IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 214 OF 2007

ANTHONY BOWEN
and
DAVID JONES **Claimants**

AND

THE ATTORNEY GENERAL OF BELIZE **Defendant**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Antoinette Moore SC for the claimants.
Ms. Priscilla Banner, Crown Counsel, for the defendant.

—

JUDGMENT

Introduction and Background

In these proceedings, the claimants Anthony Bowen and David Jones, are seeking redress under section 20 of the Belize Constitution in respect of sentences of life imprisonment passed on them after their conviction for the offence of murder. They now seek by their Amended Claim Form the following relief:

1. *A declaration that the claimants have been subjected to inhuman punishment in breach of their rights under sections 4 and 7 of the Constitution in that, despite being juveniles at the time the crimes for which they were convicted were committed, they were sentenced to life imprisonment by a court which did not have any discretion to impose a lesser penalty upon them.*

2. *A declaration that claimant Anthony Bowen has been subjected to inhuman punishment and treatment in breach of his rights under section 7 of the Constitution in that, he was originally erroneously sentenced to death despite having been a juvenile at the time of the offence for which he was convicted.*

3. *An order quashing the said sentences of life imprisonment of both claimants.*

4. *An order substituting a lesser fixed term sentence for each of the sentences of life imprisonment.*

5. *Further or other relief under section 20(1) of the said Constitution as may seem appropriate to the Court.*

6. *And costs.*

2. In support of their claim, Messrs. Bowen and Jones filed three affidavits: two by Mr. Bowen and one by Mr. Jones.

3. Although the present claim is a joint one relating to both claimants, the offence of murder for which each of them was convicted and the sentences of life of imprisonment imposed on each were not related. They had been tried on different dates and sentenced at different time.

4. In the case of the claimant, Anthony Bowen, he was convicted for murder on 9th August 1995, which offence he had committed on 31 December 1993. He was at the time of the commission of the offence seventeen years old: his date of birth being 17th February 1976. He was therefore a minor on the date of the offence but at the time of his trial and conviction in 1995 he was then nineteen years old. The trial judge however sentenced him to death on 9th August 1995.

5. Bowen appealed both his conviction and sentence to the Court of Appeal. His appeal against conviction was denied but his death sentence was quashed and a sentence of life imprisonment was then substituted. (See judgment of the Court of Appeal - Telford Georges P, Horace Young and Nicholas Liverpool JJA in Criminal Appeal No. 14 of 1995, delivered on 3rd April 1996).

6. On the conviction of Bowen in 1995, the death sentence was originally pronounced on him. Against that sentence on appeal, the Court of Appeal substituted life imprisonment in its judgment delivered on 3rd Aril 1996. This judgment came hard on the heels of the Court of Appeal's decision in **Melendez (1994) 3 BZ LR 289, Cr. App. No. 9 of 1996**, in which it had struck down the then section **151(2) of Indictable Procedure Act**, and utilizing section 102 of the Criminal Code as amended, recorded the fact that the appellant (Melendez) was under the age of 18 at the time he committed the murder as a special circumstance and imposed instead of detention during Her Majesty's pleasure, a sentence of life imprisonment. The Court of Appeal found that detention during Her Majesty's Pleasure

as provided in section 151(2) offended the principle of separation of powers as it transferred impermissibly to the Executive the fixing of the sentence of the appellant Melendez. At the time of Mr. Bowen's appeal the current section 146(2) of the Indictable Procedure Act had not been enacted. It was only enacted in 1998 – by Act No. 18 of that year. Therefore the Court of Appeal in substituting life imprisonment for the sentence of death that had been imposed in him stated:

> *"The change effected by Melendez (supra) should not result in a sentence being passed on the appellant Bowen which would be severer in degree than the sentence which could have been passed at the date of the commission of the crime. Accordingly the sentence of death should not have been pronounced on the appellant Bowen. A sentence equivalent in effect to the sentence which could have been pronounced then can be pronounced.*
>
> *Accordingly the sentence of death pronounced at the trial is quashed and a sentence of life imprisonment substituted."*

(Emphasis added by which it is reasonable to infer that the Court of Appeal was of the view that detention during Her Majesty's Pleasure, a sentence which it had struck down in **Melendez**, was equivalent in effect, to life imprisonment – see later on this paras. 64 – 68 of this judgment). **Melendez**, it may be noted, was decided on the 7th February 1995 and **Bowen** was sentenced to life imprisonment on the 3rd April 1996).

7. The Court of Appeal therefore quashed the death sentence originally imposed on Bowen and substituted a sentence of life imprisonment.

8. In the case of claimant Mr. David Jones, he was sentenced to life imprisonment on 30th October 2001 for the offence of murder. The **date of the commission** of the offence is however, nowhere stated in Jones' affidavit even after stating the date of his birth and his averment that at the time of the offence he was a minor of 16 years and at para. 7 of his affidavit, that he was "a juvenile at the time of the offence."

9. I should state that it is the duty of a party or his attorney to put before the court the **exact date of the claimant's commission of the offence** if at that date the claimant was a juvenile. This is the whole basis of any claim that a **mandatory life imprisonment**, as in the instant case, should not have been imposed. It is this **date of the commission of the offence** and a **claimant's date of birth**, that would be determinative of the issue of being a juvenile and the propriety of any mandatory **sentence of life imprisonment** imposed on conviction.

10. It is no wonder that Ms. Priscilla Banner in the "Defence" for the defendant at para. 5 *"puts the claimants to strict proof of the assertion that both claimants are minors, which is not admitted."*

11. Neither Jones nor his attorney gave the court the date of the commission of the offence of murder for which he was convicted on 30th October 2001 and sentenced to life imprisonment. However, against that conviction and sentence, Jones appealed to the Court of Appeal in **Crim. App. No. 20 of 2001**. On 28 June 2002, the Court of Appeal dismissed Jones' appeal and confirmed the mandatory life sentence that had been imposed upon him by the trial judge on 30th October 2001.

12. It was only from a study of the Court of Appeal's judgment that I was, in fact, able to discern that the **date of the commission of the offence of**

murder for which Jones was tried, convicted and sentenced to life imprisonment, was **26th April 2000**.

13. This date, 26th April 2000, when put alongside Jones' date of birth, **1st August 1983**, made him clearly a minor or juvenile, **on the date of the commission of the offence of murder** for which he was given the life sentence.

14. It is against this background that the claimants have launched the present proceedings. In particular, they claim that despite being juveniles at the time the crimes (murder) for which they were convicted were committed, they were sentenced to life imprisonment by a court which did not have any discretion to impose a lesser penalty upon them. This, they therefore claim, was a breach of their rights under **sections 4 and 7** of the Belize Constitution.

15. it is further claimed in respect of Anthony Bowen, that he has been subjected to inhuman punishment and treatment in breach of his rights under **section 7** of the Constitution in that, he was originally erroneously sentenced to **death** despite having been a juvenile at the time of the offence (murder) for which he was convicted.

