Introduction

The eminent jurist and now retired former President of the Caribbean Court of Justice ("CCJ"), Sir Dennis Byron, commented recently at a Commonwealth Lawyers Association webinar, entitled, "'Savings clauses', the death penalty, and constitutional rights" that the Judicial Committee of the Privy Council's ("JCPC") decision in Chandler:

> "*…reflects a traditional British constitutional principle of the sovereignty of parliament and that when dealing with countries with a written constitution, where the supreme law is the constitution, there seems to be some difficulty to fully embrace this distinctive constitutional imperative*."

He said the difference in approach which has emerged between the two courts following the decision of the JCPC in Chandler and the decisions of the CCJ in Nervais, McEwan and Bisram, gives rise to the following question:

> "*Is the Caribbean Court of Justice a more credible champion for Caribbean fundamental rights and freedoms than the Privy Council*?"

An examination of some of the principles to emerge from these four cases might help answer this question.

Background

In the 1960's many Commonwealth Caribbean nations moved towards independence. Written constitutions typically became the supreme law of each country, and they had individual human rights and freedoms enshrined within, including the rights to protection of the law and not to be subjected to cruel and unusual punishment. The death penalty is universally acknowledged to be a cruel and unusual punishment. The Republic of Trinidad and Tobago continues to have to this day, a

mandatory death penalty upon conviction for the offence of murder, irrespective of the circumstances of the offence.

"Savings clauses" feature in the constitutions of all Commonwealth Caribbean countries. A savings clause is a provision in a constitution which protects any law that was validly in force before the country's adoption of the constitution. It protects laws that might otherwise be struck down as unconstitutional on human rights grounds. The historical purpose of savings clauses was to secure "*an orderly transition from colonial rule to independence*" (per Lord Hope in *Watson v R [2004] 64 WLR 241*) but as Lord Nichols observed in his dissenting judgment in *Matthew v State of Trinidad and Tobago [2004] UKPC 33*, they "*were intended to smooth the transition, not to freeze standards for ever*."

Upon independence, Caribbean nations retained the JCPC as their final Court of Appeal. In 2005, however, following collaboration amongst Caribbean Community Nations ("CARICOM") and the earlier signing of the Treaty of Chagaramas, the CCJ was created. It sits in Trinidad and Tobago's capital city and acts in a dual capacity, as an international court of original jurisdiction in relation to Treaty of Chagaramas matters, and as the final Court of Appeal for Barbados, Belize, Guyana, and Dominica in relation to all civil and criminal matters.

At the time of writing, a motion has been proposed and seconded in the Senate of Trinidad and Tobago to adopt the CCJ as Trinidad and Tobago's final Court of Appeal: whether the majorities needed for legislative and constitutional change will be achieved in each of the country's legislative chambers remains to be seen.

Before turning to examine the JCPC decision in Chandler which conflicts with the CCJ decisions in Nervais, McEwan and Bisram, it is necessary to set out what was, and, following Chandler, remains, the law as settled by the JCPC.

Matthew v State of Trinidad and Tobago [2004] UKPC 33

In Matthew, the 5:4 majority of a specially convened 9-judge court held that the mandatory death penalty for murder in Trinidad and Tobago was an existing law for the purposes of section 6(1) of the country's 1976 Constitution. It was thus protected from constitutional challenge on human rights grounds.

The appellant in Matthew submitted that section 5 of the Act which brought the 1976 Constitution into effect required all existing laws to be modified so that they complied with the human rights provisions of the Constitution, and that this could only be achieved by deeming the death penalty provision discretionary and permissive rather than mandatory. Section 5 provides that "existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

The Board held, however, that by section 2 of the Constitution, the Constitution declares itself to be the supreme law of Trinidad and Tobago, and that section 5 of the Act, which brought it into being, formed no part of it. When read as a free-standing statement of the supreme law of Trinidad and Tobago, the Constitution retained the savings clause in clear and unambiguous terms at section 6(1).

