**IN THE SUPREME COURT OF GRENADA**
**AND THE WEST INDIES ASSOCIATED STATES**
**HIGH COURT OF JUSTICE**
**(CONSTITUTIONAL)**

**GRENADA**

**CLAIM NO. GDAHCV2021/0386**

**IN THE MATTER OF THE GRENADA CONSTITUTION**

**AND**

**IN THE MATTER OF A CHALLENGE TO THE CONSTITUTIONALITY OF SECTIONS 70, 75 AND 276(2) OF THE CRIMINAL CODE CAP. 72A OF THE 2010 EDITION OF THE CONTINUOUS REVISED LAWS OF GRENADA**

**AND**

**IN THE MATTER OF SECTIONS 5 AND 13 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 16 OF THE CONSTITUTION**

**BETWEEN:**

**EDWARD JOSEPH**

Applicant/Claimant

**And**

**THE ATTORNEY GENERAL**

Defendant

**CONSOLIDATED WITH**

**IN THE SUPREME COURT OF GRENADA**
**AND THE WEST INDIES ASSOCIATED STATES**
**HIGH COURT OF JUSRICE**
**(CONSTITUTIONAL)**

**GRENADA**

**CLAIM NO. GDAHCV2018/0008**

**IN THE MATTER OF THE GRENADA CONSTITUTION**

**AND**

**IN THE MATTER OF A CHALLENGE TO THE CONSTITUTIONALITY OF SECTION 16 OF THE PREDIAL LARCENCY CAP. 250 OF THE 2010 EDITION OF THE CONTINUOUS REVISED LAWS OF GRENADA**

**AND**

**IN THE MATTER OF SECTIONS 5 AND 15 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 16 OF THE CONSTITUTION**

**BETWEEN:**

**SHABBA FERGUSON**
**JASON ALEXIS**

Claimants

**and**

**ATTORNEY GENERAL**

Defendant

**Before:**

The Hon. Justice Raulston L.A Glasgow — High Court Judge

**Appearances:**

Mr. Ruggles Ferguson K.C. for Edward Joseph
Mr. Jerry Edwin for Shabba Ferguson and Jason Alexis
Mr. Adebayo Oluwu and Ms. Alleyna Cheeseman for the Defendant

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2023: October 23rd
2024: January 15th
October 16th

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**JUDGMENT**

**BACKGROUND**

[1] **GLASGOW, J.:** This claim is one of the more novel matters argued before this court. It seeks to interrogate issues of grave importance for the jurisprudence in Grenada. More crucially, this case engages discourse on one of the vexing societal debates namely, whether previously accepted norms with respect to

judicial corporal punishment are still appropriate, acceptable and significantly, constitutional, in light of modern and evolved thought on these matters. Specifically, the debate between the parties centers on whether this court ought to strike down flogging, which both sides accept was once an approved form of punishment for convicted persons, as being in violation of the rights and freedoms articulated in the Constitution of Grenada ("the Constitution").

[2] The parties' disputation is made easier to resolve because they concur and indeed launch their contentious presentations with the agreed proposition that flogging is offensive to contemporary views on human dignity and is repulsive to modern notions of the sanctity of the most basic human rights. The parties however seriously diverge on what the court should do about the state of the law on flogging. For the claimants, their position is that the court ought to find that retaining the laws on flogging and its hapless half sibling, whipping, (flogging and whipping will together be referred to as "flogging" in this ruling) are inconsistent with and in breach of the claimants' fundamental rights assured to them by the Constitution.

[3] For the defendant, it is argued that while flogging is repulsive to modern standards of human dignity, judicial corporal punishment has always been and remains acceptable. The defendant posits that even if one accepts that judicial corporal punishment impinges on and derogates from the claimants' section 5(1) constitutionally protected rights and freedoms, there is little to nothing that the court can or ought to do about it. This is due to the fact that flogging as a description of punishment is saved, hermetically sealed and secured from judicial scrutiny. The defendant reasons that it is the Constitution itself that shields and secures flogging from being declared inconsistent with the constitutionally protected fundamental rights of the claimants. The defendant contends further that in some other respects, even where flogging may be struck down as inconsistent with the rights and freedoms of the claimants, the court is precluded from doing anything about it because flogging as a description of punishment is reasonably justifiable in a modern democratic structure. In the discourse to follow I trust that I can ably articulate some or all of the reasons that I disagree with the defendant.

**Background to the claims**

[4] Mr. Shabba Ferguson and Mr. Jason Alexis initiated constitutional claims by originating motion filed on 6th January 2018, seeking inter alia several declarations with respect to the constitutionality of provisions of the Praedial Larceny Act[1]. Mr. Edward Joseph later initiated a similar constitutional claim by filing originating motion on 20th September 2021 seeking, inter alia, several declarations with respect to the constitutionality of provisions of the Criminal Code[2]. On 12th November 2021, Mr. Ferguson and Mr. Alexis applied for an order that Mr. Joseph's claim be consolidated with their own and the two claims be heard together. As the collective crux of the claimants' respective claims concerned the constitutionality of flogging and whipping as forms of criminal punishment, the application was granted[3].

**Mr. Ferguson and Mr. Alexis' joint affidavit in support of originating motion**

[5] Mr. Ferguson was convicted for the offence of vagrancy (section 8(1) of the Praedial Larceny Act) and sentenced to 6 strokes by the magistrate. He was unrepresented by counsel at the time. Mr. Ferguson alleges that following his sentencing, he was immediately taken to the police station, stripped naked, tied down on a flat board, ordered to place his genitals in a hole in the board, and a cloth placed over his mouth. Mr. Ferguson was whipped across his back and backside. There was no medical personnel present during the beating. After being flogged, he was told to clothe himself and leave the police station. Mr. Alexis deposes that on 13th January 2017, he was arrested and charged with the offence of praedial larceny, and he may be flogged if convicted for that offence.

**Mr. Joseph's affidavit in support of the originating motion**

[1] Cap 250 of the 2010 Continuous Revised Edition of the laws of Grenada.
[2] Cap 72A of the 2010 Continuous Revised Edition of the laws of Grenada.
[3] By Order dated 20th May 2022.

[6] Mr. Joseph was convicted and sentenced in the 1970's for housebreaking but received an early release by the Grenada People's Revolutionary Government. By 2017, he fell on hard times, became dependent on alcohol and committed a robbery while armed with a cutlass. At the robbery trial, Mr. Joseph pleaded guilty to the offence of robbery with violence contrary to section 276 (1) (b) of the Criminal Code. At the sentencing hearing on 24th November 2017, he was sentenced to imprisonment for 9 years and 3 strokes. He was unrepresented by counsel at the time of sentencing. After sentencing, Mr. Joseph was immediately taken to the police station closest to the court, and told that he would be flogged as sentenced.

[7] Mr. Joseph alleges that he protested to the police officers and requested that he be flogged at His majesty's Prison (the prison) in the presence of a medical doctor. His request did not meet with success. He was ordered to take off his pants, bend over a table, and he received 6 strokes. After the flogging, he was taken to the prison but he was never examined by a medical doctor. Mr. Joseph later learned that the judge had only ordered him to receive 3 strokes instead of 6 strokes. He recalls that he did not tell anyone at the prison about the flogging since he was angry and deeply ashamed about it.

**The Claimants' Claim for Relief**

**Mr. Ferguson and Mr. Alexis**

[8] Mr. Ferguson and Mr. Alexis collectively claim that the punishment of flogging amounts to degrading and inhuman punishment contrary to section 5 of the Constitution. They also claim that the sections of the Praedial Larceny Act which authorise flogging for men while expressly prohibiting flogging for women amounts to discrimination based on sex which is contrary to section 13 of the Constitution. They also complain that judicial officers wrongfully exercise their discretion to order a sentence of flogging when anyone is convicted of praedial larceny, irrespective of whether the infraction was in respect of sections 8(1), 8(2) or 8(3) of the Praedial Larceny Act. This wrongful exercise of the magistrate's discretion is unlawful.

[9] Mr. Ferguson also seeks an award of compensation and exemplary damages on the grounds that his flogging was executed with a degree of arbitrariness and unlawfulness. Mr. Alexis asks the court to grant him an interim injunction to restrain the defendant from imposing or executing the punishment of flogging on him until the determination of his claim. Mr. Ferguson and Mr. Alexis collectively request:

1) A declaration that the sentence of flogging authorized by section 16 of the Praedial Larceny Act is inhuman and degrading punishment;
2) A declaration that the manner and circumstances in which the punishment of flogging was inflicted on Mr. Ferguson on 14th July 2017 amounted to inhuman and degrading punishment in contravention of section 5 of the Constitution;
3) A declaration that section 16 of the Praedial Larceny Act which authorizes the flogging of men but prohibits the flogging of women contravenes section 13 of the Constitution;
4) A declaration that section 16(2) of the Praedial Larceny Act which provides for mandatory flogging is inhuman and degrading and contravenes section 5 of the Constitution;
5) An order permanently restraining the defendant from imposing or executing the punishment of flogging under the Praedial Larceny Act so long as it is authorized in contravention of section 13 of the Constitution;
6) Vindicatory damages for Mr. Ferguson;
7) Exemplary damages against the defendant for the arbitrary way the punishment of flogging was inflicted on Mr. Ferguson; and
8) Costs.