16. In short, the claimants now seek to impugn the **sentences of life imprisonment** imposed on them.

17. In the case of Bowen, the **sentence of life imprisonment** was substituted by the Court of Appeal in place of the death sentence that had been imposed on him on his conviction. I have explained at para, 6 above why this was done: this was in lieu of his incarceration at Her Majesty's pleasure, which the Court of Appeal had held in **Melendez** supra, to be

unconstitutional. The Court of Appeal therefore in upholding Bowen's conviction, substituted **imprisonment for life**.

18. In the case of Jones, the Court of Appeal having dismissed his appeal against his conviction upheld the **sentence of life imprisonment** that had been imposed by the trial judge.

19. It is manifest in both cases that the claimants were, **at the time of the commission of their respective crimes of murder**, juveniles or minors.

What this case is about

20. This case is about the compatibility with the Constitution of Belize and Article 37(a) of the Convention on the Rights of the Child of the life imprisonment sentences imposed on the claimants on their conviction for the offence of murder. Although it may sound like an appeal against their sentences, I must make it clear that I do not sit as an appellate court for the purposes of this case, and I certainly do not have the power to review by way of an appeal, a sentence substituted by the Court of Appeal. The claimants have however pitched their case as one for redress under section 20 of the Constitution that the sentences of mandatory life imprisonment imposed on them transgress certain of the provisions of the Belize Constitution protecting fundamental rights and freedoms contained in its Part II.

21. ***Constitutional Provisions relied upon to impugn the life imprisonment sentences imposed on the claimants***

It is pertinent to set out the provisions of the Constitution the claimants have invoked in these proceedings to impugn the sentences of life

imprisonment imposed upon them. These are sections 4 and 7 of the Belize Constitution.

22. Section 4 provides in terms:

> *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.*
>
> *(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable –*
>
> *(a) for the defence of any person from violence or for the defence of property;*
>
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
>
> *(c) for the purpose of suppressing a riot, insurrection or mutiny; or*
>
> *(d) in order to prevent the commission by that person of a criminal offence.*

23. **Section 7** provides as follows:

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

24. I must say straight away that from a perusal of the textual provisions of section 4, it is manifest and of this I am satisfied, that this section of the Constitution is not engaged in this case. Section 4 guarantees the protection of **the right to life** of everyone in Belize. This right to life is, without doubt, the most elemental of the rights guaranteed and protected in Part II of the Constitution. A person can only be deprived of this most elemental of human rights in the circumstances provided in section 4.

25. I do not understand the claimants to be arguing that they have been deprived of this primordial right or that they are threatened with its deprivation. The fact that they are alive and are able to press this present claim is, in my view, a telling manifestation that the defendant or anyone for that matter, has not infringed or violated their section 4 right. Ms. Antoinette Moore SC the attorney for the claimants, in presenting their case properly abandoned this ground of their claim.

26. *The Gravamen of the claim*

The gravamen of the claimants' case, however, is that the imposition of sentences of life imprisonment on them for the offence of murder for which they were convicted, was a breach of their right under section 7 of the Constitution, which guarantees to everyone protection **against torture or inhuman or degrading punishment or other treatment**. This they claim is so because on the date of the commission of the offence for which they were convicted, they were at that time juveniles. Therefore they argue the imposition of life sentences on them offended section 7 of the Constitution.

27. The nub of the claimants' case, therefore, is that because they were minors or juveniles at the time of their offences, they should not have received **the life sentences** imposed upon them and that therefore their sentences are not only **not in conformity with the Constitution of Belize but also in breach of international Human Rights law, in particular, the United Nations Convention on the Rights of the Child**.

28. In particular, the claimants contend that **section 146(2) of the Criminal Procedure Act** Chapter 91 of the Laws of Belize, Revised Edition 2003, is repugnant to the Constitution of Belize and incompatible with **Article 37(a) of the UN Convention on the Rights of the Child (CRC)** given the definition of a child in Article 1 of the CRC. And that this is more so as Belize was among the first member states of the UN, to ratify the CRC on 2nd September 1990 and enacted provisions in the **Families and Children Act** – Chapter 173 of the Laws of Belize, Revised Edition 2003 relating to the CRC: see for example, **section 3 and the related First Schedule of the Act** and **section 149** on promoting, monitoring and evaluating the implementation of the CRC.

29. It is further contended for the claimants that **section 146(2)** of the Indictable Procedure Act, as it stands, makes the **imposition of a life sentence on a minor or juvenile convicted for murder mandatory**, thereby disabling the sentencing court from taking into account any other extenuating circumstances other than age, in imposing sentence. That is to say, **life sentence for a minor/juvenile convicted of murder is mandatory** in contradistinction from a **discretionary life sentence**.

30. In point of fact, although Bowen was sentenced to life imprisonment by the Court of Appeal in substitution for the death sentence that had been originally imposed on him on his conviction after the former section 151(2) of the Indictable Procedure Act which had provided for detention during

Her Majesty's pleasure for convicted juveniles had been struck down in **Melendez** supra, but **before** the extant section 146(2) of the Indictable Procedure Act was enacted, the Court of Appeal did say that **it was imposing the life sentence as equivalent in effect to the sentence that could have been pronounced** by the trial judge. Therefore, it is fair to say that Bowen's life imprisonment is the equivalent provided for in section 146(2) of the Indictable Procedure Act.

31. It is in this sense that I understand and take the focus in this judgment on section 146(2) of the Indictable Procedure Act in relation to the mandatory life imprisonment it provides for juveniles convicted for murder which the claimants seek to impugn.

32. *The Case for the Defendant*

The defendant on the other hand, opposed the grant of any of the relief sought by the claimants. Ms. Priscilla Banner, the Crown Counsel for the defendant, argued and submitted that the sentences of life imprisonment imposed on them were not unconstitutional as section 146(2) of the Indictable Procedure Act was introduced by an amendment to the Act in 1998. This as I have noted at para. 6 above was a direct result of the judgment of the Court of Appeal in **Melendez supra**, in which it had held that imprisonment at Her Majesty's Pleasure of a minor convicted for murder, was untenable in the light of the scheme of the Belize Constitution on the separation of powers between the Executive and the Judiciary. Such a sentence had been permissible under **section 151(2)** of the Indictable Procedure Ordinance.

33. The amendment was effected by Act No. 18 of 1998. It became **section 146(2) of the Indictable Procedure Act**. This provides in terms as follows:

> ***"146(2) Sentence of death shall not be pronounced on or recorded against a person convicted of a crime if it appears to the Court that at the time when the crime was committed he was under the age of eighteen years but in lieu thereof the Court shall sentence him to imprisonment for life."***

34. This provision of the Indictable Procedure Act, it is manifest, is at the heart of this case: the claimants contend that the life sentences imposed upon them are unconstitutional and contrary to the CRC; while it is contended for the defendant that section 146(2) speaks to the intention of the Legislature, that is to say Parliament intended the court to impose a life sentence on a minor convicted for murder.

35. Therefore Ms. Banner with some force, argued and submitted that the law on life sentence on minors convicted for murder is not unconstitutional, particularly in the light of the presumption of legality in favour of Acts of Parliament.

