



Type: **Research Article**

The Retention of the Mandatory Death Penalty in Trinidad and Tobago: An Ongoing Human Rights Concern

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ABSTRACT

Keywords

Caribbean Court of Justice
Death Penalty
Human Rights
The Rights to Life
Trinidad and Tobago

Commonwealth Caribbean countries account for a significant portion (roughly 15%) of the Global South region. The Republic of Trinidad and Tobago ("Trinidad and Tobago") is the lone Commonwealth Caribbean country that retains the mandatory death penalty on its statute book in defiance of its human rights obligations. The retention of this anti-human rights punishment is due, in large measure, to decisions from Trinidad and Tobago's final court of appeal, the Judicial Committee of the Privy Council ("JCPC"), which has affirmed the constitutionality of the mandatory death penalty. This article comparatively evaluates the jurisprudence on the mandatory death penalty from the JCPC and its regional counterpart, the Caribbean Court of Justice ("CCJ"), to demonstrate that while the CCJ rightly places a premium on the protection of human rights, the posture of the JCPC severely threatens the respect, protection, and fulfillment of human rights. The article argues that the most recent judicial decision from the JCPC on the mandatory death penalty continues to afford Trinidad and Tobago a free pass to disregard its international human rights obligations indefinitely. It further argues that this state of affairs is wholly censurable for a civilized nation that supposedly has respect for the fundamental rights of the individual. Consequently, the Parliament of Trinidad and Tobago should take the only corrective action remaining, which is to abolish the mandatory death penalty by legislative intervention.

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1. Introduction

Cruel, inhuman and degrading, the death penalty has been a feature of the most ancient civilizations and is well documented in historical records. The Code of King Hammurabi of Babylon dating from the Eighteen Century B.C is thought to be amongst the first laws imposing the death penalty, by prescribing the death penalty for twenty-five offenses. The



Maxims of Ptahhotep from Ancient Egypt warned that the death penalty applied for a man who approached the woman of another man's house ([Eyre, 1984](#)). Upon the accession of Emperor Kao Ti to the imperial throne of China in 201 B.C., three rules were found sufficient to maintain peace and order, one being "those who kill shall die". In Ancient Greece 399 B.C. after the trial of Socrates he was sentenced to death ([Kim, C. and LeBlang, 1975](#)).

Regardless of social standing, none have been spared the grisly end of capital punishment. Commoners, nobility, and those subsequently canonized have met their ill-fated end by execution. Notably, some of the ghastliest victims and instances of the death penalty have been the genesis of religions and mark the rise and fall of political regimes.

First, the Crucifixion - a gruesome and protracted method of execution by nailing to a cross - of Jesus of Nazareth (King James Bible, 2001, Matthew 27) is a pivotal event for the birth of Christianity. Jesus' death demanded by the Jews for what was believed to be for the crime of blasphemy (Cox, 2004, pp. 64-65) is quite possibly the most venerated public execution in human history.

There, much to the delight of a gathered crowd, Jesus was spat upon, flogged, crowned with thorns, thirst quenched with vinegar and languished on the cross, until he died (King James Bible, 2001 Matthew 27,1-66). Mary, Mother of God, bore witness to her son's crucifixion and the gambling for Jesus' garments. Horrific! But, Christians have accorded the death of Jesus by crucifixion as responsible for the salvation of humankind ([Peter Laughlin, 2014](#)). Yet still, the death sentence rendered by Pontius Pilate, Governor of Judea, on Jesus of Nazareth contradicts the Fifth Commandment "Thou Shalt not Kill" (King James Bible, 2001, Exodus 20;13). However, the death penalty is advanced by religious and legal scholars as an exception to the Fifth Commandment ([Dewan, 2001](#)).

Second, Peter, a favorite amongst Jesus' disciples, was crucified in an inverted position in Rome at his request ([Robinson, 1945](#)). Peter deemed himself unworthy to be crucified in the same manner as Jesus Christ, his Lord and Savior ([Robinson, 1945](#)). The death of Peter, now Saint Peter to the Roman Catholic Church, marks the creation of the Papacy ([Roald Dijkstra, 2020](#)).

In 2018, Saint Peter's successor, the progressive Pope Francis, writing in an encyclical - the highest form of papal communication - entitled "Fratelli Tutti (All Brothers)" ratified the position of the Catholic Church against the death penalty ([Francis, 2018](#)). Previously, Pope Francis described the death penalty as "an attack on the inviolability and dignity of the person" that is "inadmissible" in all cases ([Sr Bernadette Mary Reis, 2017](#)). Thereby, Pope Francis revised the Papacy's centuries old position which allowed for the death penalty in exceptional cases. In 2020, Pope Francis called for the abolition of the death penalty ([Fratelli Tutti, 2020](#)).

Third, in the name of "Liberté, Égalité, Fraternité", the French King Louis XVI and Queen Marie Antoinette were both publicly decapitated by the guillotine during the French Revolution, and the ensuing Reign of Terror. A Reign of Terror, only brought to an end by the same blade of a guillotine, through the beheading of Robespierre, founder of the French Revolution.



Fourth, within this millennium, global audiences, by the invention of technology, consumed recurring news footage of the hanging of the Iraqi dictator, Saddam Hussein. The dictator's capital punishment ordered for his crimes against humanity.

The foregoing examples demonstrate that throughout history, an execution has been cause for much public celebration. Now extended to the level of international celebration, within the 21st century. The celebration of such carnage, even by "right-thinking" members of societies, is very disturbing to many anti-death penalty campaigners ([Amnesty International, 2022](#)). Against the backdrop of civilizations' embrace of the death penalty, and its use being associated with the closing of one chapter and the opening a new chapter in history, it is easy to see why the death penalty has attracted such staunch defenders. Mere mention of the term is sure to generate a very polarizing debate. Philosophical, political and practical considerations characterize this debate ([American Civil Liberties Union, 2022](#)).

But in this epoch of history, with the post-World War II international human rights law architecture, is the death penalty suitable in a "civilized" society? What methods are appropriately humane to inflict death? Have United Nations Member States ceded their ability to impose the death penalty? All of which are atypical questions in this debate. By no means could the authors locate or even attempt to locate a precise answer to all of these questions.

