Privy Council Appeal No. 99 of 2002

(1) Lennox Ricardo Boyce and

(2) Jeffrey Joseph Appellants

v.

The Queen Respondent

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL

COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 7th July 2004

Present at the hearing:-

Lord Bingham of Cornhill

Lord Nicholls of Birkenhead

Lord Steyn

Lord Hoffmann

Lord Hope of Craighead

Lord Scott of Foscote

Lord Rodger of Earlsferry

Lord Walker of Gestingthorpe

Mr. Justice Edward Zacca

[Majority judgment delivered by Lord Hoffmann]

Summary

1. The issue in these appeals is the constitutionality of the mandatory death penalty in Barbados. The relevant provisions of the constitution are sections 1, 15(1) and 26. Section 1 says that the constitution shall be the supreme law of Barbados and that any other law shall "to the extent of the inconsistency, be void". Section 15(1) says that no person shall be subject to "an inhuman or degrading punishment". But section 26 says that no existing law "shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23". The law decreeing the mandatory death penalty was an existing law at the time when the constitution came into force and therefore, whether or not it is "an inhuman or degrading punishment", it cannot be held inconsistent with section 15(1). It follows that despite section 1, it remains valid.

2. The language and purpose of section 26 are so clear that whatever may be their Lordships' views about the morality or efficacy of the death penalty, they are bound as a court of law to give effect to it. As Lord Bingham of Cornhill said in Reyes v The Queen [2002] 2 AC 235, 246, "The court has no licence to read its own predilections and moral values into the constitution". And their Lordships do not understand Mr Starmer QC, who ably represented the appellants, to dispute that if one simply reads the constitution, there is no basis for holding the mandatory death penalty invalid for lack of consistency with section 15(1).

3. This is a very important point. It is not suggested that there is any ambiguity about the constitution itself. It is accepted that it is simply not susceptible to a construction, however enlightened or forward-looking, which would enable one to say that section 26 was merely a transitional provision which somehow and at some point in time had become spent. It stands there protecting the validity of existing laws until such time as Parliament decides to change them.

4. Recognising this difficulty, Mr Starmer's main argument is that a provision in the United Kingdom order in council which brought the constitution into effect but did not form part of the constitution itself requires the existing law so far as possible to be modified to conform to section 15(1) and that such conformity can be achieved by deeming the death penalty to be discretionary.

5. For reasons upon which their Lordships will expand at greater length, they regard this argument as completely untenable. It is incompatible with the status of the constitution as the supreme law of Barbados, arbitrary to the point of absurdity in its results and would have been ultra vires the statutory powers under which the order in council was made. It follows that it must be rejected.

6. The result is that although the existence of the mandatory death penalty will not be consistent with a current interpretation of section 15(1), it is prevented by section 26 from being unconstitutional. It will likewise not be consistent with the current interpretation of various human rights treaties to which Barbados is a party. Their Lordships have anxiously considered whether there is some possible construction of the constitution which would avoid these results and have concluded that none exists. Their Lordships naturally respect the views of the minority who see more merit in Mr Starmer's argument but since their opinion does not deal with the objections which their Lordships regard as insuperable, they remain unpersuaded. It follows that the decision as to whether to abolish the mandatory death penalty must be, as the constitution intended it to be, a matter for the Parliament of Barbados.

The appeals

7. On 2 February 2001 in the Supreme Court of Barbados, Lennox Boyce and Jeffrey Joseph were convicted of the murder of Marquelle Hippolyte and sentenced to death. On 27 March 2002 the Court of Appeal of Barbados dismissed their appeals against conviction and sentence. They appeal to Her Majesty in Council against sentence only. The only ground of appeal is that the judge wrongly thought that the sentence of death was mandatory.

The mandatory death penalty.

8. Since the island of Barbados was colonised by the English in the seventeenth century, death has been the mandatory sentence for the crime of murder. That was the common law of England and it became the law of Barbados. In the nineteenth century it was codified in English statutes dealing with offences against the person: see section 3 of the Offences Against the Person Act 1828 (9 Geo. 4 c.31) and section 1 of the Offences Against the Person Act 1861. Each of these statutes was followed a few years later by a similar statute in Barbados. Section 2 of the Barbados Offences Against the Person Act 1868 provided, as section 1 of the English Act of 1861 had done, "whosoever shall be convicted of murder shall suffer death as a felon".

9. In the United Kingdom the death penalty was confined by Part II of the Homicide Act 1957 to certain kinds of murder which the Act designated "capital". The Murder (Abolition of Death Penalty) Act 1965 abolished altogether its imposition for murder and section 1 of the Offences Against the Person Act 1861 was repealed. But no similar legislation was enacted in Barbados and the old law remained in force when Barbados became independent on 30 November 1966. Since then, section 2 of the 1868 Act has been replaced by section 2 of the Offences Against the Person Act 1994: "Any person convicted of murder shall be sentenced to, and suffer, death".

The Constitution.

10. When Barbados became independent, it adopted a written constitution. The Constitution was made by the representatives of the people of Barbados gathered at a conference in London. It derived formal legitimacy from an Order in Council made under powers conferred by the Barbados Independence Act 1966, passed by the Parliament of the United Kingdom, the outgoing sovereign power in the Island. But once the Constitution had come into effect, its British origins became no more than a matter of historical interest. The Constitution became and remained the supreme law of Barbados because it was accepted by the people of Barbados as the instrument which they had chosen to regulate their government and society.

11. Section 1 declared the constitution to be the supreme law of Barbados:

"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."

12. Chapter V established a Parliament (consisting of Her Majesty, a Senate and an House of Assembly) with power to make laws for the peace, order and good government of Barbados. These included the power to alter the Constitution, provided that Parliament complied with certain conditions in section 49 which were intended to make constitutional amendments more difficult to pass than ordinary legislation. No law could amend the constitution unless it expressly said that it was intended to do so (subsection (6)). Any amendment had, at the least, to be supported by a majority of all members of each House (not merely a majority of those who voted) and certain specified provisions in the Constitution were so entrenched as to require an amendment to have the support of not less than two-thirds of the members of each House: subsection (2).

