Abstract

This chapter focuses on the differing approaches of the Judicial Committee of the Privy Council and the Caribbean Court of Justice towards the interpretation of the independence Constitutions of the Commonwealth Caribbean. Critiquing the lack of autochthony and the lack of meaningful public participation in the drafting of the region's independence Constitutions, a number of influential Caribbean constitutional scholars have advocated a much more judicially creative approach to the interpretation of the region's constitutions than the more conservative approach that has dominated the JCPC's more recent jurisprudence. I call the approach advocated by these scholars the holistic approach because it treats the constitution as a whole as greater than the sum of its parts. The Caribbean Court of Justice in two recent judgments on appeals from Barbados and Guyana respectively has now adopted this approach. Notwithstanding its undoubted attraction in terms of resolving some of the deficiencies and flaws in the region's independence Constitutions, it will be argued that the holistic approach risks undermining not only the whole interpretive process, but also the whole constitutional order.

Keywords

Commonwealth Caribbean, constitutional interpretation, Judicial Committee Privy Council, Caribbean Court of Justice.

CHAPTER 20

THE INTERPRETATION OF COMMONWEALTH CARIBBEAN CONSTITUTIONS: DOES TEXT MATTER?

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20.1 Introduction

For the last fifty-odd years the Judicial Committee of the Privy Council (JCPC), has been exercising a form of 'extraterritorial' constitutional interpretation, laying down principles for the interpretation of the constitutions of Britain's former colonies in the Caribbean.[1] Though the JCPC's jurisdiction is enshrined within each of these countries' constitutions,[2] its judges are, nevertheless, constitutional 'outsiders' in the sense that they are not situated physically, culturally, or socially within the communities whose constitutions they are interpreting. Very few

* Thanks are due to Professor Stefan Vogenauer and Dr Donal Coffey of the Max Planck Institute for European Legal History and to Dr Se-shauna Wheatle who read and commented on an earlier version of this chapter.

1 See Rosalind Dixon and Vicki C. Jackson, 'Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests' [2013] 48 Wake Forest Law Review 149.

2 See, for example, Constitution of The Bahamas s. 104.

of the JCPC's judges have ever visited these countries and they are candid enough to admit that they know very little about them.[3]

Quite apart from the problems its outsider status brings, the JCPC now faces a new challenge in the form of the Caribbean Court of Justice (CCJ), which was established in 2006, and which is composed, almost exclusively, of judges from the region.[4] The CCJ has been vested with a final appellate jurisdiction for appeals concerning constitutional matters for those countries in the region which subscribe to its appellate jurisdiction and has also been charged with the mission of developing a 'distinctively Caribbean jurisprudence' in constitutional matters.[5] To date, only four countries have ratified the Agreement establishing the CCJ's appellate jurisdiction: Barbados, Guyana, Belize and Dominica,[6] so the volume of cases it receives is limited. Nevertheless, in two recent judgments—*Nervais v The Queen*[7] and *McEwan et al v AG Guyana*[8]—the CCJ has made it abundantly clear that it intends to adopt a significantly different approach to that of the JCPC when interpreting the region's constitutions. In this

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3 See comments of Lord Hoffmann available at <http://www.jamaicaobserver.com/news/50444_Privy-Council-judge-supports-CCJ> accessed 17 February 2016.

4 The only judges to have been appointed to the CCJ from outside the region, to date, are the British-born Justice David Hayton and Justice Jacob Wit from the Netherlands.

5 See, for example, M. de la Bastide, 'The case for a Caribbean Court of Appeal' (1995) 5 Caribbean Law Review 401, 429.

6 Barbados and Guyana subscribed to the CCJ's appellate jurisdiction from the outset, But Belize and Dominica are relative latecomers, having subscribed only in 2010 and 2015 respectively.

7 [2018] CCJ 19 (AJ) (hereafter *Nervais*).

8 [2018] CCJ 30 (AJ) (hereafter *McEwan*).

chapter I intend to explore the ways in which the JCPC's and the CCJ's approaches to constitutional interpretation differ, and to reflect on what this reveals about their respective attitudes towards the role of the courts and the legislature as agents of constitutional change.

In order to provide a framework for the discussion that follows, I will begin by highlighting a central feature of the region's independence constitutions which has achieved particular prominence in the debate about the correct approach to their interpretation; namely, the inclusion of savings clauses that immunise laws that were in force prior to independence and forms of punishment that were lawful prior to independence against constitutional challenge on the grounds that they infringe the rights and freedoms guaranteed by the constitution. I will then examine the four main approaches to the interpretation of the region's constitutions that have been adopted by the JCPC: the 'textual', the 'structural', the 'purposive', and, what I will call the hybrid 'purposive/textual'. Thereafter, I will investigate the alternative approach to constitutional interpretation proposed by a number of the region's leading constitutional scholars and adopted by the CCJ in *Nervais* and *McEwan*. I will call this the 'holistic' approach because it attaches little weight to the text of the individual provisions of the constitution, preferring instead to treat the constitution as the embodiment of a set of fundamental values and principles which collectively are greater than the sum of their written provisions. I will then proceed to examine how the CCJ applied this approach in *Nervais* and *McEwan* in order to circumvent the immunising effect of saving laws clauses to be found in the Constitutions of Barbados and Guyana respectively.

Finally, I will offer a critique of the holistic approach. While acknowledging its appeal in providing a solution to the seemingly intractable problem of the limitations imposed on courts when confronted with pre-independence laws that violate the fundamental rights and freedoms

guaranteed by the constitution but which are immunised by a general savings law clause, I will argue that the holistic approach is based on two highly contestable assumptions. The first is that the process by which the region's constitutions were adopted undermines their democratic legitimacy and thereby liberates judges from fidelity to the text of the constitution. The second is that even where constitutional interpretation amounts to a rewriting of the constitution, this is justified because of the dysfunctionality of the region's legislatures. I will argue that, by contesting the democratic legitimacy of the region's constitutions and disregarding the plain meaning of the text of the constitution, the holistic approach risks discrediting the entire interpretive process. I will also argue that by privileging the legal over the political constitution, the holistic approach overlooks the democratic legitimacy that flows from constitutional amendments that accord with the amendment procedures enshrined in the region's constitutions. Finally, I will reflect on the implications of the holistic approach in terms of its impact upon the relationship between the jurisprudence of the CCJ and the JCPC.

20.2 The preservation of colonial laws: savings clauses

Before exploring the different approaches to the interpretation of the region's constitutions, it is necessary first to examine a central feature of the region's constitutions, namely the preservation of colonial laws predating independence.

Each of the region's independence constitutions included one or both of two kinds of saving laws clauses which preserved existing laws, rendering them immune from constitutional challenge on the grounds of inconsistency with the Bill of Rights included in each constitution.

The first kind of savings clause, which I will call a *partial* savings clause, preserved all forms of punishment that were lawful prior to independence. A typical example is section 17(2)

of the Jamaican Constitution. While section 17(1) prohibits torture and inhuman or degrading treatment or punishment, section 17(2) provides that:

> 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.

This meant that, post-independence, it was not possible to challenge a form of punishment that was lawful at the time of independence on the ground that it violated the constitutional guarantee not to be subject to torture or cruel or inhuman treatment or punishment. The second, which I will call a *general* savings clause, was even more extensive, affording immunity from constitutional challenge to all laws that were in force at the time of independence. Section 26(8) of the Jamaican Constitution provides a typical example:

> 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.[9]

These savings clauses are not unique to the Caribbean and can be found in the independence constitutions of a number of other former British colonies, particularly those in Africa.[10] Rikwa

[9] Such clauses are to be found in all of the early independence constitutions, including, in addition to Jamaica: Trinidad and Tobago, Barbados, and the Bahamas.