This debate was initially sparked in the Commonwealth Caribbean aeons ago and has lingered on to the present day. The current debate largely revolves around the legality of the mandatory death penalty. Throughout the years, the Commonwealth Caribbean, and more precisely Trinidad and Tobago, has seen the pendulum swing in favor of both the constitutionality and unconstitutionality of the mandatory death penalty. Notably, the Commonwealth Caribbean region now has two separate lines of reasoning on the legality of the mandatory death penalty. On the one hand, the CCJ, which is the final court of appeal for four (4) Commonwealth Caribbean countries, has reasoned in *Nervais & Severin v The Queen* (2018) that the mandatory death penalty is unconstitutional because, amongst other things, it infringes on fundamental human rights. On the other hand, the JCPC, which is the final court of appeal for the other thirteen (13) Commonwealth Caribbean countries including Trinidad and Tobago, recently reaffirmed in *Jay Chandler v The State (No. 2) (Trinidad and Tobago)* (2022) that the mandatory death penalty is constitutional, notwithstanding its inconsistency with human rights. This 2022 decision from the JCPC has reignited the debate on the legality of the mandatory death penalty. The decision also generated a new debate as to which court's approach is more palatable with international human rights. The authors of this paper seek to make a contribution to these debates.

This paper is divided into three sections. The first section briefly explores the legal history of the mandatory death penalty in the Commonwealth Caribbean to show that it was always an inherently anti-human rights punishment that was derived from a colonial era defined by human rights abuses. The second section situates the mandatory death penalty within an international human rights context to highlight the fact that Trinidad and Tobago's retention of this cruel and inhuman punishment denotes a serious lack of reverence for its international human rights obligations. The third section juxtaposes the CCJ's decision in



Nervais & Severin (2018) with the JCPC's decision in *Jay Chandler (2022)* to argue that the CCJ's approach is more meritorious from an international human rights perspective and is likely to garner greater support from countries that ascribe tremendous significance to the respect, protection and fulfilment of human rights.

The authors acknowledge that since the JCPC's decision is binding on Trinidad and Tobago, the only way for Trinidad & Tobago to be compliant with its international human rights obligations is by repealing the mandatory death penalty.

2. Research Methods

This manuscript uses a "black-letter" methodology that focuses largely on law in a book rather than law in action with a special attention on an ongoing human rights concerns related to the retention of the mandatory death penalty in Trinidad and Tobago. Several approaches, such as statutory, conceptual, and historical are also used to enrich the analysis. Moreover, this article also refers to case laws in order to identify specific rules that are applied, discuss rule's definition, and its underlying principles that are intended to create a better formula for the discussed legal issues ([Kilcommins, 1973](#)).

3. Discussion

3.1. The legal history of the mandatory death penalty in the Commonwealth Caribbean

The provenance of the mandatory death penalty in the Commonwealth Caribbean is inseparably connected to the British Empire, over the territories that now comprise the Commonwealth Caribbean. During the colonial era - when Caribbean and other Global South countries were under British hegemony - Britain extended the application of its laws, including the mandatory death penalty, to its colonies. Therefore, the mandatory death penalty became an imposition from the Global North onto the Global South.

The death penalty was adopted by Great Britain in the 6th century AD. The punishment was inflicted on persons who committed murder, treason and other serious offences ([Knowles, 2015a](#)). Eventually, the mandatory death penalty was incorporated into the English common law, that is, the law created and developed by English judges through their decisions. In the 19th century, the death penalty was codified in English statutes, namely, the *Offences Against the Person Act* ("OAPA") 1828 and the *OAPA 1861*. Part III of the *OAPA 1828* provided that: "...every person convicted of murder, or of being an accessory before the fact of murder, *shall* suffer death as a felon...", whereas section 1 of the *OAPA 1861* provided that: "[w]hosoever shall be convicted of murder *shall* suffer death as a felon."

As a consequence of British colonization in the 19th and 20th centuries, former Caribbean colonies were constrained to implement corresponding pieces of legislation which prescribed the mandatory death penalty for murder. For example, the Trinidad and Tobago *OAPA 1925* reflects the reception of the mandatory death penalty from Britain. Section 4 of the *OAPA 1925* provides: "[e]very person convicted of murder *shall* suffer death." The reception of the mandatory death penalty in Caribbean colonies was during an era where there was little recognition of universal human rights.



The effect of the mandatory death penalty in Britain and its Caribbean colonies was that a person convicted of murder was automatically sentenced to death without any judicial consideration of the circumstances of the offence or the offender. Its effect was aptly described in ([Matthew v The State, 2004a](#)) para. 35 which stated that:

“[the punishment] requires sentence of death to be imposed on anyone convicted of murder, without regard to the circumstances of the offence or the offender or to any features which may tend to mitigate the gravity of the crime, and without giving the defendant any opportunity to address the judge and advance reasons why he does not deserve to die.”

During the early 20th century, debates were spawned in the UK regarding the abolition of the mandatory death penalty. Non-parliamentary bodies were established to advocate for the abolition of the punishment. One of those bodies was the National Council for the Abolition of the Death Penalty (NCADP). The NCADP argued about the lack of futility of the death penalty, and the fact that it was incongruous with what should obtain in a civilized society such as the UK (Knowles, 2015). However, the abolition of the death penalty in the UK was predominantly as a result of three cases in the 1950's that demonstrated the injustice of the imposition of the mandatory death penalty. These three cases revealed that the mandatory death penalty was being meted out to persons who were innocently convicted of murder and persons who committed murder but within extenuating circumstances. Following the executions of these three individuals, it was objectively realized that if there had been judicial inquiries into the circumstances of each case, the defendants would have been reprieved ([Knowles, 2015](#)). The cruelty, inhumanity and arbitrariness of the mandatory death penalty were therefore brought into sharp relief.

With a strong desire to prevent future recurrences of these injustices, Prime Minister of the UK Harold Wilson committed to abolishing the mandatory death penalty when his political party became the government in 1964. His government piloted the ([Murder \(Abolition of the Death Penalty\) Bill, 1964](#)) in Parliament. The Bill was passed in Parliament, and the ([Murder \(Abolition of the Death Penalty\) Bill, 1964](#)) became operative on 9 November 1965 ([Knowles, 2015](#)). This Act *provisionally* abolished the death penalty for murder in Britain for a five-year period and substituted it with a sentence of life imprisonment (section 1(1) of the ([Murder \(Abolition of the Death Penalty\) Bill, 1964](#))). However, it was not until 1969 that the death penalty was *permanently* abolished for murder and in 1998 for other serious offences such as treason, piracy and military offences through the entry into force of the ([Murder \(Abolition of the Death Penalty\) Bill, 1964](#)) and the ([Human Rights Act, 1998](#)). The latter Acts were effected to make the UK compliant with its international human rights obligations ([Knowles, 2015e](#)).