36. She relied in this regard on a statement by the Lord Chancellor in delivering the judgment of the Privy Council in **Shell Co of Australia Ltd v Federal Commissioner of Taxation (1930) 44 CLR 530** who, at p. 545 quoted Issacs J of the High Court of Australia:

> *"They* (that is their Lordships in the Privy Council) *agree with him when he says that unless it becomes clear beyond reasonable doubt that the legislation in question transgressed the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will."*

Ms. Banner also prayed in aid the statement of the presumption of legality in favour of Acts of Parliament when a court is taxed, as I am in the instant case, to review the constitutionality of legislation or sections of legislation. Justice Issacs of the Australian High Court stated the position thus in **The Federal Commissioner of Taxation v Munro and British Imperial Oil Co Ltd v The Federal Commissioner of Taxation (1926) 38 CLR 153** at 180:

> *It is always a serious and responsible duty to declare invalid, regardless of consequences, what the national Parliament, representing the whole people … has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety or expediency – as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us – the question is: Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim Ut res magis valeat quam pereat. Nullification of enactments and confusion of public business are not lightly to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will. Construction of an enactment is ascertaining the intention of the legislature from the words it has used in the*

circumstances, on the occasion and in the collocation it has used them. There is always an initial presumption that Parliament did not intend to pass beyond constitutional bounds. If the language of a statute is not so intractable as to be incapable of being consistent with this presumption, the presumption should prevail. That is the principle upon which the Privy Council acted in Macleod v Attorney-General for New South Wales ((1891) AC 455). It is the principle which the Supreme Court of the United States has applied, in an unbroken line of decisions, from Marshall C.J. to the present day (see Adkins v Children's Hospital) (1923) 261 US 525 at p. 544.

37. I respectfully say that I entirely agree with these sage words, they can hardly be dissented from, there is therefore always present the initial presumption of legality in favour of legislation.

38. Having said this, however, I am convinced and satisfied that a court in Belize, when faced with a piece of legislation that is sought to be impugned as infringing some fundamental human rights provisions of the Constitution as the claimants in the instant case contend against section 146(2) of the Indictable Procedure Act, must always bear in mind the constitutional imperative stated in **section 2** of Belize Constitution:

> ***"This Constitution is 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."***

39. Therefore making due allowance for the presumption of legality in favour of **section 146(2)**, I am bound to set it alongside the constitutional

provisions, in particular **section 7**, the claimants say it is incompatible with in this case, to see if that presumption is sustained.

40. Ms. Banner also contended that **section 146(2)** expressly recognizes the status of minors convicted for murder as it provides for life imprisonment as punishment. And that as life imprisonment is fixed by law the Court has no discretion to vary it. Therefore she submitted life sentence for convicted juvenile murders is **mandatory** as the sentence fixed by the Legislature.

41. It is also contended for the defendant in relation to **Article 37(a)** of the CRC that it is not superior to section 146(2) of the Indictable Procedure Act.

42. The brunt of the submission on behalf of the defendant in this regard is that the CRC which Belize has ratified and which is prayed in aid of the claimants' case, is not, in any event, applicable in Belize's domestic legal system absent its express incorporation by an Act of the Legislature into Belizean law. A subsidiary strand of this argument is that **The Guiding Principles in the Implementation of the Family and Children's Act** stipulated in section 3 of the Act do not apply in the criminal justice system as they are only intended for the implementation of the Act. The argument is advanced therefore, that the CRC is an unincorporated treaty and therefore not directly applicable in Belize.

43. Finally, it was argued for the defendant **section 146(2)** of the Indictable Procedure Act was an amendment that came after the CRC and it should therefore prevail over the latter in case of any inconsistency between the two.

44. *Article 37(a) of the Convention on the Rights of the Child*

The CRC is of course, a multilateral treaty concluded under the aegis of the United Nations. It represents today the most widely-acceded to treaty. See generally Geraldine Van Bueren, **The International Law on the Rights of the Child** (1998, Save the Children and Martin Nihoff Publishers).

45. Belize, as I have noted at para. 27 above, ratified the CRC in 1990, and this was not long after its conclusion in 1989.

46. Article 37(a) of the CRC provides as follows:

> **"Article 37**
>
> **States Parties shall ensure that:**
>
> **(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age."** (Emphasis added).

47. The CRC in **Article 1** defines who a child is in the following terms:

> **"Article 1**
>
> **For the purposes of the present Convention a child means every human being below the age of eighteen**

years unless under the law applicable to the child, majority is attained earlier."

48. Section 2 of the Family and Children's Act provides a coterminous definition of **"a child"** to mean, **"unless provided otherwise in any law, a person below the age of eighteen years."**

49. Despite the initial demurer on behalf of the defendant as to the age of the claimants at the times of their commission of the offence of murder for which they were convicted (see para. 10 above), it is, I think, fair to say that in the course of the hearing of the claim it became common ground that they were juveniles or below eighteen years of age at the material time: the first claimant was seventeen years old in 1993 when he committed the offence; and the second claimant was sixteen years plus.

50. I have briefly recounted in paras. 17, 18 and 19 of this judgment, how both claimants had the **sentences of life imprisonment** imposed on them. These are the subject of the instant claim in which the claimants say that by reason of those sentences they have been subjected to inhuman treatment and punishment in breach of their constitutional rights under section 7.

51. *The issues in this case*

These, I think, may be briefly stated. The first is: **is section 146(2) of the Indictable Procedure Act unconstitutional, in particular, does it fall foul of section 7 of the Belize Constitution?**

52. The second issue is: **What is the status of the CRC in Belizean law, in particular, is its Article 37(a) applicable in the case of sentencing juveniles/minors convicted for murder?**

53. *Determination*

I turn now to a determination of these issues.

A. Is section 146(2) of the Indictable Procedure Act unconstitutional such as to offend section 7 of the Belize Constitution?

54. The thrust of the claimants' case on this score is that as the subsection stands, it makes the **imposition of a life sentence** on a juvenile convicted of murder **mandatory**, without any discretion in the sentencing court. This, the argument runs, thereby renders such a sentence proscribed by section 7 of the Constitution.

55. I must state at this point that I am not in this case, concerned and certainly not in my capacity as a judge, with the issue whether the **mandatory life sentence** for murder committed by juveniles is desirable or necessary. This is a matter best left for more capable and informed hands to decide. My sole and primary role in this case is to determine whether such a sentence is lawful. It is unarguable that as the subsection stands, it makes a **sentence of life imprisonment** mandatory on a juvenile convicted for murder.

56. Ms. Banner cogently made the point that the subsection automatically takes account of the extenuating circumstances of a juvenile murderer, by imposing a life sentence, unlike his adult counterpart who is more likely to have the ultimate sentence imposed on him. Therefore, she submitted the subsection is not in contravention of section 7 of the Constitution as it takes full account and makes concessions for the age of the juvenile convicted of murder.

57. I am mindful as well of the counsel of wisdom courts have over time been exhorted to approach a challenge to the constitutionality of legislation in the light of the presumption of legality in favour of legislation generally – see **Peter Whelan and Another v Minister of Justice, Equality and Law Reform Ireland and the Attorney General (2007) IEHC 374**.