13. Among the entrenched provisions was Chapter III, headed "Protection of Fundamental Rights and Freedoms of the Individual". This chapter began (in section 11) with a declaration that "every person in Barbados is entitled to the fundamental rights and freedoms of the individual" including "life, liberty and security of the person" and a list of other human rights familiar from international human rights instruments starting with the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948. Section 11 went on to say that the following provisions of Chapter III were to have effect for "affording protection to those rights and freedoms".

14. Sections 12 to 23 then set out in detail the extent of the protection which the Constitution afforded to the specified rights and freedoms, together with 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". The drafting of these sections was strongly influenced by the terms of the European Convention on Human Rights. So, for example, section 12(1) of the Constitution ("No person shall be deprived of life intentionally save in execution of the

sentence of a court in respect of a criminal offence under the law of Barbados of which he has been convicted") is obviously derived from Article 2 of the Convention. Likewise, section 15(1) ("no person shall be subject to torture or to inhuman or degrading punishment or other treatment") is much the same as Article 3.

15. The European Convention had in fact applied to Barbados while it was a colony. In 1953 the United Kingdom government made a declaration pursuant to the Convention, extending its application to Barbados and other colonies. So it was perhaps natural that similar phraseology should be used in Chapter III of the Constitution. But the effect of having it in the Constitution was of course very different. The Convention bound the United Kingdom, in respect of its government of Barbados, only as a matter of international law. But Chapter III of the Constitution was part of the supreme law of Barbados. The rights which it protected took priority over all other laws.

International law

16. Besides entrenching fundamental rights in its Constitution, the new state of Barbados also acceded to international human rights treaties. In 1967 it became a member of the Organisation of American States (OAS). Membership involves adherence to the OAS Charter, which includes an obligation in very general terms to respect the fundamental rights of the individual. These were elaborated in 1948 by the American Declaration of the Rights and Duties of Man, similar in its terms to the Universal Declaration. Article I provides that "Every human being has the right to life, liberty and the security of his person". The Inter-American Commission on Human Rights, an organ of the OAS, has expressed the view that all member states are bound by the American Declaration.

17. In 1973 Barbados acceded to the International Covenant on Civil and Political Rights (ICCPR). It has origins in common with the European Convention, as may be seen from Articles 6(1) and 7:

"6(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

7. No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

18. In 1978 the American Convention on Human Rights (ACHR) came into force. Article 4 (Right to Life) deals with the death penalty in greater detail than the earlier instruments:

"1. Every person has the right to have his life respected. This right shall be protected by law … No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes …

6. Every person condemned to death shall have the right to apply for amnesty, pardon or commutation of sentence, which may be granted in all cases."

19. Barbados ratified the ACHR in 1982. The organ which interprets the treaty is the Inter-American Court of Human Rights and in 2000 Barbados accepted its compulsory jurisdiction.

20. At the times when Barbados adhered to these treaties, it is unlikely that many people would have thought that the mandatory death penalty for murder involved a breach of any of their obligations. The ACHR, for example, expressly contemplated the continued application of the death penalty in those countries which imposed it for "the most serious crimes". The notion that the objectionable element lay in it being mandatory for all cases of murder only gained currency as a result of the decisions of the United States Supreme Court in Woodson v North Carolina (1976) 428 US 280 and Roberts v Louisiana (1977) 431 US 633.

21. The objection to the mandatory death penalty is that acts which fall within the definition of murder (particularly when extended by the murder/felony rule) vary widely in moral reprehensibility. The government of Barbados has always accepted that the execution of everyone convicted of murder would be unacceptably harsh and undiscriminating – in fact, cruel and inhuman. But the government argues that the provisions for the application of the death penalty must be considered as a whole and that they include the power of the Governor-General, on the advice of the Barbados Privy Council, to commute the death sentence in any case in which it is thought appropriate to do so. The Constitution codifies and institutionalises the exercise of the royal prerogative of mercy which was exercised on the advice of the Home Secretary when the death penalty existed in England. The government says that when one takes these powers into account and examines the operation of the death penalty in practice, it is not rigidly or arbitrarily applied. It argues that the mandatory sentence enables the law to achieve maximum deterrence while the power of commutation provides the necessary flexibility and humanity in its practical application.

22. These arguments have not so far been accepted by the interpretative organs established under the international treaties to which Barbados is a party. Edwards v The Bahamas (2001) Report No. 48/01 the Inter-American Commission decided that the mandatory death penalty for murder was inconsistent with the American Declaration of Human Rights. In Hilaire, Constantine and Benjamin (2002) (Ser.C) No. 94 the Inter-American Court of Human Rights decided that it was inconsistent with the American Convention on Human Rights. And in Kennedy v Trinidad and Tobago (2002) CCPR/C/67/D/845/1999 the Human Rights Committee of the United Nations decided that it was inconsistent with the ICCPR.

23. The reason for the rejection of arguments similar to those put forward by the government of Barbados was recently summarised by the Board in Reyes v The Queen [2002] 2 AC 235, 257, an appeal from Belize:

"The Board is mindful of the constitutional provisions … governing the exercise of mercy by the Governor General … But it is not a sentencing function and the Advisory Council is not an independent and impartial court … The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. It has been repeatedly held that not only determination of guilt but also determination of the

appropriate measure of punishment are judicial not executive functions …. The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process."

24. In Reyes the Board applied this reasoning to the mandatory death penalty under the law of Belize and held that it was inconsistent with section 7 of the Constitution, which is in terms identical with section 15(1) of the Constitution of Barbados. At the time when the Belize constitution was adopted, few people thought that the mandatory death penalty was inconsistent with section 7, any more than the people of Barbados thought that it was inconsistent with section 15(1). But, for reasons to which their Lordships will return in greater detail in a moment, changes in society and attitudes are capable of bringing about changes in the practical content of fundamental rights like the protection against cruel and unusual punishments in both international and domestic law.