**Mr. Joseph**

[10] Mr. Joseph concurs that flogging is degrading and inhuman punishment. He argues that while flogging of males under the Criminal Code predates the Constitution, females are excluded from the punishment, which is a breach of sections 5 and 13 of the Constitution. He points out that the Constitution allows for laws to be modified or adapted to conform to the Constitution. He strenuously maintains that the discriminatory nature of the punishment under the Criminal

Code cannot be cured by authorizing the flogging of women, which was not a punishment that predated the Constitution. What he proposes is that the sections of the Criminal Code which authorize flogging can be modified with the following exception to conform to the Constitution: "Except that no sentence of flogging or whipping shall be imposed after commencement of the Constitution."

[11] Mr. Joseph also complains that his flogging on 24th November 2017 was in violation of section 50 of the West Indies Associated States Supreme Court Act[4], as the law provides protection against immediate flogging, by providing an opportunity to appeal and having his sentence stayed while on appeal. He insists that his flogging immediately after his sentencing and before the expiration of the period in which he could have explored his right to appeal violated his right to protection of the law guaranteed under section 8 of the Constitution of Grenada.

[12] Mr. Joseph requests:

1) A declaration that the punishment of flogging or whipping set out at sections 70, 75 and 276 (2) of the Criminal Code is degrading and inhuman;
2) A declaration that section 75 of the Criminal Code which provides for flogging and whipping of males but not females is unconstitutional and inconsistent with sections 13 of the Constitution which affords protection against discrimination on the basis of sex;
3) A declaration that a sentence of flogging or whipping, pursuant to the provisions of the Criminal Code, imposed after commencement of the Constitution is unconstitutional and unlawful, being either in contravention of section 13 or section 5 of the Constitution;
4) An order that section 70 and 75 of the Criminal Code be construed with the following exception – "Except that no sentence of flogging or whipping shall be imposed after commencement of the Constitution";

[4] Cap 336 of the 2010 Continuous Revised Edition of the laws of Grenada.

5) A declaration that the execution forthwith of the sentence of flogging imposed on Mr. Joseph on 24th November 2017 was contrary to section 8 of the Constitution;
6) Damages inclusive of vindicatory and exemplary damages; and
7) Costs.

**The defendant's response to claimants' claims**

**Corporal Borris George's affidavit in response to Mr. Ferguson and Mr. Alexis'**

[13] Corporal George served as a prosecutor with the Royal Grenada Police Force. He was present at the police station on 10th July 2017 after Mr. Ferguson had been sentenced to 6 strokes for an offence related to the Praedial Larceny Act. Corporal George was asked to join the execution of the sentence. Mr. Ferguson was taken to the 'Recreation Room' within the precincts of the magistrate court, where flogging sentences are usually executed. The room has a table or chair without holes and is secluded to ensure privacy. Convicted persons are normally asked to remove their clothing and to secure their genitalia when they bend over, so it is not visible from behind.

[14] "Tan" branches are normally used to execute sentences. These branches are trimmed and kept smooth. Strokes are administered to the buttocks, without any mouth gags. If something unusual happens, like excessive bleeding, the person is usually given urgent medical attention. Otherwise, persons are released after receiving strokes. In the case of Mr. Ferguson, all the required procedures were followed, and 6 strokes were administered as ordered. Corporal George deposes that Mr. Ferguson told him that he asked for strokes as an alternative to imprisonment. In relation to Mr. Alexis, there is a pending praedial larceny charge against him.

**The Honourable Sir Lawrence Joseph's affidavit in response to Mr. Ferguson and Mr. Alexis**

[15] Sir Lawrence Joseph served as a member of Cabinet and as Attorney General of Grenada at the time of the initial filing of these claims in 2018. He explains in his affidavit that the exclusion of females from corporal punishment bears a

sufficient rational nexus between the differentia in male and female offenders for larceny, as there are obvious natural physiological differences between males and females, which parliament must have considered when enacting the provisions of section 16(2) of the Praedial Larceny Act. The differentiation between males and females in the Criminal Code has always existed. The differentiation is predicated on social and moral sensibilities and the rationality of gendered social attitudes. These matters are not appropriate for the court to pass on, as they are squarely within the remit of the elected legislature.

[16] The exclusion of women from flogging, or any form of corporal punishment represents prevailing social opinion in Grenada, as no one would support the flogging of women as a form of judicial corporal punishment. The exclusion of females from the imposition of judicial corporal punishment was not arbitrary but bore a rational connection with the object of the praedial larceny law, which was better protection of praedial produce by a stronger deference to male offenders, who are primarily the offenders found guilty of praedial larceny.

**Corporal Borris George's further affidavit in response to Mr. Ferguson and Mr. Alexis**

[17] Mr. Ferguson had been convicted of 9 offences under the Praedial Larceny Act during the period 2012 to 2017, along with other similar offences. The last 2 convictions relate to the current constitutional motion. Mr. Alexis also had previous convictions for praedial larceny and related offences, but he was never flogged for any offence under the Praedial Larceny Act.

**Rural Constable Garvin Colville's affidavit in response to Mr. Joseph**

[18] Corporal Colville served as a Rural Constable with the Royal Grenada Police Force. He was attached to the Praedial Larceny Department. He had previously administered strokes pursuant to court orders. On 24th November 2017, he served as the chief police escort for the High Court. He recalls that Mr. Joseph

pleaded guilty to the offence of robbery with violence and was sentenced to imprisonment for 9 years and 3 strokes by the presiding judge. Mr. Joseph did not indicate any intention to appeal his sentence or that he was denied access to vindicate his rights. After sentencing, Mr. Joseph was escorted to the police station, and Corporal Colville explained the sentence to him. Mr. Joseph indicated that he understood what was explained to him.

[19] Corporal Colville asked Mr. Joseph if he had any health conditions or needed to be examined by a medical doctor before the flogging. Mr. Joseph replied that he did not. Mr. Joseph was asked remove to his pants and to bend over the chair. He did so voluntarily and 3 strokes were administered with a tamarind whip and not 6 as alleged. Mr. Joseph remained silent during the flogging. While no cuts were visible, there was some swelling. After the flogging, as Mr. Joseph indicated that he suffered from no illnesses and showed no side effects to the flogging, no medical doctor was called to examine him before he was escorted to the prison. Mr. Joseph's record of convictions indicated that he had 3 convictions after the one in 1970, the last being a conviction in 2017.

**Corporal Evelyn Sylvester's affidavit in response to Mr. Joseph**

[20] Corporal Sylvester served as a Corporal at the prison. At the time, he performed the task of officer in charge of prisoner reception, including the admission and discharge of inmates, calculations of sentences, and management of inmate files. As part of his duties, he held custody of and access to prison records. On 7th April 2017, Mr. Joseph was admitted to the prison, and a 'First Sheet' was required to be completed. The First Sheet records the progression of the criminal matter including calculations of the earliest and latest dates of discharge following conviction. When an inmate is first admitted to the prison, the inmate is examined by medical personnel. In the case of all new admissions or when an inmate attends court and returns to prison, that inmate is subjected to an unclothed search and checked for prohibited items. The officer asks each inmate about any injuries or complaints that they wish to report. If any visible injuries are seen, the officer questions the inmate about the injury and whether medical attention is needed.

[21] If an inmate complains of being injured while in police custody, the officer is required to take a statement and fill out a form about the complaint and the inmate is taken for medical attention. Mr. Joseph was examined by a medical doctor on admission to the prison. On 24th November 2017, Mr. Joseph attended his sentencing hearing where he was sentenced to 9 years imprisonment and 3 strokes as reflected on his First Sheet. On his return to prison, Mr. Joseph was searched at the gate. There is no record of any injuries being noted during that search and he made no complaint of being injured while in police custody. There was no requirement for Mr. Joseph to be medically examined after sentencing on 24th November 2017, as medical examinations only occur if inmates complain of illness or injury.

**THE TRIAL**

[22] At the trial on 23rd October 2023, counsel for the defendant indicated that the matters in the claim were substantially disputes of law and suggested that the defendant was not disputing the factual matrix put forward by the claimants, save two or three statements made. Counsel for the claimants agreed with this position. Prior to the trial, counsel for both parties filed submissions on the legal issues, with counsel for the claimants filing submissions on 8th May 2018, 1st December 2021 and 29th July, 2022. Counsel for the defendant also filed submissions on 16th August 2018, 7th May 2021 and 19th July 2022.

