

Patrick Reyes

Appellant

v.

The Queen

Respondent

FROM

THE COURT OF APPEAL OF BELIZE

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 11th March 2002

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett
Lord Rodger of Earlsferry

[Delivered by Lord Bingham of Cornhill]

1. On 16 April 1997 Patrick Reyes, the appellant, shot and killed Wayne Garbutt and his wife Evelyn. He was tried on two counts of murder, convicted and sentenced to death on each count as required by the law of Belize on conviction of murder by shooting. His appeal against conviction was dismissed by the Court of Appeal and his petition for special leave to appeal against conviction was dismissed by this Board. But the Board granted the appellant special leave to raise two constitutional arguments not advanced in the courts below. The first argument challenges the constitutionality of the mandatory death penalty, which is said to infringe both the protection against subjection to inhuman or degrading punishment or other treatment under section 7 of the constitution of Belize and the right to life protected by sections 3 and 4. Under this head the appellant does not challenge the constitutionality of the death penalty as such: his submission is directed to the mandatory requirement that sentence of death be passed in certain cases, of which his is one. The second argument challenges the constitutionality of hanging as the means of carrying

out the sentence of death. The crown has not been represented on the hearing of this appeal, but the Attorney-General has written to say that the Belize Government is content that the Board should decide the issues and that it adopts a neutral stance.

The facts

2. The main facts leading to the convictions were not in dispute. The appellant and the deceased occupied houses which were close to each other but divided by a strip of public land that had been reserved as part of a roadway. The deceased Wayne Garbutt obtained a lease of the public land from the government and decided to enclose it as part of his property. The appellant evidently heard of this intention, and understood that a fence was to be built some 2 feet away from the back of his house. On 16 April 1997 the appellant left for work in the morning, but before doing so told his son to inform him if work on building the new fence began. His place of work was some two miles away. Wayne Garbutt did begin building the fence and the appellant's son reported this to him. The appellant left work and returned home by bicycle. The building of the fence was under way. The appellant arrived on the scene and asked Wayne Garbutt to show him "the papers that he got for the lands". Garbutt said that he had "a paper" but refused to show it to the appellant. The appellant went into his own house and soon afterwards emerged with a gun which he pointed at those who were erecting the fence. There was a gunshot which injured one of the workmen and a further shot which killed Wayne Garbutt. He was shot in the back. Evelyn Garbutt then came on to the porch of their house, and the appellant shot her also. The appellant walked over to where Wayne Garbutt's inert body lay, looked at it, and then turned the gun on himself and pulled the trigger. His injuries were serious and he was kept in hospital for three months before being discharged and charged with the two murders.

3. It is understood that the appellant is a man of good character, with no previous record of violence. At the trial he called a priest who spoke highly of him. He was examined by two psychiatrists, one in hospital, the other in prison. The first found him to be hallucinating, and subject to a psychotic episode for which she treated him, but she was unable to express an opinion on his state of mind at the time of the killings. The second concluded that the appellant may on 16 April 1997 have been suffering from a brief psychotic disorder which could have impaired his mental responsibility, but he was unable to make a definitive diagnosis of the appellant's state of mind on the day of the incidents.

The Criminal Code of Belize

4. Section 102 of the Criminal Code of Belize originally provided:

“Every person who commits murder shall suffer death”.

By section 114 of the code proof of murder requires proof of an intention to kill, and in succeeding sections defences of diminished responsibility and provocation are provided. In 1994 section 102 of the code was amended by re-numbering that section as subsection (1) and adding to it the following proviso:

“Provided that in the case of a Class B murder (but not in the case of a Class A murder), the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu thereof shall sentence the convicted person to imprisonment for life.”

The section was further amended by adding two further subsections:

“(2) The proviso to subsection (1) above shall have effect notwithstanding any rule of law or practice which may prohibit a jury from making recommendations as to the sentence to be awarded to a convicted person.

(3) For the purpose of this section –

‘Class A murder’ means:-

- (a) any murder committed in the course or furtherance of theft;
- (b) any murder by shooting or by causing an explosion;
- (c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
- (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;
- (e) in the case of a person who was a prisoner at the time when he did or was a party to the murder,

any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting; or

- (f) any murder which is related to illegal drugs or criminal gang activity;

‘Class B murder’ means any murder which is not a Class A murder.”

The categories of murder listed in class A were plainly based on section 5(1) of the British Homicide Act 1957, but with the addition of an additional category of capital murder expressed in (f). It was because the murders committed by the appellant fell within subsection (3)(b) that imposition of the death sentence was mandatory.

5. Hanging is the means by which the death sentence is carried out in Belize.

The Constitution of Belize

6. On 21st September 1981 Belize became a sovereign independent state within the Commonwealth. Its constitution, (Laws of Belize, C4) was expressed in section 2 to be

“the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.”