25. The government of Barbados is still in dispute with the Inter-American Commission on the point (there is to be a reference to the Inter-American Court of Human Rights), but their Lordships feel bound to approach this appeal in the footing that the mandatory death penalty is inconsistent with the international obligations of Barbados under the various instruments to which reference has been made. This does not of course have any direct effect upon the domestic law of Barbados. The rights of the people of Barbados in domestic law derive solely from the Constitution. But international law can have a significant influence upon the interpretation of the Constitution because of the well established principle that the courts will so far as possible construe domestic law so as to avoid creating a breach of the State's international obligations. "So far as possible" means that if the legislation is ambiguous ("in the sense that it is capable of a meaning which either conforms to or conflicts with the [treaty]": see Lord Bridge of Harwich in R v Home Secretary, ex parte Brind [1991] 1 AC 696, 747) the court will, other things being equal, choose the meaning which accords with the obligations imposed by the treaty.

26. This principle is obviously at its strongest when it appears that the domestic law was passed to give effect to an international obligation or may otherwise be assumed to have been drafted with the treaty in mind. Its application to laws which existed before the treaty is more difficult to justify as an exercise in construction but their Lordships are willing to proceed on the hypothesis that the principle requires one to construe the constitution and other contemporary legislation in the light of treaties which the government afterwards concluded.

Fundamental rights in Barbados

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.

28. Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts - what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment - had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a "living instrument" when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life. Section 15(1) is a provision which asks to be construed in this way. The best interpretation of the section is that the framers would not have intended the judges to sanction punishments which were widely regarded as cruel and inhuman in their own time merely because they had not been so regarded in the past.

29. All this is trite constitutional doctrine. But equally trite is the proposition that not all parts of a constitution allow themselves to be judicially adapted to changes in attitudes and society in the same way. Some provisions of the Constitution are not expressed in general or abstract terms which invite judicial participation in giving them practical content. They are concrete and specific. 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.

The savings provision

30. It follows that if there were no exceptions to the supremacy of the fundamental rights provisions of the Constitution over all other laws, section 2 of the 1994 Act would be void to the extent that it made the death penalty mandatory. But section 2 of the 1994 Act is a consolidation of a law which existed in 1966. For existing laws, section 26 of the Constitution contains an important exceptions to the supremacy of its fundamental rights provisions.

"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.

(2) In subsection (1)(c) the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) "written law" includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly."

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.

32. The wisdom of casting a blanket of immunity from constitutional challenge over the whole corpus of existing laws might be debatable. Not all of the former British colonies in the Caribbean thought it necessary to do so. The framers of the Constitution of Barbados (and other constitutions containing similar provisions) may have adopted them because, as Lord Devlin suggested in DPP v Nasralla [1967] 2 AC 238, 247-248, they thought that the existing laws already embodied the most perfect statement of fundamental rights and that no inconsistency with sections 12 to 23 was possible. (See also Lord Diplock in De Freitas v Benny [1976] AC 239, 244). Against this explanation, however, it could be said that if the framers were fully persuaded on the point, they would not have thought section 26 necessary. A more likely explanation is, as Lord Hope of Craighead says of a similar provision in the Jamaican constitution in the judgment of the Board in Lambert Watson v The Queen, that –

"It was a reasonable working assumption, in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy."

33. It is however unnecessary to devote too much time to speculating about the thought-processes of the framers of the Constitution because, whatever may have been their reasons, they made themselves perfectly clear. Existing laws were not to be held inconsistent with sections 12 to 23 and therefore could not be void for inconsistency with the Constitution. Nor does the Constitution itself contain any textual warrant for the existence of a power of modification falling short of a power to hold an offending provision void.

The Order in Council

34. Mr Starmer claims to find such an intermediate power of modification in section 4(1) of the Barbados Independence Order 1966 SI No 1455, which brought the Constitution into effect:

"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."

35. There is no dispute that "this Order" includes the Constitution which was set out in a schedule and brought into force by section 3. So the appellant says that section 4(1) requires the modification or adaptation of all existing laws to secure their conformity with sections 12 to 23. Mr Starmer reconciles this power (or duty) with the immunity conferred by section 26 by saying that to modify is not to hold inconsistent. All that section 26 prohibits is a judicial declaration that an existing law is entirely inconsistent with those provisions. If the existing laws can be modified in a way which leaves something standing, section 26 moults no feather. On the other hand, if there are linguistic or conceptual reasons why nothing short of the total inconsistency of an existing law will satisfy sections 12 to 23, then the fundamental rights declared by those sections are defeated and the existing law remains valid.

36. This is an argument which does not appear to have occurred to anyone until it surfaced as a "fall-back" argument deployed by counsel in DPP v Mollison [2003] 2 AC 411, 417 and was given the traditional epithet "ingenious" by Lord Bingham of Cornhill. It was promoted to ratio decidendi by the majority of the Board in Roodal v The State [2004] 2 WLR 652. But, as their Lordships said at the outset, it is (a) irrational in its consequences (b) beyond the powers conferred by the Act under which the Order was made, and (c) inconsistent with its language and purpose. Their Lordships will develop these three reasons in more detail.

(a) Irrationality

37. The purpose of the proposed power of modification is said to be to bring existing laws into conformity with the Constitution, including sections 12 to 23. But securing conformity with sections 12 to 23 stops short at total rejection of an existing law, however non-conforming.

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.