Accordingly, the 1925 mandatory death penalty provision was saved by section 6 of the Constitution, and it did not have to be modified, read down or interpreted in a way which gave effect to the co-existing human right guaranteed in section 5(2)(b).

Boyce v The Queen [2004] UKPC 32

In Boyce, an appeal from Barbados against the then mandatory death penalty in that country, it was argued that the penalty was incompatible with the right not to be subjected to inhuman or degrading punishment conferred by section 15(1) of the country's Constitution.

The Board had to decide whether the penalty was saved by the savings clause contained in section 26 of the Constitution and if so, whether it could be modified or read compatibly with the section 15(1) right.

As in Matthew, the Board was asked to consider whether the modification provision contained in section 4(1) of the Barbados Independence Order 1966, which brought the Constitution into effect but formed no part of it, enabled existing laws to be modified to conform with the human rights provisions in the Constitution. The appellant argued that if an existing law could be modified to be read in conformity with the Constitution, this should be done; but if this was not possible, the existing law would remain saved by the savings clause!

The Board accepted that absent the savings clause, the mandatory death penalty would not have been compatible with the right contained in section 15(1). However, the penalty was provided for by an unaltered re-enactment of an existing law. It was thus protected by the savings clause. As in Matthew, the majority concluded that to modify it to conform to section 15(1) would be wrong and ultra vires section 5(1) of the Barbados Independence Order 1966 which brought the Constitution into effect.

The dissenting minority, upholding the correctness of the Board's earlier decision in *Roodal v State of Trinidad and Tobago [2003] UKPC* was of the view that the savings clause, read together with the modification clause, did indeed permit the court to identify an inconsistency between an existing law and fundamental human rights in the Constitution, and to "*modify the inconsistency out of existence*" as Saunders P. put it more recently in the CCJ decision in McEwan (para. 58). The savings clause would only be needed where it was impossible to modify an existing law to make it conform with the Constitution.

Lord Hoffman, however, delivering the majority opinion of the Board, put the conceptual difficulty with the appellant's argument and Roodal in this way at paragraph 38:

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

The majority further observed that applying the section 4 modification provision of the 1966 Order in the manner contended for by the appellant would have driven a coach and horses through the Constitution itself, the country's supreme law. In short, judges had no power to modify otherwise valid laws and the power to change such laws vested in the legislature.

Nervais v R [2018] CCJ 19 (AJ)

In Nervais, the former President of the CCJ delivering a majority judgement of a Court which comprised seven Justices of Appeal, made the following observations about savings clauses at paragraphs 58 and 59:

> "*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.*
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> *It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. 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*."

Nervais concerned appeals to the CCJ against findings by the Barbados Court of Appeal that the mandatory death penalty was constitutional despite the fact, as the Court of Appeal candidly recognised, "*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" (per Byron P. at para. 6). The Court of Appeal regarded itself as bound by Boyce until such time as it may be overruled by the CCJ.

The issue was whether, notwithstanding the savings clause, the word, "shall" in the mandatory penalty provision might be modified to be read, "may" to give effect to a fundamental right and protection contained in section 11(c) of the Constitution, the right to "protection of the law." The Court noted:

> "*In this context … murder varies enormously with varying degrees of culpability … 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…*" (per Byron P. at para. 5).

The CCJ had to first consider whether section 11 of the Constitution was a mere preamble to the human rights provisions contained in sections 12 to 23, as contended for by the State of Barbados because of the use of the words, "whereas" and "the following provisions of this chapter shall have effect…" in section 11. It then had to consider the relationship between sections 11, 18 and 26.

The majority rejected the notion that section 11 was a mere preamble and affirmed it to be an enacting provision which "*declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados*" (per Byron P. at para. 37).

The savings clause provides that no existing law "shall be held to be inconsistent with or in contravention of any provision of *sections 12 to 23*." There is no reference at all to section 11 in the savings clause.