In section 21 it was provided:

“Nothing contained in any law in force immediately before Independence Day nor anything done under the authority of any such law shall, for a period of five years after Independence Day, be held to be inconsistent with or done in contravention of any of the provisions of this Part.”

Section 21 was contained in Part II of the constitution, entitled “Protection of Fundamental Rights and Freedoms”. Thus, unusually if not uniquely, the continuing savings clauses found in many other if not all Caribbean constitutions, whether in the wider form found in some constitutions or the narrower form found in others, have no close counterpart in the constitution of Belize.

7. Part II of the constitution contains the following provisions relevant to the appellant’s arguments:

“3. Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty, security of the person, and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association;
- (c) protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and
- (d) protection from arbitrary deprivation of property,

the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

4.(1) A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.

6.(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

7. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

Section 20 gives the Supreme Court jurisdiction to afford redress where the provisions of sections 3 to 19 of the constitution have been contravened, but, as Mr. Fitzgerald QC for the appellant accepts, the terms of section 4(1) preclude a challenge to the constitutionality of the death sentence as such.

8. Part IV of the constitution defines and governs the rôle of the governor-general and Part V governs the executive. In this chapter

there are a series of detailed provisions governing exercise of the prerogative of mercy which are relevant to a submission considered below. Sections 52 and 53 are in these terms:

“52.(1) The Governor-General may –

- (a) grant a pardon, either free or subject to lawful conditions, to any person convicted of any offence;
- (b) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for any offence;
- (c) substitute a less severe form of punishment for any punishment imposed on any person for any offence; or
- (d) remit the whole or any part of any punishment imposed on any person for any offence or of any penalty or forfeiture otherwise due to the Crown on account of any offence.

(2) The powers of the Governor-General under subsection (1) of this section shall be exercised by him in accordance with the advice of the Belize Advisory Council.

53. Where any person has been sentenced to death (otherwise than by a court-martial) for an offence, the Attorney-General shall cause a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained), together with such other information derived from the record of the case or elsewhere as he may require, to be taken into consideration at a meeting of the Belize Advisory Council, so that the Council may advise the Governor-General whether to exercise any of his powers under section 52(1) of this Constitution.”

9. Section 54 governs the composition and procedure of the Advisory Council. It is to consist of a chairman, who shall hold, or have held, or is qualified to hold, office as a judge of a superior court of record, and not less than six members who “shall be persons of integrity and high national standing”, of whom at least two shall have held high civil service positions, and at least one shall be a member of a recognised profession in Belize. Two of the members are to be appointed by the governor-general acting in accordance with the advice of the prime minister, given with the concurrence of the leader of the opposition, and the other members

of the council are appointed by the governor-general acting in accordance with the advice of the prime minister, given after consultation with the leader of the opposition. Members of the council are appointed for 10 years or such shorter period as may be specified in their instruments of appointment. They are required to take an oath on appointment. The functions of the council are expressed, in subsection (7), to be

- “(a) to advise the Governor-General in the exercise of his powers under section 52 of this Constitution;
- (b) to perform such other tasks and duties as are conferred or imposed on it by this Constitution or any other law.”

The council is not to be subject to the direction or control of any other person or authority. The governor-general, again acting in accordance with the advice of the prime minister given after consultation with the leader of the opposition, is to appoint one of the members of the council to be its senior member. The senior member is to preside in the absence of the chairman. It is provided that five members of the council shall be a quorum, decisions are to be taken by a majority and on an equality of votes the chairman is to have a casting vote unless he is the governor-general. The council is to regulate its own procedure. The constitution thus provides that in exercising the prerogative of mercy the governor-general shall be advised by a balanced, independent body of high standing, whose advice he is bound to follow.

The penalty for murder

10. Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence of death. This simple and indiscriminating rule was introduced into many states now independent but once colonies of the crown.

11. It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous. The Royal Commission on Capital Punishment 1949-1953 examined a sample

of 50 cases and observed in its report (1953) (Cmd. 8932) at p. 6, para. 21 (omitting the numbers of the cases referred to):

“Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly ... the facts of 50 cases of murder that occurred in England and Wales and in Scotland during the 20 years 1931 to 1951. From this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all.”

A House of Lords Select Committee on Murder and Life Imprisonment in 1989 observed (HL Paper 78-1, 1989) in para. 27:

“The Committee consider that murders differ so greatly from each other that it is wrong that they should attract the same punishment.”

12. An independent enquiry into the mandatory life sentence for murder sponsored by the Prison Reform Trust and chaired by Lord Lane in 1993 reported, at p. 21:

“There is probably no offence in the criminal calendar that varies so widely both in character and in degree of moral guilt as that which falls within the legal definition of murder.”

It made reference at page 22 to research showing that in England and Wales “murder is overwhelmingly a domestic crime in which men kill their wives, mistresses and children, and women kill their children”.