58. I am however, in this case only concerned with the lawfulness or constitutionality of the **mandatory imposition of the sentence of life imprisonment** provided for a juvenile in **section 146(2)**.

59. This essentially raises, I think, the approach to the interpretation of the relevant provisions of the Constitution with which the law sought to be impugned is said to be incompatible. In this regard, I am guided by the following statement by Lord Bingham, who speaking for the Board of the Privy Council in **Reyes v The Queen (2002) 2 LRC 606** said this:

> *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 l1979] 3 All ER 21 at 25, Union of Competent Site Owners and Lessees v Government of Mauritius [1984] MR 100 at 107, A-G of the Gambia v Momodou Jobe (1985) LRC (Const) 556 at 564, R v Big M Drug Mart Ltd [1985] 1 SCR 295 at 331, State v Zuma [1995] 1 LRC 145, State v Makwanyane [1995] 1 LRC 269 and Matadeen v Pointu [1998] 3 LRC 542 at 551. 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 charter-party. 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 nark the progress of a maturing society (see Trop v Dulles (1958) 356 US 86 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] 1 LRC 269 at 311:

> *'Public opinion may have some relevance to the inquiry, 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 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 marginalized people of our society.'

60. **Reyes** was an appeal from Belize to the Privy Council in which the appellant had challenged the compatibility of section 102(3)(b) of the Criminal Code which provided for the automatic (mandatory) imposition of death sentence upon conviction for a class of murder, in that case by shooting, with section 7 of the Belize Constitution. The Board held that such a sentence might be grossly disproportionate to the particular circumstances of individual cases and that if a sentencing court is denied an opportunity to take into consideration the particular circumstances of a convicted offender and of his offence, then such a sentence might well be held to be arbitrary and disproportionate and so in violation of the fundamental right to freedom from inhuman and degrading treatment.

61. The issue in **Reyes** was, of course, the **lawfulness of the imposition of a mandatory death sentence**. In the instant case before me, the issue is about **the lawfulness or compatibility of the mandatory imposition of life sentence on juvenile convicted for murder**, pursuant to section 146(2) of the Indictable Procedure Act, with the Constitution of Belize.

62. I am fully cognizant of the legal and political reality that it is quintessentially the function and responsibility of the National Assembly (the Legislature) to make laws. This is anchored in section 68 of the Belize Constitution which provides:

"Subject to the provisions of this Constitution, the National Assembly may make laws for the peace, order and good government of Belize."

63. The role of the Courts is of course to interpret and apply the laws enacted by the Legislature, informed always by the over-arching consideration stipulated in section 2 of the Constitution regarding the supremacy of the Constitution itself and the necessity for consistency of any law with it.

64. In the field of the criminal law, the primacy, nay, exclusivity of the Legislature to create offences is undoubted. (I do not mean to discount common law offences). It is common therefore to see that when the Legislature creates an offence, it prescribes what punishment shall attach to the commission of such offence. The Legislature gives indications as to the degree of seriousness with which it views various offences by specifying in many cases the **maximum**, **minimum** or **the mandatory sentence** to be imposed upon conviction for a particular offence.

65. In the instant case, the **mandatory life imprisonment** for convicted juvenile murderers was substituted for their **imprisonment during Her Majesty's Pleasure**. This is the direct result and effect of **section 146(2) of the Indictable Procedure Act** post **Melendez** supra. The crucial issue therefore is: what is the meaning and effect of **"imprisonment for life"** within the context of **section 146(2)**?

66. This issue arose for determination in a cross-appeal by the respondent to the Privy Council in **DPP of Jamaica v Mollinson (2003) AC 411**. In that case, the respondent was convicted for a murder committed when he was 16 years old and was sentenced to be detained during the Governor-General of Jamaica's pleasure. On appeal, the Court of Appeal of Jamaica ruled that the sentence was unconstitutional and that it should be modified in accordance with the relevant provision of the Jamaica Constitution to provide for detention at the Court's pleasure, and the respondent's sentence should be replaced with one of life imprisonment. The respondent cross-appealed against this sentence.

67. In addressing the issue of the respondent's life imprisonment substituted by the Jamaican Court of Appeal, Lord Bingham stated on behalf of the Board ay para. 20 of its judgment as follows:

> *The fourth question: should the sentence of life imprisonment stand?*
>
> *20 Having ruled that "the court's pleasure" should be substituted for "the Governor General's pleasure", the Court of Appeal majority ruled that the respondent be imprisoned for life and that he be not considered for parole until he had served a term of 20 years' imprisonment. This is the subject of the respondent's cross-appeal. His point is a short one. A sentence of imprisonment for life is a sentence of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18. Substitution of the court for the Governor General should not lead to a change, and a change disadvantageous to the detainee, in the punishment imposed.*
>
> *21 The Board did not understand the Director to resist this argument, to which there is, in the opinion of the Board, no answer. The cross-appeal therefore succeeds. The sentence of life imprisonment must be quashed and a sentence of detention during the court's pleasure substituted. It is not for the Board to prescribe how the sentence should be administered in order to give effect not only to the requirement that the offender be punished but also to the requirement that the offender's progress and development in custody be periodically reviewed so as to judge when, having regard to the safety of the public and also the welfare of the offender, release on licence may*

properly be ordered. The Director considered that a suitable regime could be devised without undue difficulty, and the Board shares his confidence. (Emphasis added).

68. I am therefore persuaded that the sentence of life imprisonment provided for in **section 146(2) of the Indictable Procedure Act** is of a different nature from a sentence of indefinite detention. It is a sentence designed to address the special circumstances of those convicted of murder committed while they were under the age of 18. See, **Regina v Secretary of State for the Home Department, Ex parte Venables and Thompson (1998) AC 407**. In that case there is to be found an instructive review of the origins and development of what was essentially section 151(2) of the Indictable Procedure Ordinance providing for the detention of juveniles murderers during Her Majesty's Pleasure. See in particular, pages 423 – 427. This sentence was later changed in Belize as a result of **Melendez supra**. But there is no denying the fact that **section 146(2)** is the linear descendant of section **151(2)** of the Indictable Procedure Ordinance. A point that arose for decision in **Venables** was the character of detention during Her Majesty's Pleasure: was it a form of life sentence or was it a sentence of discretionary custody of such duration as should be thereafter decided? The majority view of the House of lords was that it was not a life sentence but was a wholly discretionary sentence – at p. 498; see also **Greene Brown v The Queen (2000) 1 AC 45**.

69. I am of the considered view that given the provenance (as successor to the former section 151(2) of the Indictable Procedure Code) and the milieu in which it is intended to operate, (the sentencing of persons convicted for murder who were under 18 years at the time of the commission of the offence), section 146(2) of the Indictable Procedure Act **does not and cannot be intended**, notwithstanding its provisions, **to mean or apply automatically a mandatory life sentence on a juvenile convicted for**

murder without possibility of release. To hold otherwise would, in my view, be to obliterate and render meaningless or nugatory the distinction in the treatment of juvenile and adult offenders, which has long been a feature of the criminal justice system.