[10] Every constitution in common law Africa except for Namibia and South Africa possesses a death penalty savings clause, specifically immunising the death penalty from constitutional challenge. See

Weill offers two possible explanations for their inclusion.[11] The first is based on the presumption that the constitution was not creating new rights but rather recognising and codifying rights that citizens of these colonies already enjoyed. Existing laws thus became the benchmark for the interpretation of the scope of the rights guaranteed by the constitution and, by implication, could not themselves be treated as unconstitutional.[12] The second explanation is based on the fragility of these newly independent states which did not possess the resources or the will to comb though pre-existing laws to determine their compatibility with the constitution. Accordingly, they deployed explicit savings clauses to preserve all existing laws, both written and common law.[13] As Weill notes, this had the added advantage of reassuring 'Britain in particular and the world at large that the new nation would at least maintain and respect the rights and liberties of the democratic Motherland'.[14]

As we shall see in section 20.3 of this chapter, whatever the rationale for their inclusion, these savings clauses have presented formidable interpretive challenges for the JCPC when confronted with colonial laws or forms of punishment that are inconsistent with the freedoms

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Andrew Novak, 'Constitutional Reform and the Abolition of the Death Penalty in Kenya' (2012) 45 Suffolk U. L. Rev 285, 356. See, for example, Constitution of Botswana s. 19(2)(3).

11 Rikva Weill, 'Bills of Rights With Strings Attached: Protecting the Past From Judicial Review' (1 June 2017) in Rosalind Dixon, Geoffrey Sigalet, and Grégoire Webber (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge Studies in Constitutional Law, Forthcoming) <SSRN: https://ssrn.com/abstract=3050656.> accessed 8 December 2018.

12 Weill (n 11) 10.

13 Weill (n 11) 11.

14 Weill (n 11) 11.

guaranteed by the region's Bills of Rights and that are repugnant to contemporary human rights norms.

20.3 The JCPC: Approaches to constitutional interpretation

Until relatively recently, the judges of the JCPC were not in the habit of articulating their reflections on matters of constitutional interpretation.[15] However, in the last two decades, with the emergence of a transnational judicial conversation about constitutional rights,[16] they have been much readier to expound their own approach to constitutional interpretation and to refer to the development of constitutional interpretation in other common law jurisdictions.

Broadly speaking, it is possible to identify four main approaches that have been adopted by the JCPC—the 'textual', the 'structural', the 'purposive', and what I will call the hybrid 'purposive/textual'— always remembering that this taxonomy is subject to two caveats. The first is that the JCPC's interpretive approach is flexible and is inevitably influenced by the subject matter of the case and the nature of the constitutional provision in issue. The second is that the JCPC tends to sit in panels of five judges rather than *en banc* so that, as we will see, differently constituted panels sometimes favour different interpretive approaches to the same issue. As we will also see, even within the same panel the majority and dissenting judges often divide sharply over the correct interpretive approach.

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15 Peter Hogg, 'Canada from Privy Council to Supreme Court' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2007*)* 84.

16 See Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2001) 20(4) Oxford Journal of Legal Studies 499.

20.3.1 The textual approach

The textual approach, as practised by the JCPC, is based on the presumption that the meaning of the constitution is derived from the text of the constitution itself, as it would be understood by the reasonable reader.[17] This is not to say that the intentions of the framers are irrelevant, but rather the best way of discovering those intentions is by reference to the words that they used. This version of the textual approach is closely related to the traditional English approach to statutory interpretation, as defined in the leading English text on statutory interpretation:

> An enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to the legislative intention . . . [T]he function of the court is to find out and declare that intention [which] is the paramount, indeed only ultimate, criterion.[18]

This resembles, but is not identical to, the *originalist* approach popular in the US, in so far as it regards the intentions of the framers as important and relevant. However, the textualist approach differs from the originalist approach, most famously associated with US Supreme Court Justices, such as Antonin Scalia, which requires the interpreter to use historical methods to determine the meaning of the constitution by reference to its public meaning as at the time of its ratification.[19] Though the JCPC has sometimes had regard to the history of the drafting of Caribbean

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[17] Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 269.

[18] Francis Bennion, *Bennion on Statutory Interpretation*, (5th edn LexisNexis 2008) 469.

[19] See Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 U. Cinn. L. Rev. 849.

independence constitutions,[20] it has never regarded this as decisive, preferring always to base its conclusions on the meaning of the constitution as understood by the reasonable reader.

Textualism places a restraint upon the exercise of judicial discretion by confining judges to discovering the intentions of the constitution's framers as these are expressed in the text. In so doing it affords judges a measure of protection against accusations of acting undemocratically when they strike down a statute or quash a decision of a government minister. By appealing to the framers' intentions as the normative basis for their decision, judges can insulate themselves against charges of anti-majoritarianism or judicial supremacism. Schooled in the English tradition of statutory interpretation, and conscious of their remoteness and detachment from the countries for which they are serving as the final appellate court,[21] the attraction of the textual approach for the judges of the JCPC is clear.

The seminal example of the JCPC's textual approach is to be found in the case of *DPP v Nasralla,*[22] which was heard just four years after Jamaica's independence, and which was to have a profound influence on the development of the JCPC's constitutional jurisprudence in respect of the region's Bills of Rights for decades to come. The principal issue in this case was whether the provision on *autrefois acquit* to be found in section 20(8) of the Jamaican Constitution was simply declaratory of the common law or whether it expressed the rule on *autrefois acquit* differently from the common law; and, if so, whether it was the former or the latter which should prevail.

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[20] See, for example, *Newbold and Others v Commissioner of Police* [2014] UKPC 12 [24].

[21] See Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36(1) OJLS 26.

[22] [1967] 2 AC 238 (hereafter *Nasralla*).

In Lord Devlin's view, the answer to this question was to be found in the text of the Constitution itself without the need to resort to any external source or to necessary implication. Whereas the general rule, as embodied in section 2 of the Jamaica Constitution, is that the provisions of the Constitution should prevail over other law, an exception was made in chapter III of the Jamaica Constitution, which begins with the declaration: 'Whereas every person . . . *is* entitled to the fundamental rights and freedoms of the individual (emphasis added).' For Lord Devlin this meant that the chapter containing the Bill of Rights proceeded upon the presumption that 'the fundamental rights which it covers are already secured to the people of Jamaica by existing laws'. This presumption was reinforced by the language of the general savings clause found in section 26(8) of the Constitution which meant that the laws in force at the time of the establishment of the Constitution were not to be subjected to scrutiny to see whether or not they conformed to the precise terms of its protective provisions. According to Lord Devlin:

> The object of these provisions is to ensure that no future enactment shall in any matter which the Chapter covers derogate from the rights which at the coming into force of the Constitution, the individual enjoyed.[23]

A close and literal reading of the text of the Constitution thus led to the conclusion that the framers did not intend that the provision on *autrefois acquit* to be found in section 20(8) was any different to the common law rule on *autrefois acquit*.

From this distance in time, half a century after judgment was delivered, it is easy to dismiss *Nasralla* as an anachronism, typical of an era when international jurisprudence on human rights was much more rudimentary. However, textualism continues to exert a profound influence on the

[23] *Nasralla* (n 23) 24 G–H.

JCPC's approach to constitutional interpretation, as can be seen in the majority judgment delivered by Lord Millett in the Bahamian case of *Pinder v The Queen*,[24] concerning the constitutionality of a sentence of flogging, which was heard some thirty-four years after *Nasralla.* The central issue in this case was whether a statute, enacted in 1991, some eighteen years after independence, and providing for the imposition of a sentence of flogging (a form of punishment that was lawful prior to independence),[25] was saved from constitutional challenge by the partial savings clause to be found in section 17(2) of the Constitution, which reads as follows:

> Nothing contained in or done under the authority of *any law* shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in the Bahamas Islands immediately before 10th July 1973 [the date of independence]. (emphasis added)

Before the Court of Appeal of The Bahamas, it had been argued that the partial savings clause, like the general saving laws clause in article 30(1) of the Constitution, protected only pre-existing laws from constitutional challenge and could not, therefore, save the 1991 Act.

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[24] [2002] UKPC 46, [2002] 3 WLR 1443 (hereafter *Pinder)*. Lord Millett was the sole dissenting judge in the English case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, which was heard one year later, and in which a majority of the House of Lords adopted a very expansive approach towards the courts' power to interpret legislation to render it compatible with the rights guaranteed by the European Convention of Human Rights pursuant to section 3 Human Rights Act 1998.