A majority of 6:1 decided that section 11 declares the entitlement to, and provides the foundation of, the short list of fundamental rights set out in subsections (a) to (d). These include the right to protection of the law at section 11(c).

This right is supplemented by section 18, the scope of which also required careful consideration. The Court concluded that the section provides a non-exhaustive list of the ways in which protection of the law might be safeguarded, but the section 11(c) right was wider in scope than the specific protections in section 18.

The Court then went on to consider whether "protection of the law" includes or is the same as due process, connoting procedural fairness.

Citing its earlier decision in *Zuniga and others v Attorney General of Belize [2014] CCJ 2* at paragraph 49, in which the CCJ observed that in relation to mandatory or mandatory minimum sentences, courts should always examine such penalties with "*a wary eye*" because they might deprive the court of an opportunity to exercise the "*quintessentially judicial function of tailoring the punishment to fit the crime*," the Court held that the right to protection of the law includes the right to a fair trial, which does not end at the conviction of an accused, but also includes the mitigation and sentencing stages of the process.

By this carefully constructed and navigated route, the Court's majority concluded that the mandatory nature of the death penalty violated the section 11(c) right to protection of the law. The Court then turned to section 1 of the Constitution which provides, "…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." Accordingly, the death penalty provision was void to the extent that it imposes a mandatory penalty but valid to the extent that it is permissive.

The Court also considered the question whether the provisions of section 4(1) of the 1966 Independence Order might be used to modify a law saved by section 26 of the Constitution – the argument rejected by the majority in Boyce. The Court commented:

> "*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. A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as*

> *appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights*." (para. 68)

Thus it was that the CCJ held by a 6:1 majority that section 11(c) of the Barbados Constitution provides an independently enforceable fundamental right which is immune from the savings clause; and, that section 4(1) of the 1966 Independence Order may be used to modify a law which is saved by the savings clause.

McEwan v Attorney General of Guyana [2018] CCJ 30 (AJ)

The current President of the Court, Saunders P. opened his judgement with these words:

> "*Difference is as natural as breathing. Infinite varieties exist of everything under the sun. Civilised society has a duty to accommodate suitably differences among human beings. Only in this manner can we give due respect to everyone's humanity. No one should have his or her dignity trampled upon, or human rights denied, merely on account of a difference, especially one that poses no threat to public safety or public order. It is these simple verities on which this case is premised*."

Section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act in Guyana made it an offence for a man to wear female attire (and, for a woman to wear male attire) in a public place for an improper purpose.

In February 2009, the appellants, who are transgender, were arrested and detained in police custody for a weekend. On Monday morning, they were brought before a Magistrates Court where they learned for the first time that they were being charged with the section 153(1)(xlvii) offence. They pleaded guilty because this was cheaper than instructing counsel to

defend the charges. They were fined and the sentencing magistrate made inappropriate comments before they left the court.

They later brought proceedings against the State challenging the constitutional validity of the law under which they had been arrested and prosecuted. They submitted that the offence breached their human rights under the Constitution.

The Judge at first instance and the Court of Appeal of Guyana found that the offence was saved by the Constitution's savings clause and therefore was not justiciable on human rights grounds. Only the legislature could change this. The Court of Appeal also rejected the argument that post-independence amendments to section 153(1)(xlvii) had caused it to lose its status as an existing law. The Court said the substance of the law had not been changed by these amendments, so it remained protected.

The appellants appealed to the CCJ which had to consider whether the provision violated their rights to equality and non-discrimination, and to freedom of expression under Articles 146 and 149 of the Constitution.

Articles 138 to 149 and 149 A – J of the Constitution contain the human rights and fundamental freedoms provisions. Articles 149 A – J were added to the Constitution in 2003.