13. Judicial statements to the same effect are not hard to find: see, for example, in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 674, per Lord Diplock; *R v Howe* [1987] AC 417 at 433F, per Lord Hailsham of St Marylebone LC; *Rajendra Prasad v State of Uttar Pradesh* [1979] 3 SCR 78 at 107, per Krishna Iyer J. The differing culpability of different murderers is strikingly illustrated by statistics published by the Royal Commission on Capital Punishment on pp. 316-317 of their report referred to above: these show that of murderers sentenced to death and reprieved in England and Wales between 1900 and 1949 twice as many served terms of under five years (in some cases terms of less than a year) as served terms of over 15 years.

14. This problem of differential culpability has been addressed in different ways in different countries. In some a judicial discretion to impose the death penalty has been conferred, reserving its imposition for the most heinous cases. Such was the solution adopted in South Africa before its 1993 constitution, when it was held that the death penalty should only be imposed in the most exceptional cases where there was no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence: *State v Nkwanyana* 1990 (4) SA 735 at 743E-745G. Such is also the solution adopted in India where the rule has been expressed by Sarkaria J in the Supreme Court in *Bachan Singh v State of Punjab* [1980] 2 SCC 475 at 515 in these terms:

“(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under section 302, Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its

execution, a source of grave danger to the society at large, the Court may impose the death sentence.”

15. In other countries the mandatory death sentence for murder has been retained but has only been carried out in cases which are considered to merit the extreme penalty. Such was the case in the United Kingdom when the death penalty was mandatory: of those convicted of murder and sentenced to death in England and Wales between 1900 and 1949, 91% of women and 39% of men were reprieved: see report of the Royal Commission, at p. 326. No convicted murderer was executed in Scotland between 1929 and 1944: *ibid*, at p. 302. Such has also been the practice in many other countries. In *Yassin v Attorney-General of Guyana* (unreported), 30 August 1996, Fitzpatrick JA, sitting in the Court of Appeal of Guyana, said at pp. 24-25 of his judgment:

“Add to this the notorious fact that in Guyana for some years as a matter of executive policy the death penalty is only implemented in some, not all, cases of persons convicted of murder, and the ‘sifting out’ of those cases in which the [offenders] are found not to warrant the ultimate penalty is done by means of the exercise of the prerogative of mercy rather than by amendment of the law relating to capital punishment.”

The Board was told that there has been no execution in Belize since 1985.

16. In other countries a distinction has been drawn between murders, described as capital (or first degree), which carry the mandatory death penalty and others (non-capital or second degree) which do not. Such was the solution applied in the United Kingdom between 1957 and 1965. It is a solution favoured by a number of American states. And it is the solution adopted in 1994 by Belize, as noted above. Even where a murder is classified as capital or first degree, the prerogative of mercy may be exercised to mitigate the extreme penalty.

International developments

17. The mandatory penalty of death on conviction of murder long pre-dated any international arrangements for the protection of human rights. Under the law of England and Wales there was never any ground upon which the lawfulness of the sentence, duly imposed upon lawful conviction, could be challenged. Until 1968 the constitutionality of the death penalty was not challenged before the Supreme Court of the United States: see *White, The Death Penalty in the Nineties* (University of Michigan, 1991), p. 4. But

the last half century has seen two important developments relevant to the issues before the Board.

18. The first of these is the adoption of a series of international instruments to protect human rights. Earliest in time was the Universal Declaration of Human Rights 1948, which includes the following articles:

- “3. Everyone has the right to life, liberty and security of person.
5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”

19. The American Declaration of the Rights and Duties of Man 1948, promulgated in the same year, contains in article 1 a provision identical in meaning to article 3 of the Universal Declaration. In article XVIII it provides a right of resort to the courts for protection against acts of authority violating any fundamental constitutional rights. Article XXVI provides:

“Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.”

20. In 1950 there followed the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1953) (Cmd 8969) providing:

“Article 2

Right to life

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6

Right to a fair trial

1. In the determination ... of any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law ...”

21. The International Covenant on Civil and Political Rights 1966 contains in article 6.1 a provision to this effect:

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

Article 7 provides protection against subjection to torture or cruel, inhuman or degrading treatment or punishment. Article 14(1) provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. It also provides:

“(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

22. The American Convention on Human Rights 1969 confers rights, differently worded but to the same broad effect: to life (article 4), to humane treatment (article 5) and to a fair trial (article 8). In relation to each of the last four of these instruments machinery exists, whether through a court or a commission or other body, to interpret the meaning and effect of the instrument, sometimes with binding force, sometimes not.