[25] The Criminal Law (Measures) Act 1991.

However, in Lord Millett's view, this was 'an impossible construction of the *plain words* of the partial savings clause' for the following reasons. Firstly, unlike the general savings clause to be found in section 30(1), section 17(2) uses the expression 'any law', not 'any existing law'. The purpose and scope of the two sections was, accordingly, quite different. The former was intended to give general and complete protection to the entire body of written law as it stood when the Constitution was adopted. By contrast, the latter gives only limited protection against constitutional challenge in respect of descriptions of punishment that were lawful in the Bahamas at the date of independence. It preserves pre-existing punishments, not pre-existing laws, and it preserves them from constitutional challenge at any time. Secondly, section 17(2) looks to the future. It is intended to embrace future legislation. Thirdly, if the words 'any law' in section 17(2) meant 'any existing law' then it would be impossible to give effect to the concluding words 'that was lawful in the Bahamas Islands immediately before [the date of independence]', for every description of punishment which was authorised by a pre-existing law must by definition have been lawful immediately before independence. These words require the punishment authorised by the law under challenge to be compared with that which was formerly authorised by pre-existing laws: their inclusion made it plain that two different laws were involved.

Finally, if the partial savings clause was confined to pre-existing laws, then it would be otiose because it would achieve nothing that was not already achieved by the general savings clause to be found in section 30(1) of the Constitution.[26] If, however, the words 'any law' in the

[26] '[N]othing 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 Articles 16 to 27 (inclusive) of this Constitution to the extent that the law in question- (a) is a law (in this Article referred to as "an existing law") that was

partial savings clause are given their '*natural'* meaning there is no inconsistency between the partial savings clause in section 17(2) and the general savings clause in section 30(1). While a pre-existing law remains on the statute book section 30(1) protects it from challenge under section 17(1) which prohibits torture and inhuman or degrading treatment or punishment of any kind. Once the pre-existing law has been repealed, however, the power of the legislature to authorise any form of treatment or punishment is circumscribed by section 17(1) and permitted only to the limited extent authorised by section 17(2).

Lord Millett acknowledged that such an interpretation, which permitted the imposition of a sentence of judicial flogging, was repugnant to contemporary human rights norms. Nevertheless, in his view such was the scheme that was adopted by the Constitution of The Bahamas. Whether it would meet with universal approval was, in Lord Millett's view, entirely beside the point. Invoking the framers' intentions, Lord Millett concluded that:

> It would not have been irrational . . . to take the view that public interest requires the nature and extent of the punishment for serious crimes should be reconsidered from time to time in the light of changing circumstances; and that it should be free to abolish and, if thought fit, restore those punishments which were lawful in

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enacted or made before 10th July 1973 and has continued to be part of the law of The Bahamas 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 the said Articles 16 to 27 (inclusive) in a manner in which, or to an extent to which, it was not previously so inconsistent.'

1973 [at the time of independence] without being required to seek a constitutional amendment in order to do so.[27]

20.3.2 The structural approach

Structuralism as defined by perhaps its most famous exponent, Charles L. Black Jr, looks for guidance about the framers' intentions by construing the text in the light of the entire document, having regard to the overall constitutional arrangements of offices, powers and relationships.[28] Structuralists, such as Black, argue that by looking to the constitution's structure as a whole it is possible to understand an individual provision's meaning within the document. Within the context of the US Constitution, for example, the US Supreme Court has had particular regard to federalism and the allocation of power as between federal and state governments in interpreting specific provisions.[29] This version of structuralism remains closely wedded to textualism, in so far as it invites judges still to have regard to the plain meaning of the words of the constitution, but remembering to construe them in the light of the entire document.[30]

There is however, another version of structuralism, which represents a departure from strict textualism, in so far as it looks to broad principles which are said to underpin the text of the constitution, such as the separation of powers, representative government, equality and the rule

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[27] *Pinder* (n 24) [25].

[28] *Structure and Relationship in Constitutional Law* (Louisiana State University Press 1969).

[29] See, for example, *Carrington v Rash* 380 US 89 (1965).

[30] See Steven Calabresi and Saikrishna Pakash, 'The President's Power to Execute the Laws' (1994) 104 Yale LJ 541.

of law, to interpret specific provisions where the constitution is vague or ambiguous, or to fill a lacuna.[31] It is this latter version of structuralism which informed the JCPC's approach to constitutional interpretation[32] in one of its most frequently cited judgments—*Hinds v The Queen*.[33]

In this case the Board was concerned with two main issues. The first was the constitutionality of a new court—the Gun Court—established by the Parliament of Jamaica under a post-independence statute, the Gun Court Act, to try those accused of firearms offences. The second concerned the constitutionality of a provision of the Gun Court Act which prescribed a mandatory sentence of detention 'at hard labour during the Governor General's pleasure' from which a prisoner could only be discharged in accordance with the advice of a Review Board that was composed almost entirely of members who had not been appointed in the manner laid down in Chapter VII of the Constitution for persons entitled to exercise judicial power. In dealing with these issues Lord Diplock, for the majority, began by setting out what he considered to be the correct approach to the interpretation of constitutions, such as the Constitution of Jamaica, which were established either by Act of the Imperial Parliament or by an Order in Council made by her Majesty.

According to Lord Diplock, such constitutions were negotiated as well as drafted by persons familiar with the so-called Westminster model of government and with the basic concept of the

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[31] Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2007) 129.

[32] See, for example, dicta of Lord Sumption in *Ferguson and Others v Attorney General Trinidad and Tobago* [2016] UKPC 2 [14] 40 BHRC 715.

[33] [1977] AC 195 (hereafter *Hinds*).

separation of powers as it had been developed in the unwritten constitution of the United Kingdom. Prior to independence, the citizens of these countries were already living under a governmental system which reflected this basic concept. These new constitutions were 'evolutionary not revolutionary'. As a consequence, a great deal had been 'left to necessary implication'. It had been taken for granted, for example, that the basic principle of separation of powers applied to the exercise of their respective functions by the Legislature, the Executive and the Judicature. Such constitutions did not, therefore, normally contain any express prohibition upon the exercise of legislative powers by the Executive or of judicial powers by either the Executive or Legislature. The absence of express words to that effect did not, however, prevent the legislative, the executive and the judicial power of the new state being exercisable exclusively by those respective bodies.

The chapter dealing with the Judicature invariably contained provisions dealing with the method of appointment and security of tenure of the members of the judiciary which were designed to secure their independence from the other two branches and though it might have been silent as to the distribution of judicial power between various courts:

> What . . . is implicit in the very structure of a constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution.[34]

[34] *Hinds* (n 33) 213 C.

These structural principles led the JCPC to the following conclusions. Firstly, that the establishment of the Gun Court was unconstitutional to the extent that it purported to confer on persons qualified and appointed as resident magistrates a jurisdiction which under Chapter VII of the Constitution was exercisable only by persons qualified and appointed as judges of the Supreme Court. Secondly, that a sentence of hard labour, the length of which was determined by the Review Board, violated the principle of the separation of powers because it transferred from the judiciary to an executive body, whose members were not appointed in accordance with Chapter VII of the Constitution, a discretion to determine the severity of punishment to be inflicted upon an individual member of a class of offenders.

It should be acknowledged that the characterisation of the Westminster model by Lord Diplock in *Hinds* was in certain respects a highly idealised version of the Westminster model, which has not always been observed by the UK Parliament, as when it conferred on the Home Secretary control of the release of mandatory life sentence prisoners pursuant to section 29 Crime (Sentences) Act 1997. Nevertheless, the structural approach to interpretation adopted by Lord Diplock *in Hinds* was followed, a quarter of a century later, by the JCPC in *DPP (Jamaica) v Mollison,*[35] in connection with a pre-independence law which would otherwise have been immunised by a savings law clause. At issue in this case was section 29 Juveniles Act 1951, which required that juveniles convicted of murder be detained 'during the Governor's pleasure'. In *Hinds,* the JCPC had held that a similar provisions unconstitutional, not because of its repugnancy to any of the rights guaranteed by the Constitution, but because of its incompatibility with the principle of the separation of powers upon which the Constitution was founded. Here

[35] [2003] 2 AC 411.

too, the JCPC held that the statutory provision in issue offended the principle of the separation of powers, which required that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive. While the general savings clause in the Jamaican Constitution immunised pre-independence laws, such as the Juveniles Act 1951, from constitutional challenge on the grounds that any such law violated the fundamental rights and freedoms guaranteed by the Jamaican Constitution, it did not immunise such laws from challenge on the grounds that they violated the implied constitutional principle of the separation of powers.

