freedoms to which every person in Barbados is entitled. The section *explicitly* states that the very detailed provisions which follow "shall have the effect" of affording protection to those rights and freedoms subject to limitations contained in those provisions. The rights and limitations are finely balanced to ensure that rights exercised by one person do not unduly interfere with the rights of another. Section 24 was framed on the understanding that only breaches of sections 12-23 would attract a remedy. For this reason, section 11 is omitted from the remedy provisions in section 24. Section 26 saves existing law from being held to be inconsistent with or in contravention of any provision of sections 12-23. The clear implication is that the framers of the Constitution did not intend for section 11 to be independently justiciable and therefore there was no need to save existing law against it.

[82] These propositions formed the unstated premise of several past decisions.[78] They were recently and authoritatively affirmed by Lord Mance in *Newbold v Commissioner of Police & Ors*[79] in relation to the equivalent provisions in the Bahamas Constitution.

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[77] See section 13 (3) (d) regarding suspension of right to personal liberty

[78] See: Campbell-Rodriques v A-G [2008] 4 LRC 526; Blomquist v A-G of Dominica [1988] LRC Const. 315

[79] Supra (n.15)

The equivalent of sections 11, 24 and 26 of the Barbados Constitution are Articles 15, 28 and 30 of the Bahamian Constitution. Lord Mance said:

> "In short, Mr Fitzgerald's submission does not only run counter to the natural meaning of art 15. It also ignores the word 'Whereas' and the recital in art 15 that it is 'the subsequent provisions of this Chapter' which 'shall have effect for the purpose of affording protection of the aforesaid rights'.
>
> Finally, it ignores the clear implication of the restriction of the right of redress under art 28 and the restriction of the saving of existing laws from challenge to cases of alleged contravention of arts 16-27. If art 15 had been understood as an independent enacting provision, the constitutional right of redress would have been extended to it. Similarly, to read art 15 as an enacting provision would undermine and make pointless art 30(1), the clear aim of which was that fundamental rights otherwise provided by the Constitution should not prevail over any contrarily expressed 'existing law'. The Board therefore considers that art 15 has no relevance or application in this case, save as a preamble and introduction to the subsequently conferred rights." [80]

[83] The reasoning of the majority in the present case establishes that section 11 is not a mere preamble in the traditional sense of the term but has declaratory force. From this it is deduced that the wording of section 11, that subsequent provisions "shall have effect" of affording protection to "those rights and freedoms", refers to the rights declared in section 11 (a) to (d). The majority then refers to *Attorney-General of Barbados v Joseph and Boyce*;[81] *Lucas v The Attorney General of Belize*[82] and *Maya Leaders Alliance v Attorney General of Belize*[83] which elaborate upon the notion of 'protection of the law' to bolster their conclusion that section 11 contains separate justiciable provisions. Support is also sought in the wording of section 24 (2) which contains the proviso that the High Court shall not exercise its powers under that subsection if it is satisfied that adequate means of redress are or have been available to the person concerned 'under any other law'.

[84] These are weak weapons with which to attack a strong fortress. It is not disputed that the reference in section 11 to "*those*" rights and freedoms refers to the rights and freedoms listed in section 11 (a) to (d). Section 11 itself uses that formulation on its way to specifically providing that the subsequent provisions shall have effect "*for the purpose of affording protection* to those rights and freedoms". The subsequent

[80] Supra (n.15) [33]
[81] Supra (n.3)
[82] Supra (n.29)
[83] Supra (n.30)

provisions which state and flesh out the rights in respect of which protection is given are sections 12-23. Accordingly, the remedy provision in the Constitution refers to sections 12-23. Also, the clauses which save existing law against declaration of inconsistency with the Bill of Rights refer to sections 12-23. It is pellucid that the declaratory force in section 11 relates to the rights as they are elaborated upon in sections 12-23. To focus on and isolate the reference to the "*those rights and freedoms"* phrase in section 11 is to mistake the forest for the trees.