39. Suppose, for example, that a few years before Independence in 1966 there had been a public outcry against the number of burglaries. Politicians claimed that the available punishments of imprisonment, fines and community service were not sufficiently deterrent. So Parliament

passed the Burglary Act 1962. It contained a single section: “Anyone convicted of burglary may be sentenced to a whipping of not more than 10 lashes”. (Compare Pinder v The Queen [2003] 1 AC 620.) After the Constitution with its fundamental rights and freedoms had come into force, the Act would have been inconsistent with section 15(1). Flogging is nowadays a cruel and unusual punishment. Even though the Act conferred only a discretion, any exercise of that discretion would be the infliction of a cruel and unusual punishment. But section 26 would have made it impossible for a court to hold that the Act was void. And Mr Starmer would probably accept that the conciseness of language and concept in such a law means that it is incapable of “modification”. It is the kind of example he gave to show that even on his construction of the Order, section 26 could still have some work to do. Such a law is either good or bad. If section 26 does not allow it to be held bad, it remains good. So the Act would have remained valid.

40. But imagine that in 1964 there had been a Burglary Consolidation Act, which repealed and re-enacted all the previous laws about burglary including the 1962 Act. Instead, a section of the new Act provided: “Anyone convicted of burglary may be sentenced to (a) imprisonment (b) a whipping of not more than 10 lashes (c) a fine (d) community service”. Mr Starmer’s argument is that the consolidation would have made all the difference. It would now be possible to modify the 1964 Act by deleting “(b) a whipping of not more than 10 lashes” and leaving everything else. It would be absurd to have to declare the whole of the law of burglary void just because it provided for one punishment which was excessive. That is just the kind of thing which a power of modification is intended to prevent. So Mr Starmer says that the power may be used to excise the punishment of flogging even when there can be no question of any part of the law being invalidated.

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

42. Mr Starmer compared the power of modification in section 4(1) with the rule of construction in section 3(1) of the United Kingdom Human Rights Act 1998, which requires a court “so far as it is possible to do so” to read and give effect to legislation in a way which is compatible with Convention rights. That too, he said, stops short of allowing the court to declare legislation void. But there is no comparison between a principle of construction (whether judge-made, like the principle about international obligations, or statutory, like section 3(1) of the 1998 Act) and a power of modification. The second takes on where the first leaves off. The rule of construction is based on the premise that the law is capable of having a meaning consistent with the international or constitutional norm and requires that it be given that meaning. The power of modification is based on the premise that the law cannot be given a meaning consistent with the constitutional norm and therefore, by reason of the supremacy of the constitutional norm, must be either modified or nullified. It is a broad power which proceeds by way of adaptation or excision to remove the inconsistency.

43. A rule of construction, like section 3(1) of the 1998 Act is to guide the court in its determination of what a law means. It is tautologous to say that a rule of construction does not allow the court to declare the law void. Deciding what a law means is something conceptually different from (and prior to) a decision about whether it is valid. A power of modification, on the other hand, proceeds from the finding that the law is partially invalid. It allows the court to say that, read with the Constitution, the law now has an effect in some respect different from that which it had before the Constitution was adopted.

(b) Ultra vires

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

45. Furthermore, the Order was made pursuant to the powers conferred upon Her Majesty by section 5 of the Barbados Independence Act 1966. Subsection (1) confers the power to provide a constitution for Barbados. Subsection (4) is the only provision under which section 4(1) of the Order could have been made:

“A Constitution Order may contain such transitional or other incidental or supplementary provision as appear to Her Majesty to be necessary or expedient.”

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

47. Mr Starmer emphasised the breadth of the power of modification, which is well attested in the authorities. It allows the court to remould the old law in any way which is necessary to preserve some part of its effect consistently with conformity to the constitution. But Mr Starmer seemed to think that this was a point in his favour. On the contrary, it is very much against him. A broad power of modification is appropriate when it forms part of the constitutional scheme for ensuring that laws inconsistent with the Constitution shall “to the extent of the inconsistency, be void”. In such a scheme, there is a continuum of measures which can be taken to produce conformity, in which simply declaring the whole law to be void is the limiting case. Short of total inconsistency, there can be modification. But a broad power of modification produces absurdity when the court cannot declare the law void. The more Mr Starmer emphasised the breadth of the power of modification, the more implausible became his analogy with a rule of construction such as section 3(1) of the United Kingdom Human Rights Act 1998.

48. The objection to Mr Starmer’s construction is not to the breadth of the power of modification but to the circumstances in which he submits that

the power may be used. The power may be as broad as one pleases, but its obvious purpose is to save existing laws from being declared wholly void; not to allow the courts to modify laws which would otherwise be valid. As Lord Hobhouse of Woodborough said in Browne v The Queen [2000] 1 AC 45, 49 of a statutory proviso inconsistent with the constitution:

"It is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to its modified form, not to strike down the proviso altogether."

49. Thus the purpose of section 4(1) is to ensure that so far as possible, substance will prevail over form. The courts are empowered and encouraged not to reject provisions to which there can be no substantive objection merely because as a matter of language and form they are bound up with provisions inconsistent with the Constitution. Instead, there is a broad power to remould language and form to sever the good from the bad. It is unnecessary to discuss the extent of the power; it obviously has substantive limits; for example when it presents the court with choices which are more appropriately made by the legislature. But whatever the breadth of the power, it is truly incidental or supplementary to the Constitution because it is ancillary to the supremacy of the Constitution over other law. Its purpose is to enable the courts to preserve the effect of existing laws as far as it is possible to do so.

50. Thus in the burglary example mentioned earlier, if there had been no section 26, the 1962 Act would have been declared void. If there had been a consolidation Act, it would have been modified to excise the punishment of flogging. Whatever the form of the legislation, the substantial result would have been the same. Powers to modify and adapt are ways of giving effect to the declaration in section 1 that laws inconsistent with the Constitution shall to that extent - and only to that extent - be void. But they make no sense in relation to laws which would otherwise be valid.