20.3.3 The purposive approach

Though aligned to the structural approach, the purposive approach addresses a different problem; namely, the presumption relied upon by Lord Devlin in *Nasralla* that the rights and freedoms guaranteed by the region's Bills of Rights were coterminous with the rights and freedoms that existed prior to independence. This presumption (the *Nasralla* presumption) was to have a profound effect on the interpretation of the region's Bills of Rights for decades to come. In *Collymore v AG Trinidad and Tobago*,[36] for example, the JCPC refused to recognise that the right to freedom of association, guaranteed by section 1(j) of the Constitution of Trinidad and Tobago, could embrace the right to strike on the grounds, inter alia, that no such right existed either under statute or under the common law prior to independence. The abridgment by the Industrial Stabilisation Act 1965 of the trade union's rights to strike did not, therefore, infringe the constitutional right to freedom of association. Again, in *Riley v AG Jamaica,*[37] a prisoner,

[36] (1968) 12 WIR 5.

[37] [1983] AC 719 (hereafter *Riley*).

condemned to death, was prevented from arguing that a prolonged delay in his execution violated his constitutional right not to be subject to inhuman and degrading treatment or punishment on the ground that he could not demonstrate that a delayed execution would have been unlawful prior to independence.

Gradually, however the *Nasralla* presumption began to be superseded by a 'purposive' approach to the interpretation of the region's constitutions, which can be traced directly to the judgment of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher*.[38] Tasked with the question of deciding whether the term 'child' in section 11 of the Constitution of Bermuda, which guaranteed freedom of movement, included an 'illegitimate child,' Lord Wilberforce observed that the starting point in answering this question was to recognise that a constitution was a *sui generis* instrument, 'calling for principles of interpretation of its own'. This did not mean there were no rules of law which should apply to the interpretation of a constitution:

> Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.[39]

However, the broad and ample style in which the constitutional guarantees of rights and freedoms were drafted, influenced as they were by the European Convention on Human Rights, and 'laying down principles of width and generality', called for:

[38] [1980] AC 319 (hereafter *Fisher*).

[39] *Fisher* (n 38) 329 E–F.

> a *generous* interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of the fundamental rights and freedoms referred to (emphasis added).[40]

The first hint of the difference the purposive approach could make to the interpretation of the region's constitutions was the dissenting judgment of Lord Scarman and Lord Brightman in *Riley*.[41] The majority had decided that they were prohibited from examining the constitutionality of the delay in carrying out the death sentence because of the partial savings law clause in the Jamaican Constitution.[42] However, by adopting a purposive approach, Lords Scarman and Brightman argued it was possible to read the partial saving clause in a way that avoided the 'austere legalism' preferred by the majority. This involved recognising that the 'treatment' which is prima facie 'inhuman' and therefore in violation of section 17(1) of the Constitution was not the death sentence per se, but the execution of the sentence 'as the culmination of a prolonged period of respite'. Read in this way, such 'treatment' fell outside the immunising effect of the partial savings law clause. A decade later, in *Pratt and Morgan v AG Jamaica*,[43] Lord Scarman and Lord Brightman's approach to the interpretation of section 17(2) was applied by a differently

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[40] *Fisher* (n 38) 328 G–H.

[41] *Riley* (n 37).

[42] s. 17(2).

[43] [1994] 2 AC 1(hereafter *Pratt and Morgan)*. Four years earlier the European Court of Human Rights had delivered its seminal judgment in *Soering v UK* 11 Eur. H.R. Rep. 439 (1989) which recognised that delay in the carrying out of the death sentence—the so-called 'death-row phenomenon' in the United States—violated the right under Article 3 of the European Convention on Human Rights not to be subject to torture or inhuman or degrading treatment or punishment.

constituted JCPC, which concluded that to execute a man who had been in prison awaiting execution for more than five years was *presumptively* unconstitutional.

In the decade that followed *Pratt and Morgan,* in a series of decisions that followed hard on the heels of each other, the ramifications of the JCPC's new purposive approach towards the interpretation of the rights and freedoms guaranteed by the region's constitutions became even more apparent in the increasing number of restrictions being imposed on the operation of the death penalty within the region. Firstly, in *Bradshaw v AG Barbados,* it was held that the period of five years, within which governments were obliged to execute the death sentence, could not be extended to take account of the time taken by international human rights bodies to deal with petitions to those bodies by condemned prisoners (which invariably exceeded five years).[44] Then, in *Thomas v Baptiste,* it was held that governments could not curtail a condemned prisoner's right to petition these bodies in those countries with constitutions which included a due process clause.[45] Finally, in *Lewis v AG Jamaica,* it was held that, in extreme circumstances, the conditions under which a condemned prisoner was incarcerated might lead to the death sentence being commuted.[46]

It was, however, in relation to the constitutionality of the mandatory nature of the death penalty, and the immunity afforded to mandatory death sentences by constitutional savings clauses, that the application of the purposive approach reached its zenith. In the first of a series

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[44] [1995] 1 WLR 936.

[45] [2000] 2 AC 1(hereafter *Thomas v Baptiste*).

[46] [2000] 3 WLR 1785 (hereafter *Lewis*).

of cases to be heard on this issue, *Reyes v The Queen*,[47] on appeal from Belize, the JCPC had to rule on the constitutionality of the mandatory death penalty prescribed by section 102 of the Criminal Code of Belize. Though the Constitution of Belize contained a savings clause for pre-independence laws which were alleged to infringe Part II of the Constitution, entitled Protection of Fundamental Rights and Freedoms,[48] the protection it afforded to such laws only lasted for a period of five years after independence and had thus long expired by the time this case was heard. Consequently, the JCPC was concerned solely with the constitutionality of the mandatory death penalty itself.

In addressing this question, Lord Bingham began by outlining the principles that he believed should underpin constitutional interpretation. While the court must commence its task by carefully considering the language used in the constitution, a generous and purposive interpretation was to be given to constitutional provisions protecting human rights. This did not mean the court had licence to read its own predilections and moral values into the Constitution. Nevertheless, the Court was required to consider the substance of the fundamental right at issue and ensure '*contemporary protection of that right in the light of evolving standards of decency, that mark the progress of a maturing society*'.[49] This meant having regard to the wide range of decisions handed down by the appellate courts of other jurisdictions condemning mandatory death sentences, and having regard to the norms to which Belize had subscribed by ratifying such international instruments as the Universal Declaration of Human Rights 1948 and the

[47] [2002] UKPC 11; [2002] 2 AC 235 (hereafter *Reyes*).

[48] Constitution of Belize, s. 21.

[49] *Reyes* (n 47) [26].

International Covenant on Civil and Political Rights 1966. On this basis, the JCPC concluded that the mandatory death penalty constituted inhuman or degrading treatment incompatible with the appellant's rights pursuant to section 7 of the Belize Constitution because it precluded any judicial consideration of the humanity of condemning him to death.

Having already ruled that the mandatory death penalty was in and of itself unconstitutional, the JCPC turned, in *Hughes v The Queen* [50] and *Fox v The Queen*,[51] to the question of whether it was nonetheless saved by the partial savings clause contained in the Constitutions of St Lucia and St Kitts respectively.[52] In addressing this question, the Board decided to 'flip' the purposive approach by construing the immunity from constitutional challenge afforded by the partial savings clause as narrowly as possible. In support of this approach Lord Bingham cited with approval the dicta of Aguda JA of the Botswana Court of Appeal in *State v Petrus*:

> It is another well known principle of construction that exceptions contained in constitutions are ordinarily to be given a strict and narrow, rather than a broad construction.[53]

Construing the savings clause narrowly meant that it only saved laws which *authorised* the death penalty, it did not save laws which *required* the infliction of the death penalty. Accordingly, by *requiring* the imposition of a death penalty, section 178 of the Criminal Code of St Lucia and

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[50] [2002] UKPC 12; [2002] 2 AC 259.