[85] None of the cited cases by my colleagues expressly found section 11 or its equivalent (in the case of Belize) to be independently justiciable. Indeed, the Belizean cases of *Lucas* and *Maya Leaders Alliance* are singularly unhelpful to the position taken by the majority. Admittedly, in *Lucas*, this Court held that 'the protection of the law' is a broad spectrum right and that, " When one takes into account the full meaning of the chapeau to s 3 all the rights protected in ss 3 to 19 of the Constitution are 'subject to respect for the rights and freedoms of others and for the public interest'."[84] In *The Maya Leaders Alliance*,[85] this Court held that the evolving concept of 'protection of law' encompassed the responsibility of the State to comply with its international obligations.

[86] These pronouncements do not support the majority since the 'right to protection of the law' adjudicated, appears both in the chapeau and in the substantive provisions following the chapeau providing for the protection of that right. The elaboration by the Court of the right in the chapeau was at one and the same time an elaboration of the enforceable right in the substantive provisions. The underlying structure and integrity of the Constitution was therefore maintained.

[87] *A-G v Joseph and Boyce*,[86] is more on point since it dealt with the protection of law clause present in the chapeau but not in the substantive provisions. de la Bastide PCCJ and Saunders JCCJ were jointly of the view that section 18, whose side-note is 'protection of the law', was "not intended to be an exhaustive exposition of that right. Indeed… it would be well-nigh impossible to encapsulate in a section of a Constitution all the ways in which it may be invoked or can be infringed." They stated that it "would

[84] Supra (n. 29), [62]
[85] [2015] CCJ 15 (AJ), (2015) 87 WIR 178
[86] Supra (n. 3) [60]

be a very poor thing indeed if [protection of the law] were limited to cases in which there had been a contravention of the provisions of s 18."[87]

[88] The decision in *Joseph and Boyce* is not dispositive for two reasons. First, nowhere does it confront the clear mandate and implications that flow from the underlying structure of the Bill of Rights. In the face of this mandate, any conclusion based on the undesirability of limiting enforceability to a contravention of section 18, is to reason from an 'is' to an 'ought'. There is no explanation of how to reconcile a separate justiciability for section 11 with the architecture of the constitutional provisions. That explanation has work to do in drafting any external limits on the elaboration of the protection of the law clause; for, taken at face value, the power of implication could cover all the substantive provisions of sections 12-23 thereby rendering the entire edifice of the Bill of Rights superfluous. Neither is there an indication of how internal limits on rights elaborated from section 11 will be established ahead of litigation to ensure balance between the exercise of rights and the preservation of rights of persons impacted by that exercise.

[89] Second, the actual decision appears not to be based on a separate enforceability for section 18. Rather, de la Bastide PCCJ and Saunders JCCJ considered that the evolution and elaboration of the right to protection of law could be accommodated in the rights enumerated in sections 12-23, particularly, section 18.[88] Accordingly, the decision is in line with the Belizean cases of *Lucas* and *Maya Leaders Alliance*. Where there is no accommodation possible, the rule of law requires that the integrity of the Constitution must be maintained. To cure any perceived deficiency, Parliament, as the legislative arm of the state, must be engaged. The task is not particularly herculean since it appears that the 'protection of the law' is the only preambular clause not repeated in the substantive provisions. In the present scenario, then, the attention of the Attorney General of Barbados should be drawn to the discussion surrounding the desirability of curing the lacunae in the Constitution by considering a constitutional amendment along the lines of asserting, as a first paragraph of section 18, wording to the effect that, "*No person shall be deprived of the right to the protection of the law".* Engagement in such a conversation has significant potential and value for the health and growth of our young constitutional democracies.

[87] Ibid
[88] Ibid, [60]-[62].