In a robust judgement the Court identified four reasons why the offence could not survive:

(i) The savings clause should have been restrictively construed because it is the Court's duty to give a generous interpretation to provisions affording fundamental human rights. The Court of Appeal was wrong to conclude that the offence remained saved as an existing law notwithstanding several post-independence amendments; it had lost its character as an existing law by reason of those amendments. A restrictive rather than liberal approach to the savings clause would have allowed the Courts to declare the law invalid - (paras. 46 to 49).

(ii) The savings clause did not apply to the following parts of the Constitution: Article 1, which characterises the

State of Guyana as an indivisible, secular and democratic State; Article 40, which bestows a right to a happy, creative and productive life; and Articles 149 A – J, a series of new, separate and distinct rights concerning equality and equitable treatment before the law, which were added to the Constitution in 2003 following what Saunders P. described as "*a thorough and democratic reform process*" and which the Court agreed are numerically and qualitatively distinct from Article 149 – (paras. 50 to 53).

(iii) The savings clause did not apply to Article 39(2) of the Constitution which requires Guyanese courts to "pay due regard to international law, international conventions, covenants and charters bearing on human rights" when interpreting any of the fundamental human rights provisions of the Constitution. The reception of Guyana's international obligations into domestic law via Article 39(2), thereby rendering them enforceable by the citizen, placed greater pressure on Guyanese courts to interpret the savings clause as restrictively as possible so that Guyana might remain compliant with its obligations – (paras. 54 to 55).

(iv) Described by Saunders P. as the most contentious approach, the courts should have first applied the modification clause contained in section 7(1) of Guyana's Constitution Act to the relevant pre-independence law before attempting to apply the savings law clause.

The CCJ concluded that the section 153(1)(xlvii) offence violated Article 149(1) (protection from discrimination), Article 149D (equal treatment and equality of persons before the law) and Article 146 (freedom of expression) and had no place in a modern secular democratic State. It admonished the magistrate for the inappropriate comments and stated that the Courts below should not have excused those remarks.

Marcus Bisram v Director of Public Prosecutions [2022] CCJ 7 (AJ)

There is no need to deal with the factual circumstances of Bisram. Suffice to say that the CCJ reaffirmed that the approach of the courts, when confronted with a conflict between the Constitution and an existing law, should be to first consider whether the existing law might be modified to be read in conformity with the Constitution - the "modify first" approach.

Jay Chandler (Appellant) v The State (Respondent) (No 2) (Trinidad and Tobago) [2022] UKPC 19

In Chandler the JCPC was asked to consider whether Matthew had been wrongly decided considering the jurisprudence now emerging from the CCJ.

Chandler was an appeal from Trinidad and Tobago, once again challenging the constitutional validity of the mandatory death penalty. Chandler's sentence had been commuted to life imprisonment by the time of the appeal and the Board noted that Trinidad had not executed anyone since 1999. It noted further, however, that this was due, in part, to delays in the appellate process and commented that while the mandatory penalty remains in force, it provides lawful authority for the State to execute a condemned person unless they become the beneficiary of a presidential pardon under sections 87 and 88 of the Constitution.

As in Matthew, it was not in dispute that the mandatory death sentence is a cruel and unusual punishment, that it contravenes section 5(2)(b) of the 1976 Constitution and is therefore liable to be declared void unless it can be saved as an existing law. Section 2 of the Constitution provides that the Constitution is the supreme law and any law that is inconsistent with the Constitution is void to the extent of the inconsistency. The Board noted that section 6 of the 1976 Constitution preserved many laws which existed before the adoption of that Constitution including the imposition of a mandatory death penalty.

Lord Hodge reviewed the previous decisions of the Board culminating in Matthew and summarised the position at para. 32 of the judgement. This is worth reading and is set out in full in a more comprehensive version of this article. He then reviewed the CCJ decisions in Nervais, McEwan, and Bisram, before addressing the first, and indubitably most difficult hurdle that the appellants had to overcome: "stare decisis" and whether there were "*very strong reasons*" for the Board to depart from its earlier decision in Matthew.

