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Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean

Margaret A. Burnham*

Since the constitutions of the Commonwealth Caribbean states were first adopted in the 1960s, courts have been confounded by the savings clauses in these instruments. These clauses place a “no go” sign over the fundamental rights grants of the charters by grandfathering pre-existing law into the constitutional regime. Meant initially as a shortcut method of marrying common law rights and constitutional protections, the clauses have presented particularly vexing problems of construction as appellate tribunals have attempted to reconcile international human rights norms with municipal law.¹ In July 2004, the Judicial Department of the Privy Council (“Board”), the court of last resort on death penalty cases in the large majority of the Commonwealth Caribbean states, decided three cases challenging the constitutionality of the mandatory death penalty. In the cases of *Boyce*,² *Matthew*,³ and *Watson*,⁴ the court dealt with the general savings clause in three territories and, in deeply divided judgments, rendered three different outcomes. As the Caribbean states proceed with the establishment of a regional constitutional court to replace the Privy Council, the savings clause will present a challenging obstacle to the construction of a coherent jurisprudence.

This Article analyzes the 2004 Privy Council trilogy against the backdrop of the genesis of the savings clause in Caribbean death penalty jurisprudence. First, I discuss the theoretical and practical problems the savings clause creates. Second, I discuss

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1. For a general treatment of the savings clause, see MARGARET DEMERIEUX, *FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS* 47, 55-69 (Faculty of Law Library University of West Indies ed., 1992).

2. *Boyce v. The Queen*, [2004] U.K.P.C. 32 (appeal taken from Barb.).

3. *Matthew v. State*, [2004] U.K.P.C. 33 (appeal taken from Trin. & Tobago).

4. *Watson v. The Queen*, [2004] U.K.P.C. 34 (appeal taken from Jam.).

the Privy Council's effort to reconcile the special savings clause with human rights law on the "death row phenomenon," as developed most prominently in *Soering*,⁵ the landmark case in which the European Court of Human Rights condemned protracted incarceration on death row. I analyze the problem of the mandatory sentence in death penalty jurisprudence and the Privy Council's 2004 trilogy. Finally, I conclude that the savings clause appears to present an insurmountable obstacle to genuine constitutional process, and that therefore, its elimination should be considered.

A. AN INTRODUCTION TO THE SAVINGS CLAUSE PUZZLE

There are two types of savings clauses in Caribbean constitutional law. The general savings clause purports to carry forth all the laws from the old regime, while the special savings clause insulates from challenge specific penalties or punishments that were in existence at independence. The general clause of the Constitution of Trinidad & Tobago saves all "existing law" from challenge,⁶ including, of course, laws that are incompatible with fundamental rights guarantees.⁷ The Constitution of Jamaica contains a special clause saving preexisting penalties from review under the clause prohibiting torture, inhuman or degrading punishment,⁸ as well as a general clause insulating from fundamental rights challenge those laws that were in force prior to the adoption of the constitution.⁹ Only the Constitution of Belize is free from

5. *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439 (1989).

6. TRIN. & TOBAGO CONST. ch. I, pt. II, § 6.

7. See, e.g., *Matthew v. State*, [2004] U.K.P.C. 33 (appeal taken from Trin. & Tobago).

8. Section 17 of the Constitution of Jamaica provides:

- (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 authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

JAM. CONST. ch. III, § 17.

9. Section 26(8) of the Constitution of Jamaica provides:

- Nothing contained in any law in force immediately before the appointed day shall be held to be inconsistent with any of the provisions of this Chapter; and nothing done under the authority of any such law shall be held to be done in contravention of any of these provisions.

JAM. CONST. § 26, cl. 8. This section has been applied to save laws that on their

any kind of savings clause.

The savings clause presents a range of interpretive challenges, some theoretical and others practical. By privileging pre-existing laws and shielding them from scrutiny, two of the central features of constitutionalism – constitutional supremacy and judicial review – are severely undermined. The savings clause takes back with one hand what the fundamental rights provisions are meant to give with the other, rendering ordinary laws more sacrosanct than the constitution to which they should be subordinated. Like an out of body experience, the clause requires constitutional jurists to ignore the very constitutional protections they are charged with enforcing.¹⁰ The clause eliminates the plasticity, organicity, and elasticity that fundamental rights adjudication requires to respond effectively, as it must, both to evolving universal standards¹¹ and to culturally specific normative shifts.¹² In sum, it violates the time honored rule, cogently expressed by Alexander Hamilton, that constitutional framers must “look forward to remote futurity.”¹³

Because the Commonwealth Caribbean constitutions are not uniform in their use of the savings clause, there are complex practical problems of interpretation. For example, some of the constitutions have no savings clauses at all, while others have more than one. Some constitutions provide that existing laws should be construed to bring them into conformity with the constitution;¹⁴ others are silent on the question of how to construe conflicting, existing laws. The constitutional text does not always reveal whether existing statutory law alone is continued or whether common law is also saved.¹⁵ The savings clause in the Barbados and

proper construction contravene constitutional rights. *Id.* See also, e.g., *Baker v. The Queen*, 23 W.I.R. 463 (1975).

10. In 1994 a judge of the Jamaican Court of Appeal, upholding as saved a sentence of whipping, wrote that the Court was not ruling on “the constitutionality or legality of the sentence of whipping.” *The Queen v. Pryce*, No. 89/94 [1994] S.C.C.A. (unreported decision).

11. In *Hilaire, Constantine & Benjamin*, Case No. 94, Inter-Am. C.H.R., ser. C. (June 21, 2002), the Inter-American Commission observed that the savings clause itself violated the treaty obligations of Trinidad because it precludes domestic courts from recognizing and enforcing international law.

12. As Lord Wilberforce famously observed in *Minister of Home Affairs v. Fisher*, [1980] A.C. 319, 328, constitutional interpretation should avoid the “austerity of tabulated legalism.”

13. *THE FEDERALIST* NO. 34, at 160 (Alexander Hamilton) (Garry Wills ed., 1982).