[90] It is the case that section 24 (2) of the Constitution refers to the possibility of redress under other laws. It is not entirely clear what *other laws* this refers to, but the general context is illuminating. Section 24 (1), quoted above, enables the courts to entertain allegations of contravention of sections 12-23, "without prejudice to any other action with respect to the same matter which is lawfully available". Section 24 (2) then provides that the High Court has original jurisdiction to hear and determine these allegations with the proviso that the court "shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." The natural meaning of the reference would seem to be to laws *other than the Constitution*. There may be adequate means of redress available under administrative law, judicial review or in common law actions. Constitutional motions ought to be a last resort, reserved for the significant assaults on the rights of citizens where there are no other means of redress available.

[91] For these reasons I am not convinced that section 11 provides a viable route to avoiding the mandate in section 2 of the OAPA which decrees a mandatory sentence of death for murder.

Reliance on Section 4 (1) of the 1966 Independence Order

[92] Mr. Douglas Mendes SC argued for, and the majority places great reliance upon, the use of section 4 (1) of the 1966 Independence Order to modify or alter laws, such as section 2 of the OAPA, saved by section 26 of the Constitution. The suggestion is that section 4 (1) of the Independence Order can be deployed to discipline the interpretation of section 2 of the OAPA. The statutory requirement that the death penalty "shall" be imposed for murder should be interpreted to mean that the death penalty "may" be imposed for murder.

[93] Alas, there are insuperable historical, jurisprudential and practical problems in employing section 4 of the 1966 Independence Order in this way. From a historical point of view, the Independence Order was manifestly not intended to be, and does not form part of the Constitution. In this, the majority of the Privy Council in *Boyce and Joseph v The Queen*[89] was clearly right. The Barbados Independence Act 1966

[89] Supra (n. 2) [44], [57]

was enacted by the UK Imperial Parliament on 17th November 1966. Section 1 recognized 30th November 1966 as "the appointed day" on and after which Her Majesty's Government in the United Kingdom would cease to have any responsibility for the Government of Barbados. Section 1 (2) provided: "(2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Barbados as part of its law..." Section 2 provided for consequential modification of British Nationality Acts, section 3 for the retention of citizenship of UK and Colonies by certain citizens of Barbados, and section 4 for consequential modifications of other enactments. Section 5 conferred upon Her Majesty the power, by Order in Council, to provide a new Constitution for Barbados to come into effect on the appointed day. Section 5 (4) then provides that the Constitution Order, "may contain *such transitional or other incidental or supplementary provisions* as appear to Her Majesty to be necessary or appropriate" while section 5 (6) required that the Constitution Order be laid before Parliament before being made.

[94] The Barbados Independence Order in Council 1966 was made on 22nd November 1966 under the Imperial Independence Act 1966 (having been laid in the UK Parliament) and includes the Constitution which was set out in a Schedule and brought into force by section 3. The Independence Order was made pursuant to the power to provide for appropriate or necessary *transitional or other incidental or supplementary provisions*. As the mere handmaiden for ushering the country into independence, it is difficult to believe that section 4 (1) of the Independence Order was intended to be the permanent source of power for the modification, adaptation or qualification of laws saved by the Constitution, as contended by the Appellants. As the majority stated in *Boyce and Joseph*,[90] once the Constitution had come into effect, its British origins become no more than a matter of historical interest.

[95] The argument that section 4 (1) of the colonial Independence Order has work to do in post-independence Barbados is also implausible from the perspective of Barbados' constitutional jurisprudence. With the attainment of political independence, a new national legal order is officially inaugurated, and the Constitution creates a new rule of recognition and a new *grundnorm* with its own internal points of reference. Professor H.L.A. Hart considers that at the end of the period of devolution of power,

[90] Supra (n. 2) [10]

> "... we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a 'local root' in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed."[91]

[96] Professor Simeon McIntosh applies this jurisprudential prescription to the Barbados Constitution, thus:

> "True, the Barbados Independence Constitution was an Order-in-Council of the British Imperial Parliament; however, once the process of devolution of sovereignty upon the territory was complete, the act became irrevocable, and the Independence Constitution became the charter or the highest norm of the 'new' legal order, whose validity is now presupposed. On this view, the Independence Constitution no more derives legal validity from the Act of the Imperial Parliament than if it were extracted by force."[92]