23. The second important development has been the advance to independent statehood of many former colonies under entrenched constitutions expressed to be the supreme law of the state. In the majority of such countries, as in Belize, the practice was adopted of setting out in the constitution a series of fundamental rights and freedoms which were to be protected under the constitution. It is well-established that in drafting the chapters containing these statements of rights heavy reliance was placed on the European Convention, first in drafting the constitution of Nigeria and then in

drafting those of Jamaica and many other states around the world: see *Minister of Home Affairs v Fisher* [1980] AC 319 at 328; *Simpson, Human Rights and the End of Empire* (Oxford, 2001), pp. 863-872; *Demerieux, Fundamental Rights in Commonwealth Caribbean Constitutions* (University of West Indies, 1992), p. 23. In some instances, adopting the language used in article 10 of the Bill of Rights 1688, the eighth amendment to the constitution of the United States 1791 and section 12 of the Canadian Charter of Rights and Freedoms (1982), the prohibition on inhumane treatment has referred to “cruel and unusual treatment or punishment”.

24. The European Convention applied to Belize as a dependent territory of the crown from 25 October 1953 when it came into force until 21 September 1981 when Belize became independent. On 25 September 1981 Belize adhered to the Universal Declaration, in January 1991 to the American Declaration and in June 1996 to the International Covenant (but it has not adopted the Optional Protocol to the International Covenant nor become a party to the American Convention).

The approach to interpretation

25. In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. This is sometimes described as deference shown by the courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it.

26. When (as here) an enacted law is said to be incompatible with a right protected by a constitution, the court’s duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the constitution to decide whether the enacted law is incompatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation: see, among many

other cases, *Weems v United States* (1909) 217 US 349 at 373; *Trop v Dulles* (1958) 356 US 86 at 100-101; *Minister of Home Affairs v Fisher* [1980] AC 319 at 328; *Union of Campement Site Owners and Lessees v Government of Mauritius* [1984] MR 100 at 107; *Attorney-General of The Gambia v Momodou Jobe* [1984] AC 689 at 700-701; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 331; *State v Zuma* 1995 (2) SA 642; *State v Makwanyane* 1995 (3) SA 391; *Matadeen v Pointu* [1999] 1 AC 98 at 108. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is 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 (see *Trop v Dulles*, above, at 101). In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in *State v Makwanyane*, 1995 (3) SA 391, in para. 88:

“Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society.”

27. In considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such norms to which Belize has subscribed, as outlined in paragraphs 18, 19, 21 and 24 above. By becoming a member of the Organization of American States Belize proclaimed its adherence to rights which, although not listed in the charter of the Organization, are expressed in the Declaration. With some differences of wording, all these instruments prohibit “cruel, inhuman or degrading treatment or punishment”, words equivalent in meaning to those used in this constitution. As more fully discussed below, the requirement of humanity has been read as incorporating the precept that consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender should be regarded as a *sine qua non* of the humane imposition of capital punishment.

28. In interpreting the constitution of Belize it is also relevant to recall that for 28 years preceding independence the country was covered by the European Convention, the provisions of which were in large measure incorporated into Part II of the constitution: it could scarcely be thought that it was intended, in adopting and giving primacy to these rights in the new constitution, to diminish rights which the people had previously been entitled to enjoy. This does not mean that in interpreting the constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does.

Section 7: Inhuman or degrading punishment or other treatment

29. The constitution of Belize plainly sanctions the death penalty. The questions whether the passing and implementation of sentence of death are themselves inhuman and degrading are questions which do not and cannot, under this constitution, arise. Being bound to accept that the death penalty is not in itself inhuman and degrading, Mr. Fitzgerald accordingly directs his argument to the mandatory nature of the penalty. He takes as his starting point the proposition, reflected in the practice of every civilised state, that

not everyone convicted of murder deserves to die: see paragraphs 11-16 above. That is also so, he submits, of murders legislatively classified as capital or first-degree murders. He contends that a sentencing regime which imposes a mandatory sentence of death on all murderers, or all murderers within specified categories, is inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the individual defendant, to be passed without any opportunity for the defendant to show why such sentence should be mitigated, without any consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such a sentence might be wholly disproportionate to the defendant's criminal culpability. While of course accepting that the Board cannot enquire into the detailed facts, Mr. Fitzgerald uses the present case to illustrate his argument. While some murders by shooting, when committed by armed gangsters, may represent a very serious threat to public order, this was not a killing of that kind; the use of a gun was arguably incidental, little different from use of a knife or other weapon. The appellant is not a habitual criminal or a man of violence. There is evidence, perhaps shown by his attempted suicide and the psychiatric evidence, that the appellant's state of mind was abnormal at the time of the killings, even if (as the jury held) it fell short of diminishing his responsibility. There were considerations which could have been urged on the judge in mitigation of sentence had the judge been permitted by the Criminal Code to give effect to those considerations and if he had been persuaded by them. A law which denies a defendant the opportunity, after conviction, to seek to avoid imposition of the ultimate penalty, which he may not deserve, is incompatible with section 7 because it fails to respect his basic humanity.