70. What would be even more disturbing is that if section 146(2) were found to authorize or legitimize the mandatory life imprisonment for juveniles convicted for murder, it would put them at a clear and distinct disadvantage when compared with adults convicted of the same crime, murder. The latter now have, since **Reyes**, supra, before sentence is passed, on conviction, the opportunity to dissuade why a lesser sentence than death ought to be imposed because of possible extenuating circumstances attendant on the commission of the offence or of the particular offender.

71. Section 146(2) as it stands affords no such opportunity to a juvenile convicted of murder, apart from the fact that he was under 18 years at the time of the commission of the offence. It simply directs the judge on the conviction of the juvenile for murder to sentence him to imprisonment for life. There is no room for the sentencing judge to hear and consider anything about the juvenile offender and the commission of the offence of murder itself. The section is simply **mandatory**.

72. I find, as well, that the **mandatory life sentence regime** of section 146(2) would nullify some of the goals of sentencing minors, namely, **reform** and **rehabilitation**. The general purpose of sentencing in the criminal justice system are taken to be **punishment**, **retribution**, **deterrence**, **protection of the public** and **rehabilitation of offenders**. The regime of section 146(2) starkly ignores the latter consideration. As it stands, it gives no indication of any "tariff" element which would go towards meeting the other considerations of sentencing, such as punishment. It simply obliges the

court to mechanically impose a life sentence on the convicted juvenile murderer.

73. A serious deficit, I find as well, with section 146(2) is that it directs the automatic non-discretionary imposition of life imprisonment on a juvenile convicted for murder. Such a sentence in the circumstances has no minimum period; it is for life, evidently only determinable at the end of the prisoner's life. There is no guideline or discretion allowed the Court in imposing it.

74. I am therefore convinced that in enacting section 146(2) and substituting life imprisonment for a convicted juvenile murderer in place of detention at Her Majesty's Pleasure, the Legislature did not intend that the juvenile should spend the rest of his natural life in prison.

75. There might well be considerations which could be urged on the Court relating to the commission of the offence of the murder itself and or the particular juvenile in mitigation of sentence if section 146(2) permits the judge to have regard to this. But the subsection as it stands, simply directs the judge, on conviction, to sentence the juvenile to life imprisonment.

76. Section 146(2) as it stands, I find as well, in my view, fails to give room to considerations of proportionality in relation to individual circumstances when it directs a mandatory life imprisonment for juveniles convicted of murder. In this way, the subsection fails to allow the particularized consideration of relevant aspects of the character and record of each convicted juvenile before the imposition upon him of a life sentence: Stewart J in the US Supreme Court in **Woodson v The State of North Carolina (1976) 428 US 280** at pp 393 – 305. That case had to deal with a statute that provided a mandatory death penalty on conviction for certain

defined categories of murder. But the underlying rationale of lack of proportionality is I think, equally applicable to the mandatory imposition of life imprisonment upon juveniles on conviction for murder as section 146(2) directs. Such a sentence holds the promise and reality of life till death in prison for the juvenile upon whom it is imposed.

77. Let there be no mistake, murder is a most serious offence and the revulsion with which it is rightly and generally regarded is very much in place. It is an offence that involves, by definition, the loss of human life. This point cannot be ignored. But its perpetrators and circumstances of its commission can be infinite and varied. But section 146(2) makes no room for this.

78. However, I am not in this judgment to be taken as saying or implying that life imprisonment has no place in the criminal justice system. Far from it. In fact today, in **section 20 of the Crime Control and Criminal justice Act, Chapter 102 of the Laws of Belize, Revised Edition 2000**, provides for the imposition of a mandatory term of life imprisonment for persons found guilty on more than two occasions for certain specified offences regarded as serious offences: rape, kidnapping, forcible abduction, dangerous harm, maim, use of deadly means of harm, robbery and blackmail. This is a kind of the "three strikes you are out" provisions found in some jurisdictions. However, the imposition of the mandatory term of life imprisonment in these cases is tempered by considerations of special extenuating circumstances which the court shall record in writing, for not imposing that sentence.

79. But section 146(2) of the Indictable Procedure Act, which is in issue in this case, as it stands, simply does not afford the court to have regard to any extenuating circumstances or consideration either of the commission of

the offence or of the offender. It starkly and unremittingly directs the court to sentence the convicted juvenile to imprisonment for life.

80. However, I am, in the instant case, only concerned with the compatibility of section 146(2) of the Indictable Procedure Act with section 7 of the Belize Constitution: I am taxed to decide whether the mandatory life imprisonment imposed on the claimants when they were juveniles under section 146(2) of the Indictable Procedure Act, is "inhuman or degrading punishment or other treatment" within the meaning of that expression in the Constitution.

81. Therefore, bearing in mind the advice and guidance of the Privy Council in this context, as Lord Bingham, with respect, helpfully put it in **Reyes supra** at para. 26 of the Board's judgment:

> *"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 (…) 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."*

I now turn to consider whether section 146(2) is or is not compatible with the Constitution.

82. In the case before me, it is fair to say that both Ms. Antoinette Moore SC for the claimants and Ms. Priscilla Banner for the defendant, were not exactly in disagreement about the meaning of section 146(2). They both accepted that it directs the imposition of mandatory life imprisonment on a

juvenile convicted for murder. The gulf between them is therefore about the compatibility or otherwise of the subsection with the Constitution.

83. I have tried in preceding paragraphs of this judgment to state the court's understanding and effect of section 146(2). In brief, it requires and directs a court in the case of any juvenile convicted for murder to be mandatorily sentenced to life imprisonment.

84. Is it therefore incompatible with the protection against inhuman and degrading punishment or other treatment proscribed by section 7 of the Constitution?

85. In supporting of their claim both Mr. Bowen and Mr. Jones filed affidavits. Mr. Bowen states in his first affidavit regarding his sentence as follows:

> *"2. On 9th August 1995, I was convicted of murder and the death penalty was wrongly imposed by the Supreme court of Belize. My date of birth is 17th February 1976 and at the time of this crime I was a minor of 17 years.*
>
> *3. I appealed against my conviction and sentence to the Court of Appeal of Belize and on 8th June 1996, the Court of Appeal of Belize varied my sentence to one of life imprisonment. I spent almost one year on death row even though I was only 17 years of age at the time of the crime for which I was convicted.*
>
> *4. While in prison, I have made great efforts to come to term with my past mistakes and reform and improve myself. My efforts and rehabilitation have been recognized by the prison authorities and I was appointed as a trustee in 1998 and as a head prefect in 1999.*
>
> *5. I have concentrated on having an active and productive life in prison and I am a member of the prison's football team and participated in the work-release program with the Ministry of*

Housing. I have also been attending Father John Stoker's counseling group for several years.