While efforts to abolish the death penalty were raging in the UK in the 1960's, most Caribbean colonies were preoccupied with securing political Independence from Britain. Jamaica and Trinidad and Tobago were the first two Caribbean countries to gain Independence from Britain in 1962, and other Caribbean countries followed suit in subsequent years until 1983. Each of these independent Caribbean countries adopted a written Constitution. These Constitutions typically contain “supremacy clauses”, which



proclaim that the Constitution is the supreme law of the nation and if any other law is inconsistent with the Constitution, that law should be rendered void to the extent of its inconsistency.

In an effort to ensure legal certainty, these independent Caribbean countries “saved” some British colonial laws, including the mandatory death penalty, as part of their legal systems ([Roodal v The State, Para. 67, 2003](#)). To this end, some of their Constitutions contain what are commonly referred to as “savings law clauses”. These savings law clauses supposedly have an immunizing effect insofar as their intent is to preserve the constitutional validity of pre-Independence laws, such as the mandatory death penalty, notwithstanding that such laws may be inconsistent with fundamental human rights provisions in Commonwealth Caribbean Constitutions ([Boyce and Joseph v R \(Barbados\), Para. 31-32, 2004](#)). A savings law clause can be located in *Trinidad and Tobago’s Republican Constitution 1976*.

Section 6 of the 1976 Constitution reads:

(1) *Nothing in sections 4 and 5 [the fundamental rights sections] shall invalidate—*

(a) *an existing law...*

(3) *In this section—*

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

Similar provisions can be found in the Independence Constitutions and the subsequently revised Constitutions of other Commonwealth Caribbean countries. However, not all Commonwealth Caribbean countries deployed such provisions to save the mandatory death penalty upon achieving Independence. Some Commonwealth Caribbean countries simply retained the punishment statutorily in the absence of constitutional savings law clause(s).

Interestingly, even though Britain abolished the mandatory death penalty for murder in 1969, most Commonwealth Caribbean countries continued to retain it as a punishment for murder for multiple years thereafter. These countries rationalized the retention of the mandatory death penalty by viewing it as a major deterrent to the high incidence of murders in the Commonwealth Caribbean ([Tittmore, 2004](#)). Notwithstanding, in the late 20th century and the early 21st century, the mandatory death penalty was being abolished in most Commonwealth Caribbean countries, primarily because of judicial rulings which invalidated the penalty on the basis that it was contrary to evolving universal human rights standards ([Reyes v The Queen, 2002](#)); ([The Queen v Hughes, 2002](#)); ([Fox v The Queen, 2002](#)); ([Watson v The Queen, 2004](#)); ([Pipersburgh v The Queen, 2008](#)).

As recent as 2018, Barbados became one of the last countries in the Commonwealth Caribbean to repeal the mandatory death penalty after it was declared unconstitutional by the CCJ ([Nervais & Severin v The Queen, 2018](#)). Presently, Trinidad and Tobago is the only country in the Commonwealth Caribbean that retains the mandatory death penalty for



murder. Consequently, persons are still mandatorily sentenced to death for murder in Trinidad and Tobago, even though an execution has not been carried out since 1999.

3.2. The Status of the Death Penalty Under International Law

Under international law there is no universally ratified international treaty which prohibits the death penalty. What exists are several international human rights treaties which restrict the use of the death penalty to limited circumstances. Treaties in the category are the International Covenant on Civil and Political Rights (“ICCPR”), the American Convention on Human Rights (“ACHR”) and the Arab Charter on Human Rights. However, (i) State practice and *opinion juris* relating to abolition, and (ii) regional and domestic courts which establish that the death penalty is violation of the prohibition of torture (a *jus cogens* norm) and other cruel, inhuman and degrading treatment, evidence that international law has evolved to encourage abolition of the death penalty.

The 1948 Universal Declaration of Human Rights (“UDHR”) is the first international instrument adopted by the United Nation (“UN”) that enshrines international human rights. Article 3 of the UDHR provides “Everyone has the right to life” and Article 5 provides “No one shall be subjected to cruel, inhuman or degrading punishment or treatment.” The UDHR is generally accepted as the foundation of international human rights law and many of its articles are regarded as customary international law. However, it is not clear whether Articles 3 and 5 of the UDHR were designed to capture a prohibition against the death penalty.

International human rights instruments adopted after the UDHR permit the death penalty in limited circumstances for the most serious crimes. Article 6 of the ICCPR enshrines the right to life. While Article 6 begins by protecting the right to life, it proceeds to recognize the death penalty as a permissible exception to the right to life. Article 6(1) provides “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. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.” Although Article 6(1) is permissive of the death penalty, it was not meant as a justification for the perpetuation of the death penalty, but to restrict its application until it was abolished. This abolitionist orientation of the ICCPR is supported by Article 6(4) that provides “nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Convention.”

The 1969 ACHR is the core regional human rights treaty between Organization of American States (OAS) Member States. Article 4(1) of the ACHR provides “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” Article 4(2) of the ACHR provides that “In countries that have not abolished the death penalty, it may be imposed only for the serious crimes ...” and Article 4(3) of the ACHR obligates States that have abolished the death penalty to refrain from its reintroduction.

The European Convention on Human Rights (“ECHR”) does not mention the element of the most serious crimes. However, Article 2- Right to Life mentions that “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.” Therefore, the ECHR allows for the death penalty. All three of these instruments were drafted in the late 1950’s when few States had embraced abolition of the death penalty. Therefore, the text of the instruments reflect this ethos by allowing the death penalty.

The Arab Charter on Human Rights 1994, like the ICCPR and the ACHR envisions the death penalty for the most serious crimes by providing in Article 6 that “[s]entence of death may be imposed for the most serious crimes in accordance with the law in force at the time of the commission of the crime and pursuant to a final judgement rendered by a competent court.”