30. Despite the semantic difference between the expressions "cruel and unusual treatment or punishment" (as in the Canadian Charter and the constitution of Trinidad and Tobago) and "cruel and unusual punishments" (as in the eighth amendment to the United States constitution) and "inhuman or degrading treatment or punishment" (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated: see, for example, *Lauriano v Attorney-General* [1995] 3 Bz LR 77 at 85; *Guerra v Baptiste* [1996] AC 397 at 409-410. In *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 at 1072 Lamer J said:

"I would agree with Laskin CJ in *Miller and Cockriell v The Queen* [1977] 2 SCR 680, where he defined the phrase 'cruel

and unusual’ as a ‘compendious expression of a norm’. The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of section 12 of the Charter is, to use the words of Laskin CJ in *Miller and Cockriell, supra*, at p. 688, ‘whether the punishment prescribed is so excessive as to outrage standards of decency’. In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.”

In *State v Makwanyane* 1995 (3) SA 391 the Constitutional Court of South Africa reviewed the meaning of “cruel, inhuman or degrading treatment or punishment” in the context of the 1993 Constitution of South Africa. The issue before the court did not concern the constitutionality of a mandatory death penalty but the constitutionality of the death penalty itself. The court was therefore addressing a more fundamental question than that now before the Board. But the discussion of “cruel, inhuman or degrading” in paragraph 26 of the judgment given by Chaskalson P is illuminating, and his conclusion is apt:

“The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution ...”

Similarly, in the present case, the task of the Board is to decide whether the mandatory death sentence imposed on the appellant under the Criminal Code of Belize is “inhuman or degrading punishment or other treatment” within the meaning of that expression in the constitution of Belize.

31. In support of his contention that the mandatory imposition of sentence of death on the appellant on his conviction of murder by shooting violates his right under section 7 of the constitution not to be subjected to inhuman or degrading punishment or other treatment, Mr. Fitzgerald is able to rely on a wide range of decisions and opinions. In *Lauriano v Attorney General* [1995] 3 Bz LR 77 the Court of Appeal of Belize (Telford Georges P, Young and Malone JJA) upheld the constitutionality of the mandatory death sentence in Belize. In the course of its judgment the court did however recognise the need for flexibility in administering the sentence and the need for the character and record of the offender and the circumstances of the particular

offence to be considered (page 87). The court concluded, for reasons which the Board cannot accept (see paragraph 47 below), that the Advisory Council provided the necessary flexibility but relied on such flexibility in concluding that the procedure conformed with the standards of civilised society and was not inhumane and degrading (page 87).

32. Reliance was also placed by the appellant on the very recent decision of the Eastern Caribbean Court of Appeal in consolidated appeals from Saint Vincent and the Grenadines and Saint Lucia: *Spence v The Queen* and *Hughes v The Queen* (unreported, 2 April 2001), a decision currently the subject of appeal to the Board in *Hughes'* case. In each of these appeals the appellants challenged the constitutionality of the mandatory death sentences passed upon them. The domestic laws of both countries required sentence of death to be imposed on conviction of murder and section 5 of both constitutions prohibited the subjection of any person to torture or to inhuman or degrading punishment or other treatment. One of the major issues argued was whether the mandatory death penalty required by domestic law was compatible with the constitutional prohibition. In the course of his judgment Sir Dennis Byron CJ outlined his approach to constitutional interpretation, citing *Matadeen v Pointu* [1999] 1 AC 98 and *Minister of Home Affairs v Fisher* [1980] AC 319 and described it (paragraph 7) as the duty of the court to "give life and meaning to the high ideals and principles entrenched within the Constitution". In paragraph 30 he defined the issue:

"The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender, whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate: whether the lawful punishment of death should only be imposed after there is a judicial consideration of mitigating factors relative to the offence itself and the offender."

He made extensive reference to a number of authorities mentioned below, and expressed his conclusions on this point in paragraphs 43-46 of his judgment:

"(43) The experience in other domestic jurisdictions, and the international obligations of our states, therefore suggest that a court must have the discretion to take into account the individual circumstances of an individual offender and offense in determining

whether the death penalty can and should be imposed, if the sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process.

- (44) In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.
- (45) This rationale conforms with my understanding of a prohibition against inhuman punishment and therefore explains and gives life and meaning to the express provision of section 5 of the Constitutions of Saint Lucia and Saint Vincent. I have found the jurisprudence to be persuasive and I adopt it in defining the extent of the protection which section 5 of the Constitution has guaranteed to every citizen.
- (46) I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration for the individual circumstances of the offense and the offender before a sentence of death could be imposed in accordance with its provisions.”

33. Redhead JA dissented, taking the view (paragraph 166) that it was for the people and Parliament to change the law. Saunders JA (Ag) expressed agreement with the Chief Justice in paragraphs 214-217 of his judgment:

- “(214) In any assessment of a possible violation of section 5, a court must confront the question as to what criteria should be used to evaluate punishment or treatment that is inhuman or degrading. In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 imposes upon the State an obligation to conform to certain ‘irreducible’ standards that can

be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.