6. *However, in prison I feel that I exist rather than live; I am locked away from everything I hold dear. I have a very supportive family and I long to return to them, to start work again and to make a positive contribution to the society I have been kept away from for so long.*

8. *I believe that these fundamental rights granted by the Constitution have been breached by the imposition of a mandatory life sentence on me, as I was a juvenile at the time that the crime was committed.*

9. *I believe my constitutional rights were also breached due to the mandatory nature of my sentence. This did not allow the judge to take into account the particular circumstances of my case and factors such as my previous good character and age and instead I was condemned to spend the rest of my life imprisoned.*

10. *Despite being a juvenile at the time of the offence, I have been committed to imprisonment until my death with little possibility of being released at any point. I believe not being given the opportunity to reform and to eventually be released is an inhuman punishment and has condemned me to a life without dignity in breach of my constitutional rights.*

And Mr. Jones states as follows:

2. *I was sentenced to life imprisonment by the Supreme Court on 30 October 2001 for murder.*

3. *My date of birth is 1 August 1983 and at the time of this crime I was a minor of 16 years.*

4. *I understand that under the Belize Constitution I have a right to life and that I have a right not to be subjected to torture, inhuman or degrading punishment.*

5. I believe that these fundamental rights granted by the Constitution have been breached by the imposition of a mandatory life sentence on me, as I was a juvenile at the time that the crime was committed.

6. I believe my constitutional rights were also breached due to the mandatory nature of my sentence. This did not allow the judge to take into account the particular circumstances of my case and factors such as my previous good character and age and instead I was condemned to spend the rest of my life imprisoned.

7. Despite being a juvenile at the time of the office, I have been committed to imprisonment until my death with little possibility of being released at any point. I believe not being given the opportunity to reform and to eventually be released is an inhuman punishment and has condemned me to a life without dignity in breach of my constitutional rights.

86. These are serious averments which, in my view, engage section 7 of the Belize Constitution. There is nothing in rebuttal on the facts from the defendant. Ms. Banner however argued and submitted, relying on **Whealan** supra, that their life imprisonment was fixed by law as prescribed by Parliament. To sentence a 17 year old and 16 year old as the claimants when they committed the offence of murder for which they were convicted to imprisonment for life simply because section 146(2) of the Indictable Procedure so directs would, I find, be difficult not to qualify as "inhuman and degrading punishment or other treatment." This would I think, be like throwing the claimants into some kind of Black Hole without any hope of release and simply left to rue their fate for the rest of their natural lives in prison. Their fate is in the circumstances, eponymously defined by their sentences – one of life imprisonment without any prospect of release.

87. Where is the humanity in sending juveniles to life imprisonment without prospect of release? Such a sentence flagrantly overlooks, if not disregards, any possibility of reform or rehabilitation, an aim of any humane and progressive penological system in addition to punishment, retribution and deterrence.

88. In **R v Offen (2001) 1 WLR 253**, the Court of Appeal of England and Wales, considered a section of the English 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 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 on Human Rights, unless 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.

89. In **Offen**, the court found out it was a case of very exceptional circumstances and therefore the life sentence imposed was not appropriate and it set it aside and substituted it with a determinative sentence of three years imprisonment.

90. Accordingly, for the reasons I have stated, I find that the way section 146(2) has been used and applied in the case of the claimants to provide for their incarceration for life without possibility of release, is in the circumstances, a punishment or treatment that cannot be justified in the light of the provisions of section 7 of the Belize Constitution. I am satisfied and convinced that section 146(2) of the Indictable procedure Act should not be interpreted and applied solely on the basis of its wording, but must be informed by the circumstances of the offence and the offender. The mandatory life sentence imposed for murder committed by juveniles instead of detention during Her Majesty's Pleasure, pursuant to section

146(2) was not, in my view, intended or expected by the Legislature in 1998, to involve detention of the juvenile offender for the rest of his life. As it stands and read literally, and this is the basis of the claimants' case, it is applied to the effect that the juvenile offender upon whom it is imposed has committed a crime of such gravity (murder), that he forfeits his liberty to the state for the rest of his life and should be detained for life without the possibility of release or subsequent judicial intervention. I therefore have no doubt about the inhumanity of such a sentence under section 146(2) and its incompatibility with section 7 of the Belize Constitution.

91. In relation to the claimant, Anthony Bowen, the second relief sought on his behalf is that he had been subjected to inhuman punishment and treatment in breach of section 7 of the Constitution of Belize in that he was originally on conviction, erroneously sentenced to death despite the fact that he was a juvenile at the time of the commission of the offence (murder) for which he was convicted. A separate declaration is therefore sought for Mr. Bowen to this effect.

92. Mr. Bowen states at para. 2 of his first affidavit that at the time of the commission of his offence (1993), he was a minor of 17 years. He further states at para. 2 of his second affidavit that the Court of Appeal affirmed his conviction but allowed his appeal against sentence and substituted an imprisonment for life.

93. At the time of the commission of the offence in 1993 for which Bowen was convicted in 1995 and sentenced to death, because of the operation and effect of section 151(2) of the Indictable Procedure Act, and because of his age, the proper sentence then was detention during Her Majesty's pleasure. Therefore to impose the death sentence on him was manifestly an error. This undoubted error was however rectified by the Court of

Appeal when it decided Bowen's appeal against sentence and substituted life imprisonment having affirmed his conviction.

94. In my view, for relief to be sought now, some 15 years after the event, which itself had been subsequently rectified, is, I think, somewhat moot. I do not mean that claims for constitutional relief for breach of a fundamental right can go stale. But it would be more efficacious if prosecuted with some dispatch.

95. In the circumstances however, the more substantial claim is the constitutionality of the imposition of mandatory life imprisonment without prospect of release on Mr. Bowen and his co-claimant. This has been addressed in this part of this judgment. However, I am satisfied that Mr. Bowen is nonetheless entitled to the further declaration that his constitutional right guarantee by section 7 of the Constitution was breached when, despite being a juvenile at the time of the commission of the offence, the trial court erroneously sentenced him to death: the applicable sentence then was detention during Her Majesty's Pleasure. I accordingly grant the declaration sought by Mr. Bowen in respect of the erroneous sentence by the sentencing judge.

96. What I have found and concluded so far on section 146(2) and section 7 of the Constitution of Belize is sufficient to dispose of the case in the claimants' favour. Bur another important strand in their claim relates to the applicability of the CRC to their case. I think I am obliged to say something on this.

97. ***B.*** ***<u>I now turn to the status of the Convention on the Rights of the Child (CRC), in particular, its Article 37(a) in the context of sentencing juveniles convicted for murder.</u>***

98. This is the other plank in the claimants' platform in this case as they seek to impugn the life sentences imposed on them.

99. Belize ratified the CRC in 1990 and enacted the Families and Children Act in 1998. It is therefore urged on behalf of the claimants that the life imprisonment sentences imposed on them when they were juveniles were contrary to the CRC itself and hence not in keeping with some of the provisions of the Families and Children Act.

100. In particular, article 37(a) of the CRC is prayed in aid for the claimants. I have produced the text of this Article at para. 45 of this judgment. It is also contended for the claimants that some of the provisions of the Families and Children Act resonate with the provisions of the CRC and that in fact the latter has been incorporated into the laws of Belize.

101. It is therefore submitted for the claimants that the sentences of life imprisonment imposed on them as a result of their convictions, were contrary to Article 37(a) of the CRC and that international human rights instruments to which Belize has subscribed should inform its domestic laws where applicable.