[97] The coming into being of the Barbados Constitution was therefore an act of juridical singularity which created a new legal order unchallengeable by any colonial legislation not saved or otherwise accommodated by the Constitution. Such colonial law simply does not have a jurisprudential 'leg to stand on'. This is reinforced by section 1 of the Constitution which states with befitting dignity that:

> "This Constitution is the supreme law of Barbados and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

It is not possible, then, that the clause in the Independence Order could prevail over those in the Constitution, or even that the two sets of provisions could come into conflict. In the legal order created by the Constitution, *ex nihilo*, only the Constitution and the laws it sanctions exist. The Constitution has no rival.

[91] H.L.A. Hart, The Concept of Law, (3rd edn, Oxford University Press 2012) 120.
[92] Simeon CR McIntosh, Caribbean Constitutional Reform: Rethinking the West Indian Polity (The Caribbean Law Publishing Company Ltd., 2002) 90.

[98] A practical difficulty with reliance on section 4 (1) relates to the time at which the modification or qualification is deemed to have taken place. Reliance on section 4 (1) implies a duty of modification of all existing laws to conform to sections 12-23. There is no discretion in the judiciary - existing laws "shall" be construed in accordance with subsection (1).[93] This means that at independence, all existing laws become open to immediate challenge for lack of conformity with sections 12-23 with the result that those laws which are deemed capable of modification are saved with such modifications and those which are not so capable are void for inconsistency with the Constitution under section 1.

[99] Under the section 4 (1) theory, the modification exercise throws up some potential gems. For one thing, that exercise is complicated by the fact that it may be conducted years or even decades after Independence. In *Bowe and another v R*,[94] the Appellants challenged the requirement in section 312 of the Penal Code of the Bahamas that the death sentence must be passed on adults, other than pregnant women, convicted of murder. There had been no general savings law clause in the 1963 and 1969 Constitutions and therefore no constitutional provision similar to those held by a majority of the Board in *Boyce, Matthew* and *Watson*, to be effective in precluding challenge to an existing law on grounds of inconsistency with the human rights guarantees of the Constitutions of Barbados, Trinidad and Tobago, and Jamaica, respectively. The situation changed on 10th July 1973 with the inclusion of article 30 (1) which precluded challenge to any existing law for inconsistency with or contravention of the Human Rights guarantees in Articles 16 to 27. As article 30 (1) did not operate retrospectively, the Board held that the compatibility of section 312 of the Penal Code had to be judged by the law obtaining before 10th July 1973.

[100] The Privy Council found that the varying degrees of culpability of those committing the crime of murder (and therefore the appropriateness of differing sentences) "was widely recognized well before 1973".[95] There was clearly a significant body of historical data in support of this position and the Board conducted an extensive legal review tracing the origins of the English policy against disproportionate penalties to the Magna Carta of 1215 and the Bill of Rights of 1689; the Bill being reflected in the eighth amendment to the United States Constitution adopted in 1791. The Board noted

[93] Bowe and another v R [2006] 1 WLR 1623 at [25].
[94] [2006] 1 WLR 1623.
[95] Ibid at [31]

that as early as 1794 the Pennsylvanian Legislature passed legislation to differentiate between capital and non-capital murders. The Royal Commission on Capital Punishment (1949-1953) also came to the same conclusion as regards the myriad of offences which fall within the category of 'murder' and the vast number of ways in which each may differ. Several cases were cited beginning in the 19th Century with *Winston v United States*[96] where the US Supreme Court referred to the "hardship of punishing with death every crime coming within the definition of murder at common law"[97] noting that "[b]y 1963 all the states had replaced their automatic death penalty statutes with discretionary jury sentencing."[98]