Critically, international tribunals have repeatedly stated that the mandatory death sentence is a violation of the international human right to life. The UN Human Rights Committee (“HRC”), the monitoring body for the ICCPR, in ([Pagdayawon Rolando v Philippines, 2004](#)), explained that “the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of [the ICCPR], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.”

The Inter-American Court of Human Rights (“IACtHR”) in ([Hilaire, Constantine and Benjamin et Al. v. Trinidad and Tobago, 2001](#)) reaffirmed that the mandatory death penalty constitutes an arbitrary deprivation of life. The IACtHR in ([Boyce et.Al. v Barbados, 2007](#)) confirmed incompatibility of the mandatory death sentence with the ACHR stating:

“...capital punishment is not per se incompatible with or prohibited by [the ACHR]. However, the Convention has set a number of strict limitations to the imposition of capital punishment... limited to the most serious crimes ... the reference to “the most serious crimes” in Article 4(2) render the imposition of mandatory death sentences incompatible with such provisions where the same penalty is imposed for conduct that can be vastly different, and where it is not restricted to the most serious crimes.”

Several international developments support the view that international law has evolved to encourage the prohibition of the death penalty. These include but are not limited to (i) international custom (the trend of abolition) and UN General Assembly Resolution 62/’149 (the UN Moratorium on the Death Penalty), (ii) the emergence of the non-refoulment principle in situations exposing individuals to the real risk of the application of the death penalty; and (iii) the trend of international and domestic courts to examine the death penalty under the prohibition of torture and other cruel, inhuman and degrading treatment and punishment; thereby, the death penalty is categorized under a *jus cogens* norm.

First, international custom strongly supports the conclusion that the death penalty is incompatible with the right to life. The 2012 Report of the UN Secretary General, Question of the Death Penalty evidences state practice on abolition. The report states that approximately 150 of the 193 Member States have abolished the death penalty for all crimes and that in those States that retain it there is a general trend among them to restrict its use or to call for a moratorium on executions. By 2020 this number increased with some 170 States having



abolished or introduced a moratorium on the death penalty either in law or in practice. Evidence of *opinio juris* on the prohibition of the death penalty can be seen by the adoption of the 2011 and 2018 UN General Assembly Resolutions which called on retentionist States to establish a moratorium on executions, with a view to abolition ([United Nations General Assembly A/Res/65/206; A/Res/73/175, 2020](#)). In their submissions, several States showed support for abolition.

Second, the development of the non-refoulement principle in international law, that States which have abolished the death penalty should not expose persons to a real risk of its application, supports the argument that international custom is evolving to prohibit the death penalty. Additionally, the non-refoulement principle suggests that the death penalty is a violation of the right to life, and the right not be subjected to cruel, inhuman and degrading treatment.

Initially, the HRC in the decision of ([Kindler v. Canada \(Minister of Justice\), 1991](#)) did not find that Article 6 of the ICCPR extended to protect persons facing deportation where they were exposed to a real risk of the application of the death penalty. In ([Roger Judge v Canada, 2003](#)), the HRC reversed this position and found that Article 6 imposed an obligation on States Parties to the ICCPR, which have abolished the death penalty, not to deport or extradite persons to a country where they faced the real possibility of the application of the death penalty.

The HRC further opined that the global trend of abolition of the death penalty supported the view that an international consensus favoring prohibition of the death penalty has been established stating that:

“Since the decision in Kindler v Canada there has been broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out... the Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in a context and in light of the present-day conditions.”

The International Bar Association views the HRC’s decision in *Roger Judge* as evidence that “the human rights discourse around the death penalty is expanding.”

Third, as explored by Juan Méndez, former UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“CIDT”), there is a growing jurisprudential trend to treat the death penalty within the context of the prohibition of torture and CIDT ([Méndez, 2012](#)). The ability of States to impose the death penalty without violating the prohibition of torture and CIDT is becoming increasingly limited. The imposition of the death penalty can arguably be encompassed by Article 1.1 of the Convention Against Torture (“CAT”), which defines “torture” as “any act by which severe pain or suffering whether physical or mental, is intentionally inflicted on a person by, or with the instigation or consent of a public official or person acting in an official capacity, so as to intimidate, punish, or obtain information from the person, among other motives.” However, some international actors argue that Article 1 of CAT which defines “torture” “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions” and prevents the



death penalty from violating the prohibition against torture ([Sury, 2020](#)). The basis of this argument is similar to that of Article 6 of the ICCPR which limits but does not prohibit the use of the death penalty.

As one of the most universally recognized human rights, the IACtHR in ([Caesar v. Trinidad and Tobago, 2005](#)) “rightly acknowledged that the prohibition of torture as well as of other cruel, inhuman and degrading treatment, has entered into the domain of *jus cogens* [peremptory norm].”

Additionally, regional and domestic opinions suggest that the death penalty in all cases constitutes CIDT or even torture, regardless of methods or circumstances of implementation, or the particular individuals on which it is imposed.

The European Court of Human Rights (“ECtHR”) in ([Al-Saadon & Mufdhi v. the United Kingdom, 2010](#)) found that due to state practices overtime, the provision on the right to life had been amended so as to prohibit the death penalty in all circumstances and to make it a violation of the prohibition of torture and CIDT in Article 3 of the ECHR. The ECtHR stated:

“The Court emphasized that 60 years ago, when the Convention was drafted, the death penalty had not been considered to violate international standards. However, there had been a subsequent evolution towards its complete abolition, in law and in practice, within all the Members of the Council of Europe. Two Protocols to the Convention had thus entered into force, abolishing the death penalty in time of peace (Protocol 6) and in all circumstances (Protocol 13), and the United Kingdom had ratified them both. All but two Member States had signed Protocol 13 and all but three States which had signed it had ratified it. This demonstrated that Article 2 of the Convention had been amended so as to prohibit the death penalty, which involved the deliberated and premeditated destruction of a human being by the State authorities, causing physical pain and intense psychological suffering as a result of the foreknowledge of death, could be considered inhuman and degrading and, as such, contrary to Article 3 of the Convention.”

In ([A.I.\(X.W.\) v. Russia, 2015](#)) the ECtHR reaffirmed this jurisprudence in a case concerning the expulsion of a criminal suspect from Russia to China, where he faced a real risk of exposure to the death penalty. The ECtHR reasoned that Russia had undertaken to abolish the death penalty upon becoming a Member of the Council of Europe. The Court found that the death penalty had become an unacceptable form of punishment and this applied fully to Russia. Therefore, the applicant’s return to China would have been contrary to Articles 2 (the right to life) and 3 (the prohibition of torture).