[23] After oral submissions by both parties at the trial on their respective positions, and discussion on the legal issues, I asked counsel to file further submissions regarding their divergence on the legality and constitutionality of flogging as a form of punishment in Grenada. Both counsel duly complied, with counsel for the defendant filing submissions on 14th January 2024 and the claimants filing their submissions on 15th January 2024.

**ISSUES FOR THE COURT'S CONSIDERATION**

[24] After consideration of the submissions filed prior to and after trial, I determined that these were the issues for deliberation:

1) Whether the punishment of flogging amounts to inhuman and degrading punishment within the meaning of section 5(1) of the Constitution;
2) Whether the savings clause in section 5(2) of the Constitution prevents the punishment of flogging in the Criminal Code and Praedial Larceny Act from being challenged as unconstitutional;
3) Whether flogging as set out in the Criminal Code and Praedial Larceny Act amounts to sex discrimination by providing protection against flogging for women but not offering the same protection to men;
4) If flogging as set out in the Criminal Code and Praedial Larceny Act amounts to sex discrimination, whether it has been shown that the law on flogging is reasonably justifiable in a 21st century democratic society (section 13(4) of the Constitution;
5) If flogging authorised by the Criminal Code and Praedial Larceny Act is found to be unconstitutional, whether the provisions can be modified to conform to or are void to the extent of their inconsistency with the Constitution;
6) Whether the mandatory sentences in section 16 of the Praedial Larceny Act contravene section 5 of the Constitution;
7) Whether the imposition of flogging immediately after sentencing infringed the claimants' rights to (1) protection from inhuman and degrading punishment (section 5(1)) of the Constitution; and (2); protection of the law and due process in 8 of the Constitution; and
8) Whether the claimants are entitled to any of the relief sought.

**DISCUSSION AND LEGAL ANALYSIS**

**Whether the punishment of flogging amounts to inhuman and degrading punishment or treatment within the meaning of section 5(1) of the Constitution.**

[25] Section 5(1) of the Constitution provides:

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

[26] As noted above, the case for both parties converges on the accepted principle that flogging is simply a degrading and inhuman form of treatment. This is hardly a difficult proposition to accept. Lords Nicholls of Birkenhead and Hope of Craighead put the matter more bluntly in **Pinder v R**[5] where their Lordships stated definitively that "*that flogging is torture or inhuman punishment*." In that case, the troubling question of what to do about the law on flogging also confronted the Privy Council. Ultimately it was decided that applying provisions in the Bahamian Constitution for reasons unique to the facts of that case, the law on flogging in the Bahamas ought to stand. International organisations such as the Inter-American Commission on Human Rights[6] also propagate the contemporary view that flogging as a form of punishment or treatment is incompatible with international guarantees against torture, cruel and inhuman punishment.

[27] But, as stated above, counsel for the defendant while accepting that torture and its other variant forms were prohibited at common law, maintains that judicial corporal punishment was never regarded at common law as torture, inhuman or degrading punishment, and was always seen as an exception to that principle. The defendant presents **Kong v Public Prosecutor**[7] in support of this submission. As the common law exception was preserved in our Constitution, judicial corporal punishment is not inhuman or degrading punishment or treatment and no resort to section 5(2) arises or is necessary. The defendant also argues that in any event there is little or nothing that the court can do about flogging since it is either saved as description of punishment predating the

[5] [2002] UKPC 46.
[6] Grenada and the Bahamas are both signatories to the American Convention on Human Rights. See for instance, Inter-American Commission on Human Rights (IACHR) Report #79/07
[7] [2015] 5 LRC 324 (CA – Sing) at 352.

Constitution or is a description of punishment that is reasonably justifiable in a democratic society.

**My thoughts on this issue**

[28] What constitutes torture, inhuman or degrading punishment or treatment will always be a source of contentious debate throughout human history. The varying discussions often converge on the simple and incontrovertible concept that all humans expect to be and indeed ought to be treated with decency and with dignity. The divergence and even more difficult debate is engaged on finding consensus on what constitutes the basic acceptable norms of decency and dignity to which each human is entitled. Consensus on universal and acceptable standards has never been easily achieved. Humans have even gone to war and bloodshed over these matters. What we can all agree on though is that the basic standards of dignity to which each human is to be entitled are dynamic concepts that will be refined and evolve over time. What may have been acceptable yesteryear will no longer be accepted today.

[29] Flogging is not immune from these discussions and debates. It is hardly surprising that flogging, which was at one point considered an acceptable form of punishment for convicted persons is now frowned upon and even decried as torture by modern standards of humane treatment. Writing in **Pinder**, the Privy Council observed that flogging "*… had previously been abolished in the United Kingdom in 1948 (except for offences committed while the offender was in prison where it was abolished in 1953), though it remained in force in parts of the British Isles until very recently."* [8]

[30] For Grenada's part, the flogging laws took hold in the Criminal Code of Grenada as far back as the 1897 Criminal Code. Where praedial larceny is concerned, flogging as a punishment for stealing of produce and a number of other offences was introduced in the 1992 Praedial Larceny Act. I risk elongating this ruling but I think that it would assist the point being made here to recite in full the terms of the Praedial Larceny Act on the question of flogging –

[8] [2003] 1 AC 620 at para 4.

**“3. Fruit or vegetable produce in a garden, etc.**

Whoever steals, or destroys, or damages with intent to steal, any plant, root, fruit, or vegetable produce growing in any garden, orchard, pleasure-ground, nursery-ground, hothouse, green-house, or conservatory shall, on summary conviction, either be imprisoned for a term not exceeding twenty-four months or else forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not less than three thousand dollars or more than ten thousand dollars as to the magistrate seems proper.

**4. Vegetable produce not growing in garden, etc.**

Whoever steals, or destroys, or damages with intent to steal, any cultivated plant, root, fruit or vegetable produce used for the food of man or beast or for medicine, or for the distilling, or for dyeing, or for in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, pleasure-ground, or nursery-ground, shall, on summary conviction, either be imprisoned for a term not exceeding twenty-four months or else forfeit and pay, over and above the value of the articles so stolen, or the amount of the injury done, such sum of money, not less than three thousand dollars or more than ten thousand dollars as to the magistrate seems proper.

**5. Damage to produce**

Whoever maliciously roots up, destroys or damages any tree, plant, root, fruit, vegetable or other produce which is used or is capable of being used, whether after treatment or otherwise, as food or as an ingredient in food for man or beast, wheresoever lying, standing, growing, cultivated, or planted, shall be guilty of an offence and liable, on summary conviction, to a fine not less than three thousand dollars or more than ten thousand dollars and to imprisonment for twenty-four months.

6. **Dishonestly receiving praedial produce**

(1) Whoever dishonestly receives or unlawfully obtains any tree, plant, root, fruit, vegetable or other produce which is used or is capable of being used, whether after treatment or otherwise, as food or as an ingredient in food for man or beast knowing, or in circumstances in which he or she ought to know the same to have been stolen or unlawfully obtained shall be guilty of an offence against this Act. (2)

Whoever has in his or her possession any tree, plant, root, fruit, vegetable, flower of any fruit or food-producing plant or any part thereof which is used or is capable of being used, whether after treatment or otherwise, as food or as an ingredient in food for man or beast or as medicine for man or beast or for the manufacture of any article, and does not give a good account of how he or she came in possession thereof, shall be guilty of an offence against this Act.

**7. Where circumstances not constitute stealing, alternate offence of obtaining by false pretences may be found**

If upon trial of any person under section 3, 4, 5 or 6 it appears that any produce or article referred to in any of those sections was appropriated, received or obtained by such person by fraud, under circumstances which do not constitute stealing, or dishonestly receiving or unlawfully obtaining, such person shall not by reason thereof be entitled to be acquitted, but may under this section be found guilty of obtaining such produce by false pretences with intent to defraud.

**8. Vagrancy in respect of praedial larceny**

(1) Whoever enters, or is seen or is found on or within any estate, farm, garden, orchard, pleasure ground, nursery ground, hot house, green house or conservatory, without the consent of the owner, occupier, or person in charge thereof and does not give a good account of himself or herself, or does not satisfy the Magistrate that he or she had a right to be thereon or therein, shall be guilty of an offence against this Act. (2) Whoever— (a) is found on or within any estate, farm, garden, orchard, pleasure ground, nursery ground, hot house or conservatory without the consent of the owner, occupier, or person in charge thereof, or any other person lawfully thereon and threatens or intimidates or, attempts to intimidate the owner, occupier, or person in charge thereof, or any other person lawfully thereon; or (b) is found on or within any estate, farm, garden, orchard, pleasure ground, nursery ground, hot house or conservatory, without the consent of the owner, occupier, or person in charge and is also armed with or has in his or her custody or possession any offensive or dangerous weapon or instrument, shall be guilty of an offence against this Act and shall on summary conviction be liable to a term of imprisonment of not less than two years and not exceeding two years. (3) Whoever is found on or within any estate, farm, garden, orchard, pleasure ground, nursery

ground, hot house, or conservatory, and commits any act of violence upon the owner, occupier, or person in charge thereof, or any other person lawfully thereon or attempts to commit such act, shall be guilty of an offence against this Act and shall on summary conviction be liable to a term of imprisonment not exceeding five years.