102. Ms. Moore SC for the claimants was careful to point out that it was not being advanced for the claimants that all mandatory life or other mandatory sentences are unconstitutional. The claimants' case, she submitted, is that the life imprisonment sentences imposed on them are unconstitutional because they were minors at the time of the commission of the offence and because by section 146(2) the sentencing court was

deprived of the ability or opportunity to consider anything else, given the age of the claimants.

103. Such sentences as were imposed on the claimants, she submitted, ignore the provisions of the CRC, in particular its Article 37, and they are repugnant to the evolving standards and aims of the juvenile justice system. Rehabilitation, she further submitted, should be a feature of any fair and progressive juvenile justice system. But this would not be possible, and is in fact precluded in a system that directs a mandatory life imprisonment for juveniles.

104. Ms. Banner for the defendant, however, stoutly resisted the applicability of the CRC and its provisions called in aid for the claimants in this case.

105. First, she submitted that the enacted law (section 146(2)) of the Indictable Procedure Act, directing life imprisonment for juvenile murderers came **after** Belize ratified the CRC. Therefore as it represents the view of the Legislature on this issue it must prevail over the provisions of the CRC.

Yes, section 146(2) was enacted to replace the old section 151(2) providing for detention of convicted juveniles during Her Majesty's Pleasure, in 1998, some eight years after Belize had ratified the CRC.

106. But with respect, the issue is not as simplistic as that. In my view, a court must always be astute to recognize and if possible give effect to international human rights obligations contained in treaties or conventions the state has subscribed to. The accepted and proper way to nullify the operation or effect of such instruments is, I think, by denunciation of or reservation or formal withdrawal from participation in such instruments by the state concerned. Simply to say, as Ms. Banner contends, that a later state legislation that is inconsistent with provisions in international human

rights treaties means that those provisions are inapplicable is, I find, untenable; and in the circumstances, cannot avail the defendant. By signing and ratifying an international treaty, agreement or convention, a state assumes obligations and later domestic legislation inconsistent with a treaty obligation does not justify the non-observance of that obligation.

107. This brings me to the more substantial point pressed for the defendant. This relates to the applicability of the First Schedule of the Families and Children Act, in particular, para. 4 of that Schedule. This raises the issue of the status of the CRC in the domestic law of Belize: is it incorporated or not, even though ratified?

108. **Section 3** of the Families and Children Act provides in terms:

> ***"3. The principles in regard to children's rights set out in the First Schedule to this Act shall be the guiding principles in the making of any decision affecting a child."***

109. **The First Schedule** sets out the **Guiding Principles** in The Implementation of The Act. **Paragraph 4** of the Schedule sets out the rights a child shall have and **sub paragraph (c)** states as follows:

> *"(a)* …
>
> *(b)* …
>
> *(c) to exercise, in addition to all the rights stated in this Schedule and the Act, all the rights set out in the UN Convention on the Rights of the Child, with the appropriate modifications to*

suit the circumstances in Belize, that are not specifically mentioned in the Act or in this Schedule." (Emphasis added).

110. I am not convinced that the phrase "*with the appropriate modifications to suit the circumstances of Belize"* claws back any of the rights set out in the CRC so as to negate the obligation to ensure that no child is sentenced to life imprisonment without possibility of release. I am of the considered view after having carefully perused the CRC itself and the provisions of the Families and Children Act, that the latter has by reason of the **express reference theory** made the former applicable in Belize. I am also satisfied that from the several provisions of the Families and Children Act, there is sufficient **evidential nexus** between this Act and the CRC to warrant the conclusion that the letter was intended by the Legislature to have direct effect in Belize. This conclusion, I find, is supported by, for example, the provisions of sections 148 and 149 of the Families and Children Act.

Section 148 establishes **the National Committee for Families and Children**. But more importantly, the functions and terms of reference of the National Committee are stated in section 149; among these are as stated in paragraph (a):

> ***"(a) promoting, monitoring and evaluating the implementation of the Convention on the Rights of the Child, and ensuring that the Government meets its national and international obligations, as a party to the Convention."*** (Emphasis added).

111. A clearer case of incorporation of an international treaty by express reference can hardly be imagined. See generally Shaheed Fatima **Using International Law in Domestic Courts** (2005, Hart Publishing, Oxford and Portland, Oregon; especially Chapter 9 on *Unincorporated treaties and Legislation*.

112. I am satisfied that the CRC does apply in Belize and that the First Schedule of the Families and Children Act can operate depending on the issue, even in the sphere of the criminal justice system as well.

113. I am accordingly, satisfied that since Belize's accession to the CRC in 1990, one of the Convention rights available to a child caught up in the web of the criminal justice system is the obligation incumbent on Belize, as a state party to the Convention as provided in **Article 37(a)** which states:

> *"States Parties shall ensure that:*
>
> *(as) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years."* (Emphasis added).

114. It should be observed that the obligation incumbent on Belize under this Article is to ensure that **neither capital punishment nor life imprisonment without possibility of release is imposed for offences committed by juveniles**. That is to say persons below eighteen years.

115. This obligation I find has subsisted since 1990 when Belize ratified the CRC and later incorporated it into its laws. It subsisted in April 1996 when the life imprisonment without possibility of release was imposed upon the claimant Anthony Bowen. The obligation still subsisted as well in the case of David Jones when he was also sentenced to life imprisonment in October 2001 without possibility of release. The obligation I find subsisted even in 1998 when the Legislature effected a change to the Indictable Procedure Act allowing, in section 146(2) thereof for the imposition of life imprisonment upon juveniles convicted of murder. This provision, with respect, ignored Belize's subsisting obligation under Article 37(a) of the CRC. And this, as I have concluded in para. 105 of this judgment is no warrant for the contention that section 146(2) trumps Article 37(a). This conclusion finds support in **section 65(b)** of the **Interpretation Act**, which provides:

> *"65. The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely:*
>
> *(a)* …
>
> *(b) that a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not;*
>
> *(c)* …

116. I am therefore satisfied that an interpretation that finds in favour of Article 37(a) is, undoubtedly, preferable as it would be clearly in keeping with Belize's obligations under the CRC in relation to the imposition of sentences of life imprisonment on juveniles. As it stands, I am convinced that section 146(2) of the Indictable Procedure Act seriously derogates from Belize's obligation regarding sentencing juveniles.

117. *Life imprisonment and possibility of release for juveniles convicted for murder?*

It is the imposition of **life imprisonment on juveniles without possibility of release** that Belize had undertaken, since 1990, by its accession and ratification of the CRC, to ensure never happens.
And it is this spectre or reality of life imprisonment without possibility of release that has animated the claimants to launch the present proceedings.

118. From the terms of their sentences, **life imprisonment**, because of their conviction for murder and an examination of the relevant Prison Rules, I find the complaint of the claimants not without justification.

119. Belize only introduced **parole** by the side-wind of subsidiary legislation in 2006: The Prison Rules 2006 in **Part VI** created the **Parole System**, This system now allows for the release of certain categories of prisoners on parole. The system administered by the **Parole Board** allows for the release of these prisoners from imprisonment before the full sentence of their prison term has been served. The essence of parole is the release from prison, before completion of the sentence, invariably on condition that the prisoner abide by certain rules during the balance of the sentence he has been imprisoned for.