Constitutional courts have likewise held that the death penalty in all circumstances is a violation of the prohibition of torture, cruel, inhuman and degrading treatment and punishment. For example, the Constitutional Court of South Africa in ([S v. Makwanyane Another, 1995](#)) had to decide whether the imposition of the death penalty violated the prohibition of cruel, inhuman and degrading treatment or punishment protected by section 11(2) of the Constitution. It stated:



“The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity, which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account...and giving the words of section 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning... the death penalty is indeed a cruel, inhuman and degrading punishment...and it follows that the [death penalty] must be held to be inconsistent with section 11 (2) [the prohibition of cruel, inhuman and degrading treatment and punishment] of the Constitution.”

Correspondingly, the Court of Appeal of Tanzania in ([Republic v. Mbushuu and Others, 1994](#)) held that the death penalty was a violation of the Constitution of Tanzania Article 13 (6), that stated “[i]t is prohibited to torture a person, to subject a person to inhuman treatment or degrading punishment.” In making this determination Justice F Mwalusanya wrote: “[e]ven if one takes into account the sensitivities of the people of Tanzania, one cannot escape the conclusion that the death penalty, taken as whole, is cruel, inhuman and degrading punishment. The various ugly aspects of the death penalty as amply demonstrated above, are apt to move the heart of even the stone-hearted.”

Other courts that have addressed the death penalty under constitutional prohibitions of torture and other cruel, inhuman and degrading treatment and punishment include the Canadian Supreme Court in ([United States v Burns, 2001](#)) and the Constitutional Courts of Albania, Hungary, Lithuania and Ukraine (cited in *Ocalan v. Turkey*, 2005, para. 159).

3.3. Judicial treatment of the mandatory death penalty by the JCPC and the CCJ

From the outset of the 21st century, the mandatory death penalty was being challenged constitutionally in Commonwealth Caribbean countries. Most of these challenges resulted in the JCPC adjudging the mandatory death penalty unconstitutional in countries such as Belize, St. Lucia, St. Kitts and Nevis and Jamaica on the basis that the imposition of the penalty violated the right not to be subjected to cruel and inhuman punishment or treatment ([Reyes v The Queen, 2002](#)) ([The Queen v Hughes, 2002](#)) ([Fox v The Queen, 2002](#)) ([Watson v The Queen, 2004](#)) ([Pipersburgh v The Queen, 2008](#)).

With respect to Trinidad and Tobago, the JCPC has oscillated between the mandatory death penalty being constitutional and unconstitutional over the years. However, a recent ruling from the JCPC has reaffirmed the constitutionality of the penalty in Trinidad and Tobago because of its protection by a constitutional savings law clause ([Jay Chandler v The State \(No. 2\) \(Trinidad and Tobago\), 2022](#)). This position is in contradistinction to the position adopted by the CCJ, which ruled in 2018 that the mandatory death penalty in Barbados was unconstitutional despite there being a similar savings law clause ([Nervais & Severin v The Queen, 2018](#)). This section juxtaposes these two divergent judicial approaches towards the mandatory death penalty exclusively from a human rights perspective.

The first monumental case decided by the JCPC regarding the mandatory death penalty in Trinidad and Tobago was ([Roodal v The State, 2003](#)). In this case, the appellant (a condemned man) contested the constitutionality of section 4 of the *Trinidad and Tobago OAPA 1925* which reads: “[e]very person convicted of murder *shall* suffer death.” The



appellant contended, amongst other things, that a mandatory death sentence contravened his right not to be subjected to cruel and unusual punishment under section 5(2)(b) of the *Trinidad and Tobago Constitution 1976*. The respondent argued that a mandatory death sentence is constitutional since it was safeguarded by a savings law clause under section 6(1) of the *Constitution*.

In a 3-2 decision, the majority construed section 4 of the OAPA in a manner which rendered it consonant with Trinidad and Tobago's international human rights obligations and ruled that a mandatory death sentence would be unconstitutional - notwithstanding its coverage by the savings law clause - owing to its inconsistency with the prohibition of cruel and inhuman punishment. Lord Steyn, speaking for the majority, stated ([Roodal v The State, Paras. 29-31, 2003](#)):

[29] "So far as possible the Constitution should also be interpreted so as to conform to the international obligations of Trinidad and Tobago...at the time of the murder, namely on 19-20 August 1995, Trinidad and Tobago was a party to the [ACHR]...The imposition of a mandatory death sentence is inconsistent with art 4 of the [ACHR] as explained by the [IACtHR] in its judgment in *Hilaire*...If possible, an interpretation consistent with the Convention should be adopted."

[30]-[31] "Moreover, Trinidad and Tobago is still a member of the [OAS]...Trinidad and Tobago is subject to the petition procedure before the [Inter-American Commission on Human Rights] for violations of the American Declaration...The Declaration contains a guarantee in art XXVI against cruel, infamous or unusual punishment. The Commission concluded...that a mandatory sentence of death was...in breach of art XXVI...A mandatory sentence of death is inconsistent with the international obligations of Trinidad and Tobago under the Declaration. An interpretation consistent with the international obligations of Trinidad and Tobago is to be preferred...For all these reasons the Board concludes that s 4 of the 1925 Act should be interpreted as providing for a discretionary life sentence."

Conversely, the dissenting minority opined that the mandatory death penalty was constitutional since it was shielded by a savings law clause, and therefore, it could not be invalidated by reliance on the prohibition of cruel or unusual punishment. They stated ([Roodal v The State, Paras. 101-103, 2003](#)):

[101]-[102] "...the majority argue that so far as possible the Constitution should be interpreted so as to conform to the international obligations of Trinidad and Tobago. The only provision to whose interpretation those international obligations might have relevance is s 5(2)(b), preventing cruel and unusual punishments...On the other hand, s 6(1)(a) [the savings clause] is of general application; it covers all the various rights in ss 4 and 5...The international obligations of Trinidad and Tobago in relation to the death penalty are therefore not a consideration which can affect its interpretation...In these circumstances any obligation to interpret the Constitution, so far as possible, so as to conform to the country's international obligations would not bite..."