[51] [2002] UKPC 13; [2002] 2 AC 284.

[52] This was because the saving laws clause in Belize's Constitution was limited to a period of five years and had expired by the relevant time.

[53] [1985] LRC (Const) 699 720 D–F.

section 2 of the Offences against the Person Act 1873 in St Kitts and Nevis were inconsistent with the constitutional prohibition against inhuman treatment and punishment and were 'to that extent' void.

Hughes and *Fox* had been concerned with the immunising effect of a partial savings clause. However, one year later the purposive approach was once again deployed by the JCPC, in the case of *Roodal v The State*,[54] to remove the protection afforded to a law prescribing a mandatory death penalty by the general savings clause in the Constitution of Trinidad and Tobago. On this occasion, however, the purposive approach focused in the modifications clause to be found in section 5(1) of the Constitution Act of Trinidad and Tobago 1976, which provides that:

> 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.

Exercising the modifying power purportedly conferred by section 5(1), the JCPC construed section 4 of the Offences Against the Person Act 1925, which prescribed a mandatory death penalty, as providing instead for a discretionary death penalty so as to bring it into conformity with the constitutional prohibition against inhuman and degrading treatment or punishment.

20.3.4 The hybrid purposive/textual approach

[54] [2003] UKPC 78; [2005] 1 AC 328 (hereafter *Roodal)*.

In so far as *Roodal* represented the triumph of the purposive over the traditional textual approach, the victory was very short-lived. Within a matter of months, in *Boyce and Another v AG Barbados,*[55] a nine-member panel of the Board[56] overruled its decision in *Roodal.* The constitutional matrix in *Boyce* was almost identical to that in *Roodal.* Once again the Appellants sought to argue that a mandatory death penalty,[57] contained in this case in section 2 of the Offences Against the Person Act 1861, should be modified in accordance with a modifications clause to be found in this case in an Order in Council made pursuant to section 5 Barbados Independence Act 1966, notwithstanding the constitutional immunity afforded to existing laws by the general savings clause in section 26 of the Constitution of Barbados. According to the appellants, the result of exercising the modification powers conferred by section 4(1) of the Order in Council would be to replace the mandatory element of the punishment with a discretionary death penalty,

Adopting what I would describe as a hybrid purposive/textualist approach, Lord Hoffmann, delivering judgment for the majority, began by making it clear he agreed with the proposition that the purposive approach was appropriate to the interpretation of the fundamental rights guarantees contained in the Constitution. Unlike the traditional textual approach evident in *Nasralla*, Lord Hoffmann did not regard the rights guaranteed by the constitution as merely declaratory of rights already enjoyed under the common law. The residual textual component of Lord Hoffmann's approach is, however, evident in his declaration that 'not all parts of a

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[55] [2004] UKPC 32; [2005] 1 AC 400 (hereafter *Boyce*). Because of the threat that *Roodal* was about to be overruled, the case was heard by an enlarged panel of nine judges.

[56] The panel included Justice Zacca, a former Chief Justice of the Supreme Court of Jamaica.

[57] Contained in the Offences Against the Person Act 1861.

constitution allow themselves to be judicially adapted to changes in attitudes and society in the same way.'[58] Some provisions—the general savings clause in section 26 of the Constitution of Barbados being one such—are not 'expressed in general or abstract terms which invite judicial participation in giving them practical content'.[59]

This led Lord Hoffman to reject the reliance that had been placed by the majority in *Roodal* on a similarly worded modifications clause in the Constitution of Trinidad and Tobago in order to circumvent the immunising effect of an identical general savings law clause. In view of the importance subsequently attached to the modifications clause by the CCJ in its judgments in *Nervais* and *McEwan,* it is worth considering in some detail Lord Hoffmann's reason for rejecting the deployment of the power of modification in the manner proposed by the Appellants in *Boyce and Joseph*. As Lord Hoffmann explained, the idea of using the modifications clause to rewrite pre-independence laws so as to bring them into conformity with the Bill of Rights guaranteed by the Constitution, did not appear to have occurred to anyone until it surfaced as a 'fall-back' argument in *DPP v Mollison* in the event that the court did not accept the argument that section 29 Juveniles Act 1951 was void because it was incompatible with the implied principle of the separation of powers. In Lord Hoffman's view, however, reliance on the modifying power contained in section 4(1) of the Order in Council was 'completely untenable' for three reasons.

[58] *Boyce* (n 55) [29].

[59] *Boyce* (n 55) [29].

Firstly, it was irrational.[60] In order not to render the general savings clause entirely otiose, the Appellants' argument had to assume that there were some existing laws which, either for linguistic or conceptual reasons, could not be successfully modified so as to bring them into conformity with the Constitution. In Lord Hoffmann's view this was absurd. The idea that all existing laws were liable to modification in order to conform to principles of fundamental rights would have been understandable. Equally, the idea that all existing laws should be exempt is explicable. However, that the exercise of the modifying power 'should depend upon the mode of expression or the unity of the particular law defies rational explanation'.[61] If accepted, such an argument would have defeated the framers' intentions as these were expressed in the text of the Constitution. As Lord Hoffmann explained, the delegates attending the independence conference in London would have been 'astonished to find that by reason of a provision subsequently inserted into an Order in Council, existing laws would survive inconsistencies with [the fundamental rights and freedoms guaranteed by the Constitution] only if they were sufficiently self-contained in language and concept'.

Secondly, the exercise of the modifying power in the way proposed by the Appellants would be *ultra vires*. The Order in Council containing the modifications clause was made pursuant to powers conferred by section 5(4) Barbados Independence Act, which provided that:

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

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[60] *Boyce* (n 55) [37].

[61] *Boyce* (n 55) [38].

However, the power of modification proposed by the Appellants could not possibly be described as 'transitional, incidental or supplementary'. Rather it went to the very substance of the Constitution and largely destroyed the effect of the general saving clause contained in section 26 of the Constitution, which reserves the power to modify or alter existing laws to Parliament. Though Lord Hoffman did not consider it necessary to discuss the extent of the modifying power contained in section 4(1), he made it clear that that it had substantive limits; for example when it presents courts with choices which are more appropriately made by the legislature.

Thirdly, by reason of section 26 there was no possible lack of conformity between existing laws and the fundamental rights guaranteed by the Constitution. If the power of modification were to apply there would have to be lack of conformity not just with one subsection of the Constitution, but with the Constitution as a whole.

Lord Hoffmann recognised that the outcome of adopting his approach to the interpretation of the relationship between the modifications clause and the general savings clause meant preserving the constitutionality of the mandatory death penalty, even though it was repugnant to contemporary human rights norms. Lord Hoffmann further acknowledged that the framers' wisdom in 'casting a blanket of immunity from constitutional challenge over the whole corpus of existing laws' could be regarded as debatable. Though Lord Hope had suggested, in *Lambert Watson v The Queen,* that this had been done in the interests of legal certainty and to secure an orderly transfer of legislative authority from the colonial power to the newly independent democracy,[62] Lord Hoffmann considered that it was unnecessary 'to devote too much time to speculating about the thought-processes of the framers of the Constitution'. Whatever may have

[62] [2004] UKPC 34 [46]; [2005] 1 AC 472 (hereafter *Watson*).

been their reasons, the framers had made themselves perfectly clear.[63] Reading the general savings clause in conjunction with the supremacy clause in section 1 of the Constitution, disclosed 'a clear constitutional policy': no existing written law was to be held inconsistent with the rights and freedoms guaranteed by the Constitution. To this Lord Hoffmann added:

> 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 (emphasis added).[64]

In a direct challenge to the minority, who criticised the majority's judgment for putting an over-literal construction on the words used in the Constitution, attaching little or no weight to the principles which should guide the approach to constitutional interpretation, and giving little or no weight to the human rights guarantees which the people of Barbados intended to embed in their Constitution, Lord Hoffmann observed that:

> The 'living instrument' principle has its reasons. 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.[65]

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[63] *Boyce* (n 55) [33].