14. See, e.g., *GREN. CONST.*, sched. 2, pt. 1, § 1.

15. See, e.g., *Jones v. Att’y Gen.*, (1995) 1 W.L.R. 891, 895, where the Privy Council deemed the mandatory death penalty saved by a provision of the Constitution of the

Guyana constitutions applies only to written law.¹⁶ The savings clause in the Constitution of Belize was limited to five years after independence, and hence, it has expired.¹⁷

Consequently, in sibling constitutions, constitutional readings of the same rights-granting language can vary enormously depending on the mechanics of the particular savings clause, specifically whether the clause is general or special, and whether there is textual guidance respecting the interpretation of the clause. For example, in the mandatory death penalty cases, the Privy Council has ruled that, by virtue of the savings clause, the cruel, inhuman and degrading treatment language protects against such a penalty in Belize, St. Lucia, and St. Kitts & Nevis, but not in Barbados and Trinidad & Tobago.

Obviously, the savings clause problem could be ameliorated by law reform initiatives to modernize Caribbean statute law. However, the necessary legislative resources have not been adequately mobilized to affect such an overhaul, and consequently, many of the states still labor under laws received from England during the colonial period. The history of the death penalty illustrates the absurd results that can occur when independent states are still tethered to colonial laws that have been discarded as unjust by the colonial power itself. Although capital punishment was abolished in England in 1965 after a long debate on the subject, the independent territories of the Commonwealth Caribbean retained the penalty. Indeed, even before independence, there were disparities in the death penalty laws of England and the colonies where more crimes were covered by the mandatory penalty.

B. JUDICIAL READINGS OF THE SAVINGS CLAUSE

Appellate courts have deployed a range of strategies to address the savings clause. Initially, the Privy Council held that the fundamental rights provisions overrode existing law despite the savings clause,¹⁸ but it later rejected this view.¹⁹ In a 1981 case from Trinidad holding that police misconduct constituted

Bahamas. In considering what laws were saved, the Board reasoned that "law" includes any instrument having the force of law and any unwritten rule of law and 'lawful' and 'lawfully' shall be construed accordingly." *Id.*

16. See *BARB. CONST.* § 26(1); *GUY. CONST.* § 2(1).

17. See *BELIZE CONST.* § 21.

18. See *Chief of Police v. Powell*, [1968] 12 W.I.R. 403.

19. See *Baker v. The Queen*, [1975] A.C. 774 (P.C. 1975) (appeal taken from Jam.) (deeming saved a provision of the Jamaica Juveniles Act that on its true construction was incompatible with the constitution).

state action, the Privy Council appeared to revert to its first position, refusing to apply the pre-existing common law immunity rule despite the savings clause.²⁰

In *Attorney General v. Reynolds*,²¹ a 1979 decision, the Privy Council resolved a clash between existing law and a fundamental right by, in effect, rewriting the existing law to bring it into conformity with the constitution. The issue in *Reynolds* was whether a 1959 pre-constitution emergency powers law of St. Kitts & Nevis and Anguilla²² was insulated by the general savings clause of that state's 1967 independence constitution.²³ The parties appealed from an award of damages to Reynolds against the state to compensate him for his unlawful detention under an emergency order. The order, which did not specify the grounds for Reynolds's detention,²⁴ contravened the constitution's protection against unreasonable and unnecessary emergency detention. The Privy Council rejected the state's argument that its action was justified under the saved emergency powers law - which did not require a reasonableness determination - and grafted such a requirement onto the law in order to construe it consistently with the constitution. The Privy Council observed:

[i]t is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principle purposes of which is to protect fundamental rights and freedoms.²⁵

1. *Delay in Capital Cases*

In capital cases challenging the death row phenomenon and

20. See *Thornhill v. Att'y Gen.*, [1981] A.C. 61 (P.C. 1979) (appeal taken from Trin. & Tobago). See also *Bell v. Dir. Of Pub. Prosecutions*, [1985] A.C. 937 (P.C. 1985) (appeal taken from Jamaica).

21. *Att'y Gen. v. Reynolds*, [1980] A.C. 637 (P.C. 1979) (appeal taken from W. Indies).

22. The Leeward Islands Emergency Powers Order in Council of 1959 provided: The Administrator of a colony . . . may during a period of emergency . . . make such laws for the colony as appear to him to be necessary or expedient for securing the public safety, the defense of the Colony or the maintenance of public order"

SIR FRED PHILLIPS, COMMONWEALTH CARIBBEAN CONSTITUTIONAL LAW 53 (2002).

23. See *id.* at 55. See also ST. KITTS & NEVIS & ANGUILLA CONST. § 103(5).

24. The detention order provided "[t]hat you John Reynolds during the year 1967, both within and outside of the state, encouraged civil disobedience throughout the state, thereby endangering the peace, public safety and public order of the state." *Reynolds*, [1980] A.C. at 661.

25. *Id.* at 655.

the mandatory penalty, the Privy Council's opinions construing the savings clause have been inconsistent, leading critics to claim that these cases are result-driven. In the 1983 case of *Riley v. Attorney General*,²⁶ the Privy Council held that the special savings clause in the Constitution of Jamaica insulated from scrutiny prolonged delay in carrying out the penalty. Following precedent,²⁷ the Board concluded that even if inhuman and degrading, delay could never contravene the constitution because of the operation of the special savings clause. The Board observed that where undue delay did not afford a claim for relief from the sentence prior to the constitution, it could not be a ground for relief as a fundamental constitutional right. The Board wrote that "[a]n obvious instance of a description of punishment exceeding in extent that authorized by law would be the execution of a death sentence by burning at the stake."²⁸

In *Riley*, the Privy Council set forth three factors that, taken together, engage the punishment savings clause bar. The Board held that fundamental rights cannot override existing criminal sanctions where the challenged governmental conduct: (1) is "done under the authority of law;" (2) involves "infliction of punishment of a description authorized by the law in question" that was lawful in Jamaica prior to the effective date of the constitution; and (3) does not exceed "the description of the punishment so authorised."²⁹ A divided Board held that the first two conditions were clearly met, and that, as to the third, delay was not an unconstitutional denial of the protection against inhuman or degrading punishment because "the legality of a delayed execution by hanging of a sentence of death lawfully imposed . . . could never have been questioned before independence"³⁰

26. *Riley v. Att'y Gen.*, [1983] 1 A.C. 719 (P.C. 1979) (appeal taken from Jam.)

27. In *de Freitas v. Benny*, [1976] A.C. 239 (P.C. 1975) (appeal taken from Trin. & Tobago), the Privy Council held that the savings clause in Trinidad's constitution saved a death sentence from challenge on grounds of prolonged delay. In *Abbott v. Att'y Gen.*, [1979] 1 W.L.R. 1342, 1348 (P.C. 1979) (appeal taken from Trin. & Tobago), the Committee wrote that a case of unconstitutional delay in execution of a capital sentence "is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months"

28. *Riley*, [1983] 1 A.C. at 726.