- (215) The mandatory death penalty in these two countries, as presently applied, robs those upon whom sentence is passed of any opportunity whatsoever to have the court consider mitigating circumstances even as an irrevocable punishment is meted out to them. The dignity of human life is reduced by a law that compels a court to impose death by hanging indiscriminately upon all convicted of murder, granting to none an opportunity to have the individual circumstances of his case considered by the court that is to pronounce the sentence. ...
- (216) It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst cases of homicide then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate *must* be imposed upon such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. For all these reasons and upon the strength of the authorities presented to me I am driven firmly to one conclusion. To the extent that the respective sections of the Criminal Codes of the two countries are interpreted as imposing the mandatory death penalty, those sections are in violation of section 5 of the respective Constitutions.
- (217) In reaching such a conclusion it does not perturb me that, in the past, the mandatory death penalty may have been regarded as a natural, inescapable, even acceptable consequence of all murder convictions. The spirit and intent of section 5 combined with the broad manner in which that section is drafted permit courts of law a wide discretion. ... the court, at the instance of litigants with standing, is entitled to place punishments and treatments under continuous judicial scrutiny in order to ensure that they are not

or have not become inhuman and degrading. A Constitution is a living document and the prohibition against inhuman treatment is peculiarly conditioned by ‘evolving standards of decency’. Were it otherwise, then the full measure of the right assured to the citizen by section 5 would be severely compromised either by the paying of homage to unenlightened common law relics or by slavish adherence to the outmoded mores of yesteryear.”

34. In the cases of *Spence* and *Hughes* the Court of Appeal was considering domestic laws which did not distinguish between capital and non-capital murders, and the majority may have considered that such a distinction would provide the necessary degree of discrimination between one murder and another (see paragraphs 47, 48 and 218 of the judgments). But the Board is not aware of any case in which the distinction, when challenged, has been held to be sufficiently tightly drawn to provide the necessary guarantee of proportionality and relation to individual circumstances where the death penalty is mandatory on conviction of a murder in the capital category. In *Woodson v The State of North Carolina* (1976) 428 US 280 the Supreme Court of the United States considered a North Carolina statute which provided a mandatory death penalty on conviction of certain defined categories of murder. The issue was whether such a statute was compatible with the eighth amendment to the constitution. Giving judgment for the plurality, Stewart J said at pp. 303-305:

“A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot fairly be denied – that death is a punishment different from all other sanctions in kind rather than degree ... A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

This Court has previously recognised that ‘[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender’. ... Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence have been viewed as a progressive and humanizing development ... While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”

35. A similar result was reached in *Roberts v Louisiana* (1977) 431 US 633 in which the Supreme Court considered a Louisiana statute which also provided a mandatory penalty of death on conviction of certain categories of murder. At 636-637 the Court said:

“To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might

attend the killing of a peace officer and which are considered relevant in other jurisdictions.

As we emphasized repeatedly in *Stanislaus Roberts* and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.”

36. In *Mithu v State of Punjab* [1983] 2 SCR 690 the Supreme Court of India considered a provision of the Indian Criminal Code which required sentence of death to be passed on a defendant convicted of a murder committed while the offender was under sentence of imprisonment for life. The court addressed its attention to article 21 of the Indian constitution, which protects the right to life. Certain observations made by Chandrachud CJ, at pp. 704, 707 and 713 are relevant to the present discussion:

“But, apart from that, a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair ... Thus, there is no justification for prescribing a mandatory sentence of death for the offence of murder committed inside or outside the prison by a person who is under the sentence of life imprisonment. A standardized mandatory sentence, of that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case ... Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws.”

A Nevada statute to similar effect was held to be unconstitutional by the Supreme Court of the United States in *Sumner v Shuman* (1987) 483 US 66.

37. The need for proportionality and individualised sentencing is not confined to capital cases. *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 concerned the compatibility with section 12 of the Canadian Charter of a statute imposing a minimum sentence of seven years' imprisonment on conviction of importing any narcotic into Canada. The Supreme Court of Canada recognised that in some cases (and perhaps in the case under appeal) seven years' imprisonment for such an offence would be appropriate, but held the provision to be incompatible with section 12 because it would in some cases be grossly disproportionate to the gravity of the offence. As pithily put by Lamer J in his judgment on p. 1073,

“This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves.”

If a sentence prescribed by law is grossly disproportionate in that sense, it could be justified (if at all) only under section 1 of the Canadian Charter.

38. The significance of proportionality was also addressed by the Constitutional Court of South Africa in *State v Makwanyane* 1995 (3) SA 391, where it was said in para. 94:

“Proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading No court would today uphold the constitutionality of a statute that makes the death sentence a competent sentence for the cutting down of trees or the killing of deer, which were capital offences in England in the 18th century But murder is not to be equated with such ‘offences’. The wilful taking of an innocent life calls for a severe penalty, and there are many countries which still retain the death penalty as a sentencing option for such cases. Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors

which have been mentioned, are also factors that can and should be taken into account in dealing with this issue.”