[103] “...s 6(1)(a) is there, for sound reasons, to prevent existing laws being held void...by reference to the rights in ss 4 and 5. That being so, [the mandatory death penalty] cannot be invalidated by reference to s 5(2)(b) of the Constitution.”

Rivetingly, in the Trinidadian case of (*Matthew v The State*, 2004a) and the Barbadian case of (*Boyce and Joseph v R (Barbados)*, 2004), an enlarged nine-member JCPC panel revisited the legality of the mandatory death penalty. These cases were adjudicated on the same day considering their similar factual matrices and identical outcomes. Therefore, to avoid repetition, only (*Matthew v The State*, 2004b) will be examined since Trinidad and Tobago is the primary focus of this paper.

The central issue was whether the mandatory death penalty could be invalidated by the “supremacy clause” in section 2 of the 1976 *Constitution* by virtue of its inconsistency with fundamental human rights provisions. In a 5-4 decision, the JCPC overturned the ruling in (*Roodal v The State*, 2003) and affirmed the constitutional legitimacy of the mandatory death penalty. The majority held that even though the mandatory death penalty violates the right to life and is a cruel and unusual punishment, it is still constitutional because of its special protection by the savings law clause.

Lord Hoffman in writing the majority decision noted (*Matthew v The State*, Para. 1-7, 2004b):

[1]-[3] “...The law decreeing the mandatory death penalty was an existing law at the time when the Constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with ss 4 and 5 [the fundamental rights sections]. It follows that...it remains valid...[the savings clause] stands there protecting the validity of existing laws until such time as Parliament decides to change them...”

[6]-[7] “The result is that although the existence of the mandatory death penalty will not be consistent with a current interpretation of ss 4 and 5, it is prevented by s 6(1) [the savings clause] from being unconstitutional. It will likewise not be consistent with the current interpretation of various human rights treaties to which Trinidad and Tobago is a party. Their lordships have anxiously considered whether there is some possible construction of the Constitution which would avoid these results and have concluded that none exists...It follows that the decision as to whether to abolish the mandatory death penalty must be, as the Constitution intended it to be, a matter for the Parliament of Trinidad and Tobago...The effect of today’s decision is to overrule the recent case, *Balkissoon Roodal v The State*...Henceforth the death sentence for murder will continue to be mandatory...”

However, the minority believed that the mandatory death penalty is unconstitutional on the footing that, amongst other things, it is in contravention of fundamental human rights. The minority explained that (*Matthew v The State*, Para. 35-36, 2004b):

[34] “...It is in our opinion clear that the interpretation of the 1976 Constitution of Trinidad and Tobago which commends itself to the majority does not ensure the



protection of fundamental human rights and freedoms, degrades the dignity of the human person and does not respect the rule of law..."

[36] *"...the State accepts that the mandatory death penalty for murder amounts to 'cruel and unusual treatment or punishment' within the meaning of the Constitution...It may seem surprising that the respondent State should strive to uphold a right to subject its citizens to what it acknowledges to be cruel and unusual treatment or punishment, but that is what it seeks to do and what the majority hold it is entitled to do..."*

After canvassing the international obligations of Trinidad and Tobago under various human rights conventions, the minority further explained that ([Matthew v The State, Paras. 59-63, 2004b](#)):

[59]-[60] *"It is in our opinion clear that the effect of reversing Roodal is to put the State in breach of its international obligations under the [UDHR], the [ICCPR], the American Declaration and the [ACHR]...In acknowledging, as it does, that imposition of the mandatory death penalty is cruel and unusual treatment or punishment, the State must indeed be taken to admit these breaches of its international obligations. For the foregoing reasons we would modify s 4 of the 1925 Act..."*

[61]-[63] *"The effect of the modification is to convert the mandatory death penalty into a discretionary death penalty...The result of reversing Roodal is to replace a regime which is just, in accordance with internationally-accepted human rights standards and...workable by one that is unjust, arbitrary and contrary to human rights standards accepted by the State."*

As mentioned previously, the JCPC had likewise upheld the constitutionality of the mandatory death penalty in Barbados ([Boyce and Joseph v R \(Barbados\), 2004](#)). In 2005, Barbados replaced the JCPC with the CCJ as its final appellate court ([Caserta, S., Madsen, 2016](#)), and the mandatory death penalty remained on Barbados' statute book for quite some time. However, this changed in 2018 when the CCJ in ([Nervais & Severin v The Queen, 2018](#)) decided on the legal status of the mandatory death penalty for the first time.

In ([Nervais & Severin v The Queen, 2018](#)), the CCJ had to consider whether the mandatory death penalty in Barbados - previously located in section 2 of the *OAPA 1994* - was unconstitutional because it breached fundamental rights under the *Constitution*, namely, the right to protection of the law, the right to life, the right not to be subjected to cruel and inhuman punishment and the right to a fair trial or whether it was preserved by the savings law clause in section 26 of the *Constitution* and was therefore immune from constitutional challenge.

Ultimately, the majority found that the mandatory death penalty was unconstitutional because, amongst other things, it represented a violation of the fundamental human rights, whereas the lone dissenting judge, Justice Anderson, considered the punishment to be unconstitutional solely because it breached the separation of powers principle. However, only the judicial analysis surrounding the violation of human rights will be discussed.



The CCJ supported the decision in ([Roodal v The State, 2003](#)) and overruled the decision in ([Boyce and Joseph v R \(Barbados\), 2004](#)) and ([Matthew v The State, 2004b](#)). The majority of the CCJ stated ([Nervais & Severin v The Queen, Para. 58-117, 2018](#)) :

[58] - [59] *“The general saving clause [section 26] is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned...With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights...”*

[68] *“We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution...In our view, the Court has the duty to construe [existing laws], with a view to harmonizing them, where possible, through interpretation...by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights...”*

[117] *“The Court by majority declares that s 2 of the OAPA is inconsistent with [the right to protection of the law], [the right to life], [the right not to be subjected to cruel and inhuman punishment] and [the right to a fair trial] of the Constitution of Barbados to the extent that it provides for a mandatory sentence of death.”*

After the judgement in ([Nervais & Severin v The Queen, 2018](#)), Barbados abolished the mandatory death sentence and replaced it with a discretionary death sentence in 2018 ([Offences Against the Person \(Amendment\) Act, 2018](#)).