[101] The difficulty for the Board in tracing a change in the jurisprudence to a time prior to 10th July 1973 was that the mandatory death penalty was not understood in 1973, and for at least two decades afterwards, to be inconsistent with fundamental human rights. Thus, the mandatory nature of the death penalty was not challenged in *de Freitas v Benny*[99] or *Abbott v Attorney General of Trinidad and Tobago*[100] or in *Jones v Attorney General of the Commonwealth of the Bahamas*.[101] These authorities were dismissed with the observation that, "The inference must be drawn that the argument was not recognized by lawyers to be available."[102] The further difficulty that the challenge to the mandatory nature of the death penalty had previously been dismissed by the Board in *Runyowa v The Queen*[103]was met with the answer that fundamentally, the Board had "abdicated its duty of constitutional adjudication."[104] Lord Diplock's observation of the acceptability of the mandatory death sentence in *Hinds v The Queen*[105] was dismissed as *obiter dicta*, and Lord Diplock's expressed rejection of the challenge to the mandatory death sentence in *Ong Ah Chuan v Public Prosecutor*[106] was itself rejected at least partly on the basis of the absence from the Singapore Constitution of a provision similar to section 3 of the 1963 Bahamian 'Constitution' (section 3 is actually part of the Order in Council) allowing for the power to construe existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. Having vaunted over

[96] (1899) 172 U.S. 303
[97] Ibid at 310 cited in Bowe and another v R [2006] 1 WLR 1623 at [32]
[98] Bowe and another v R [2006] 1 WLR 1623 at [33] citing Woodson v North Carolina (1976) 428 US 280, 291-292
[99] [1976] AC 239, 247
[100] [1979] 1 WLR 1342
[101] [1995] 1 WLR 891
[102] Bowe and another v R [2006] 1 WLR 1623 at [39]
[103] [1967] 1 AC 26
[104] Bowe and another v R [2006] 1 WLR 1623 at [40]
[105] [1976] 1 All ER 353
[106] [1981] AC 648

these obstacles, the Privy Council was able to arrive at the conclusion that "all the building blocks of a correct constitutional exposition were in place well before 1973" and that it mattered "little what lawyers and judges might have thought in their own minds".[107] What mattered was:

> "…what the Constitution says and what it has been interpreted to mean. In 1973 there was no good authority contrary to the appellants' argument, and much to support it. In the final resort, the most important consideration is that those who are entitled to the protection of human rights guarantees should enjoy that protection. The appellants should not be denied such protection, because, a quarter century before they were condemned to death, the law was not fully understood."[108]

[102] In my view, the Board expended unnecessary effort on an inefficacious theory. I readily agree that the Appellants ought to enjoy the contemporary appreciation of the constitutional human rights guarantees (including those protecting against the mandatory death sentence) but do not consider that that protection must necessarily be pigeonholed as crystallizing at the point of Independence with the corresponding refined distinctions and gymnastics which have engaged the Board. What if the protection had crystallized in 1975, two years after Independence but twenty years before the Appellants had been convicted of murder? Should the court, two decades after the mandatory death penalty became widely accepted as a cruel and inhuman punishment nonetheless be forced to impose it? I think not. And what of other alleged protections, including those against certain methods of carrying out of the death penalty? Are these to be dismissed, if established as contrary to current standards of human rights, simply on the basis, assuming such be proved, that the rights crystallised after the date of independence? I do not think so.

[103] In short, using section 4 (1) of the colonial Independence Order to discipline the general savings law clause in section 26 (and the special savings law clause in section 15 (3) of the Constitution) does not solve the problems presented by the savings law clauses. It circumvents these problems by imposing an artificial date stamp that will require revisiting with the onward march in the evolution of human rights law. At best, it merely postpones the day of reckoning.

[107] Bowe and another v R [2006] 1 WLR 1623 at [42]
[108] Ibid

[104] But if section 4 (1) is unavailable, then the general savings law clause in section 26 of the Constitution would appear to rule out altogether any suggestion that the law in existence at the time of Independence could be in contravention of the Bill of Rights. The special savings law clause in section 15 (2) of the Constitution would appear to prohibit any attack on the specific colonial penalties or punishments in existence at the time of Independence. It is precisely for this reason that on their face, both the general and special savings law clauses are in tension with the fundamental rights provisions (or some of the fundamental rights provisions) and therefore throw up the problem as to how this 'serious contradiction'[109] in the Constitution is to be resolved.