39. In *R v Offen* [2001] 1 WLR 253 the Court of Appeal of England and Wales considered a section of the Crime (Sentences) Act 1997 which required the court to impose a life sentence on a defendant convicted of a second serious offence as defined in the statute. It was held (at p. 276) that there might well be circumstances in which such a sentence would be arbitrary and disproportionate, and so contravene article 3 of the European Convention unless (p. 277) the section was so applied as to preclude the passing of a life sentence on an offender who did not constitute a significant risk to the public.

40. Among international bodies interpreting human rights instruments the need for proportionality and individualised sentencing has been generally accepted. In *Edwards v The Bahamas* (Report No. 48/01, 4 April 2001) the Inter-American Commission considered the compatibility of the mandatory death penalty imposed on the petitioners on their conviction of murder with various articles of the American Declaration including article XXVI. In paras. 147 and 178 of its report the Commission said:

“147. The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to life based solely upon the category of crime for which an offender is found guilty, without regard for the offender’s personal circumstances or the circumstances of the particular offense. The Commission cannot reconcile the essential respect for the dignity of the individual that underlies Articles XXV and XXVI of the Declaration, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual’s case.

178. The Commission further concludes that the State, by sentencing the condemned men to mandatory death penalties absent consideration of their individual circumstances, has failed to respect their rights to humane treatment pursuant to Article XXV and XXVI of the Declaration, and has subjected them to cruel, inhuman, or degrading punishment or treatment in violation of those Articles. The State sentenced the condemned men to death solely because they were convicted of a predetermined category of crime. Accordingly, the process to which they have been subjected,

would deprive them of their most fundamental rights, their rights to life, without consideration of their personal circumstances and their offenses. Treating [the petitioners] in this manner abrogates the fundamental respect for humanity that underlies the rights protected under the Declaration, and Articles XXV and XXVI in particular.”

41. This conclusion followed the trend set by earlier decisions on the American Convention. In *Downer and Tracey v Jamaica* (Report No. 41/00, 13 April 2000), the Inter-American Commission said in para. 212:

“The experience of other international human rights authorities, as well as the high courts of various common law jurisdictions that have, at least until recently, retained the death penalty, substantiates and reinforces an interpretation of Articles 4, 5, and 8 of the Convention that prohibits mandatory death sentences. Based upon a study of these various international and domestic jurisdictions, it is the Commission’s view that a common precept has developed whereby the exercise of guided discretion by sentencing authorities to consider potentially mitigating circumstances of individual offenders and offenses is considered to be a condition *sine qua non* to the rational, humane and fair imposition of capital punishment. Mitigating circumstances requiring consideration have been determined to include the character and record of the offender, the subjective factors that might have influenced the offender’s conduct, the design and manner of execution of the particular offense, and the possibility of reform and social readaptation of the offender.”

The Commission’s decision in *Baptiste v Grenada* (Report No. 38/00, 13 April 2000) was to similar effect: see particularly para.90. In *Thompson v Saint Vincent and the Grenadines* (2000) UNDOC/CCPR/C/70/D/906/1998 the Human Rights Committee established under the International Covenant considered the mandatory death penalty imposed on the applicant under the law of Saint Vincent. The Committee’s decision was based on article 6 (the right to life) of the International Covenant, but article 7 (relating to cruel, inhuman or degrading treatment or punishment) was also considered. In paras. 8.2 and 8.3 the Committee said:

“8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author’s case, constitutes a violation of articles 6(1), 7 and 26 of the Covenant. The State party has replied that the death

sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offense. The death penalty is mandatory in all cases of 'murder' (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6(2), 7, 14(5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6(1)."

42. In *Soering v United Kingdom* (1989) 11 EHRR 439 it was article 3, and not article 2, of the European Convention which the Strasbourg Court was asked to consider. In paragraphs 103-104 of its judgment it said:

"Article 3 cannot be interpreted as generally prohibiting the death penalty. That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present-day attitudes in the Contracting States to capital

punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.”

43. For purposes of this appeal the Board need not consider the constitutionality of any mandatory penalty other than death, nor the constitutionality of a mandatory death penalty imposed for any murder other than by shooting. In the absence of adversarial argument it is undesirable to decide more than is necessary to resolve this appeal. The Board is however satisfied that the provision requiring sentence of death to be passed on the appellant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect. Section 102(3)(b) of the criminal code is, accordingly, to the extent that it refers to “any murder by shooting” inconsistent with section 7 of the constitution. The category is indiscriminate. By virtue of section 2 of the constitution subsection (3)(b) is to that extent void. It follows that any murder by shooting is to be treated as falling within Class B as defined in section 102(3) of the criminal code. This is sanctioned by section 134(1) of the constitution, which provides:

“Subject to the provisions of this Part, the existing laws shall notwithstanding the revocation of the Letters Patent and the Constitution Ordinance continue in force on and after Independence Day and shall then have effect as if they had been made in pursuance of this Constitution but they shall be construed with such modifications adaptations qualifications

and exceptions as may be necessary to bring them into conformity with this Constitution.”

