THE IMPLICATIONS OF THE PRIVY COUNCIL DECISION IN *CHANDLER*

On 16 May 2022 a 9 judge panel of the Privy Council gave judgment in the important constitutional case of *Chandler v The State (No 2)*.[1] In *Chandler* the Privy Council upheld the mandatory death penalty, following its earlier decision in *Matthew v The State*.[2] The Privy Council, therefore, rejected the Court of Caribbean Justice (CCJ)'s approach in three recent decisions: *Nervais v R*,[3] *McEwan v AG of Guyana*[4] and *Bisram v DPP*,[5] which it handed down a few weeks before *Chandler*.

The Privy Council accepted in *Chandler* hat the mandatory death penalty in Trinidad breached the constitutional right prohibiting cruel and unusual punishment.[6] The key issue, however, was whether the mandatory death penalty in Trinidad under s 4 of the Offences Against the Person Act 1925 was immune from constitutional challenge because the 1925 Act pre-dates the 1976 Constitution and must be treated as "saved law".

The Privy Council decision in *Chandler* is real significance for at least five reasons.

First, the death sentence for murder has been a very controversial issue in the region for many years. The Privy Council decision in *Pratt v AG of Jamaica* that execution more than 5 years after sentence constitutes inhuman or degrading punishment spurred the establishment of the CCJ.[7]

Secondly, the Privy Council has, itself, has expressed different views on the savings clause in its earlier decisions. In *Roodal v State of Trinidad* Lord Steyn invalidated mandatory death penalty.[8] He held that the Court must first consider whether a statutory provision is capable of being modified under s 5(1) of the Constitution Act 1976[9] (which enacted the Republican Constitution as a Schedule to the 1976 Act)- before considering whether it is a saved law under s 6 of the Constitution.[10] This provoked very strong dissents from Lord Millett and Rogers who decided

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1 [2022] 3 WLR 39

2 [2005] 1 AC 433

3 [2018] 4 LRC 545

4 [2019] 1 LRC 608

5 [2022] CCJ 7(AJ)

6 Section 5(2)(b) of the Trinidad Constitution prohibits the imposition of "*cruel and unusual treatment or punishment*".

7 [1994] 2 AC 1. Section 17(1) of the Jamaica Constitution prohibits "*inhuman or degrading punishment*".

8 [2005] 1 AC 328

9 Section 5 of the Constitution Act 1976 states:

> *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.*

10 Section 6(1) of the Constitution states:

> *(1) Nothing in sections 4 and 5 shall invalidate-*
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> *(a) an existing law;*
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> *(b) an enactment that repeals and re-enacts an existing law without alteration; or*
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> *(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.*

that the Privy Council had first to decide whether a statutory provision in question is saved law under the Constitution before looking at the modification power.

In *Matthew*, however, the Privy Council decided by a majority of 4[11] to 3[12] to reverse *Roodal* for, essentially, two reasons. Lord Hoffmann took the view that the reasoning in *Roodal* was wrong. Relying on the modification power contained in ordinary legislation was, he said, incompatible with Constitution's status as supreme law. Lord Hoffmann stressed that, whilst constitutional rights must be interpreted as a living instrument to be adapted to changing attitudes and changes in society, other constitutional provisions like the savings clause were concrete and specific. He, therefore, held that the savings clause could not be updated as a living instrument, but had to be interpreted on ordinary principles of statutory interpretation.

Furthermore, Lord Hoffmann in *Matthew* found that the statutory approach in *Roodal* was arbitrary to the point of absurdity. He pointed out that *Roodal* only immunised saved laws which (for linguistic or conceptual reasons) could not be re-interpreted under the modification power. He discussed this issue extensively in Barbados appeal, *Boyce v the Queen*.[13] Lord Hoffmann gave the example of a provision which stated that "*anyone convicted of burglary may be sentenced to a whipping of not more than ten lashes*". Whipping amounts to inhuman treatment. But the language of this provision is incapable of being modified. By contrast, Lord Hoffmann considered a provision when permitted burglars to be sentenced for either imprisonment or whipping. In that case the sentence of whipping which could be modified and deleted, to preserve the power to imprison. Lord Hoffmann, therefore, held that the *Roodal* approach was arbitrary- the precise language of a provision became critical, elevating form over substance.