29. *Id.*

30. *Id.* As Margaret DeMerieux has noted, in *Riley* the Privy Council's awkward formulation of the effect of the savings bar is revealing. The Board observed that since "[t]he legality of delayed execution by hanging, of a sentence of death *could never have been questioned before independence*" it was therefore not subject to constitutional challenge. *Id.* at 561 (emphasis added). DeMerieux points out that the "could never have been questioned" language actually masks the disturbing fact that

Ten years later, in *Pratt*,³¹ the Privy Council revisited the issue and famously reversed *Riley*. The Privy Council adopted the minority view in *Riley*, holding that the premise of the majority there, that delay in the execution of capital punishment would not have been unlawful before independence, was simply wrong.³² The *Pratt* Board distinguished *types* of punishment, such as death by hanging, which it held were saved, from the method of implementing permissible punishments, which was subject to constitutional scrutiny.³³ The special clause saved the penalty, but not the means of its application, and the general savings clause could not insulate from challenge prolonged delays in the execution of the sentence because such practices offended the common law and were not tolerated in the colonial era.³⁴

2. *The Mandatory Death Penalty*

The Privy Council would ultimately come to apply the escape hatch ingeniously fashioned in *Pratt* to the mandatory penalty as well. The special clause could not save the mandatory penalty from scrutiny, but the rub came in interpreting the general clause in the 2004 cases of *Boyce*, *Matthew*, and *Watson*.

In an early reading of the effect of the savings clause on punishments claimed to be unconstitutionally inhuman or degrading, the Privy Council held in a 1967 Rhodesian case³⁵ that a mandatory death penalty for arson was insulated from review.³⁶

lengthy delays were perfectly lawful and systemic in the pre-constitution period. DEMERIEUX, *supra* note 1, at 63.

31. *Pratt v. Att'y Gen.*, [1994] 2 A.C. 1 (P.C. 1993) (appeal taken from Jam.).

32. Before *Pratt* was decided, the minority view in *Riley* had garnered support in some of the Caribbean appellate courts. See, e.g., *Re Gayman Jurisingh and Others*, [1993] 48 W.I.R. 301.

33. The *Pratt* Board wrote:

Their Lordships will therefore depart from *Riley* . . . and hold that section 17(2) is confined to authorizing descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which the executive intend to carry out a sentence are in breach of section 17(1).

Pratt, [1994] 2 A.C. at 29.

34. Guyana, which had severed its ties with the Privy Council, rejected *Pratt's* rule that delays exceeding five years were presumptively unconstitutional. See *Yaseen v. Att'y Gen.*, No. 19-20 [1996] (Guy. C.A.) (unpublished decision) (on file with author).

35. *Runyowa v. The Queen*, [1967] 1 A.C. 26 (P.C. 1966) (appeal taken from Rhodesia and Nyasaland).

36. Section 60(1) of the then Constitution of Rhodesia and Nyasaland proscribed torture and inhuman or degrading punishment or other treatment. See RHODESIA

Then in *Ong*,³⁷ an appeal from Singapore decided in 1981, the Board, per Lord Diplock, upheld a mandatory death penalty for drug trafficking. While the Privy Council decided these two Caribbean cases on other grounds, the capital sentences under review in *Abbott v. Attorney General*³⁸ and *de Freitas v. Benny*³⁹ also involved mandatory penalties. In *de Freitas*, the Privy Council declared that the "[s]entence of death for murder . . . is mandatory under the Offences Against the Person Ordinance, which was in force at the commencement of the Constitution."⁴⁰ In *Abbott*, the petitioner challenged excessive delay in carrying out the mandatory sentence; the Privy Council rejected the due process claim on the ground that the delay was not excessive as measured against existing practice in Trinidad at the time its constitution came into force.⁴¹

The Privy Council began to pave the way for a more searching approach to mandatory sentences in *Lewis v. Attorney General*.⁴² Although that 2000 case upholding a death row inmate's right to representations before the Mercy Committee did not address directly the constitutionality of the mandatory sentence, it made clear that adequate process required individualized sentencing, thereby setting the stage for greater judicial oversight of the right to mitigation.

AND NYASALAND CONST. § 60(1). Section 60(3) of the constitution saved punishments authorized before the effective date of the constitution. *Id.* at § 60(3).

37. *Ong Ah Chuan v. Pub. Prosecutor*, [1981] A.C. 648 (P.C. 1980) (appeal taken from Sing.).

38. *Abbott v. Att'y Gen.*, [1979] 1 W.L.R. 1342, 1348 (P.C. 1978) (appeal taken from Sing.).

39. *de Freitas v. Benny*, [1976] A.C. 239 (P.C. 1975) (appeal taken from Trin. & Tobago).

40. *Id.* at 245.

41. While in *Abbott* the Privy Council equated existing practice with existing law for purposes of the savings clause, see *Abbott*, [1979] 1 W.L.R. at 1348, in *Bell*, the Board took a different view of the effect of existing practice on fundamental rights. See *Bell v. Dir. of Pub. Prosecutions*, [1985] A.C. 937, 938 (appeal taken from Jamaica). *Bell* challenged pretrial delay as violative of his constitutionally protected right to "a fair hearing within a reasonable time." JAM. CONST. § 20(1). Although no speedy trial right existed before the constitution, and the existing practice tolerated long delays, the Privy Council held that the constitution conferred a new enforceable right to a speedy trial. See *Bell*, [1985] A.C. at 938.