Whether it would ever be possible to draft a provision for a mandatory death sentence which was sufficiently discriminating to obviate any inhumanity in its operation is not a question which the Board is called upon to decide.

44. In reaching this decision the Board is mindful of the constitutional provisions, summarised above, governing the exercise of mercy by the governor-general. It is plain that the Advisory Council has a most important function to perform. But it is not a sentencing function and the Advisory Council is not an independent and impartial court within the meaning of section 6(2) of the constitution. Mercy, in its first meaning given by the *Oxford English Dictionary*, means forbearance and compassion shown by one person to another who is in his power and who has no claim to receive kindness. Both in language and literature mercy and justice are contrasted. The administration of justice involves the determination of what punishment a transgressor deserves, the fixing of the appropriate sentence for the crime. The grant of mercy involves the determination that a transgressor need not suffer the punishment he deserves, that the appropriate sentence may for some reason be remitted. The former is a judicial, the latter an executive, responsibility. Appropriately, therefore, the provisions governing the Advisory Council appear in Part V of the constitution, dealing with the executive. It has been repeatedly held that not only determination of guilt but also determination of the appropriate measure of punishment are judicial not executive functions. Such was the effect of the decisions in *Hinds v The Queen* [1977] AC 195 at 226(D); *R v Mollison (No. 2)* (unreported) 29 May 2000, Appeal No. 61/97, 29 May 2000); *Nicholas v The Queen* (1998) 193 CLR 173, paras. 16, 68, 110, 112. The opportunity to seek mercy from a body such as the Advisory Council cannot cure a constitutional defect in the sentencing process: see *Edwards v Bahamas*, above, paras. 167-168; *Downer and Tracy v Jamaica*, above, paras. 224-226; *Baptiste v Grenada*, above, paras. 117-119.

45. Limited assistance is to be gained from such decisions of the Board as *Runyowa v The Queen* [1967] 1 AC 26 and *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was. But further mention should be made of the recent decision of the Court of Appeal of Belize in *Lauriano v Attorney-General* [1995] 3 Bz

LR 77. In that case a defendant, upon whom a mandatory death sentence had been passed, challenged the constitutionality of that sentence under section 7 of the constitution as inhuman and degrading punishment. The court was referred to *Woodson v The State of North Carolina* (1976) 428 US 280, and to Stewart J's account of developments in the United States but observed at p. 86:

“We have not been addressed on the history of legislative enactments and judicial pronouncements in Belize and the Commonwealth Caribbean generally and will venture no observations. In the absence of a body of material supporting the proposition, the approach of Stewart J cannot automatically be transferred to the context of Belize.”

46. The court also attached considerable importance to sections 52-54 of the constitution, governing the prerogative of mercy, of which it said at p. 87:

“In this case, however, it is the Constitution itself which vests in the Council the jurisdiction to advise commutation of the penalty. The power has not been vested by an ordinarily enacted law, itself open to review on grounds of constitutional invalidity. It is artificial to attempt to view the mandatory sentence which the courts must impose separate and apart from the constitutional provisions for its review enshrined in section 54 of the Constitution.

This process can supply the necessary flexibility. The character and record of the offender and the circumstances of the particular offence are open to consideration by the Council. Viewed in its entirety the procedure appears to conform with the standards of civilised society and not to be inhumane and degrading.”

47. The Board cannot accept the reasoning in this decision. As the Attorney-General has accepted, the decision in *Lauriano* was based on far more limited material than is now before the Board. The judgment delivered by Stewart J was not wholly based on the domestic history of the United States, and there is now an international body of decisions entirely consistent with his reasoning quoted above. While the Board would be the first to acknowledge the importance of the role which the constitution has conferred on the Advisory Council, it is clear that such a non-judicial body cannot decide what is the appropriate measure of punishment to be visited on a defendant for the crime he has committed.

Conclusion

48. Having regard to the clear conclusion it has reached on section 7 of the constitution, the Board finds it unnecessary to express a conclusion on sections 3 and 4. This should not however be taken as a rejection or acceptance of the appellant's arguments based on those sections. Nor need the Board rule on the constitutionality of hanging as a means of implementing a sentence of death properly imposed, a task which the Board would be most reluctant to undertake in the absence of any finding or ruling by the courts of Belize.

49. The Board will humbly advise Her Majesty that the appellant's appeal against sentence should be allowed and sentence of death quashed. The case should be remitted to the Supreme Court of Belize in order that a judge of that court may pass appropriate sentence on the appellant having heard or received such evidence and submissions as may be presented and made.