Separation of powers and monopoly of the judicial power of sentencing

[105] The Constitution establishes the Judicature to have and to exercise jurisdiction under the Constitution or any other law.[110] The exclusive vesting of the judicial power in the courts is protected by the separation of powers principle as a critical component of the infrastructural design of the Constitution. An Act enacted in the manner and form required to amend specifically targeted provisions in the Constitution will nevertheless be unconstitutional if it also infringes or trenches on the principle of separation of powers, and particularly the jurisdiction of the courts: *Hinds v The Queen*.[111] The judicial power is to be exercised by the courts free from interference from the legislative and the executive arms of the Government.

[106] The courts are, of course, themselves subservient to the Constitution from which they derive their legitimacy and authority. They cannot properly trench on the constitutional powers and responsibilities of the other branches of the Government. Amendment of the Constitution, a law-making function, is reserved for the Legislature. Neither can the courts interpret the Constitution according to their own predilections and prejudices and thus undermine the Constitution and the rule of law. No matter how imperfect or inconvenient the constitutional wording may be, or how slowly the Legislature may be perceived to be in carrying out its responsibility to amend the Constitution, the courts have no license to usurp the legislative function. The Constitution is the supreme law and must be obeyed by each of the branches of Government.

[109] Simeon CR McIntosh, Caribbean Constitutional Reform: Rethinking the West Indian Polity (The Caribbean Law Publishing Company Ltd., 2002) 253
[110] See for example s. 79C of the Constitution
[111] [1976] 1 All ER 353

[107] It follows that it is not permissible for the courts to interpret the savings law clause in section 26 so as to strip it of its obvious meaning and intent. The task of revising and amending the savings law clause is exclusively reserved for the Parliament of Barbados as and when that institution thinks it fit and proper to do so. As regards the imposition of the mandatory penalty of death for murder, that Parliament has relatively recently made it pellucidly clear in enacting section 15 (3) of the Constitution that it wishes to retain the mandatory death penalty. Parliament may amend the Constitution to fall into line with its international obligations (particularly under rulings given by the Inter-American Court of Human Rights[112]) but until it does so, unless those obligations are of a *jus cogens* nature, the courts are bound by the legislative and constitutional edicts.

[108] The conundrum of unbridled interpretation that waters down the savings law clauses in the Constitution is well illustrated by the instructive example given by Lord Hoffman for the majority in *Boyce v The Queen:*

> "For example, section 63 of the Constitution says that the executive authority of Barbados shall be vested in Her Majesty the Queen. It would not be an admissible interpretation for a court to say that this meant that it should be vested in a head of state who was appointed or chosen in whatever way best suited the spirit of the times; that the choice of Her Majesty in 1966 reflected the society of the immediate post-colonial era and that having an hereditary head of state who lived in another country was out of keeping with a modern Caribbean democracy. All these things might be true and yet it would not be for the judges to give effect to them by purporting to give an updated interpretation to the Constitution. The Constitution does not confer upon the judges a vague and general power to modernise it. The specific terms of the designation of Her Majesty as the executive authority make it clear that the power to make a change is reserved to the people of Barbados, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a constitution up to date." [113]

[109] None of this is to say, however, that the courts are obliged to impose the mandatory penalty of death for murder. Far from it. The courts have exclusivity of judicial power to sentence. The separation of powers protects the independence of the courts in carrying out this function. There is no direction in the *Constitution* that the courts *must* impose the mandatory death penalty; rather that direction is found in section 2 of the OAPA which is saved by the Constitution. The constitutional prescription is that the

[112] See the cases of *Boyce et al. v Barbados* (Supra n. 8) *and Dacosta Cadogan v Barbados* (supra n. 10) for example
[113] [2005] 1 AC 400 at [29].

courts cannot 'hold' section 2 to be unconstitutional or inconsistent with the rights in sections 12-23. However, whilst the court cannot constitutionally find section 2 to be unconstitutional or inconsistent with the Bill of Rights, the court is not obliged, and cannot be obliged, to obey its dictate and thus to mandatorily impose the death penalty. The court is protected from this legislative edict by the separation of powers.