Deriving inspiration from the CCJ’s decision in ([Nervais & Severin v The Queen, 2018](#)), lawyers called upon the JCPC to reconsider the constitutionality of the mandatory death penalty in Trinidad and Tobago and to overrule the decision in ([Matthew v The State, 2004b](#)). Consequently, in 2021 the JCPC heard the case of ([Jay Chandler v The State \(No. 2\) \(Trinidad and Tobago\), 2022](#)). In May 2022, the JCPC unanimously upheld the decision in ([Matthew v The State, 2004](#)) and reaffirmed the constitutional validity of the mandatory death penalty in Trinidad and Tobago.

While the JCPC acknowledged that the mandatory death penalty offends against the right not to be subjected to cruel and unusual punishment, it reasoned that the punishment is safeguarded against constitutional challenge by the savings law clause and that it is the responsibility of Parliament, and not the courts, to modify or repeal such punishment to avoid any disconformity with the fundamental rights in the 1976 *Constitution*.

The JCPC observed ([Jay Chandler v The State \(No. 2\) \(Trinidad and Tobago\), Para. 12-74, 2022](#)):

[12] *“It is not in dispute that a mandatory death sentence for murder...is a cruel and unusual punishment... [the “supremacy clause”] would therefore invalidate it because it*



would contravene [the prohibition of cruel and unusual punishment] unless [the saving clause] applies to save it as existing law...”

[68]-[74] “...the Board is not persuaded by the judgments of the CCJ in *Nervais*...that *Matthew* was wrongly decided or that the law went in a wrong direction in that decision...the meaning of the savings clause does not change over time, unlike the general statements of rights and freedoms in [the fundamental rights provision] which...can adapt to changes in a society’s understanding of those rights and freedoms...”

After making these observations, the JCPC concluded that ([Jay Chandler v The State \(No. 2\) \(Trinidad and Tobago\), Para 96-98, 2022](#)):

[96]-[98] “...the 1976 Constitution saves existing laws, including the mandatory death penalty, from constitutional challenge. The consequence of that is that the state of Trinidad and Tobago has a statutory rule which mandates the imposition of a sentence, which will often be disproportionate and unjust. The sentence is recognized internationally as cruel and unusual punishment. The state does not dispute that characterization...Nonetheless, such a provision is not unconstitutional. The 1976 Constitution has allocated to Parliament, as the democratic organ of government, the task of reforming and updating the law, including such laws.”

Considering the above, the JCPC’s posture in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)) starkly remain at variance with the CCJ’s posture in *Nervais & Severin* (2018). These two conflicting approaches regarding this human rights issue have polarized Commonwealth Caribbean societies. Staunch human rights defenders favor the CCJ’s approach, whereas conservatives favor the JCPC’s approach.

The authors advance arguments in defence of human rights to show why the CCJ’s approach in ([Nervais & Severin v The Queen, 2018](#)) should be preferred over the JCPC’s approach in ([Matthew v The State, 2004b](#)) and ([Chandler, 2022](#)).

Firstly, it is universally recognized that human rights are inalienable. This principle means that human rights should not be taken away, except in specific situations and according to due process ([United Nations Office of the High Commissioner for Human Rights, 2022](#)). However, the imposition of the mandatory death sentence amounts to an arbitrary deprivation of the right not to be subject to cruel and inhuman punishment *without due process* ([Hilaire, Constantine and Benjamin et Al. v. Trinidad and Tobago, pp. 36, 2001](#)). This absence of due process is due to the condemned person not being afforded an opportunity to be heard as to why a less extreme sentence should be passed on them.

For the principle of inalienability of human rights to have any weight or value, individuals should *fully* benefit from their rights, and their rights should only be abridged or suspended if there is a reasonable justification for doing so; for example, if those rights have to yield to an overriding public interest. However, with the mandatory death penalty, a condemned person is deprived of the full enjoyment of their right not to be subjected to cruel and inhuman punishment, not because there is a reasonable justification for this deprivation, but simply because it is a punishment that was “saved” from a colonial system.



The authors argue that if the inalienability of human rights is to mean anything, an arbitrary deprivation of a human right without any reasonable justification has to be viewed as no real or full benefit of that right at all. To grant a human right to a person under normal circumstances with one hand, and then arbitrarily divest the same person of that human right when they are condemned with the other hand, is to frustrate the principle of inalienability of human rights.

The authors submit that the JCPC's decisions in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)) fly in the face of the universal principle of inalienability of human rights. However, the CCJ's decision in ([Nervais & Severin v The Queen, 2018](#)) pays the necessary homage to this principle and should therefore be considered more palatable from a human rights viewpoint.

Secondly, Commonwealth Caribbean countries are liberal constitutional democracies. The security of the rule of law and human rights is an earmark of any liberal constitutional democracy. There are two conceptions of the rule of law, viz., (i) the formal conception, which focuses on the form and procedural requirements of the law, and (ii) the substantive conception, which focuses on the substance of the law ([Deinhammer, p. 35, 2019](#))

The formal conception requires, amongst other things, that the law be certain. The JCPC in ([Chandler, pp. 64-66, 2022](#)) invoked this conception to argue that overruling the decision in ([Matthew v The State, 2004](#)), which legitimised the mandatory death penalty in Trinidad and Tobago for almost two decades, would generate tremendous legal uncertainty.

The authors argue that this is an unconvincing basis for failing to overturn the decision in ([Matthew v The State, 2004](#)) for two reasons. First, the principle of legal certainty should not be used to justify a court's failure to overrule a previous judicial decision that was erroneously decided, particularly when human rights are at stake. If a decision such as ([Matthew v The State, 2004](#)) proves to be misguided in law, especially human rights law, it should be corrected to prevent future injustices regardless of how long it has existed as binding authority. Second, the common law has always been dynamic instead of static. Therefore, notwithstanding the general rule that the law must be certain, this must be properly balanced against the requirement for the common law to be responsive to contemporaneous human rights standards.

Critically, by over-emphasizing the formal conception of the rule of law in ([Chandler, 2022](#)), the JCPC neglected the substantive conception of the rule of law. As was posited by Lord Bingham, this substantive conception requires: (i) the law afford adequate protection to fundamental human rights; and (ii) compliance by the state with its obligations in international law ([Bingham, 2007](#)).