[64] *Boyce* (n 55) [33].

[65] *Boyce* (n 55) [59].

Whatever may be the deficiencies of the Barbados Constitution from a contemporary human rights perspective, in Lord Hoffmann's view the power to change it was reserved to the people of Barbados, acting in accordance with the procedure prescribed by the Constitution for its amendment: 'That is the *democratic* way to bring a Constitution up to date (emphasis added).'[66]

Lord Hoffmann's views were echoed by Lord Hope in *Watson*,[67] in which the JCPC considered the constitutionality of Jamaica's mandatory death penalty legislation. Castigating his colleagues for seeking to devise ever more ingenious ways of transcending the effect of general saving laws clauses, Lord Hope argued that the solution to the jurisprudential difficulties they presented lay not with the courts, but with the region's parliaments which had the power to remove these clauses from the constitution.[68]

20.4 The CCJ and the *holistic* approach to constitutional interpretation

Much of the theoretical underpinning to the CCJ's holistic approach to constitutional interpretation can be found in the writings of three of the region's leading constitutional scholars:[69] Tracy Robinson, Arif Bulkan and Adrian Saunders; the last-named of whom is

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[66] *Boyce* (n 55) [29].

[67] *Watson* (n 62).

[68] *Watson* (n 62) [54].

[69] Tracy Robinson, Arif Bulkan, and Adrian Saunders, *Fundamentals of Caribbean, Constitutional Law* (Sweet & Maxwell 2015) (hereafter Robinson et al, *Fundamentals*); T. Robinson, 'Our Inherent

currently the President of the CCJ. These scholars are deeply critical of what they regard as the highly formalist and literal approach adopted by the JCPC in cases such as *Pinder* and *Boyce.* They advocate instead a holistic approach, which conceives of the constitution as more than the sum of its written provisions. In effect, this means treating the constitution 'not as a set of discrete written provisions which derive their formal authority from their legal enactment, but as a normative structure which is based on certain foundational principles that are the deepest source of its authority'.[70]

At first glance, there would appear to be considerable overlap between the holistic and the structural and purposive approaches as they have been applied by the JCPC, but there are important differences. The holistic approach lies much further along the spectrum of judicial creativity in terms of the interpretive licence it affords to judges. Unlike the purposive approach, which requires judges 'to pay respect to the language which has been used and to the traditions and usages which have given meaning to that language', the holistic approach directs judges to eschew the usual and ordinary meaning of the words used if that meaning is too technical or overly legalistic, or has the effect of 'undermining the broad intent of the constitution'.[71] Even a

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Constitution' in D. Berry and T. Robinson (eds), *Transitions in Caribbean Law* (Caribbean Law Publishing Company 2013) (hereafter Robinson, 'Our Inherent Constitution'); and Tracy Robinson and Arif Bulkan, 'Constitutional Comparisons by A Supranational Court in Flux: The Privy Council and Caribbean Bills of Rights' MLR 2017 Vol. 80 No. 3, 380 (hereafter Robinson and Bulkan, 'Constitutional Comparisons').

[70] Goldsworthy, 'Constitutional Interpretation' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2007) 2.

[71] Robinson et al, *Fundamentals* (n 69) 147.

provision, the meaning of which appears to be plain on the face of it, 'may have to be reconciled with other provisions or core principles of the constitution that, on a broader review, it is in tension with'.[72] This requires judges to adopt not the plain or natural meaning, but rather the meaning which is most compatible with the 'underlying sentiments and principles' of the constitution.[73] These unwritten foundational principles are be treated as supreme and binding on all state actors 'even in the absence of and, in extraordinary cases, in spite of, an explicit constitutional provision'.[74] What is needed, it is argued, is a mode of interpretation that honours fundamental rights and freedoms 'without being entirely undone by textual restrictions within the constitution'.[75]

In support of the interpretive licence which the holistic approach affords to judges, Robinson argues that the usual justification for giving pre-eminence to the text—because it reflects the choices and institutional arrangements of 'the people'—as the authoritative guide to the meaning of the constitution, has much less traction in the context of the Commonwealth Caribbean.[76] This is due to a combination of factors each linked to the process by which these constitutions came into existence. These include the lack of public consultation and participation in the making of the region's independence constitutions, the involvement of the Colonial Office in their drafting, and their enactment by means of an Order in Council of Her Imperial Majesty, all of which,

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[72] Robinson et al, *Fundamentals* (n 69) 158.

[73] Robinson et al, *Fundamentals* (n 69) 158.

[74] Robinson, 'Our Inherent Constitution' (n 69) 250.

[75] Robinson, 'Our Inherent Constitution' (n 69) 249.

[76] Robinson, 'Our Inherent Constitution' (n 69) 250.

Robinson argues, 'erodes their democratic legitimacy.' [77] In turn, Robinson argues, this makes approaches that 'over-privilege the texts of the constitution as the expression of the will of the Caribbean people',[78] or that 'greatly privilege the original intentions of the framers of the constitutions' difficult to sustain.[79]

The application of this holistic approach will now be examined by reference to two recent judgments of the CCJ: *Nervais* and *McEwan.*

20.4.1 *Nervais*

Like *Boyce,* this case was concerned with the constitutionality of the mandatory death penalty in Barbados. However, unlike *Boyce,* the focus of the CCJ in this case was directed towards the entirely novel question of whether section 11 of the Constitution was separately enforceable. The answer to this question was critical because, unlike the rights and freedoms guaranteed by sections 12 to 23 of the Constitution, section 11 was not subject to the immunising effect of the general savings clause to be found in section 26. In view of the reliance placed by the CCJ on the separate enforceability of section 11 it is worth setting out the provision in full:

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

[77] Robinson, 'Our Inherent Constitution' (n 69) 250. See also Robinson and Bulkan, 'Constitutional Comparisons' (n 69).

[78] Robinson, 'Our Inherent Constitution' (n 69) 272.

[79] Robinson et al, *Fundamentals* (n 69) 126. See also McIntosh, *Caribbean Constitutional Reform* (n 13) 41.

origin, political opinions, colour, creed or sex, but subject to respect for the individual rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) Life, liberty and security of the person;

(b) Protection for the privacy of his home and other property and from deprivation of property without compensation;

(c) The protection of the law; and

(d) Freedom of conscience, of expression and of assembly and association,

The following provisions of this Chapter shall have effect.

The Constitution then proceeds in sections 12 through to 23 to list the rights and freedoms which it guarantees.

Previously, the JCPC had treated clauses like section 11, which are common to constitutions throughout the region, as mere preambles to the rights set out in the chapter guaranteeing fundamental rights and freedoms. Thus, for example, in *Olivier v Buttigeig,* the JCPC observed of a similar provision to be found in the Constitution of Malta:

> It is to be noted that the section begins with the word 'Whereas.' Though the section must be given such *declaratory* force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense prefatory or explanatory note in regard to the sections which are to follow. (emphasis added)[80]

[80] [1967] 1 AC 115, 128F.

Notwithstanding this precedent, Sir Dennis Byron, delivering judgment for the majority in *Nervais*, held that it would be irrational to attribute a meaning to the word 'whereas' which would make section 11 impotent, i.e. unenforceable. The fact that section 11 was omitted from the savings provisions in section 26 did not, in his view, mean that section 11 was preambular only. Rather, 'the view that better accords with the protection of fundamental rights is that the Court is not prevented from holding that existing laws may be inconsistent with the rights and freedoms set out in section 11'.[81]

Having decided that section 11 was separately enforceable, the majority had little difficulty in finding that the protection of the law guaranteed by section 11(c) included the right not to be subject to a mandatory death penalty. Though it was acknowledged that section 11 is omitted from the redress clause contained in section 24, which empowers the court to provide an appropriate remedy for violations of the rights and freedoms guaranteed by the Constitution, this was not a reason in the majority's view to assume that the rights guaranteed by section 11 were not separately enforceable. The duty of the Court was 'to give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms'.[82] This meant deploying the modifications clause contained in section 4(1) of the Independence Order in Council to modify the mandatory death penalty provided by section 2 OAPA 1861, so as to bring it into conformity with the Constitution by substituting a discretionary for the mandatory death penalty.