[110] The existence of judicial power to disregard the legislative imprimatur to impose the death penalty mandatorily was denied, but at the same time illustrated, by the Privy Council itself in several cases.[114] Take the example of *Matthew v State of Trinidad and Tobago.*[115] The Board upheld the constitutionality of the mandatory death penalty but then refused to impose it. Their Lordships reasoned that in consequence of the earlier *Roodal* case,[116] *Matthew* had been given to understand that the question of whether he should be sentenced to death would now be considered by a judge. It would therefore be "unfair" to him to have the mandatory death sentence carried out. Their Lordships considered that it "would be a cruel punishment for him to be executed" when the possibility of being resentenced had "been officially communicated to him and then been taken away."[117] The Board made use of the power vested in the court by the Constitution to "make 'such orders… as it may consider appropriate for the purpose of enforcing … any of the provisions [relating to human rights and fundamental freedoms]"[118] to allow the appeal and commute the death sentence to life imprisonment.

[111] The unfairness and the cruelty of imposing the mandatory death sentence was also the basis relied on in *Matthew* to commute the death sentence of everyone sentenced to death and awaiting execution at the date of that judgment. Drawing what could be regarded as an artificial line, the Board decided that these considerations did not apply to persons convicted and sentenced to death after the date of their judgment, even though they may have been awaiting trial at the time of the *Roodal* decision.

[112] Whatever may be the merits of the distinction by the Privy Council, the fact is that the judicial power to impose an appropriate sentence, based on considerations of fairness and the cruelty of the punishment, cannot be constrained by the legislative direction

[114] See for example, Boyce and Joseph v R supra (n. 2), Matthew v State of Trinidad (supra n.63)
[115] Supra (n.63), 452-453.
[116] Roodal v State of Trinidad and Tobago [2005] 1 AC 328
[117] Supra (n.63) [31]
[118] Supra (n. 63) [32]

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

[113] Whether it is possible for a constitutional amendment to compel the courts to impose a sentence that is contrary to otherwise sound sentencing principles probably turns first on whether the Act to amend the Constitution can properly become a constitutional amendment, given its probable inconsistency with the doctrine of separation of powers. If it were to overcome that hurdle, compliance by the courts would probably turn on whether the constitutional amendment was contrary to fundamental norms of international law known as *jus cogens*. National constitutions and laws are subservient to norms of *jus cogens* and courts everywhere are obliged to uphold and enforce such fundamental international principles.

Conclusion

[114] It is by reason of the judicial monopoly on the power to sentence protected by the separation of powers that I, too, would allow the appeal and order the resentencing of the Appellants.

Disposition

[115] While we are cognizant that the decision of the Court will affect persons, who have been sentenced to death pursuant to section 2 of the OAPA, we are mindful of making binding orders on behalf of litigants who have not appeared before us. This however, does not prohibit us from expressing our views on the procedure that should be adopted in relation to such persons. We are therefore of the view that those persons convicted of murder and sentenced to death pursuant to Section 2 of the OAPA or who have had their mandatory death sentences commuted to life imprisonment be brought with reasonable expedition before the Supreme Court for resentencing.

[116] The Court unanimously orders that:

a. the appeals be allowed;

b. the Appellants be expeditiously brought before the Supreme Court for resentencing; and

[117] The Court by majority declares that Section 2 of the OAPA is inconsistent with sections 11 (c), 12 (1) 15(1) and 18(1) of the Constitution of Barbados to the extent that it provides for a mandatory sentence of death.

/s/ CMD Byron

The Rt. Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D. Hayton

/s/ W. Anderson

The Hon Mr. justice W. Anderson

/s/ M. Rajnauth-Lee

Mme Justice M Rajnauth-Lee

/s/ D. Barrow

Mr Justice D. Barrow