If the JCPC accepts that the common law must be certain, then it should also accept, or at a minimum consider, that the common law must adequately protect fundamental human rights. However, in ([Matthew v The State, 2004b](#)) and ([Chandler, 2022](#)), the JCPC failed to adequately protect the right not to be subjected to cruel and unusual punishment. Additionally, the JCPC failed to interpret the 1976 *Constitution* in a manner that would make Trinidad and Tobago compliant with its international human rights obligations.



Comparatively, the CCJ's approach in ([Nervais & Severin v The Queen, 2018](#)) protects fundamental human rights and pays deference to the State's international human rights obligations when interpreting the Constitution. Put simply, the JCPC's approach dismissed the substantive conception of the rule of law, whereas the CCJ's approach advanced this substantive conception.

A major problem with the JCPC's approach is that exclusive reliance on the formal conception of the rule of law would allow atrocious human rights abuses to be lawful without providing any protection against those abuses ([Raz, p. 221, 1979](#)). Accordingly, the JCPC's approach in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)) permits the imposition of the mandatory death penalty and does not provide any adequate protection for condemned persons or their right not to be subjected to cruel and unusual punishment, whilst the CCJ's approach in ([Nervais & Severin v The Queen, 2018](#)) shielded condemned persons and their human rights from the brutal effects of the imposition of the mandatory death penalty. Clearly, from the lens of international human rights, the CCJ's approach is preferable.

Finally, in the Commonwealth Caribbean, the judiciary is the putative guardian of the fundamental human rights. The Constitution is merely a document that, amongst other things, embodies the fundamental rights of individuals. Therefore, the Constitution, by itself, is incapable of protecting or fully protecting fundamental rights. Hence, there is a constitutional duty conferred on the courts to interpret and jealously guard fundamental rights.

In this respect, the authors endorse the majority opinion in ([Roodal v The State, Para. 34, 2003](#)) that:

"The Constitution itself has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament."

When a court is confronted with the conflict between human rights and a "saved"/existing mandatory death penalty, it will be constrained to protect one or the other because the protection of both is therefore mutually exclusive. This is because the protection of the relevant human rights will necessitate the invalidation of the mandatory death penalty, and the protection of the mandatory death penalty will inevitably mean that the relevant human rights will become vulnerabilities.

From the line of cases, both the JCPC and the CCJ had the opportunity to either afford human rights or the mandatory death penalty their judicial protection. The JCPC in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)) correctly *acknowledged* that the mandatory death sentence in Trinidad and Tobago infringes on the right not to be subjected to cruel and unusual punishment. However, mere *acknowledgement* of an infringement of a fundamental right cannot be equated to the *protection* of that right. The JCPC failed to actually *protect* the fundamental right not to be subjected to cruel and unusual punishment when: (i) it held that the mandatory death penalty was constitutional notwithstanding its inconsistency with the said right; and (ii) it intimated that its hands were tied and stated that it was for Parliament



to modify or abrogate the mandatory death sentence to bring it into conformity with the said right.

Conversely, the CCJ in ([Nervais & Severin v The Queen, 2018](#)) not only acknowledged that the mandatory death penalty contravened fundamental human rights, but proceeded to strike down the law because it violated those rights. Thereby, the CCJ properly discharged its constitutional duty to be the guardian of fundamental human rights.

The effect of the JCPC's decisions in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)) is that Trinidad and Tobago could perpetually retain the mandatory death penalty and recommence the execution of condemned persons at any point in the future if it so desires. This is the effect even though the mandatory death penalty is universally recognized as a punishment that is unjust, torturous, cruel, inhuman, degrading and barbaric, and even though it is largely accepted that this punishment should have no place in liberal constitutional democracies.

Although condemned persons have not been executed in Trinidad and Tobago for over two decades, the mere retention of the mandatory death sentence evinces this country's unwillingness to respect, protect and fulfil the fundamental human right of condemned persons not to be subject to cruel and unusual punishment. The burning question, then, is - how can this regrettable state of affairs be remedied?

Since the JCPC is the final court of appeal for Trinidad and Tobago, its decision in ([Chandler, 2022](#)) is binding and cannot be reversed by any other court. Moreover, considering that the JCPC has consistently upheld the constitutionality of the mandatory death penalty in Trinidad and Tobago beginning in ([Matthew v The State, 2004](#)), it is highly unlikely that the JCPC will depart from its current position in ([Chandler, 2022](#)) in the near future or at all. It is evident that there is only one solution at this juncture, that is, the Parliament of Trinidad and Tobago has to volitionally abolish the mandatory death penalty. The prospect of this occurring anytime soon is quite slim given that Trinidad and Tobago has defended the constitutionality of the mandatory death penalty for almost two decades.

However, there is the possibility that the Parliament of Trinidad and Tobago will have a change of heart to finally change this law. The authors hope that the Parliament of Trinidad and Tobago will eventually realize that the mandatory death penalty, and not individuals, should be condemned. The authors further hope that the Parliament of Trinidad and Tobago will understand that it should no longer retain a punishment which arguably violates the *jus cogens* rule prohibiting torture or CIDT. Perhaps, just perhaps, the Parliament of Trinidad and Tobago will reflect and take action to repeal the mandatory death penalty once and for all!

4. Conclusion

The tensive relationship between the mandatory death penalty and fundamental human rights has beset the Commonwealth Caribbean, and continues to beset Trinidad and Tobago in particular, for more than half a century. Virtually all countries, courts and international human rights bodies have unconditionally accepted that the mandatory death penalty contravenes fundamental rights. However, the disturbing retention of the mandatory



death penalty in Trinidad and Tobago has been validated by the JCPC in ([Matthew v The State, 2004](#)) and ([Chandler, 2022](#)). In addressing the conflict between the savings law clause and the mandatory death penalty on the one hand, and fundamental human rights on the other hand, the JCPC continues to support an approach to constitutional interpretation that accords greater protection to the savings law clause and the mandatory death penalty while subverting fundamental human rights. The JCPC's failure to follow the CCJ's approach in ([Nervais & Severin v The Queen, 2018](#)), which respects, protects and fulfils human rights, has conclusively shown that this conundrum can only be solved if the Parliament of Trinidad and Tobago abolishes the mandatory death penalty. This abolition is long overdue!

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