Departing From a Previous Decision

In examining the difference that has emerged on this issue between these two courts of final appeal, and how the JCPC approached it in Chandler, it is important to have regard to the test which the Board was required to apply when asked to say that Matthew had been wrongly decided.

Lord Hodge's immediate focus was on "stare decisis", a fundamental tenet of the common law, and on the importance of maintaining constitutional legal certainty. He said this at paragraph 57:

> "*The Board would need to be satisfied that the decision was wrong and that it lacked a satisfactory foundation. It is not enough that the Board as presently constituted might take a different view if considering the matter for the first time. In Lewis v Attorney General of Jamaica [2001] 2 AC 50, 75 Lord Slynn of Hadley in delivering the opinion of the Board stated that the Board should be "very reluctant to depart from recent fully reasoned decisions unless there are strong grounds to do so*."

Quoting Lord Hoffman in Lewis, Lord Hodge continued:

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

Lord Hodge then considered the circumstances in which the United Kingdom's Supreme Court will depart from an earlier decision. That a previous decision of the House of Lords or Supreme Court is wrong has never been a sufficient reason to depart from it. "*More is needed*", he said:

> "*That extra thing may be that the decision under challenge is hampering the proper development of the law or has otherwise distorted the law. It may be because the earlier decision has given rise to uncertainty in the law… Further, the court has recognised that there is less scope for reconsidering a decision on a question of statutory interpretation than there may be in relation to a decision involving a judicial exposition of the*

common law. Respect must be given to the words and purpose of the statutory provision and, where a court of final appeal has given an authoritative interpretation of such a provision, it will normally be for Parliament to change the law if that interpretation is thought to be incorrect… In Attorney General for Ontario v Canada Temperance Federation [1946] AC 193, 206 Viscount Simon stated that 'on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have been acted on both by governments and subjects.'" – (paras. 59, 61 and 62)

"*Nonetheless … in Lewis … Lord Slynn stated … that where a man's life was at stake, where the death penalty was involved, the Board should be prepared to depart from prior decisions if it were satisfied that the earlier cases had adopted the wrong approach…*" – (para. 65)

Applying the "wrong approach" test, Lord Hodge reviewed the historical consistency of the Board's approach to appeals concerning savings clauses and existing laws. He remarked that if the Board were to now depart from its previous decisions and hold that the existing laws of Trinidad and Tobago were modified in 1962 when the first Constitution came into effect, this would have the undesirable effect of introducing considerable uncertainty into the law of Trinidad and Tobago because the people and successive governments of Trinidad and Tobago had arranged their affairs since 1962 on the basis that the existing laws had not been modified!

He expanded upon this at paragraph 72, suggesting that if constitutions had taken effect without savings clauses, or with savings clauses that were only triggered after an existing law had been modified by a judge, it would have risked creating "*substantial legal uncertainty*" in the transitional period and beyond and it would have placed "*a great burden on the courts*" of those countries to "*re-establish a degree of legal certainty*." He suggested that the "*potential for…challenges [would have been] legion*" if the correct approach since 1962 had been to "modify first" and had this been so, "*the savings clause would have been deprived of almost all utility*." He saw considerable "*force in the suggestion that savings clauses served a historical purpose in avoiding the legal uncertainty which the unqualified introduction of a written Constitution would have entailed*." (para. 73) The decision in Matthew, he said, properly

"*gave priority to the Constitution as the supreme law of Trinidad and Tobago over the statute which enacted it…and is consistent with the historical purpose of the savings clause when newly independent states adopted for the first-time written Constitutions which contained generally worded statements of fundamental rights*." (para. 72)

The Board decided that Matthew had not been wrongly decided. Amongst the decisive factors were: (a) "stare decisis," particularly as the Board had convened a 9-member court in Matthew and Boyce to provide an authoritative and definitive ruling on this question; (b) the importance of maintaining constitutional legal certainty in the interpretation of written constitutions and other statutory instruments, and; (c) critically perhaps, the absence in the Trinidad and Tobago Constitution of a provision akin to section 11(c) of the Barbados Constitution which might have allowed the Court to side-step the savings clause.