42. *Lewis v. Att'y Gen.*, [2001] 2 A.C. 50 (P.C. 2000) (appeal taken from Jam.). In *Lewis*, the Privy Council observed that the constitution protected executive review by the Mercy Committee where the "death penalty is automatic in capital cases . . . [and] the sentencing judge has no discretion." *Id.* at 78.

a. The *Reyes* trilogy

In a trilogy of cases decided in 2002,⁴³ the Privy Council struck down the mandatory death penalty for the first time, unambiguously declaring it to be a violation of the prohibition against inhuman or degrading punishment, and one not saved under a special savings clause regime. The three cases struck down statutory schemes prescribing death for all crimes of murder,⁴⁴ as well as a statute preserving the penalty for specific classes of aggravated murder.⁴⁵

In the lead case of the trilogy, *Reyes v. The Queen*,⁴⁶ the Board held that a Belize criminal statute providing that, "[e]very person who commits murder [by shooting, among other specified means] shall suffer death"⁴⁷ violated that state's constitutional prohibition on "torture or . . . inhuman or degrading punishment or other treatment."⁴⁸ *Reyes* overruled the holding of the Belize Court of Appeal in *Lauriano v. Attorney General*⁴⁹ that the constitutional right of executive review for murder convictions was constitutionally sufficient for mitigation. No general savings clause was involved in *Reyes*, for the savings clause of the Constitution of Belize had expired.

In *Regina v. Hughes*, the Board rejected St. Lucia's argument that its special savings clause⁵⁰ rendered its mandatory death penalty beyond the reach of the inhuman or degrading punishment

43. See *Reyes v. The Queen*, [2002] 2 A.C. 235 (P.C. 2002) (appeal taken from Belize); *The Queen v. Hughes*, [2002] 2 A.C. 259 (P.C. 2002) (appeal taken from St. Lucia); *Fox v. The Queen*, [2002] 2 A.C. 284 (P.C. 2002) (appeal taken from St. Kitts & Nevis). *Fox* and *Hughes* affirmed the ruling of the Eastern Caribbean Court of Appeal in *Spence v. The Queen* that the automatic imposition of the death penalty constituted inhuman and degrading punishment or treatment. See *Spence v. The Queen* [2001] 60 W.L.R. 1077. These cases are discussed in detail in Nicholas Blake and Saul Lehrfreund, *The Constitution Amendment Act 2002 and the Death Penalty*, 19 CARIB. L.B. 2, 7 (2002).

44. See *Fox*, [2002] 2 A.C. at 290; *Hughes*, [2002] 2 A.C. at 264.

45. See *Reyes*, [2002] 2 A.C. 235.

46. *Id.* at 235.

47. *Id.* at 238. Section 102 of the Criminal Code of Belize originally provided that "[e]very person who commits murder shall suffer death." *Id.* In 1994, Section 102 was amended by Section 114 of the Code, which, among other changes to Section 102, sets forth specific categories of murder to which the mandatory sentence applies, including shooting.

48. BELIZE CONST. pt. II, § 7.

49. *Lauriano v. Att'y Gen.*, [1995] 3 Belize L.R. 77 (Belize C.A.).

50. The St. Lucia Constitution Order, adopted in 1967, provides in sched. 2, ¶ 10: Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Section 5 of the Constitution to the extent that the law in question authorizes

clause. In *Fox v. The Queen*,⁵¹ the companion case to *Hughes*, the court ruled that the mandatory death penalty⁵² ran afoul of the inhuman or degrading punishment clause in the Constitution of St. Kitts & Nevis and was not immunized by the special savings clause.⁵³

The Belize case, *Reyes*, was a relatively easy one for the Board because there was no special savings clause. Relying heavily on international human rights norms that stress the importance of the judicial role in determining penalties in capital cases, and on developments in comparative criminal law that place increased importance on proportional sentencing,⁵⁴ the case reveals how thoroughly globalized death penalty jurisprudence has become, especially since *Soering* condemned the death row phenomenon,⁵⁵ and *Makwanyane* exemplified purposive and transjudicial constitutionalism.⁵⁶

The adjudicatory model adopted by the *Reyes* Board situates the domestic constitutional question within a wider and highly integrated comparative and international normative framework. While abolition is not yet a norm of international human rights, it is a generally accepted principle that certain safeguards must be met before the penalty may be imposed,⁵⁷ and that vulnerable

the infliction of any description of punishment that was lawful in St. Lucia immediately before [the constitution's effective date].

ST. LUCIA CONST. ORDER, sched. 2, ¶ 10.

51. *Fox v. The Queen* [2002] 2 A.C. 284.

52. Section 2 of the Offences Against the Person Act, applied to the then colony of St. Kitts & Nevis in 1873, provides: "Whosoever is convicted of murder shall suffer death as a felon." *Id.* at 290; Offences Against the Person Act, sec. 2 (1861) (Eng.).

53. The savings clause of the Constitution of St. Kitts & Nevis, ST. KITTs & NEVIS CONST. sched. 2, ¶ 9, is essentially the same as that of St. Lucia. *See* ST. LUCIA CONST. ORDER, sched. 2, ¶ 10.

54. *See Reyes v. The Queen*, [2002] 2 A.C. at 253 (P.C. 2002) (appeal taken from Belize). The *Reyes* court cited, *inter alia*, the Canadian non-capital case of *The Queen v. Smith*, [1987] 1 S.C.R. 1045, and *State v. Makwanyane*, 1995 (3) S.A.L.R. 391, 433 para. 94.

55. *See Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989).

56. *See Makwanyane*, 1995 (3) S.A.L.R. at 433. *See also* *State v. Williams*, 1995 S.A.C.L.R. LEXIS 249, where the South African Constitutional Court adopted a purposive approach in considering the legality of juvenile whipping. The term "transjudicial constitutionalism" was first introduced by Ann-Marie Slaughter. *See* Ann-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Ann-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

57. While international law does not prohibit capital punishment, its application is limited by many human rights treaties. *See* International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), art. 6 (requiring a fair trial and conviction

individuals, such as juveniles and pregnant women,⁵⁸ may not be sentenced to death.

One might expect that the global approach in *Reyes* would have limited utility in the companion savings clause cases, *Fox* and *Hughes*. In *Reyes* the Board observed that the protections of the European Convention⁵⁹ were applicable to Belize as a dependent territory from 1953 until that country's independence in 1981.⁶⁰ Human rights tribunals have interpreted Article Three of the Convention,⁶¹ and the regional treaties that mirror its provisions,⁶² to bar mandatory capital sentenc-

for aggravated crimes before the death penalty may be imposed) [hereinafter "ICCPR"]; American Convention on Human Rights, July 18, 1978, art. 4, 1144 U.N.T.S. 123 (forbidding capital punishment in states that have already abolished it); Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), done at Rome Nov. 4, 1950, Protocol 13, 213 U.N.T.S. 222 (Protocol 13 entered into force Jan. 7, 2003) (prohibiting capital punishment for all times) [hereinafter "ECHR"]; ICCPR, 2nd Optional Protocol (1990); *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, E.S.C. Res. 1984/50, U.N. ESCOR (1984) (exempting from capital punishment those under 18 years of age at the time of the commission of the crime, pregnant women, new mothers, and those who are or have become insane).