(c) Language and purpose

51. Section 4(1) requires any modifications to existing laws to be "necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order". The part of the Order with which section 2 of the 1994 Act is said not to be in conformity is section 15(1) of the Constitution annexed in the Schedule. But this submission of lack of conformity requires one temporarily to avert one's eyes from section 26, which makes it clear that there is no possibility of lack of conformity between existing laws and section 15(1). If the power of modification is to apply, there must be lack of conformity not just with one subsection of the Constitution but with the Constitution as a whole. Mr Starmer says that section 26 does not go so far as to prevent there being lack of conformity with the Constitution. All it does is to preclude a court from holding that there is an inconsistency between the 1994 Act and section 15(1). Until the moment at which such a non-declaration is made, there is a lack of conformity which can be addressed by exercise of the power of modification. Mr Starmer contrasts section 26 with what he calls a "shut-out" clause such as section 3(1) of the 1962 Constitution of Trinidad and Tobago, which said that the fundamental rights sections should "not apply" in relation to any law in force at the commencement of the Constitution. That, he says, was altogether different.

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

Principles of construction

53. Mr Starmer suggested, and the minority agree, that concerns with rationality, ultra vires and the language and purpose of the section were a rather pedantic and inhibited approach to constitutional construction, deserving of condemnation as the tabulated legalism fit for conveyances and charterparties. He said that if his construction were adopted, effect would be given to the international obligations of Barbados and the constitution would be treated as a living instrument and not left trapped in a time-warp.

54. Both the attractive force of international human rights law and the "living instrument" principle have already been touched upon in their proper places. Their Lordships repeat that they do not intend to put in doubt the principle that if it is reasonably possible to give domestic law a construction which will accord with international law obligations, the courts will do so. But the construction of section 4(1) for which Mr Starmer contends is unreasonable to the point of being perverse. There is no ambiguity about the matter.

55. As for the "living instrument" principle, it can have no more application to the construction of sections 1 and 26 of the Constitution and section 4(1) of the Order in Council than to the provision that the executive power shall be vested in Her Majesty. The relevant provisions are completely specific. Section 26 says that (contrary to the general provisions of section 1) certain specifically defined laws ("existing laws") and their replacements (as defined) shall not be held inconsistent with sections 12 to 23. It follows that they cannot be void under section 1. And as the Constitution contains no provision apart from section 1 which affects the validity or requires the amendment of any law, it follows that all existing laws are to be unaffected by sections 12 to 23. In laying down this rule, the Constitution employs no general concepts which need or invite being given a contemporary content by the courts. The protected laws and the extent of their immunity from challenge are stated in the most concrete terms. It is in any case difficult to address an argument that the law should be updated and not left trapped in a time-warp when the plain and obvious purpose of section 26 is that the existing laws should not be judicially updated by reference to sections 12 to 23.

56. There is no supra-constitutional principle by which it is presumed that the provisions of a constitution, even those concerned with fundamental rights, must be capable of being given an updated effect taking precedence over all other laws. To make such an assumption is to beg the very question at issue in this case, which is whether the Constitution left it to Parliament to decide whether existing laws should be amended to conform to sections 12 to 23. The answer to that question can be found only in the Constitution itself and not in generalisations about the nature of constitutions or fundamental rights. Self-evidently it is true that if one chooses to construe the Order as imposing a duty to modify existing laws to bring them into conformity with sections 12 to 23, one will construe the general concepts used by those sections according to the living instrument principle in order to decide whether a lack of conformity exists. But this is a consequence of construing the

Order as imposing a duty to modify and not a reason for adopting that construction.

57. As for the provision upon which the appellant chiefly relies, namely section 4(1) of the Order, it does not form part of the Constitution at all. Nor does it invoke any concept of liberty, fundamental rights or the like which requires judicial exposition in its application to concrete facts. It either requires the courts to modify existing laws to conform to sections 12 to 23 or it does not. Whatever there may be to say in favour of this proposition (and for the reasons already given, their Lordships think there is very little) it gains no support from the principle of construction which treats appropriate parts of the Constitution as a "living instrument". If it imposes such a duty upon the courts now, it did so in 1966. If it did not do so in 1966, there is no principle of construction upon which it can have come to do so now.

58. It must be borne in mind that although this case is concerned with whether the law providing the death penalty for murder should be modified to conform to section 15(1) of the Constitution - a provision which could properly be regarded as now having a broader content than would have been generally thought when it was enacted - the proposed duty of modification requires all "existing laws" to be modified to conform to sections 12 to 23. In other words, it laid all existing laws open to immediate challenge for lack of conformity with sections 12 to 23 (so long as the challenge was not so radical as to leave nothing of the old law behind), whether or not there had been any change in the content of the provisions of the particular section which is said to produce the need for modification. Such a construction plainly has nothing to do with the "living instrument" principle.

59. The "living instrument" principle has its reasons, its logic and its limitations. It is not a magic ingredient which can be stirred into a jurisprudential pot together with "international obligations", "generous construction" and other such phrases, sprinkled with a cherished aphorism or two and brewed up into a potion which will make the Constitution mean something which it obviously does not. If that provokes accusations of literalism, originalism and similar heresies, their Lordships must bear them as best they can.

Existing punishment

60. The respondent placed reliance upon section 15(2) of the constitution:

"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."

61. Their Lordships do not think that this subsection has any relevance. It can have no application to existing laws because they are the subject-matter of the immunity against challenge conferred by section 26. No further provision is needed to preserve them. What section 15(2) does is to legitimise the imposition of the death penalty in future legislation: compare Pinder v The Queen [2003] 1 AC 620. But section 15(2) says nothing about whether it would be inconsistent with section 15(1) for the death penalty to be mandatory. This was the point decided by the Board in Regina v Hughes [2002] 2 AC 259 and their Lordships do not think it necessary to rehearse the reasoning of Lord Rodger of Earlsferry in that case.