Nevertheless, as Lord Bingham pointed out in his dissent in *Matthews*, Lord Hoffmann's approach was not persuasive. This is "*nothing strange in a provision which requires a court to construe an existing law with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with a human rights instrument but prohibits it from annulling the law*".[14] Until the UK left the European Union in 2020, EU law was supreme law in the UK; and the longstanding EU principles of statutory interpretation required the national courts within the EU

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(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to 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 then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that rights.

(3) In this section-

"alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

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

"rights" includes freedom.

11 Lord Hoffmann, Lord Hope, Lord Scott, Lord Rodger and Zaaca J.

12 Lord Bingham, Lord Nicholls, Lord Steyn and Lord Walker.

13 [2005] 1 AC 400

14 See *Matthews* above, para 54.

to interpret domestic legislation, as far as possible, in the light of the wording and purpose of any relevant EEC directive, whether national law originated before or after adoption of the directive.[15]

The Privy Council has subsequently considered the impact of the savings clauses on various Caribbean countries. The debate continues to focus on which provision should be applied first, the modification power (as *Roodel* held) or the savings provision (as *Matthews* held).

Thirdly, *Chandler* is momentous because the CCJ disagrees with the *Matthews*' approach. The CCJ uses the modification power first- before immunity arises as saved law. In *Nervais* the CCJ heard a Barbados appeal against mandatory death sentences under s 2 of the Offences Against the Person Act 1868. The CCJ ruled that:

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

In *McEwan* the CCJ heard a case about whether the savings clause in the Guyanese Constitution protected a "saved law" against a constitutional challenge, the cross-dressing law, which made it an offence for a man to wear female clothing in a public place for an improper purpose. Saunders P give "*four broad and interlocking approaches*" to declare the cross-dressing law unconstitutional. In *Bisram* the CCJ reiterated the majority views expressed in *Nervais* and *McEwan* on the issue of the relationship between the Savings Clause and the enjoyment by the citizenry of fundamental rights. The CCJ emphasised that

> *"…in a democracy, courts must construe the Constitution and laws so as to promote fundamental rights and freedoms. Where the Constitution can be interpreted in two ways, one which furthers fundamental rights and one which infringes them, a court has a responsibility to adopt the former."*

Fourthly, the Privy Council generally follows CCJ's analysis on constitutional rights issues. For instance, in *Commissioner of Police v Seepersad* the Privy Council held that it was unconstitutional to detain children in adult prison, by applying CCJ's approach to the right to protection of law.

Last but not least, *Chandler* concentrates on a particularly current hot topic for Supreme Courts at the moment, the principle of *stare decisis* and the role of precedent. The Privy Council's cautious conclusion on *stare decisis* is striking different from the radical position taken very recently by the US Supreme in *Dobbs v Jackson*[16] where it held that there was no constitutional right to abortion,

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[15] See the decision of the European Court of Justice in *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] E.C.R. I-4135. Furthermore, the Human Rights Act 1998 takes the same approach. Section 3 of the HRA requires the Court under s 3 to interpret legislation so far as possible to be compatible with Convention rights: see, in particular, the analysis of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. If, however, the Court cannot interpret the legislation in accordance with s 3, it has the power to make a declaration of incompatibility under s 4 of the HRA, which the Government can rectify by making subordinate legislation under s 10 of the HRA. In *Matthews* Lord Bingham at para 54 also drew attention to ss 4 and 6 of the New Zealand Bill of Rights Act 1990.