58. *E.g.*, ICCPR, *supra* note 57, art. 6 (forbidding states from imposing the death penalty for juvenile offenders or on pregnant women).

59. ECHR, *supra* note 57, art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

60. *Reyes v. The Queen*, [2002] 2 A.C. at 247 para. 27. ECHR, *supra* note 57, art. 63(1) allows "any state [to] . . . declare . . . that the present Convention shall extend to all or any of the territories for whose international relations it is responsible." The United Kingdom applied the Convention to its colonies from 1953 until their independence.

61. The *Reyes* court cited *The Queen v. Offen*, [2001] 1 W.L.R. 253, for the proposition that the mandatory death penalty for aggravated murder might contravene Article 3 of the European Convention. See also *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439 (1989), where the European Court of Human Rights stressed the importance of mitigating factors in connection with its Article 3 ruling. The 6th Protocol to the ECHR, adopted in 1983, abolished the death penalty during peacetime. See ECHR, *supra* note 57.

62. The fundamental rights approach of the European Convention, more detailed than the Universal Declaration, provided the model for the Nigerian Independence Constitution, upon which in turn the Caribbean independence constitutions were based. See DEMERIEUX, *supra* note 1, at 23. The Nigerian Constitution contained a bill of rights that was almost identical to the European Convention. See Christof Heyns, *African Human Rights Law and the European Convention*, 11 S. AFR. J. HUM. RTS. 252, 257 (1995). Article 2 of the Convention protects the right to life "save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." See ECHR, *supra* note 57, art. 2. The Caribbean independence constitutions include similar or identical language. However, historically the death penalty has been deemed an exception to the fundamental right to life. The Privy Council has consistently held that death by hanging violates neither the right to life nor the protection against inhuman or degrading treatment. See, *e.g.*,

ing.⁶³ Hence, the Board seemed to be saying that⁶⁴ the inhuman or degrading punishment clause in the Constitution of Belize should be read consistently with the interpretation given to the clause on which it was based in the European Convention.⁶⁵ Applying the Bangalore Principles,⁶⁶ the Board observed that adherence to international norms should govern in the absence of specific contrary textual constraints.⁶⁷

Where almost all of the Caribbean Commonwealth constitutions contain similar, if not identical, bills of rights originating in the European Convention, one could reasonably expect uniform interpretation of the rights language, but here again the savings clause handicapped the pursuit of a common constitutional jurisprudence, for the international and comparative law focus at the heart of *Reyes* is totally out of play in *Fox* and *Hughes*.

As I have discussed, the *Reyes* Board canvassed a broad array of precedent outside of, but binding on, the Caribbean jurisdiction by virtue of the presumed intent of the framers, European and Caribbean alike. Like Belize, St. Lucia and St. Kitts & Nevis inherited their fundamental rights provisions from the European Convention, and by virtue of the "Colonial Clause,"⁶⁸ these states

Reyes, [2002] 2 A.C. at 247 para. 29. Contra *Makwayane*, [1995] (3) S.A.L.R. at 415 (striking the penalty as violative of the constitutional rights to life and to dignity).

63. The *Reyes* Board cited the Inter-American Commission on Human Rights report that included the case of *Downer v. Jamaica*, Report No. 41/00 Inter-Am. C.H.R. (Apr. 13, 2000), applying the bar against inhuman and degrading punishment in the American Convention on Human Rights to prohibit mandatory death sentences, as well as *Edwards v. The Bahamas*, Report No. 48/01 Inter-Am. C.H.R. (Apr. 4, 2001), and *Baptiste v. Grenada*, Report No. 38/00 Inter-Am. C.H.R. (Apr. 13, 2000). See *Reyes*, [2002] 2 A.C. at 236.

64. This is implicit rather than explicit in the Board's judgment. The Board wrote that where the European Convention applied to the pre-independence period, the Constitution of Belize could not properly be read to provide diminished rights to its newly independent citizens. *Reyes*, [2002] 2 A.C. at 247 para. 28.

65. *Id.* at 245 para. 23.

66. The Bangalore Principles were adopted by a group of Commonwealth jurists at a 1988 meeting in Bangalore. See "Report of Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bangalore, India", reproduced in Michael Kirby, *The Role of the Judge in Advancing Human Rights By Reference to International Human Rights Norms*, 62 *Austl. L.J.* 514, 531-32 (1988). The principles encourage reference to and reliance on international human rights norms where domestic constitutional or statutory law is uncertain or incomplete. See Lord Lester of Herne Hill, *The Challenge of Bangalore: Making Human Rights a Practical Reality* Commonwealth L. Bull. 47 (1999).

67. The Board wrote that, "the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does." *Id.* at 235 para. 28.

68. ECHR, *supra* note 57, art. 63(1). For an account of the history of the Colonial

were also subject to its protections until they achieved their independence. However, the argument from original intent is strikingly absent in those cases. On the contrary, those cases rest not on transjudicial human rights analysis, but rather on a careful parsing of the constitutional and statutory texts at play.

b. *Pinder v. The Queen*

The promise held out by the 2002 mandatory penalty trilogy, of a thickened, internationalist perspective on human rights law in the Commonwealth Caribbean, has been all but extinguished. An early indication that a majority of the Lords considered themselves trapped by the savings clause came in the non-capital 2002 case of *Pinder v. The Queen*,⁶⁹ which was decided on the heels of *Reyes*, *Fox*, and *Hughes*. Both *Fox* and *Hughes*, as well as *Pinder*, involved the special savings clause.

The defendant in *Pinder*, convicted of several armed robberies, challenged the constitutionality of corporal punishment in the Bahamas. That state's constitution forbids inhuman and degrading treatment or punishment,⁷⁰ and it saves all punishments that were lawful before the adoption of the constitution.⁷¹ Flogging was the prescribed penalty for several serious offenses, including robbery, when the constitution was adopted in 1973.⁷² In 1984, the Bahamas abolished corporal punishment, but in 1991, responding to public outrage over escalating crime rates, the legislature restored whipping and flogging and increased other penalties.⁷³ The Privy Council rejected defendant's argument that, having abolished flogging on the grounds that it is inhuman and degrading,⁷⁴ the state could not reinstate it without amending the constitution.⁷⁵ The Board reasoned that although flogging is an inhuman and degrading penalty, it was immunized by the special

Clause, see A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION* 288 (2001).