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[81] *Nervais* (n 7) [39].

[82] *Nervais* (n 7) [39].

In conclusion, Sir Dennis Byron, on behalf of the majority, declared that the Court was under a duty 'to construe the conflicting provisions of the Constitution, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, to fashion a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights'.[83]

20.4.2 *McEwan*

This case was concerned with the constitutionality of a pre-independence law in Guyana, section 153(1)(xlvii) of the Summary Jurisdiction (Offences) Act, which makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose. Though the case raised a number of distinct constitutional issues, concerning the compatibility of section 153(1)(xlvii) with the right to equality and the right to freedom of expression, for present purposes the most important issue was the preliminary question of whether the CCJ was barred by the general saving laws clause contained in Article 152 of the Constitution from testing the constitutionality of section 153(1)(xlvii).

In answering this question the CCJ, reiterating the views it had previously expressed in *Nervais,* declared:

> A Constitution must be read *as a whole*. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution *in a manner faithful to its essence and its underlying spirit*. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the

[83] *Nervais* (n 7) [68].

> Constitution *as a whole*, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest (emphasis added).[84]

With this objective in mind, the CCJ identified 'four broad and interlocking approaches' that it could take in order 'to ameliorate the harsh consequences of the application of the saving laws clause'. The first was to construe the savings clause, as narrowly as possible. The second was to apply the saving laws clause only to challenges to the stipulated human rights provisions, i.e. in Guyana, articles 138 to 149. The third was to avoid an interpretation of domestic law that places a State in breach of its international obligations. The fourth was to apply the modifications clause contained in section 7(1) of the Constitution Act to the relevant pre-independence law before attempting to apply the savings law clause.

Applying each of these approaches, in turn, the CCJ reached the following conclusions. Firstly, that the saving laws clause did not apply to section 153(1) (xlvii) because it had been amended so many times it was no longer an 'existing law'. Secondly, the Constitution being based on the implied principle of the rule of law, section 153 could be struck down, not because it violated the fundamental rights and freedoms guaranteed by the Constitution, but because it violated this implied principle on account of its vagueness. Thirdly, that there was an onus on the courts to interpret the savings clause as narrowly as possible so as to place the law in compliance with Guyana's obligations under the American Convention of Human Rights and the jurisprudence of the Inter American Court of Human Rights which had repudiated saving laws clauses for denying the right to seek judicial protection against violations of guaranteed human

[84] *McEwan* (n 8) [41].

rights. Fourthly, that the modification clause to be found in section 7(1) of the Constitution Act, which brought the Constitution into force, must be read together with the savings clause to bring pre-independence laws such as section 153 into conformity with the rights guaranteed by the Constitution.

Having concluded that, for all of the above reasons, the Court should not be deterred by the saving clause from testing the compatibility of section 153 with the fundamental rights guaranteed by the Constitution, the CCJ then proceeded to find that section 153 was incompatible with the right to equality and the right to freedom of expression as well as being incompatible with the rule of law.

20.5 Critiquing the holistic approach

The undoubted attraction of the holistic approach is that it offers the 'silver bullet' which can remedy the problem of the saving laws clauses that has confounded the judges of the JCPC for the last two decades and more. However, the holistic approach rests on two assumptions that are highly contestable: that the process by which the region's constitutions were adopted impacts upon their democratic legitimacy, and that where the legislature fails to do so it is up it to the Court to act as the agent of constitutional change. I will deal with each of these assumptions in turn before turning to consider the implications of the application of the holistic approach in the CCJ's judgments in *Nervais* and *McEwan* in terms of the relationship between the jurisprudence of the CCJ and the JCPC.

20.5.1 Constitution-making and democratic legitimacy

As noted above, Robinson argues that the process that led to the adoption of the region's constitutions diminishes the weight to be attached to their text and erodes their democratic legitimacy. Quite apart from the fact that at least two of the Constitutions—Trinidad and Tobago in 1976 and Guyana in 1980—were reenacted post-independence and cannot, therefore, be accused of being tainted by the influence of the Colonial Office, there are two objections to this argument.

The first is that the link between the process of constitution-making and democratic legitimacy has been subject only to very limited scrutiny.[85] Some of the most successful constitutions in the last half-century or so have been the Constitutions of Germany and Japan, both of which were to a certain extent 'imposed' by foreign powers with limited public participation.[86] It does not necessarily follow, therefore, that the degree of public participation, which in any event varied from country to country across the region,[87] is the sole, or even the best, criterion for judging the democratic legitimacy of the region's constitutions.

The second objection is that by questioning the democratic legitimacy of the region's constitutions, which after all are the source of authority of its executives, its parliaments and its judges, Robinson risks undermining the whole interpretive process. For if these constitutions

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85 Ginsburg, Elkins and Blount, 'Does the Process of Constitution-Making Matter?' (2009) 5 Annual Rev. Law Soc. Sci. 201, 215.

86 See Richard Albert, 'Imposed Constitutions with Consent?' Boston College Research paper 434, 3 February, 2017.

87 D O'Brien, 'Formal Amendment Rules and Constitutional *Endurance*: The Strange Case of the Commonwealth Caribbean' in Richard Albert, Xenophon Contiades, and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017).

lack democratic legitimacy how can they serve as a normative structure expressing of the fundamental principles which are intended to underpin governance in the post-independence polity? Moreover, if judges are free to disregard the text of the constitution then why not the executive? Surely, the executive could equally well argue that its powers are not limited by the text of the constitution. Indeed, if neither the judges nor the executive are bound by the text of the constitution why should the executive be bound by decisions of judges appointed under the constitution?[88]

20.5.2 Judges as Agents of Constitutional Change

The line between legitimate and illegitimate amendment of the constitution by means of creative judicial interpretation is a very fine one and where it is drawn very often depends upon the circumstances in which a constitutional court finds itself.[89] It is the drawing of this line which was at the core of the division between the majority and the dissenting judges in *Boyce.* It is also what sets the CCJ's judgments in *Nervais* and *McEwan* apart from the views expressed by Lord Hoffman in *Boyce and Joseph* and by Lord Hope in *Watson*.

For Robinson et al, the dysfunctionality of the region's legislatures, which are 'either paralysed by partisan divides or fear a backlash at the polls',[90] means that the benefit of any doubt about whether the line has been crossed in cases where judges ignore the plain or natural

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[88] Goldsworthy, 'Originalism in Constitutional Interpretation' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (Oxford University Press 2007).

[89] Goldsworthy (n 88) 325.

[90] Robinson et al, *Fundamentals* (n 68) 260.

meaning of the text of the constitution should be given to the judiciary.[91] While these criticisms of the region's legislatures may be justified in some cases they are not unique to the Commonwealth Caribbean, and they do not mean that the region's legislatures are universally undemocratic or lacking in legitimacy. Moreover, criticism of the fallings of the region's legislatures should not be allowed to overshadow entirely the republican virtues of the amendment procedures to be found in each of the region's constitutions—special legislative majorities or referendums, or a combination or both—and their potential to enhance democratic participation in a way that amendment by means of judicial interpretation alone cannot.

The ability of citizens to participate directly in referendums respects the very fundamental principle that those who are affected by a decision should have the right to participate in the making of it. As Young contends:

> The normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes and have had an opportunity to influence outcomes.[92]

This is the very point that Robinson et al make in their criticism of the lack of public participation in the drafting of the region's independence constitutions, but which they seem to overlook in their support for creative judicial interpretation and their emphasis on the courts rather than the legislature or the demos as the agents of constitutional change.

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[91] Robinson et al, *Fundamentals* (n 68) 260.

[92] Iris Young, *Inclusion and Democracy* (Oxford University Press 2001) 5–6.