But under the **Prison Rules, persons convicted for murder** including of course, juveniles, are **expressly excluded** from eligibility for parole: **Rule 267** (8)(a) including the recent amendment to the **Rules** by Statutory Instrument No. 32 of 2010.

120. Therefore for the claimants, their life imprisonment means literally imprisonment for the rest of their natural lives **without any possibility of release**. They cannot avail themselves of the privilege of the parole system, however well-behaved they might be in prison. Their conviction for murder expressly excludes this.

121. There is, of course, the possibility of the claimants seeking clemency, through the Belize Advisory Council, of the Governor-General, as provided in **section 52** of the Belize Constitution. Therefore, the possibility exists that, though sentenced to life imprisonment, they could, by **exercise of the prerogative of mercy**, be granted a **pardon**, **respite**, a **substitution of a less severe form of punishment**, or **a remission of the whole or any part of the sentences of life imprisonment imposed on them**.

122. This is a possibility and it is unarguable that the Governor-General has over the years, no doubt charily, on the advice of the Belize Advisory Council, granted his munificence by the exercise of the prerogative of mercy in favour of some prisoners.

123. I find however, with respect, that this possibility of the prerogative of mercy is no answer to the unconstitutionality of the life sentences imposed on the claimants.

124. I am fortified in this view by the statement of the Privy Council in **Reyes supra** on the availability of the exercise of mercy by the Governor-General in the context of a challenge to the constitutionality of a particular form of

sentence (in that case mandatory death fence for the offence of murder by shooting). I am, with respect, like the Board in **Reyes** mindful of the constitutional provisions governing the exercise of mercy by the Governor-General as I have briefly stated in para. 120 above. But as the Board stated at para. 44 of its judgment in **Reyes**:

> *"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) … 29 May 2000, Appeal No. 61/97, 29 May 2000); Nicholas v The Queen (1998) 193 CLR 173, paras. 16, 68, 100, 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.

125. I am therefore of the considered view that the fact that some day, however distant, the prerogative of mercy in one of its variant forms, *may* be exercised in the claimants' favour, does now answer their challenge that the mandatory sentences of life imprisonment imposed on them in the circumstances, offend section 7 of the Constitution.

126. *Conclusion*

I am ineluctably, led to conclude from my analysis in the foregoing paragraphs of this judgment, that the claimants have made good their claim. That is to say, the sentences of mandatory life imprisonment without prospect of release imposed upon them for the offence of murder committed when they were juveniles, are not sustainable in the circumstances, in the light of the provisions of section 7 of the Belize Constitution **and** are not in keeping with the obligations of Belize under the CRC, in particular Article 37(a) of the Convention.

127. I accordingly **find and declare** that the imposition of the sentences of mandatory life imprisonment without the possibility of release for the offence of murder they committed when they were juveniles, breached section 7 of the Belize Constitution proscribing the subjection of anyone to torture, inhuman or degrading punishment or other treatment.

128. **Section 20** of the Constitution recognises and affirms the powers of this Court to award remedies for the contravention of any of the rights and

freedoms it stipulates in its Part II. This is an enforcement jurisdiction for these rights and freedoms. As Lord Nicholls of Birkenhead said in the Privy Council in the case of **Attorney General of Trinidad and Tobago v Slewchand Ramanoop (2005) UKPC 75**; **(2005) 2 WLR 1324** at para. 18 of the Board's judgment: **"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate the constitutional right which has been contravened. A declaration by the Court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation."** See also the cases of **Merson v Cartwright and Another (2005) UKPC 38**; and **Alphie Subiah v The Attorney General of Trinidad & Tobago** judgment of the Privy Council delivered on 3rd November 2008.

129. In the instant case before me, in addition to the declaration sought by the claimants regarding their mandatory life sentences, they seek as well an order quashing these sentences and a further order substituting **lesser fixed term** sentences for the indeterminate life sentences.

130. I am satisfied that **section 20** of the Constitution on which the claimants based their case, does grant this Court the power to make such orders.

131. Accordingly, I set aside the sentences of indeterminate life imprisonment imposed on the claimants. Ms. Banner for the respondent, correctly and properly conceded that if this Court found for the claimants a **fixed term** of imprisonment could be substituted.

132. In the case of Mr. Bowen, he was originally sentenced to death on 9th August 1995 on his conviction for murder. This, as it turned out, was wrongful, and the Court of Appeal in its judgment delivered on 3rd April 1996, substituted imprisonment for life. He has therefore been imprisoned

up to the present for a period of 15 years. In all the circumstances of this case, I substitute a fixed term of imprisonment of 25 years for the offence of murder that Mr. Bowen was convicted for and that the time he has spent in prison so far (15 years) be taken into account.

133. In the case of Mr. Jones, he was sentenced to life imprisonment on 30th October 2001; and his life sentence was affirmed by the Court of Appeal on 28th June 2002. In all, he has therefore been imprisonment for nine years up to the present. In the light of the findings and conclusions I have arrived at in this case, I substitute a fixed term of imprisonment of 25 years for his conviction for murder and that the time he has spent in prison so far be taken into account.

134. Before parting with this judgment let me say this if only by way of **obiter**: This case demonstrates the need to rationalize the sentencing regime for conviction for murder. There is a need for the sentencing court to indicate at the time of imposing a sentence of imprisonment for life how much time the person convicted should serve in prison, taking into account the circumstances of the commission of the offence and the offender, before he is eligible for parole. This period is referred to as the **tariff** period and is meant to reflect the objective of punishment and deterrence. It is right and appropriate that it is at the outset determined by the court for sentencing is essentially a judicial function.

But the **Prison Rules** today preclude persons convicted for murder from eligibility for parole. This in effect, would mean a person convicted for murder and sentenced to life imprisonment, including a juvenile, would spend the rest of his natural life in prison.

135. On the imposition by a court of either the discretionary or mandatory **life imprisonment** on conviction for murder, I find with respect, the judgment

of the English House of Lords delivered by Lord Mustill in **Regina v Secretary of State for the House Department ex parte Doody (1994) 1 AC 531**, of especially assistance. I recognize, of course, that the Board was in that case dealing with English statutory regimes for the imposition of life sentence for murder.

136. It is undoubted that an increasing but certainly disturbing and ugly feature of the present criminal landscape in Belize is the depressing number of minors and juveniles being caught up regularly now in the Criminal Justice system, both as perpetrators and victims. It is therefore important and urgent that a system and methodology be devised within the Criminal Justice system for the handling, treating and sentencing of juveniles. Of course, any murder committed, whether by an adult or a juvenile *is murder*, but to sentence a juvenile mandatorily for life for this crime without the prospect for release, is to deny and not to acknowledge the very potential that is in youth for reform and development: it ignores other considerations that should inform sentencing, such as rehabilitation and reform and focuses instead only on punishment and retribution. The need to rationalize the imposition of life sentence on juveniles for the offence of murder, in keeping with the constitution and Belize's international obligations, cannot be doubted or avoided.

137. I have tried to address these considerations in this judgment.

A. O. CONTEH
Chief Justice

DATED: 27th September, 2010.