69. *Pinder v. The Queen*, [2002] 1 A.C. 620 (P.C. 2002) (appeal taken from Bah.).

70. BAH. CONST. ch. III, art. 17(1).

71. Article 17(2) of the Constitution of the Bahamas provides that the protection against inhuman or degrading treatment or punishment does not extend to laws that "authorize[] the infliction of any description of punishment . . . lawful" before the adoption of the constitution. *Id.* art. 17(2).

72. See *Pinder*, [2002] 1 A.C. at 620 para. 42.

73. See *id.* para. 4.

74. The Prime Minister of the Bahamas described corporal punishment as "retrogressive and an act of torture" when he recommended its abolition to the legislature in 1984. See *id.* para. 42. Indeed, the prosecutor in *Pinder* conceded that the penalty was inhuman and degrading. See *id.* para. 45.

75. See *id.* para. 26.

punishment savings clause, despite the intervening action of the legislature in abolishing it.⁷⁶ In short, the penalty would have been constitutionally forbidden but for the savings clause. The Board observed that because it diminished the scope of guaranteed rights, the punishment savings clause had to be narrowly construed. But the Board went on to state that there was no way to avoid the insulating effect of the clause, for to do so would turn "narrow construction [into] misconstruction."⁷⁷ The majority of the Board ignored the protection afforded the defendant by international law.⁷⁸

Taken to its logical extreme, *Pinder* stands for the proposition that as long as the special punishment savings clause exists, future legislatures can always return to the barbarism of a penalty sanctioned at the time of the adoption of the constitution, no matter how often or on what grounds the punishment may have been repealed.⁷⁹ Neither death by hanging, nor flogging, nor the use of manacles and leg irons will ever be beyond the constitutional pale, even if these practices are universally abhorred and condemned. Moreover, subject only to the rule of proportionality, the legislature can impose a preexisting punishment, such as flogging for a crime of any nature, as it is the punishment itself that is saved. In sum, by virtue of the savings clause, the Commonwealth Caribbean is free to compete with the world's most repressive criminal justice systems, despite the generous guarantees of its constitutions.

c. The *Boyce* Trilogy

On September 5, 2002, in the wake of the decision in the *Reyes* trilogy, the Barbados legislature amended the constitution in order to shield the mandatory death penalty from constitutional review.⁸⁰ The intent of the amendment was to reverse Privy Coun-

76. *See id.* paras. 6-27.

77. *See id.* para. 14.

78. As a member state of the Organization of American States, the Bahamas is bound by the American Declaration of the Rights and Duties of Man, art. xxvi, which protects against cruel, infamous or unusual punishment. INTER-AMERICAN BAR FOUNDATION, THE LEGAL PROTECTION OF HUMAN RIGHTS IN THE WESTERN HEMISPHERE 36 (1978).

79. *Pinder*, [2002] 1 A.C. at 620 para. 27.

80. Section 15 of the Constitution of Barbados was amended as follows:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or 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

cil decisions on the death row phenomenon and on the right to a determination by the human rights tribunals before a state could carry out the death penalty.

Previously Jamaica and Trinidad & Tobago had taken steps to reverse the effect of *Pratt* and its progeny. These states repudiated some of their international treaty obligations.⁸¹ These defiant acts of Barbados, Jamaica, and Trinidad & Tobago in protest of the Privy Council rulings formed the backdrop against which the Board would consider the applicability of the general savings clause to mandatory sentencing in 2004.

The Board decided three cases in July 2004 that addressed the general savings clause. Taken together, the three decisions, *Boyce v. The Queen*,⁸² *Matthew v. State*,⁸³ and *Watson v. The Queen*,⁸⁴ address the question left open in the 2002 trilogy, *Reyes*,⁸⁵ *Hughes*,⁸⁶ and *Fox*⁸⁷ of whether the general savings clause shields the mandatory death penalty. The 2002 trilogy, like *Pinder*,

section to the extent that the law in question authorizes the infliction of any punishment or the administration of any treatment that was lawful in Barbados immediately before 30th November 1966.

(3) The following shall not be held to be inconsistent with or in contravention of this section:

- (a) the imposition of a mandatory sentence of death or the execution of such a sentence;
- (b) any delay in executing a sentence of death imposed on a person in respect of a criminal offence under the law of Barbados of which he has been convicted;
- (c) the holding of any person who is in prison, or otherwise lawfully detained, pending execution of a sentence of death imposed on that person, in conditions, or under arrangements, which immediately before the coming into operation of the Constitution Amendment Act, 2002
 - i. were prescribed by or under the Prisons Act, as then in force; or
 - ii. were otherwise practiced in Barbados in relation to persons so in prison or so detained.

BARB. CONST. ch. III, § 15, *amended by* Constitution (Amend.) Act, 2002-14, Supp. to Official Gazette No. 74 (Sept. 5, 2002).

81. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

82. *Boyce v. The Queen*, [2004] U.K.P.C. 32 (appeal taken from Barb.).

83. *Matthew v. State*, [2004] U.K.P.C. 33 (appeal taken from Trin. & Tobago).

84. *Watson v. The Queen*, [2004] U.K.P.C. 34 (appeal taken from Jam.).

85. *Reyes v. The Queen*, [2002] 2 A.C. 235 (P.C. 2002) (appeal taken from Belize).

86. *The Queen v. Hughes*, [2002] 2 A.C. 259 (P.C. 2002) (appeal taken from St. Lucia).

87. *Fox v. The Queen*, [2002] 2 A.C. 284 (P.C. 2002) (appeal taken from St. Kitts & Nevis).

involved only the special savings clause. *Matthew v. State* reversed the decision in the 2004 case of *Roodal v. State*,⁸⁸ which struck the mandatory penalty in Trinidad & Tobago, despite the general savings clause.