Stare decisis

62. The conclusion which their Lordships have reached on section 4(1) of the Order in Council is different from that which was reached in Roodal v The State [2004] 2 WLR 652 by a majority of the Board on the equivalent provision in the statute which brought into force the constitution of Trinidad and Tobago. There are differences in the language of the two constitutions and the two modification sections but their Lordships do not think that they are material. Mr Starmer urged the Board not to depart from the earlier decision and ordinarily there would be powerful arguments for not doing so. In this appeal, however, their Lordships sit as the final court of appeal for Barbados. The issue is one of great public importance, not only so far as it concerns the death penalty but because the effect of the Roodal decision was to lay open the whole of the pre-independence law of Barbados to challenge for lack of conformity with any of the provisions of sections 12 to 23. A majority of the Board at the first hearing of this appeal felt some disquiet at the prospect of having to give a ruling for Barbados which they felt to be wrong simply out of conformity with the earlier ruling for Trinidad and Tobago. For these reasons, the appeal was directed to be reargued before an enlarged Board for the specific purpose of deciding whether the Roodal decision was correct. In these highly exceptional circumstances, their Lordships consider that as they have reached the conclusion that Roodal was wrongly decided, they should give effect to that conviction in deciding this appeal. The consequences for the law of Trinidad and Tobago will be considered in the opinion delivered in Matthew v The State, the appeal from that country which was heard together with this one.

The Interpretation Act

63. Their Lordships now turn to two alternative arguments advanced by Mr Starmer. The first was that, as a matter of domestic law and independently of the Constitution, the mandatory death penalty had already been abolished by section 22(5) and (6) of the Interpretation Act 1966:

"(5) Where an enactment provides a punishment for an offence against the enactment, the offence shall be punishable by a punishment not exceeding that so provided.

(6) Where at the end of a section of any enactment a fine, penalty or term of imprisonment is set out, any contravention of that section shall be an offence against the enactment and shall be punishable by a fine, penalty or term of imprisonment not exceeding that so set out."

64. Their Lordships consider that this submission is not seriously arguable. The reasons are both technical and general. The technical objections are that subsection (5) does not apply because murder is not an offence against the 1994 Act. It is an offence at common law. Nor, for similar reasons, does subsection (6). Murder is not a "contravention" of section 2 of the 1994 Act and is not therefore deemed to be an offence against the Act. It is true that for the purposes of certain other sections, murder is treated as an offence against the Act. But that is no reason why it should be treated as a statutory offence for the purposes of sections 22(5) and (6), which are specifically concerned with the interpretation of

statutory offences.

65. The more general reason is that an Interpretation Act is intended to provide for the interpretation of statutes (past and future) and not their amendment. The evident purpose of subsection (5) is to make it unnecessary for the draftsman each time to use the words “not exceeding” and the purpose of subsection (6) is to avoid the need for him to say expressly that an act in contravention of a statute shall be an offence against the statute. Instead of saying “anyone who parks his car in a restricted zone shall commit an offence against this section and shall be liable on conviction to a fine not exceeding $100” he can achieve the same effect by saying “anyone who parks his car in a restricted zone shall be liable to a fine of $100”. That is typical of the modest savings in verbiage which an Interpretation Act is intended to achieve.

66. On the other hand, it is simply not credible that the Interpretation Act managed without anyone noticing to abolish the mandatory death penalty for murder. As Lord Rodger of Earlsferry said in Regina v Hughes [2002] 2 AC 259, 272, “if any such radical change in the law had been intended, it is inconceivable that it would have been enacted in anything other than clear and express words”. Mr Starmer again invoked the tug of international obligations and the “always speaking” principle which is specifically enacted in section 31(1) of the Interpretation Act:

“Every enactment shall be construed as always speaking and anything expressed in the present tense shall be applied to the circumstances as they occur, so that effect may be given to each enactment according to its true spirit, intent and meaning.”

67. But this is not legislation which refers to some concept which has to accommodate itself to new circumstances. If the Interpretation Act abolished the mandatory death penalty, it did so in 1966. If it did not, it was not because people in those days did not know about the mandatory death penalty. It was because no one would in the context of the Act have thought of the death penalty as the kind of penalty to which the Act was referring. And there is no reason why anyone should since have come to a different view about what the Act meant. As section 31(1) says, the Act must be given effect “according to its true spirit, intent and meaning”.

The separation of powers

68. Finally Mr Starmer submitted that the mandatory death penalty combined with the exercise of the constitutional power of commutation on the advice of the Barbados Privy Council infringed the principle of the separation of powers. He said that the law did not contemplate that everyone sentenced to death would actually be executed. The Privy Council in practice decided whether the convicted murderer would live or die and was therefore part of the sentencing process. But this was illegitimate, because sentencing is a judicial function and the Privy Council is not part of the judiciary.

69. Their Lordships have already noted that in Reyes v The Queen [2002] 2 AC 235 the executive nature of the exercise of the power of commutation was a reason why it was not regarded as justifying a mandatory death penalty in Belize. In Barbados, on the other hand, the mandatory death penalty is, as their Lordships have decided, preserved by section 26 of the Constitution. And the exercise of the power of commutation in death sentence cases is expressly codified in section 78. Both mandatory sentence and executive clemency are in accordance with the Constitution.

70. It follows that neither can be rejected on the ground that it infringes the principle of the separation of powers. Although Mr Blake QC submitted that it was a principle which overrode even the terms of the Constitution itself, their Lordships regard this as an extravagant proposition. To say that a constitution is based upon the principle of the separation of powers is a pithy description of how the constitution works. But different constitutions apply this principle in their own ways and a court can concern itself only with the actual constitution and not with what it thinks might have been an ideal one. All that matters is whether the mandatory death penalty and executive clemency are in accordance with the Constitution of Barbados. In their Lordships’ opinion, they are.

71. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.

Dissenting judgment by Lord Bingham of Cornhill,

Lord Nicholls of Birkenhead, Lord Steyn and

Lord Walker of Gestingthorpe

72. As in Matthew v The State [2004] UKPC 33, heard before but in conjunction with the present appeals, we have the misfortune to dissent from the conclusions and reasoning of a majority of the Board. Our reasons for dissenting are, to a very considerable extent, the same as those which led us to dissent in Matthew. We hope it will not be thought discourteous to the people or government of Barbados, or to counsel who ably argued this appeal, if we refer by reference rather than repetition to such of our reasoning in that case as we consider applicable in this.