Special legislative majorities too can create 'a climate or environment of deliberation',[93] which should, in turn, ensure that the amendment becomes part of the constitution 'with a near conclusive presumption of legitimacy'. Contrast this with constitutional amendment by means of creative judicial interpretation, which was widely perceived in the region[94] as being the effective outcome of the JCPC's judgments in cases such as *Pratt and Morgan*,[95] *Thomas v Baptiste*[96] and *Lewis*.[97] In protest at the outcome of these cases, the governments of Barbados and Jamaica amended their country's respective constitutions with the express intention of depriving these judgments of any lasting effect.[98] In this context, it is not a little ironic that at the very time at which the CCJ was hearing the appeal in *Nervais* the Government of Barbados had already tabled legislation in Parliament, the effect of which would have been to rectify section 2 OAPA 1861 by abolishing the mandatory imposition of the death sentence and to amend section 26 to redefine the effect of the existing law clause in relation to the fundamental rights provisions.[99] If

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93 John Ferejohn and Lawrence Sager, 'Commitment and Constitutionalism' (2003) 81 University of Texas Law Review 1929, 1957.

94 See P. J. Patterson, 'Completing Out Sovereignty' in Delano Franklyn (ed), *We Want Justice: Jamaica and the Caribbean Court of Justice* (Ian Randle Publishers, 2005) 3.

95 (n 43).

96 (n 45).

97 (n 46).

98 See Barbados Constitution (Amendment) Act 2002 and Jamaica Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2010.

99 The Constitution (Amendment) Bill 2010, the Offences Against the Person (Amendment) Bill 2010, and the Penal System Reform (Amendment) Bill 2010.

this process had been allowed to run its course, the amendment to the Constitution of Barbados would have carried the imprimatur of a special majority of the Barbadian Parliament rather than a majority judgment of the CCJ.

20.5.3 The relationship between the jurisprudence of the CCJ and the JCPC

As the CCJ declared in *Nervais,* the main purpose of establishing the Court was to promote the development of a 'Caribbean' jurisprudence. What that might mean in practice has never been precisely defined, but in one of its earliest judgments, *Attorney General Barbados v Boyce and Joseph,* the CCJ explained how it would go about developing its jurisprudence:

> [W]e shall naturally consider very *carefully and respectfully* opinions of final courts of other Commonwealth countries and particularly, judgments of the [JCPC] which determine the law for those Caribbean states that accept the [JCPC] as their final appellate court (emphasis added).[100]

In *Nervais,* the CCJ added that the development of its jurisprudence would require '*evolution* and change in relation to the approach of decisions of the [JCPC]'.[101] The CCJ's judgment in *Nervais* is, however, neither respectful nor evolutionary.

Sir Dennis Byron, for example, delivering judgment for the majority, castigates Lord Hoffmann's judgment in *Boyce* as suffering from 'the *imperial taint* of the view that what was

[100] [2006] CCJ 1 (AJ).

[101] *Nervais* (n 7) [7].

done under the colonial regime cannot be struck down'.[102] Later in the same judgment, Sir Dennis Byron accuses Lord Hoffman in his judgment in *Boyce* of 'undermining the concepts of independence and sovereignty',[103] and ascribes to Lord Hoffmann a view, which the latter has never professed: namely, 'the unacceptable idea that colonial law as applied to colonial subjects contained all the fundamental rights to which they were entitled'.[104] There are, undoubtedly, principled objections to the majority judgment in *Boyce*, but this is simply *argumentum ad hominem.*

The argument that section 11 of the Constitution of Barbados is separately enforceable is also far from evolutionary. There is simply no precedent for this argument in the jurisprudence of the JCPC. Instead, the majority in *Nervais* rely on an article by Robinson and Bulkan which argues, controversially, that the JCPC has previously misconstrued such clauses. Notwithstanding the novelty of this proposition, there is no attempt to grapple with the omission of section 11 from both section 24 and section 26. As Justice Anderson observed, in his dissent in *Nervais*:

> There is no explanation of how to reconcile a separate justiciability of section 11 with the architecture of the constitutional provisions.[105]

Similarly, the reliance by the CCJ in *Nervais* and *McEwan* on the modifications clause, which had been so emphatically condemned by Lord Hoffman in *Boyce,* demands some explanation,

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[102] *Nervais* (n 7) [67].

[103] *Nervais* (n 7) [67].

[104] *Nervais* (n 7) [67].

[105] *Nervais* (n 7) [88].

but none is forthcoming. Lord Hoffman's approach is simply dismissed as being based on 'mere conventional wisdom'. The CCJ prefer instead to rely on the approach adopted by the JCPC to the modifications clause in the Constitution of The Bahamas in the later case of *Bowe (Junior) and Anor v The Queen*,[106] even though the terms of appeal in that case were expressly framed so as to preclude re-argument of the points decided by the Board in *Boyce.*

Because of the decisions in *Nervais* and *McEwan* the CCJ now finds itself directly at odds with the jurisprudence of the JCPC. Given the size of the panel in *Boyce,* it is difficult to conceive of the JCPC overruling that decision any time soon, but for so long as it does not there will be two parallel human rights systems in the region. On the one hand, the judges of those countries that subscribe to the CCJ's appellate jurisdiction will be able to modify the entire corpus of pre-independence laws to bring these laws into conformity with the Constitution. On the other hand, the judges of countries that continue to subscribe to the JCPC will remain bound to give effect to pre-independence laws even where they violate the rights and freedoms guaranteed by the constitution. In the light of the decisions of the voters in the two most recent referendums in Antigua and Grenada, in 2018, to reject a proposal to replace the JCPC with the CCJ, and in the light of the political deadlock in Jamaica and Trinidad and Tobago over the same question, it seems likely that this parallel system will continue for the foreseeable future.

20.6 Conclusion

Over the last half century or so the JCPC has moved away from its early postcolonial jurisprudence, which was characterised by a very close and literal reading of the text of the

[106] [2006] UKPC 10.

region's constitutions and which treated the rights and freedoms they guaranteed as essentially declaratory of the rights already existing under the common law. The first development was the adoption of a structural approach, which sought to fill gaps and ambiguities in the text by reference to underlying principles such as the separation of powers. The second development was the adoption of a purposive approach, which sought to give the fullest effect possible to the rights and freedoms guaranteed by the constitution and to bring them into line with contemporary international human rights norms. The JCPC has not, however, abandoned the textual approach entirely. More recently, it has developed what I have called a hybrid purposive/textual approach, which combines a purposive approach towards the interpretation of the region's Bills of Rights whilst retaining a more formalistic approach to those provisions of the constitution where the intentions of the constitutions' framers are clearly expressed in the text. This hybrid approach, seeks to uphold the political constitution: where there are defects in the constitution these are to be addressed through the amendment procedures prescribed by the constitution rather than by creative judicial interpretation.

In articulating its approach to the interpretation of the region's constitutions the JCPC has been unconcerned by their alleged lack of autochthony.[107] By contrast, a number of leading Caribbean scholars have argued that the process by which their countries attained their independence has eroded the democratic legitimacy of their constitutions. As a consequence, they attach very little weight to the text of the region's constitutions. The holistic approach, which they advocate, and which has been applied by the CCJ in *Nervais* and *McEwan*, is premised on a legal constitutionalist approach to the respective roles of the judiciary and the

[107] A term coined by Sir Kenneth Wheare to convey the sense that these constitutions are not 'home grown'. See *The Constitutional Structure of the Commonwealth* (Clarendon Press 1960) 89.

legislature. The dysfunctionality of the latter means, effectively, that the courts must assume responsibility for constitutional amendment.

As I have sought to demonstrate, however, the holistic approach is based on assumptions that are, at the least, contestable. Moreover, by creating a bifurcation in the jurisprudence of the CCJ and the JCPC, the holistic approach sets those Caribbean countries which have ratified the CCJ's appellate jurisdiction apart from the majority of Caribbean countries which continue to subscribe to the appellate jurisdiction of the JCPC. This is not to say that the CCJ should be bound by the jurisprudence of the JCPC. After all, its mission is to develop a distinctively Caribbean jurisprudence. However, where the CCJ departs from the jurisprudence of the JCPC it is vital that its reasoning is sufficiently compelling to leave no doubt as to the correctness of its decision to reject the previous approach of the JCPC.