In these three 2004 cases, a deeply divided nine member Board breathed new life into a savings clause thought to be at risk after the *Reyes* trilogy sidelined the special clause and *Roodal* took on the general clause. The debates laid bare by the several opinions in these three cases – *Boyce* an appeal from Barbados, *Watson* an appeal from Jamaica, and *Matthew* an appeal from Trinidad & Tobago – underscore the sharp and volatile divisions within the Privy Council and the legal community that it leads. The Council ruled that although it infringes upon a fundamental right established by the constitutions of all three states, the mandatory death penalty is nevertheless constitutional in Barbados and Trinidad & Tobago, but not in Jamaica. The cases illustrate the enormous obstacle that the savings clause poses for the development of a predictable, coherent, and uniform Caribbean constitutional jurisprudence.

In *Boyce*, by a five-four majority, the Board, per Lord Hoffmann, held that although the mandatory death penalty⁸⁹ is an “inhuman or degrading punishment” within the meaning of the Constitution of Barbados,⁹⁰ the law pre-dated the constitution, and was thereby saved under the general savings clause.⁹¹ The Board reasoned that while the mandatory death penalty is uniformly condemned in international human rights law⁹² and in constitutional law,⁹³ as explicated by the Board in *Reyes*, the Constitution of Barbados leaves it to Parliament, and not to the

88. *Roodal v. State*, [2003] U.K.P.C. 78 (appeal taken from Trin. & Tobago).

89. Section 2 of the Offences Against the Person Act (1994) provides “Any person convicted of murder may be sentenced to, and suffer, death.” The Act was successor legislation to the Offences Against the Person Act (1861), which provided that “whosoever shall be convicted of murder shall suffer death as a felon.” *Boyce v. The Queen*, [2004] U.K.P.C. 32 paras. 8-9 (appeal taken from Barb.).

90. BARB. CONST. ch. III, § 15(1).

91. See *id.* § 26; *Boyce*, [2004] U.K.P.C. 32 para. 30.

92. Here the Board cited to *Edwards v. The Bahamas*, Report No. 48/01 Inter-Am. C.H.R. (Apr. 4, 2001) (holding the mandatory penalty inconsistent with the American Declaration of Human Rights); *Hilaire, Constantine & Benjamin*, Case No. 94 Inter-Am. C.H.R., ser. C (June 21, 2002) (holding it inconsistent with the American Convention on Human Rights); and *Kennedy v. Trin. and Tobago*, Comm. No. (CCPR/C/67/D/845/1999) [1999] U.N.H.R.C. 55 (Dec. 31, 1999) (holding it inconsistent with the International Covenant on Civil and Political Rights). See *Boyce*, [2004] U.K.P.C. 32 para. 22.

93. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976).

courts, to get rid of laws that contravene current norms. The Board rejected the arguments of the appellants that: (1) the court had the power to modify the mandatory penalty law to bring it into conformity with the bill of rights,⁹⁴ and that (2) such modification was necessary to avoid placing Barbados in breach of its international treaty obligations.⁹⁵

The Privy Council pursued these questions in an appeal from the Court of Appeal of Trinidad & Tobago in the companion case of *Matthew v. State*. *Matthew* raised a tricky question of statutory and constitutional interpretation which the Committee, sitting in a panel of five, first addressed in *Roodal v. State*.

Roodal challenged the imposition upon him of a mandatory death sentence pursuant to a 1925 statute⁹⁶ which provides that, "[e]very person convicted of murder shall suffer death."⁹⁷ Two constitutions were at play in *Roodal*. The first Constitution of Trinidad & Tobago, the Independence Charter adopted in 1962, contained a clause rendering the bill of rights protections for the right to life⁹⁸ and to be free from cruel and unusual treatment or punishment⁹⁹ inapplicable to laws then in force.¹⁰⁰ In 1976, Trinidad & Tobago adopted its current constitution, the primary purpose of which was to establish the state as an independent republic. The 1976 constitution altered the savings clause; the 1976 version provides that "[n]othing in [the relevant bills of

94. This argument rested on a reading of Section 4(1) of the Barbados Independence Order, which provides that existing laws are to 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." BARB. CONST. indp. ord. § 4(1). The modification urged by the appellant was substituting "may be sentenced to . . . death" for "shall be sentenced to . . . death." See *Reyes v. The Queen*, [2002] 2 A.C. 235 (P.C. 2002) (appeal taken from Belize).

95. Barbados is bound by the American Declaration of the Rights and Duties of Man. It has ratified the American Convention on Human Rights and the International Convention on Civil and Political Rights. See *Boyce*, [2004] U.K.P.C. 32 para. 16.

In the view of the four dissenters in *Boyce*, Section 4(1) the Barbados Independence Order, which provided for modification of existing laws, offered adequate grounds for eliminating altogether the mandatory punishment, particularly when considered in light of the state's international obligations. *Id.* paras. 77-82 (Cornhill, Nicholls, Steyn & Walker, L., dissenting).

96. *Roodal v. State* [2003] U.K.P.C. 78 para. 2.

97. *Id.*; Offences Against the Person Act § 4 (1925) (Trin. & Tobago).

98. TRIN. & TOBAGO CONST. (1962) § 1(a).

99. See *id.* § 2(b).

100. Section 3(1) of the 1962 Constitution of Trinidad & Tobago provides: "Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad & Tobago at the commencement of this Constitution." *Id.* § 3(1).

rights provisions] shall invalidate . . . an existing law.”¹⁰¹ “Invalidating” a law was different, the *Roodal* Board concluded, from the “shut-out” language used in the 1962 savings clause.¹⁰² Based primarily on this altered clause, the Board in *Roodal* held that the mandatory death penalty law – Section 4 – could be “modified,”¹⁰³ and thereby brought into conformity with the constitution without altogether invalidating the statute.

A nine member Board, four of whom sat in *Roodal*, rejected the reasoning of that case in *Matthew*. *Matthew*, also a split decision, held that the difference between the savings clauses of the 1962 and the 1976 constitutions was immaterial. A passionate dissenting judgment by Lord Nicholls of Birkenhead declared the majority view to be a cramped and unwarranted reading of the constitutional protections and an affront to international law. Addressing bluntly the motivation of the governments relying on the savings clause to obstruct human rights protection, his Lordship wrote:

Despite these constitutional and international guarantees the governments of these countries insist on continuing to inflict on their citizens a form of punishment which, by today's standards, is inhuman. Each government justifies its mandatory sentences of death for murder by pointing to a transitional savings clause in the country's constitution in respect of laws in force when the constitution was adopted. Each government seeks thereby to clothe a form of inhuman punishment with continuing constitutional legitimacy and an appearance of human rights respectability.¹⁰⁴

In the third case of the group, *Watson*, on appeal from the Court of Appeal of Jamaica, the Board considered whether a 1992 act which applies the mandatory penalty to capital but not non-

101. *Roodal*, [2003] U.K.P.C. 78 para. 22.