**16. Flogging**

(1) Notwithstanding anything contained in the Criminal Code, Chapter 72A, or any other law prohibiting or regulating the passing of a sentence of corporal punishment by flogging or whipping, it shall be lawful for a Magistrate on a second or subsequent conviction for an offence committed under section 3, 4, 5, 6, 7 or 8, in addition to any other punishment imposed under this Act, to sentence the offender where an adult to be flogged or where a young person to be whipped; but save as hereinbefore provided the provisions of the Criminal Code regulating the execution of such a sentence shall govern any such sentence made by the Magistrate under this section: Provided that in the case of an offence under section 8(2) or (3), a Magistrate shall order flogging in respect of any such offence, even if it be the first such offence of the particular offender once such offender has attained the age of eighteen years. (2) The provisions of this section shall not apply to any female person convicted of any offence under this Act."

[31] The foregoing provisions, in particular the sections dealing with vagrancy, have a particularly colourful and in many ways, troubling history in the English speaking Caribbean and, in this case, Grenada. President Saunders of the Caribbean Court of Justice (CCJ) commented on the vagrancy laws while ruling on the cross dressing laws of Guyana in the case of **McEwan and others v Attorney General of Guyana**[9] –

[9] (2019) 94 WIR 332

“The prohibition against cross-dressing for an improper purpose was enacted in Guyana in 1893…The law was part of a suite of laws enacted against vagrancy. These laws were passed in the post-emancipation period, both in the Caribbean and in the United States, to cope with the paradigm shift in the mode of production from slavery to free labour. The laws were designed to regulate and exercise control of both the ex-slave population and, in places like Guyana, the newly imported indentured labourers. The objective was to curtail mobility, to keep close to the plantations those whose labour was essential for continued exploitation. Legal coercion became indispensable to maintaining a ready source of cheap labour in the emerging free labour system. The laws, which also regulated gender and religion, were rigorously enforced by magistrates and police. Legal historian and Dean of the University of Virginia Law School, Professor Risa Goluboff, in her recent book, has noted that: 'The vagrancy law was often the go-to response against anyone who threatened, as many described it during vagrancy laws' heyday, to move “out of place” socially, culturally, politically, racially, sexually, economically, or spatially.

**Over time, states and localities deployed and retooled vagrancy laws for use against almost any—real or perceived, old or new—threat to public order and safety**. The officer on the beat in the 1950s and 1960s saw such threats everywhere, in the “queer,” the “Commie,” the “uppity” black man, the “scruffy” young white one. It was his job to see these threats, to determine who was “legitimate” and who was not. He was trained to see difference as dangerous, to see the unusual as criminal. That was what not only his superiors but also the upstanding taxpayers wanted, expected him to do. When he walked the streets questioning and arresting the scum, the flamboyant, the detritus, and the apostate, he brought vagrancy laws with him, and he did his job.'

These views have been accepted and supported by distinguished jurists. Writing about vagrancy statutes and other laws enabling arrest on suspicion, United States Supreme Court Justice William Douglas noted: **'I think we can say with confidence that in this particular area of law the traditional safeguards available to accused persons**

**tend to mean practically nothing. These vagrants usually have no lawyer to speak for them.'** He added that: **'The persons arrested on "suspicion" are not the sons of bankers, industrialists, lawyers, or other professional people. They, like the people accused of vagrancy, come from other strata of society, or from minority groups who are not sufficiently vocal to protect themselves, and who do not have the prestige to prevent an easy laying-on of hands by the police**.'

**Unsurprisingly, vagrancy laws ultimately were struck down by the Supreme Court of the United States**. They were violative of the rule of law. In Papachristou v City of Jacksonville, for example, it was held that the Jacksonville vagrancy law was unconstitutionally vague because it did not give a person of ordinary intelligence fair notice that his or her contemplated conduct was forbidden by the statute."[10] (bold emphasis mine)

[32] Justice Rajnauth-Lee (JCCJ) also offered interesting insight in **McEwan** into the provenance and purport of the vagrancy laws in post slavery societies. Her Ladyship explained that –

> "…vagrancy and related laws sought to legislate new forms of labour coercion to maintain the viability of the plantation enterprise after emancipation. Professor Rose-Marie Belle Antoine has observed: 'After the collapse of the slave system (mainly due to the fact that slavery and sugar plantations were no longer profitable), slavery was abolished by the Emancipation Acts of 1833. Yet the law and legal systems continued to reflect the unequal structure of the ex-slave, colonial society.
>
> In fact, they were used deliberately to reinforce this structure. Laws such as the Tenancy Acts and Vagrancy Acts, imported from England, served a clandestine function in the West Indies. They helped to force "idle", jobless ex-slaves, devoid of land, money or opportunity, back on the plantations. They were intended to discourage small landholdings

[10] (2019) 94 WIR 332 at paras 30 – 33.

and force labour to remain on the oversupplied market. Under the Vagrancy Acts, for example, innocuous activities such as loitering were criminalized'.[11]"

[33] It is therefore readily apparent that, at least for countries like Grenada, flogging laws have an offensive flavor not only for being repugnant to notions of basic human dignity but are also particularly odious due to Grenada's disturbing colonial past. Flogging was often used to enforce laws designed to support and maintain an oppressive system of colonial and imperial domination. We can glean much of the concerns about flogging from our own case law in the OECS and like Pinder, a few cases outside of our region with respect to flogging.

[34] In **The Queen v Kenneth Crafton**[12] from the courts in Saint Lucia, the accused was found guilty of 2 counts of unlawful carnal knowledge. The punishment for that offence was imprisonment for life and flogging. In passing sentence, Hariprashad – Charles J (as she then was) noted that flogging is seen as barbaric, degrading and inhuman and will soon be removed from the statute books[13].

[35] Sir Denys Williams CJ in the Court of Appeal of Barbados in the case of **Hobbs (Victor) and Mitchell (David) v R**[14] observed that the whipping of a person with the cat – o – nine – tails was both inhuman and degrading within the meaning of section 15(1) of the Barbados Constitution which prohibited cruel and inhuman punishment.

[36] As I have stated above, in **Pinder v The Queen**[15], it was accepted that flogging is an inhuman and degrading punishment[16].

[11] (2019) 94 WIR 332 at para 113.
[12] SLUHCV2003/0074.
[13] Ibid at 8.
[14] (1992) 46 WIR 42
[15] [2002] UKPC 46
[16] Ibid at 626.

[37] In **Fangupo v R**[17], the Court of Appeal of Tonga was tasked with determining an appeal against sentences of whipping, and observed that:

> "We think it appropriate to make some observations regarding this sentence [of whipping]. The attitude of the courts in many countries has over the last 20 years changed in relation to sentences involving corporal punishment. A number of countries have adopted or amended Constitutions to prohibit cruel and unusual punishment…We note too that various human rights bodies such as the Human Rights Committee appointed by the UN, the International American Court of Human Rights and the European Court of Human Rights have all described whipping or flogging as cruel, inhumane and degrading. This view is becoming increasingly accepted by countries around the world and has led to the constitutional changes earlier referred to…"[18]

[38] In **Ncube and Others v The State**[19], 3 adults were convicted in separate court proceedings of rape, and were each sentenced to varying terms of imprisonment and 6 strokes with a cane. They appealed their sentences for whipping and the South African Court of Appeal found that sentences of whipping upon an adult person was inhuman and degrading punishment, in light of the consideration of current judicial and academic views in various countries who have abolished whipping such as the United Kingdom, Canada, Australia and the United States of America. In finding that all of the aforesaid countries abolished whipping because it was cruel and inhuman punishment, the court also opined that there are adverse features inherent in whipping as the court found that the punishment is brutal, cruel, contrary to the humanity and evolving standards of decency of almost the whole civilized world, and was degrading to both punished and punisher alike.

[17] [2011] 1 LRC 620 at 625.
[18] Ibid at 625.
[19] [1988] LRC (Const) 442.

[39] Additional cases such as **A Juvenile v The State**[20] , **Boyce and Another v R**[21], **State v Williams and Others**[22], **The State v Kumalo**[23], **Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of State**[24] and **Caesar v Trinidad and Tobago**[25] equally conclude that flogging, whipping and corporal punishment generally constitute cruel and inhuman forms of punishment.

[40] I can do no more but add my voice to the lofty pronouncements on this matter and find, that, by modern standards, flogging as a description of punishment constitutes degrading and inhuman punishment or treatment. This form of punishment is accordingly inconsistent with section 5(1) of the Constitution that prohibits torture or inhuman or degrading punishment or other treatment.