73. The appellants do not in this appeal contend that it is contrary to the Constitution of Barbados for judges to pass sentence of death on those convicted of murder if, having considered all relevant circumstances pertaining to the offence and the offender, they consider such sentence to be just. The appellants’ challenge relates not to imposition of the death penalty but solely to mandatory imposition of the death penalty, that is, the requirement that judges must impose the death penalty in all cases of murder, irrespective of any considerations pertaining to the offence or the offender which may serve to mitigate the seriousness of the crime to some degree.

74. One distinction between the present case and Matthew should be noted at the outset. In that case the State acknowledged that the mandatory death sentence in Trinidad and Tobago is a cruel and unusual treatment or punishment and so, subject to any applicable savings clause, contrary to the Constitution. In the present case, Barbados does not acknowledge that the mandatory death penalty is “inhuman or degrading punishment or other treatment” within the meaning of section 15(1) of the Constitution of Barbados. In Reyes v The Queen [2002] UKPC 11, [2002] 2 AC 235, however, an appeal decided after the Court of Appeal reserved judgment in the present case, the Board

unanimously held the mandatory death penalty to be “inhuman or degrading punishment or other treatment.” It was not suggested in argument that that decision was wrong, and no plausible reason was given why the ratio of that decision (although decided by the Board as the final court of appeal of Belize) was inapplicable to Barbados. The Board has unanimously reached the same conclusion in Lambert Watson v The Queen (The Attorney General intervening) [2004] UKPC 34, an appeal heard with the present appeals. It is in our opinion clear that the mandatory death penalty as imposed in Barbados amounts, as in other jurisdictions, to inhuman or degrading punishment or other treatment for all the reasons given in Reyes.

75. In Matthew, attention was drawn to similarities and differences between the 1962 and 1976 Constitutions of Trinidad and Tobago. No such question arises here, since Barbados has had one Constitution only, the Constitution contained in the Barbados Independence Order 1966 (S1 1966/1455) and the 1966 Constitution scheduled to that Order. In the preamble to the Constitution the people of Barbados proclaimed their belief in the dignity of the human person, their unshakeable faith in fundamental human rights and freedoms and their belief in the rule of law. Section 1 provided that the Constitution was to be the supreme law of Barbados and that, subject to the provisions of the Constitution, if any other law was inconsistent with the Constitution, the Constitution should prevail and the other law should, to the extent of the inconsistency, be void.

76. Chapter III of the Constitution, devoted to protection of the fundamental rights and freedoms of the individual, was based on a model which had been adopted in Nigeria and was directly inspired by the European Convention on Human Rights. In this respect it differed from the Canadian model earlier followed in Trinidad and Tobago, where the influence of the European Convention (although present) was more indirect, and broadly followed the model adopted in Jamaica. The protection from inhuman treatment was expressed in section 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.”

It would seem that subsection (2) was prompted by recognition that some penal practices of the former colonial government, in particular corporal punishment, were likely to be thought to offend the prohibition in subsection (1). It is, however, clear that section 15(2) does not protect the mandatory aspect of the death penalty: R v Hughes [2002] UKPC 12, [2002] 2 AC 259, paragraphs 47-48.

77. Section 24 of the Constitution (comparable with section 14 of the 1976 Constitution of Trinidad and Tobago) gave the High Court power to enforce the human rights provisions of the Constitution. Section 26 (comparable with section 6 of the 1976 Constitution of Trinidad and Tobago) gave the High Court power to enforce the human rights provisions of the Constitution. Section 26 (comparable with section 6 of the 1976 Constitution of Trinidad and Tobago) read as follows:

“26.(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question -

(a) is a law (in this section referred to as ‘an existing law’) that was enacted or made before 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.

(2) In subsection (1) (c) the reference to altering an existing law includes references to repealing it and re-enacting it with modifications or making different provisions in lieu thereof, and to modifying it; and in subsection (1) ‘written law’ includes any instrument having the force of law and in this subsection and subsection (1) references to the repeal and re-enactment of an existing law shall be construed accordingly.”

Reference must lastly be made to section 4(1) and (6) of the Barbados Independence Order (corresponding to section 5 of the Trinidad and Tobago Act):

“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 …

(6) In this section ‘existing law’ means any law having effect as part of the law of Barbados immediately before the appointed day (including any law made before the appointed day and coming into operation on or after that day).”

78. The majority conclude that since 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, 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. This is no doubt a possible reading of these provisions. But it is not the only possible reading. Nor, in our opinion, is it the preferable reading. It puts a narrow and over-literal construction on the words used, gives little or no weight to the principles which should guide the approach to interpretation of constitutional provisions, gives little or no weight to the human rights guarantees which the people of Barbados intended to embed in their Constitution and puts Barbados in flagrant breach of its international obligations. We make general reference to paragraphs 42-46 and 50-55 of our dissenting opinion in Matthew.

79. Section 26(1) of the Constitution prohibits a court from holding any provision of an existing law to be inconsistent with sections 12 to 23 of the Constitution. Were it free to do so, the consequence would necessarily be, under section 1 of the Constitution, that the provision would be void. Thus if it were to be contended, for example, that imposition of the death penalty under an existing law in any case (even if discretionary) was inconsistent with section 12 or 15 of the Constitution, the court could not accede to that contention. To do so would be to avoid the existing law,

which cannot be done. But that is not what the appellants seek, nor what (in our opinion) they are entitled to seek. They seek not the avoidance or abrogation of an existing law but its construction with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. To modify section 2 of the Offences Against the Person Act 1994 so that it reads "Any person convicted of murder may be sentenced to, and suffer, death" is not to emasculate, avoid or render nugatory that section. It does not preclude imposition of the death penalty in cases where a judge, seised of all the facts, considers such penalty to be just and appropriate. But it is to preclude the infliction of what is now recognised to be inhuman or degrading punishment or other treatment. It is of course clear, as the authorities cited in paragraphs 50-53 of our opinion in Matthew show, that there are limits to the power of modification, but the modification we favour falls well within these limits and is one which has been made on previous occasions.