102. *See id.*

103. The 1976 Constitution Act requires such modifications. Section 5(1) of the 1976 Constitution Act provides:

Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order in Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act.

TRIN. & TOBAGO CONST. (1976) § 5(1).

104. *Matthew v. State*, [2004] U.K.P.C. 33 para. 68 (appeal taken from Trin. & Tobago) (Nichols, L., dissenting).

capital murder¹⁰⁵ contravened the constitutional prohibition against torture or inhuman or degrading punishment.¹⁰⁶ The 1992 act was adopted in an effort to ameliorate the harsh effects of the predecessor 1864 Offenses Against the Person Act that, just like the laws of Barbados and Trinidad & Tobago, applied the mandatory penalty to all murders. As with the constitutions of Barbados and Trinidad & Tobago, the Constitution of Jamaica includes a general savings clause.¹⁰⁷ Reading the savings clause narrowly, so as to grant maximum protection under the Bill of Rights, the Board held that the 1992 law was not protected by the savings clause, despite its direct descent from the Offences Against the Person Act of 1864. As the savings clause was without effect, the Board applied the teaching of *Reyes v. The Queen* that the mandatory penalty is inhuman or degrading, and then struck down the 1992 statute.¹⁰⁸ As the concurring minority of four observed, this outcome represents a "gross anomaly:"

One strange, and to our mind regrettable, implication of the majority decision in *Matthew, Boyce and Joseph* and the present appeal is that Jamaica would have succeeded in maintaining an objectionable nineteenth century law if it had not attempted to mitigate its harshness.¹⁰⁹

What is even more curious about the result in these three cases is that Jamaica's revised mandatory penalty statute would likely have passed muster in either Trinidad & Tobago or Barbados. The constitutions of those two states include within the definition of existing laws those which have been "altered," so long as the altered law does not derogate from the fundamental right in question any more than the pre-independence law.¹¹⁰ In Jamaica,

105. See *Watson v. The Queen*, [2004] U.K.P.C. 34 para. 2 (appeal taken from Jam.).

106. Section 17(1) of the Constitution of Jamaica provides that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment." JAM. CONST. § 17(1).

107. Section 26 of the Constitution of Jamaica saves from scrutiny under the fundamental rights provisions those laws that were in force before the appointed day when the constitution came into effect. *Id.* § 26(8-9).

108. After *Watson*, Jamaica now has the most well-defined capital classification regime in the region. The death penalty is now in the discretion of the trial judge for capital offenses.

109. *Watson*, [2004] U.K.P.C. 34 para. 63.

110. Section 6(1)(c) of the Constitution of Trinidad & Tobago includes in the definition of saved existing law: "[a]n enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right." TRIN. & TOBAGO CONST. § 6(1)(c). See also BARB. CONST. § 26(1)(c).

on the other hand, permissible changes are more limited. The Constitution of Jamaica saves only existing laws that are unmodified or those that have been "reproduced in identical form."¹¹¹

d. *Griffith v. The Queen*

That the Privy Council has begun to back away from the high-water mark of *Pratt* in its engagement with the Caribbean death penalty is further suggested by *Griffith*,¹¹² a December 2004 decision applying the *Boyce* holding. In *Griffith*, the facts supported a finding that the appellants were part of a group of young men involved in a fatal stabbing that resulted from a robbery gone awry. The state relied on a constructive malice theory to support the murder convictions of the men who did not actually stab the victim, and a mandatory death sentence was imposed by the Barbados trial court.¹¹³ Even though there was no determination, either at the guilt phase or at the penalty phase, of the individual *mens rea* of the defendants, the Privy Council sustained the convictions against a due process challenge, because, it concluded, felony murder was not unconstitutional and the mandatory sentencing regime was saved under *Boyce*.

C. CONCLUSION

Manifestly, legislative and judicial attention could address the mischief that the savings clause continues to create in Caribbean constitutional law. Commentators have urged constitutional amendment to eliminate the clause.¹¹⁴ The Caribbean Court of Justice will be pressed to bring some order to this area of constitutional law, for it will be charged with harmonizing the municipal law of the member states and identifying the collective social ethos of the Caribbean people.

111. Section 26(9)(1) of the Constitution of Jamaica protects laws "reproduced in identical form in any consolidation or revision of law with only such adaptations or modifications as are necessary or expedient by reason of its inclusion in such consolidation or revision." JAM. CONST. § 26(9)(1)

112. *Griffith and Ors. v. The Queen*, [2004] U.K.P.C. 58 (appeal from Barbados).

113. The death sentences in *Griffith* were reduced to life terms while their appeal was pending, but before the judgment was entered in the Privy Council.

114. See SIMEON C. R. MCINTOSH, *CARIBBEAN CONSTITUTIONAL REFORM: RETHINKING THE WEST INDIAN POLITY* 260 (2002). Lloyd Barnett suggests the savings clause was not well considered at the time of its adoption, and that the saved statutes and laws should have been more closely examined to determine whether they were consistent with fundamental rights guarantees before excluding them from constitutional reach. LLOYD BARNETT, *THE CONSTITUTIONAL LAW OF JAMAICA* 380 n.44 (1977).

Principled and reasoned decision-making is, of course, the *sine qua non* of common law constitutional adjudication. But, these mandatory sentencing cases, which raise identical human rights issues, rest on different rationales because of the operation of the general and special savings clauses. Constitutionalism cannot survive so long as the multiple iterations of the savings clause preempt, in radically different ways, basic rights. What is left is a constitution without constitutionalism, an instrument with no true normative message or predictive value.¹¹⁵ The new Caribbean Court of Justice will necessarily confront the savings clauses as it seeks to harmonize the region's constitutional law and to engender regard for international norms.

115. For a discussion of the phenomenon of empty constitutionalism, see H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD: THE AMERICAN COUNCIL OF LEARNED SOCIETIES COMPARATIVE CONSTITUTIONALISM PAPERS 65 (Douglas Greenberg et al. eds., 1993). In the African context, empty constitutionalism has more to do with the failure of constitutional instruments to hold governments to the rule of law than with the inelasticity of the constitutional terms themselves.