**Whether the savings clause in Section 5(2) of the Constitution precludes the punishment of flogging in the Criminal Code and Praedial Larceny Act from being challenged as being unconstitutional**

[41] Counsel for the parties accept that section 5(2) of the Constitution is a savings clause. However, counsel differ on how this savings clause ought to be interpreted in the context of the punishment of flogging and whipping in this case. Section 5(2) of the Constitution reads:

> "**Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section** to the extent that the law in question **authorizes the infliction of any description of punishment that was lawful in Grenada immediately**

[20] [1989] LRC (Const) 774 at 790 – 797.
[21] [2004] 4 LRC 749 at 763 – 764.
[22] [1995] 2 LRC 103.
[23] 1965 (4) SA 565 at 574
[24] [1992] LRC (Const) 515 at 516
[25] 2005) 21 BHRC 305.

**before the coming into operation of this Constitution**." (Bold emphasis and underline mine).

[42] Counsel for the claimant contends that the scope of the clause has to be considered as was done in **Chandler v The State of Trinidad and Tobago**[26], where the Privy Council unanimously held that the mandatory death sentence was immunized from challenge by the general savings clause contained in section 6 of the Constitution of Trinidad and Tobago. Counsel argues that as section 5(2) of the Constitution is a specific savings clause, **Chandler** is therefore distinguishable. This is since section 5(2) is restricted to a specific fundamental right and only saves pre-existing punishments from constitutional challenge on the basis that the punishment amounts to inhuman and degrading punishment.

[43] Counsel also references **Nervais v R**[27] and **McEwan v The Attorney General of Guyana**[28] to make the point that savings clauses are to be given a strict and narrow interpretation and consequently, only challenges to the stipulated human rights provisions are barred. On this basis, counsel asks the court to find that the savings clause in section 5(2) of the Constitution does not prevent the punishment of flogging from being challenged pursuant to section 13 of the Constitution.

[44] Counsel for the defendant replies that section 5(2) preserves pre – existing punishments not pre – existing laws, and immunizes from constitutional attack any available punishment that was lawful in Grenada immediately before the Constitution. Counsel further submits that counsel for the claimants' reliance on **Pinder** is misplaced, as the law in that case was struck down by parliament, which is the only legitimate way that flogging can be abolished. Counsel also relies on the learning in **Pratt and Another v Attorney General of Jamaica**[29], **Boyce v The Queen**[30] and **Matthews v The State**[31], where the savings

[26] [2022] UKPC 19.
[27] [2018] CCJ 19 (AJ).
[28] [2018] CCJ 30 (AJ).
[29] (1994) 2 AC 1.
[30] [2004] 3 WLR 786.
[31] [2004] 3 WLR 812.

provisions on punishment contained in pre – independence laws were found to insulate punishment from constitutional challenge.

**My thoughts**

[45] Savings clauses are, in essence, provisions in our constitutions that mandate that laws or, in some constitutions, certain type of laws that predate the Constitution cannot be set aside as being inconsistent with the Constitution for the mere fact that those laws or type of laws predate the enactment of the Constitution. These clauses present a conundrum of immense proportion for many reasons that have been eloquently discussed throughout our jurisprudence in the Caribbean from the time of the enactment of all our constitutions [32]. Writing in **McEwan**, President Saunders of the CCJ expressed some of the salient concerns regarding savings clauses in English speaking Caribbean constitutions especially in respect of what the constitutions recites as the fundamental rights of the citizen -

> "The broad effect of the savings clause, read literally by many, is that these human rights, so carefully laid out in the Constitution, must give way to the dictates of a pre-Independence law until and unless the legislature amends the pre-independence law. Until this Court's recent decision in Nervais, it has been the conventional wisdom that the savings clause completely immunised pre-independence laws from being held to be in contravention of the human rights laid out in the Constitution…
>
> By shielding pre-Independence laws (referred to as 'existing laws', because they were laws in existence at the time of Independence) from judicial scrutiny, savings clauses pose severe challenges both for courts and for constitutionalism. The hallowed concept of constitutional supremacy is severely undermined by the notion that a court should be

[32] Attorney General of Trinidad and Tobago v Maharaj (substituted on behalf of the Estate of Satnarayan Maharaj for Satnarayan Maharaj and another ) [2023] UKPC 36; Bisram v Director of Public Prosecutions [2022] 5 LRC 1; Sahadeo v Attorney General (2019) 97 WIR 304; Attorney General v Cecil Toussaint [2019] ECSCJ No. 218; Nervais v R (2017) 90 WIR 95; Pratt & Morgan v Attorney General for Jamaica and another [1993] UKPC 1.

precluded from finding a pre-independence law, indeed any law, to be inconsistent with a fundamental human right. Simply put, the savings clause is at odds with the court's constitutionally given power of judicial review."[33]

[46] President Byron of the CCJ in one of the leading pronouncements on the general savings clause (but equally appropriate to specific savings clauses) noted in **Nervais**[34] that –

> "The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned. Professor McIntosh in Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002), commenting on s 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the 'horror of this is brought home to the intelligent mind when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution'. It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. 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. This cannot be the meaning to be ascribed to that provision as it would

[33] (2019) 94 WIR 332 at paras 37 – 38.
[34] [2018] CCJ 19 (AJ).

forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.[35]"

[47] It is no surprise then that the courts have consistently insisted on a construction of savings clauses that narrowly defines and confines both their intent and scope [36]. In **Mc Ewan**, the court observed that –

> "A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest…"[37]

[48] This restrictive approach to interpretation led the CCJ in **McEwan** to suggest the following 4 broad and interlocking approaches to avoid a reflexive and harsh application of the savings clause: (1) the savings clause must be construed narrowly or restrictively, (2) the clause only saves law that infringe the individual human right itself but it does not preclude the court from holding a pre – independence law to be invalid if the law runs counter to another constitutional provision, (3) ) the clause should be construed to avoid an interpretation of domestic law that places a State in breach of its international obligations ; and (4) courts should first apply the modification clause to the pre – independence law before attempting to apply the savings clause.

[49] The Court of Appeal in **Hughes v R and Spence and v R**[38] was deliberating on the equally troubling question of whether mandatorily imposing the death penalty on persons convicted of murder was inconsistent with section 5 of the

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[35] (2018) 92 WIR 178 at paras 58 – 59.
[36] See for example AG of Grenada v Coard (2005) 88 WIR 289, Watson v R (2004) 84 WIR 241, Spence v R [2001] UKPC 35.
[37] (2019) 94 WIR 332 at para 41.
[38] [2002] 2 LRC 531.

Saint Lucia Constitution which prohibits inhuman and degrading punishment. Like Grenada, there was no blanket savings clause that immunised such a law from the full glare of constitutional scrutiny, as the savings provision was specific to the section prohibiting inhuman and degrading punishment. The savings provision in the Saint Lucia Constitution is similarly worded to section 5(2) in the Constitution of Grenada and states –

> "'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of s 5 of the Constitution to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Saint Lucia immediately before 1 March 1967 (being the date on which Saint Lucia became an Associated State)."

[50] The Court of Appeal in **Hughes and Spence** took this approach to interpreting the clause –

> "The first thing to note about this clause is that it is limited to section 5. It does not prohibit or restrict the court from making any holding with regard to any section other than section 5. Thus, the grounds of appeal that allege contravention of ss 1(a) and 2(1) of the Constitution are not affected by this clause…The second point is that even in relation to s 5 of the Constitution the prohibition is not a total one. It is limited 'to the extent that the law in question authorises the infliction of any description of punishment that was lawful …' I interpret this to mean that the court cannot declare unconstitutional 'the infliction of any description of punishment' that was lawful before Saint Lucia (and Saint Vincent and the Grenadines) became an Associated State."[39]

[51] In essence therefore, the court in interpreting savings clauses of the nature in question in this case, have restricted the application of those clauses to the specific sections to which the savings is addressed and, in the case of section

[39] [2002] 2 LRC 531 at paras 17 – 19.

5(2) and similar clauses, limited their scope to the description of the punishment being retained. Mr. Ferguson K.C is therefore correct in his assessment that many of the decisions relied on by the defendant[40] relate to saving clauses that are of a general nature. Mr. Ferguson KC is equally correct that the savings clause in section 5(2) of Grenada's Constitution is confined to a specified right, in this case the right not to be subjected to inhuman and degrading punishment. One can also glean, as skilfully articulated by Mr. Ferguson K.C, that the savings clause does not merely relate to a pre-existing law but the saving is specifically in respect of a law that authorises a "description of punishment" that predates the Constitution.