80. The construction of these provisions which we favour is in our opinion fortified by the recognition, in section 26(2) of the Constitution, that an existing law may have been modified, which can only refer to exercise of the duty under section 4 of the Order. There is also a clear contrast in the drafting of the human rights provisions of the Constitution between "shall not apply" (as in section 23(3) and (5)) and "Nothing ... shall be held to be inconsistent with or in contravention of ..." (as in section 23(4) and (6)). The former provision precludes any review of conformity and hence any exercise of the power to modify; the latter does not. Unless the effect of these alternative formulae leads to a difference of meaning, the draftsman would not have used different expressions. It is a cardinal rule of drafting to use the same expression to mean the same thing and different expressions to mean different things.

81. Since we consider the relevant provisions of the Order and the Constitution to be capable of more than one meaning, we think it appropriate to have regard to the international obligations which Barbados has undertaken.

(1) When Barbados became independent, the European Convention on Human Rights ceased (after thirteen years) to apply to it. But it very promptly became a member of the United Nations, and so bound by the Universal Declaration of Human Rights. On 5 January 1973 it acceded to the International Covenant on Civil and Political Rights and (on the same date) to the Optional Protocol, from neither of which has it withdrawn.

(2) Barbados became a member of the Organisation of American States, and so bound by the American Declaration of the Rights and Duties of Man in November 1967. In June 1978 it signed and in November 1978 it ratified the American Convention on Human Rights, and in June 2000 it accepted the compulsory jurisdiction of the Inter-American Court of Human Rights. It has not withdrawn from these obligations.

(3) As recorded in paragraph 58 of our opinion in Matthew, the jurisprudence of the Human Rights Committee, the Inter-American Commission and the Inter-American Court has been wholly consistent in holding the mandatory death penalty to be inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment. Nothing turns on minor differences of wording between one instrument or another. The appellants submitted that "No international human rights tribunal anywhere in the world has ever found a mandatory death penalty regime compatible with international human rights norms," and this assertion has not been contradicted. It is true that no application against Barbados has, to our knowledge, been made to any of these bodies, perhaps because the execution of those condemned to death has, as we understand, been exceptional. But no convincing reason has been given why punishment or treatment which is inhuman, degrading or unusual elsewhere should not have that character in Barbados.

(4) In written submissions to the Inter-American Commission on Human Rights for a hearing in October 2003, the State of Barbados insisted, we do not doubt sincerely, on its respect for human rights and international obligations. It described itself (page 7) as "unique amongst Commonwealth Caribbean countries in its acceptance and promotion of Inter-American human rights obligations." It continued (page 8):

"Barbados recognises and values the binding international legal obligations it has accepted under international and regional treaties, including those of the Inter-American system. It affirms its obligations to uphold its representative democratic system as well as to respect the fundamental rights of the individual."

At page 14 it stated:

"Barbados seeks to uphold all of the international legal obligations it has accepted under the Inter-American system. However in doing so, it must balance its obligations to uphold democratic constitutional processes, on the one hand, and its obligations related to certain human rights instruments on the other."

The context of these submissions was an amendment recently made to the Constitution of Barbados to give express constitutional protection to the mandatory death penalty. The Commission has sought an advisory opinion from the Inter-American Court, and to that extent the matter remains open. But the Commission, in a note of 17 March 2004 to the Government of Barbados, has made clear its opinion:

"The Commission has considered the oral arguments made on behalf of Your Excellency's government during the hearing held on October 20, 2003, and has reviewed the written submissions provided by your government in support of those arguments. After considering the matter during its 119th Regular Period of Sessions, the Commission has remained of the view that the mandatory imposition of the death penalty is incompatible with the protections enshrined under the Inter-American human rights instruments, for the reasons set out in its numerous decisions adopted on this issue. In reaching this conclusion, the Commission has noted the submissions of Your Excellency's government concerning the existence under Barbadian law of exceptions, defenses and other circumstances that prevent the imposition of capital punishment, statutory exceptions that allow the avoidance of capital punishment, and the availability of the mercy prerogative of the Privy Council to individuals who have been sentenced to death. It is apparent from the numerous decisions of the Commission on this matter, however, as well as from the judgment of the Inter-American Court in the Case of Hilaire, Constantine and Benjamin et al, that the existence of such provisions and procedures does not alleviate the requirement that the death penalty only be imposed after a judicial hearing where the sentence is not mandated in advance and where all mitigating factors may be presented and taken into account by the judicial authority in determining whether death is the appropriate punishment.

Accordingly, the Commission maintains the observations contained in its note of January 21, 2003, as well as its recommendation pursuant to

Article 18(b) of the Commission's Statute that Your Excellency's government reconsider its amendment to the Constitution of Barbados relating to the mandatory death penalty in light of the protections, standards and jurisprudence of the Inter-American human rights system."

While the matter now rests with the Inter-American Court, which alone can authoritatively interpret the Convention, we think it most unlikely that the Court will reach a decision different in any significant way from its earlier decisions.

(5) If, as we conclude, an interpretation of the Constitution is open to the Board which will be consistent with the international obligations of Barbados and not inconsistent with them, such interpretation should be adopted.

82. Performing the duty imposed on the courts by section 4 of the Independence Order, we would modify section 2 of the Offences Against the Person Act 1994 by substituting "may" for "shall". We would accordingly allow these appeals and remit the cases to the Supreme Court in order that that court, having heard any relevant submissions and evidence, may impose a just and appropriate sentence in each case.