[16] https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf Contrast the view of the majority (Alito, Thomas, Kavanaugh and Barrett JJ joined in Alito's J's opinion and Thomas and Kavanaugh JJ gave concurring opinions) on the impact of this decision on the decisions of the right to obtain contraceptives, *Griswold v. Connecticut*, 381 U. S. 479

overruling *Roe v Wade*[17] and *Planned Parenthood v. Casey*.[18] *Chandler* underlined that the Privy Council should only reopen an earlier precedent with the greatest hesitation: it needed to be satisfied that the decision was wrong and lacked a satisfactory foundation. The Privy Council stated that it was not enough that the Board hearing the appeal might take a different view if considering the issue for the first stime and should be particularly cautious about reinterpreting a Constitution.

The *Chandler* approach to stare decisis

The Privy Council decided there was no basis for overruling *Matthew* and good reasons not to.

It stressed that the proper interpretation of the savings clause had much wider implications than mandatory death penalty, so that applying the CCJ approach would create considerable legal uncertainty. The savings clause affected many fields (such as taxation). The Privy Council has already applied *Chandler* very recently in *Suraj v AG Trinidad* where it upheld the constitutionality of covid restrictions on freedom of assembly and religious gatherings.[19] *Chandler* pointed out that the Privy Council has consistently adopted the approach in *Matthew* in some 21 Privy Council appeals. The Privy Council, therefore, rejected CCJ view that *Matthew* was wrongly decided.

The Privy Council also emphasised that the process of fixing of sentencing penalties for a particular offence is an inherently legislative function , rather than a judicial one. The doctrine of the separation of powers was not an overriding principle that existed above and independently of a Constitution but was implicit in a Constitution. Nor was it inconsistent with the separation of powers in the Constitution for the legislature to enact the penalty to be imposed for a particular offence.

The decision in *Chandler* raises many profound issues like whether in a constitutional democracy pre-Independence saved laws should be given a higher constitutional status than fundamental rights and whether saved laws must be retained (even if might breach fundamental rights- unless altered by the democratically elected legislature. Nevertheless, regardless of how the issues of principle might continue to be debated, the Privy Council have now arrived at a settled view on

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(1965) and *Eisenstadt v. Baird*, 405 U. S. 438 (1972), the right to engage in private, consensual sexual acts, *Lawrence v. Texas*, 539 U. S. 558 (2003), and the right to marry a person of the same sex, *Obergefell v. Hodges*, 576 U. S. 644 (2015). "*Finally, the dissent* [Breyer, Sotomeyer and Kegan JJ] *suggests that our decision calls into question Griswold, Eisenstadt, Lawrence, and Obergefell. Post, at 4–5, 26–27, n. 8. But we have stated unequivocally that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." Supra, at 66. We have also explained why that is so: rights regarding contraception and same-sex relationships are inherently different from the right to abortion because the latter (as we have stressed) uniquely involves what Roe and Casey termed "potential life." Roe, 410 U. S., at 150 (emphasis deleted); Casey, 505 U. S., at 852. Therefore, a right to abortion cannot be justified by a purported analogy to the rights recognized in those other cases or by "appeals to a broader right to autonomy." Supra, at 32. It is hard to see how we could be clearer*" with that in the concurring opinion of Thomas J at 3 "*in future cases, we should reconsider all of this Court's substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is "demonstrably erroneous," Ramos v. Louisiana, 590 U. S. (2020) (Thomas, concurring in judgment) (slip op., at 7), we have a duty to "correct the error" established in those precedents, Gamble v. United States, 587 U. S. (2019) (Thomas J, concurring) (slip op., at 9)*".

[17] 410 U.S. 113 (1973)

[18] 505 U.S. 833 (1992)

[19] [2022] UKPC 26

saved laws. Although the CCJ will maintain its very different perspective, it is difficult to imagine that the Privy Council's approach will change.

This paper is based on the presentation Richard Clayton QC gave to the Commonwealth Lawyers Association webinar on 14 July 2022 when he spoke together with Sir Dennis Byron, the former President of the CCJ and Marlene Malahoo Forte QC, the Minister of Legal and Constitutional Affairs of Jamaica.