[52] The conclusion on this issue is this then. Because of the presence of section 5(2) in the Grenada Constitution, I am precluded from considering whether flogging, as a description of punishment is inconsistent with the right stated in section 5(1) that a citizen of Grenada should not be subjected to inhuman and degrading punishment or treatment. However, that factor alone does not prevent the law from being challenged on other grounds under the Constitution which are not set out in section 5(1). See **Hughes and Spence**[41]. I am of the view that this finding permits the claimants to mount their challenge that flogging may infringe the Constitution on the grounds of discrimination as contended. Additionally, complaints that the mandatory application of the flogging law is unconstitutional may be explored.

**Whether the provisions in the Criminal Code and Praedial Larceny Act which authorize flogging or whipping as punishment are discriminatory on the grounds of sex by providing protection against flogging for women but not offering the same protection to men.**

[53] The relevant sections of the law on Praedial Larceny have already been recited above in this judgment. The sections which relate to flogging in the Criminal Code are recited in sections 70, 75, 78, 79, 95, 212 and 276(2) –

[40] DPP V Nasralla [1967] 2 AC 238
[41] [2002] 2 LRC 531 at paras 25 and 191.

"Section 70 the Criminal Code provides for several different forms of punishment:

The following punishments may be inflicted under this Code –

(1) Death,

(2) Imprisonment, including detention…

**(3) Flogging,**

**(4) Whipping,**

(5) Fine, and

(6) Payment of compensation."

Section 75 outlines rules in relation to the execution of the sentence of flogging and whipping:

"(1) A juvenile offender shall not be sentenced to flogging, but in lieu thereof he may be sentenced to be whipped.

(2) **No sentence of flogging or whipping shall be passed upon a female of any age**, but in lieu of any such sentence, the court may sentence a female to solitary confinement or any other such additional punishment as the law for the time being permits to be inflicted on a female for an offence against the rules of the prison,

(3) Flogging shall be with a cat of a pattern approved by the Governor General and a sentence of flogging shall specify the number of strokes, which shall not exceed twelve,

(4) Whipping shall be with a light rod or cane or birch of tamarind or other twigs, and a sentence of whipping shall specify the number of strokes, which shall not exceed twelve,

(5) No person shall be sentenced to be flogged or whipped more than once for the same offence. "

Section 78 empowers the court to order alternative sentences to flogging or whipping.

"78. Imposition of alternative punishments

(1) The Court before which a person is convicted may, according to the circumstances of the case and subject to the provisions of this Code with respect to flogging and whipping, substitute for a punishment assigned by this Code a different punishment, as follows— (a) in the case of manslaughter or of any misdemeanour, the Court may substitute a fine, which in the case of a summary offence shall not exceed two thousand dollars; (b) where a juvenile offender is convicted of any offence punishable by fine or imprisonment, the Court may substitute whipping for the fine or imprisonment; and (c) the Court before which a person is convicted of any offence may order that, in lieu of or in addition to any other punishment, he or she enter into his or her own recognisance, with or without sureties, for keeping the peace and being of good behaviour; and that, in default of such recognisance or sureties, he or she be imprisoned, in addition to the term, if any, of imprisonment to which he or she is sentenced, for any term not exceeding six months in the case of a conviction before the Supreme Court, or three months in the case of a conviction before a Magistrate's Court, not exceeding in either case the term for which he or she is liable to be imprisoned for the offence of which he or she is convicted. (2) Power of Court to order detention in custody of juvenile offender pending infliction of whipping.—Whenever a juvenile offender is convicted of any offence punishable by fine or imprisonment and in accordance with the power conferred by this section the Court substitutes the punishment of whipping in lieu of a fine or imprisonment, it shall be lawful for the Court to order that the offender shall be detained in custody for not more than forty-eight hours until the punishment shall have been inflicted."

Section 79 of the Criminal Code allows for an increase of punishment on repetition of crime or the execution of sentences where the former term of imprisonment is unexpired.

Section 95(2) and 95(3) of the Criminal Code allows for flogging on conviction for stealing:

"(1) ...

(2) Whoever is convicted of —

(a) any of the undermentioned offences, where the value of the property alleged to have been stolen or obtained does not exceed the sum of five thousand dollars, namely, any of the offences following— (i) stealing anything of which he or she had the custody, control or possession, or to which he or she had the means of access, by reason of any office, employment or service, (ii) stealing from or in any dwelling-house, shop, garage, manufactory, warehouse or vessel, (iii) stealing any goats or swine, (iv) committing a fraudulent breach of trust; or

(b) any attempt to commit any of the offences herein referred to; or

(c) any abetment, or conspiracy for the commission, of any of the said offences, shall be liable to imprisonment for one year, or to a fine of three thousand dollars, or to both, and whether with or without flogging or whipping in respect of any offences for which flogging or whipping may be lawfully inflicted.

(3) Whoever is convicted of stealing from the person, or of attempting to steal from the person, or of abetting or conspiring to steal from the person; where the value of the property that is the subject of the offence under this subsection does not exceed the sum of three thousand dollars, shall be liable to imprisonment for two years, or to a fine of four thousand dollars, or to both, and whether with or without flogging or whipping in respect of any offences for which flogging and whipping may be lawfully inflicted."

Section 212 of the Criminal Code authorizes flogging for the offence of garroting:

. "Whoever, with any of the intents mentioned in the last preceding section, and by means of choking, suffocating, or strangling, or by any other violence or by means of any stupefying or overpowering drug, gas, or other matter, renders or attempts to render a person unconscious or insensible or physically incapable of resistance, shall be liable to imprisonment for fifteen years, and, in the discretion of the Court, to flogging."

Section 276(2) of the Criminal Code provides the penalty of flogging for the offence of robbery with violence:

"(1)…

(2) Whoever commits robbery, being armed with any offensive instrument, or having made any preparation for using force or causing harm, shall be liable for imprisonment for fifteen years, and in the discretion of the court, to flogging."

[54] Counsel for the claimants ask the court to consider section 13 of the Constitution which provides for protection from discrimination. The claimants present **Attorney General of Saint Christopher and Nevis et ors v Kaleel Jones**[42], where in construing section 15(1) of the Constitution of St. Kitts and Nevis on discrimination (which is in pari materia to section 13(1) of the Constitution of Grenada), the Court of Appeal stressed that what was required to prove discrimination was less favourable treatment of one sex vis a vis the other sex.

[55] Counsel also references **R (on the application of European Roma Rights Centre) and others v Immigration Officer at Prague Airport and another**[43], where it was stated that the ingredients of unlawful discrimination are (i) a difference in treatment between one person and another person (real or hypothetical) from a different sex or racial group, (ii) that the treatment is less favourable to one, (iii) that their relevant circumstances are the same or not materially different and (iv) that the difference in treatment is on sex or racial

[42] SKNHCVAP2004/0001.
[43] [2004] UKHL 52.

grounds. As the Criminal Code and the Praedial Larceny Act expressly shield women from being flogged or whipped, counsel claims that men are treated less favourably than women, which is a prima facie violation of section 13 of the Constitution.

[56] Counsel for the defendant submits that section 13 of the Constitution provides a guarantee against discriminatory treatment, but the right is not absolute, as it is qualified by section 13(4). Further, counsel asserts that section 13(3) prescribes the categories of discrimination enforceable under section 16 of the Constitution. Counsel submits that not all unequal treatment amounts to discrimination, as parliament has the power to enact legislation based on public policy concerns and there is justification for the unequal treatment in this case, as men and women have different characteristics as explained in **McEwan.**

**My thoughts**

[57] What does the Constitution prescribe with respect to discrimination? Section 13 of the Constitution affords citizens of Grenada, constitutional protection against discrimination on the grounds set out in that section. The parts of section 13 relevant to this discourse read:

> "(1) **Subject to the provisions of subsections (4), (5) and (7)** of this section, **no law shall make any provision that is discriminatory either of itself or in its effect**.
>
> (2)...
>
> (3) In this section, the expression "discriminatory" means a**ffording different treatment to different persons attributable wholly or mainly to their respective descriptions** by race, place of origin, political opinions, colour, creed or **sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages** which are not accorded to persons or another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –

(a) …

(b)…, or

(c) **whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to its special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society**.

(5) …

(6) **Subsection (2) of this section shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as referred to in subsection (4) or subsection (5) of this section**.

(7)…

(8)…." **(bold emphasis mine)**

[58] The term discrimination is described in the section itself which speaks of affording different treatment to different persons solely or mainly on grounds, such as in this case, sex. It must go without saying though that each situation will be different and the mere fact that different criteria and standards are applied to different persons is not what is necessarily proscribed. However, ascribing different criteria and standards must never be based solely or mainly on a person's sex. Section 13 prohibits applying differentiation on that basis without good reason. The Constitution can be therefore be said to be espousing and promoting values of fairness and equality in the manner that each person or groups of persons ought to be treated. In this context, President Saunders of the CCJ made the point in **McEwan** that –

> "At the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is

to develop a society in which all citizens are respected and regarded as equal…

The constitutional promise of equality prohibits the State from prescribing legislative distinctions or other measures that treat a group of persons as second-class citizens or in any way that otherwise offends their dignity as human beings. To safeguard equality rights, courts must adopt a substantive approach. Ensuring substantive equality might require equal treatment for those equally circumstanced, different treatment for those who are differently situated, and special treatment for those who merit special treatment. Paying regard to mere formal equality could lead to grave injustice and defeat the spirit of the equality provisions. Critical to the adoption of a substantive approach is the need to examine the impact or effect of a challenged measure.