In the final analysis, Lord Hodge acknowledged that "*both sides of this argument are tenable*." He correctly recognised and respected the CCJ's right to develop its own jurisprudence, and at paragraph 57 he went so far as to say, "*it is not enough that the Board as presently constituted might take a different view if considering the matter for the first time*." Precedent, constitutional legal certainty, the historic purpose of savings clauses and "stare decisis" won the day.

Conclusion

These two distinguished courts of final appeal, comprising some of the finest legal minds, have parted company on, what is, a fascinating topic. To say that it has troubled and divided eminent jurists of the highest calibre is an understatement. The reader can decide how best to answer the question posed by Sir Dennis Byron at the beginning of this article. Should anyone be courageous enough to have a go at trying to reconcile the two competing positions, a good starting point might be to recognise the following:

(i) Lord Hodge expressed the view that the CCJ's reasoning which conflicts with that of the JCPC was not essential to the decision in Nervais (para. 70).

(ii) The 1976 Constitution of Trinidad and Tobago does not have an enacting provision, akin to section 11(c) of the Barbados Constitution, which is immune from the savings clause.

(iii) In giving legal effect to section 11(c) and acknowledging that it bestows a separately enforceable right on the citizen, the CCJ was able to ignore the savings clause because it does not refer to 11(c). This, said Lord Hodge, "*was sufficient on its own to determine the appeal*." Therefore, "*as the savings clause…did not protect the existing law from constitutional challenge under section 11…the law could be modified under section 4 of the 1966 Independence Order.*" (para. 69) It is difficult to argue with the logic of this.

(iv) The 1976 Constitution was adopted when Trinidad and Tobago became a Presidential Republic. Lord Hodge notes that "*it was a conscious democratic decision to preserve existing laws and not to convert the savings clause into a transitional provision…Parliament had the option of dispensing with [it]…and deliberately chose not to do so. By making that choice the legislature reserved to itself the responsibility for updating the laws of Trinidad and Tobago to reflect developing appreciation of fundamental rights and freedoms and changes in social values*." (para. 69)

(v) There is undeniable force in this observation. The significance of such an important decision, taken by a country about to declare itself a Presidential Republic, ought not to be understated or brushed aside. In Trinidad and Tobago, for the moment at least, any modification to the mandatory death penalty will have to await legislative change.

(vi) Indeed, in a stark example of parliamentary supremacy, this is the route that was taken by Jamaica in 2011 when it decided to render the decision in *Pratt and Morgan v The Attorney General for Jamaica and another (Jamaica) [1993] UKPC 1* void through legislative and constitutional change rather than to give it constitutional protection.

(vii) Lord Hodge noted that the first three reasons given by the CCJ in McEwan explaining why the offence could no longer stand, were

> not, in fact, in conflict with the majority's reasoning in Matthew and Boyce. However, none of these reasons was available to the appellant in the Chandler appeal (para. 71).

It remains to be seen if Trinidad and Tobago will ever choose to adopt the CCJ as its final Court of Appeal. And should it do so, how the CCJ might answer the question asked of the JCPC in Chandler, when presented with an appeal requiring a detailed analysis of the 1976 Constitution of Trinidad and Tobago against that country's constitutional and legislative history. The current "modify first" approach of the CCJ, coupled with its stated desire to fashion a remedy that protects the citizenry under its jurisdiction from human rights breaches, would tend to support a belief that the absence of a specific provision in the Constitution of Trinidad and Tobago, akin to section 11(c) in Barbados, will present no real impediment to the CCJ striking down the mandatory death penalty provision, if it is ever asked to do so. However, this too, remains to be seen and perhaps ought not to be taken as a foregone conclusion.

Adrian Kayne, 2nd October 2022