…At its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy."[44]

[59] The court is tasked with assessing the facts to determine what then is fair and where the lines are to be drawn. Barrow J.A (as he then was) elucidated the matter thusly –

"Different treatment is only discriminatory, in the sense prohibited by the Constitution, if it results in less favourable treatment to a person compared to the treatment afforded to other persons…Subjecting a person to disabilities or denying him privileges or advantages accorded to other persons is what constitutes discriminatory treatment. A person so subjected or denied is obviously treated not merely differently, but also less favourably, than a person who is not so subjected or denied.

[44] (2019) 94 WIR 332 at paras 64 – 68.

It is different treatment which produces such a result that is proscribed…"[45]

[60] In **Wade v Roches**, President Mottley of the Belizean Court of Appeal addressed the discrimination point this way **–**

"In Bishop of Roman Catholic Diocese of Port Louise and Others v. Sattyludeo Tengur & Others, Privy Council Appeal No. 21 of 2003, (unreported), Lord Bingham dealt with the issue of discrimination. In pointing out that differentiation without more did not necessarily amount to discrimination, he referred to the judgment of Rault, J. in Police v. Rose [1976] MR 78 where at p. 81 he said: "To differentiate is not necessarily to discriminate. As Lysias pointed out more than 2,000 years ago, true justice does not give the same to all but to each his due: it consists not only in treating like things as like, but unlike things as unlike. Equality before the law requires that persons should be uniformly treated, **unless there is some valid reason to treat them differently**. In Kedar Nath v. State of West Bengal AIR 1953 SC 404 the Supreme Court of India held **that it is permissible to apply different measures to different classes of persons if the classification is based on an intelligible principle having a reasonable relation to the object which the Legislature seeks to attain**. There is inherent in the term discriminate and its derivatives as used in the Constitution a notion of bias and hardship which is not present in every differentiation and classification… **The difference of treatment will be justified when it pursues a legitimate aim and there exists at the same time a reasonable relationship of proportionality between the means employed and the aim sought to be realized**."[46] (bold emphasis mine)

[45] **Attorney General of Saint Christopher and Nevis et ors v Kaleel Jones** SKNHCVAP2004/0001 at paras 31 – 32.
[46] BZ 2005 CA 5 at para 39.

[61] It seems then, from the foregoing, that at a basic level, the aims of fairness and equality presumed in the antidiscrimination clause precludes treatment that is not merely different to others (since differentiated treatment may be warranted for all sorts of logical and obvious reasons) but treatment that is less favourable than others or solely or mainly attributable to one's sex.

[62] In this regard, context is important and accordingly, the impugned rule must be examined in the context of the aims of the statute as a whole. This was the view of the matter taken by the court in **AG v Kaleel Jones**[47], where the rule in question mandated that boys of a certain school cut their hair short. Where the parents of a young man objected, the high court found the rule to be discriminatory in that the same requirement was not made with respect to girls or that the rule was aimed at boys as opposed to girls. The Court of Appeal found that the restriction was warranted and not discriminatory since the code in which it was contained addressed the manner of dressing for all students, male and female. Evidently the standards for girls in **Kaleel Jones** (to wear skirts only of a certain length and restricting head wear for instance) were different from those for the boys (length of hair for instance). The code, while delineating standards along the lines of the sex of the student, had as its object a rational and reasonable basis that was not wholly or mainly based on sex. The code could hardly be described as discriminatory since the aims of the statute were shown to be reasonable and could only be achieved by a recognition and reflection of the differences in the sexes. In a word, no one was being treated less favourably than the other or being targeted wholly or mainly for reasons of their sex.

[63] In my view, the claimants have argued successfully that the flogging law meets out treatment to male persons that is not merely differentiated but is obviously less favourable to that meted out to the females. I agree with the claimants that other than a somewhat muted response that judicial corporeal punishment has always been applied as an accepted form of sentence for convicted males, I do not see on the defendant's case any suggestions as to why in the context of the

[47] SKNHCVAP2004/0001

penal statues in question as a whole, flogging as a punitive measure for convicted males is not less favourable treatment and is without more, discriminatory as the law evidently targets men wholly or mainly on the grounds of sex.

[64] To be fair to the defendant, it is also the defendant's case that the crimes of praedial larceny and other crimes contained in the Criminal Code are serious infractions that are mostly committed by men and as such as a matter of social policy the State has decided to retain this form of punishment to address this type of criminality by men. This point may be more properly addressed below but permit me to say this at this juncture. I would agree that social policy is for the law makers and I need not repeat the many cases that have cautioned against judges venturing into that domain. However, the enactment of laws cannot be done in patent violation of the rights entrusted to citizens by the Constitution. It is for the courts to decide if the laws have so impinged on rights. Lord Bingham commented on this issue in **R v Reyes** to the effect that –

> "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.**
>
> **When … 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**."[48] (Bold emphasis mine).

[65] I do not find this reason for retaining the law aids the defendant. I would agree that the crimes in question may be very serious ones and in the case of robbery with violence, for instance, may be a cause for continuing distress. But that is no reason to subject one set of the citizens (while protecting others) to sanctions that we all, including the defendant, agree are repugnant to all modern notions of human dignity without justification. If one looks at the Criminal Code in context and at section 70 for instance, the aim of that section is to provide a tool kit of sanctions from which the sentencing court can impose the requisite sanctions for infractions of the laws. As has been pointed in in **Hughes and Spence**[49], **Reyes**[50] and **McEwan**, it is the remit of judges to determine the appropriate sentence to be imposed on a convicted person. Our sentencing guidelines comprehensively outlines matters which, among other things, include the nature of the offence, the prevalence of the offence and characteristics and matters unique to the offender. No one has suggested that our judicial officers are unequal to the task of assessing what is an appropriate sentence. So therefore, to argue that, as a matter of social policy, the State must, without cogent reasons, maintain this law that in its execution not only treats men less favourably than women but is repugnant in the manner of so doing is not a posture that ought to be loudly announced.

**Having found that the law is discriminatory, what is next?**

[66] To highlight that this law is plain discrimination is just the beginning of the discourse. Speaking of the antidiscrimination and equality provisions of the Guyana Constitution, President Saunders of the CCJ made the following important observation in **McEwan**–

[48] [2002] UKPC 22 at paras 25 – 26.
[49] [2002] 2 LRC 531.
[50] [2002] UKPC 22.

> "…as is the case with other fundamental rights, the right not to be discriminated against is not enjoyed at large. The Constitution itself lays down exceptions and qualifications which may impact on the enjoyment of the right: art 149(3)–(7). Parliament may, for example, properly enact legislation limiting or impinging fundamental rights if such legislation is reasonably required in the interests of, inter alia, public order, public morality, or for the purpose of protecting the rights and freedoms of other persons, including the right to practice and observe any religion, or that imposes restrictions upon public officers. Any such limitation should be demonstrably justified in a democratic society. [51]"

[67] Baroness Hale opined in **Surrat et al v The Attorney General of Trinidad and Tobago**[52] –

> "[i]t cannot be the case that every Act of Parliament which impinges in any way upon the rights protected in sections 4 and 5 of the Constitution is for that reason alone unconstitutional. Legislation frequently affects rights such as freedom of thought and expression and the enjoyment of property. These are both qualified rights which may be limited, either by general legislation or in the particular case, provided that the limitation pursues a legitimate aim and is proportionate to it. It is for Parliament in the first instance to strike the balance between individual rights and the general interest. The courts may on occasion have to decide whether Parliament has achieved the right balance. [53]"

[68] And so, the contention that the law makers have passed laws, and as is also the case on this claim, continued to retain laws that discriminate against a group, gender or class of its citizens has to be measured against the right in question to assess whether the law makers have overstepped their permitted reach. The Constitution is the supreme law[54] and while the law makers are permitted to

[51] (2019) 94 WIR 332 at para 62.
[52] [2007] UKPC 55
[53] Ibid at para 58.
[54] Section 106 of the Constitution of Grenada.

enact laws for the good order of the State[55] and/or in this case, retain such laws, they are constrained to do so in a manner that does not unwarrantedly or unjustifiably restrict or derogate from the rights guaranteed by the Constitution. In this context, the lawmakers are permitted to enact or retain a law that is discriminatory only in so far as that discriminatory law is, among other things "legitimate and proportionate…" or as section 13(4) requires, the law is "reasonably justifiable in a democratic society**."** Having found that the law in question is discriminatory on the grounds of sex, the question then turns inexorably to whether the derogation from the right against discrimination is to withstand constitutional scrutiny because the law has been passed (or additionally in this case been retained) for "a legitimate aim and is proportionate" or more properly, that the law is "reasonably justifiable in democratic society."

**If the punishment of flogging amounts to sex discrimination, whether it has been shown that it is reasonably justifiable in a 21st century democratic society.**

[69] What is the approach to be taken to the question of whether the law in question is reasonably justified in a modern democratic society? Writing in **Ras Sankofa Maccabbee v The Commissioner of Police et al**[56], Ventose J (as he then was) succinctly recited the tests applied by the courts on such questions. In that case his Lordship was asked to examine whether provisions in the St. Kitts and Nevis Drugs Act violated the claimant's fundamental rights set in the Constitution of St. Kitts and Nevis. His Lordship explained that –

> "The test accepted by the Privy Council in de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 A.C. 69 to determine whether any such limitation is reasonable and justifiable is to ask whether: (a) the legislative objective is sufficiently important to justify limiting a fundamental right; (b) the measures designed to meet the legislative objective are rationally connected to it; and (c) the means used to impair the right or freedom

[55] Section 38 of the Constitution of Grenada.
[56] SKBHCV2017/0234.

are no more than is necessary to accomplish the objective. In other words, the question is whether: (1) the policy underlying sections 30 6(2) and 7(1) of the Drugs Act pursues a legitimate objective; and (2) the limitation or restriction of the Claimant's right to freedom of conscience under sections 3 and 11 of the Constitution bears a reasonable or rational relationship to the objective of sections 6(2) and 7(1) of the Drugs Act.

In Worme and Grenada Today Ltd v Commissioner of Police of Grenada (2004) 63 WIR 79, the Privy Council explained that: It is, as already explained, common ground that the crime of intentional libel constitutes a hindrance to citizens' enjoyment of their freedom of expression under s 10(1) of the Constitution. It is therefore necessary for the respondent to show that the provisions of the Code are reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons. If that is established, the burden shifts to the appellants to show, in terms of the last limb of s 10(2), that the provisions are not reasonably justifiable in a democratic society; see Cable and Wireless (Dominica) v Marpin Telecoms and Broadcasting Co Ltd (2000) 57 WIR 141 at 152, per Lord Cooke of Thorndon. Therefore, it is for the Defendants to establish that sections 6(2) and 7(1) of the Drugs Act are reasonably required in the interests of defence, public safety, public order, public morality and/or public health. Only if the Defendants establish any of these would the burden shift to the Claimant to show that sections 6(2) and 7(1) of the Drugs Act are not reasonably justifiable in a democratic society."[57]

[70] While elucidatory of the approach that the courts have taken to explicating the subject, I must adopt some caution when applying it to section 13(4) of the Grenada Constitution. This is since the provisions in the St. Kitts and Nevis Constitution permit limitations on the fundamental rights where the limitations are shown (1) to be reasonably required on a number of public interest grounds:

[57] SKBHCV2017/0234 at paras 51 – 53.

and (2) if so shown to be reasonably required, are notwithstanding, shown not be, in any event, reasonably justifiable in a democratic society. When one examines section 13(4) of the Grenada Constitution where the derogation from the section 13(1) right is enumerated, it is seen that the derogation is permitted where, among other instances, it is shown to be "reasonably justifiable in a democratic society." The "reasonably required" element is only mentioned in section 13(7) in circumstances not relevant to this discussion.

[71] The relevance of all this is that it while it is clear from what his Lordship Ventose enunciated as to what must be proven, it begs the question on whom does that burden fall to prove the same. I say this because when we examine the helpful summary cited by Ventose J on the approach that ought to be taken in cases where the derogation is to be shown to be both "reasonably required" and "reasonably justified" alongside section 13(4) in this case we see that section 13(4) does not throw up circumstances that call for that examination. What is necessary, as stated at section 13(4), is that the law must be shown to be "reasonably justified in a democratic society." The proposition that it is for the claimant to prove that the law abrogates the right or derogates from it cannot be controverted. As found above, the claimants have done so in this case in that they have established that the law on flogging is discriminatory. But who must show that the law is reasonably justified and what must be proven to so show that it is reasonably justified may be remaining questions.

[72] In reviewing the matter, I found some assistance from pronouncements made about provisions similar in the Jamaica Constitution. Section 13(2) of the Jamaica Constitution reads –

> "13 (2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, **and save only as may be demonstrably justified in a free and democratic society**- (a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and (b) Parliament shall pass no law and no organ of the state shall take any action which abrogates, abridges or infringes those rights (Bold emphasis mine).

[73] Now it is seen that in those provisions there is no such language as "reasonably required". The learned Chief Justice of Jamaica, his Lordship Brian Sykes, after fulsomely reviewing the background to changes to the Jamaican Charter of Rights in which the just cited section 13(2) is situated and relevantly applicable case law such as **R V Oakes**[58], made these observations about who must prove what –

> "The effect of the presumption in favour of guaranteed rights and freedoms is that once the claimant makes a case of violation, the burden, evidentially and legally, shifts to the one seeking to uphold the violation. Where the burden is not discharged the claimant must succeed at the end of the case. This also means that if the claimant makes a case of violation, and the violator responds but the adjudicator concludes that the response of the violator leaves the scales evenly balanced, the claimant must succeed because of the presumption in favour of fundamental rights and freedoms. The claimant having discharged his burden and if the violator fails to convince the court that the violation is justifiable in a free and democratic society then it must mean that the law is unconstitutional. Any other conclusion would be irrational and contrary to reason. The presumption of constitutionality cannot assist the violator if a prima facie case of violation is established. The violation must be justified."[59]

[74] I have noted above that section 13(4) of the Grenada Constitution stipulates that it must be shown that the law restricting the right or freedom is "reasonably justified in a democratic society". The language "demonstrably justified" is used in the Jamaica section 13(2). Nonetheless, I think that the difference between the words "reasonably justified and "demonstrably justified" is quite immaterial or so negligible as to be inconsequential if one looks at the matter through the lens of the State being required to prove that the restriction on the right is

[58] [1986] 1 S.C.R. 103.
[59] Julian J Robinson v The Attorney General of Jamaica [2019] JMFC Full 04 at paras 99

reasonably justified in a modern democratic society. I am prepared to accept though that the words "reasonably" or "demonstrably" may bear some significance when one is to consider the cogency of the evidence to be produced by the State to establish such justification. For the moment though I rest my views on the position that the State must show that the derogation is justified in a democratic society.

[75] His Lordship Sykes further explained the burden placed on the State thusly –

> "An identical conclusion applies to the Jamaican Charter. The Charter guarantees rights. No law is to be passed that 'abrogates, abridges or infringes' the guaranteed rights. Just on a textual analysis of section 13 (2) once the claimant shows that there is a violation, rationally, he could not be also asked to go on to show that the law is demonstrable justified in a free and democratic society for the reason that the prohibition is directed not to the citizen but to Parliament. Thus if Parliament is not to pass any law that violates the right or rights of the citizen and the citizen has shown that his rights have been violated then it must necessarily be for the violator to justify his violation. **The test is whether the violation is demonstrably justified… under the Jamaican Charter it is not for the claimant as in Marpin, Wormes and Madhewoo to prove a negative, namely, that the law was not reasonably justified in a free and democratic society; it is for the violator to prove that the law is justifiable in a free and democratic society**. This is a radical and fundamental shift that must be recognised. All the claimant needs to do is prove either on a textual analysis or by evidence or both that a violation has occurred, is occurring, or is likely to occur. If the case does not fall within the stated sections enumerated in section 13 (2) of the Jamaican Charter, then the only safe harbour left for the violator is to show that the law is justifiable in a free and democratic society." [60] (bold emphasis mine)

[60] Julian J Robinson v The Attorney General of Jamaica [2019] JMFC Full 04 at paras 100 – 101.

[76] Now, with respect to the standard of what must be proven by the State or as Chief Justice Sykes termed it "the violator', his Lordship also in ample form reviewed the law and explained that the standard of proof is the civil standard of proof on a balance of probabilities. His Lordship after considering the dicta in **R v Oakes**[61], extrapolated that –

> "The passage just cited refers to the only two standards of proof known to Anglo Jamaican law. These are the criminal standard of proof beyond reasonable doubt and the civil standard of a balance of probabilities. Importantly, the passage emphasises that within the civil standard the degree of cogency of evidence required to prove any fact varies according to the gravamen of the matter before the court. **It would seem to me that the violator should have cogent evidence to justify the violation**. After all, one of the hallmarks of liberal democracies is the articulation, protection and upholding of human rights. This is especially so since it is well established that a fundamental right or freedom is to be given the widest and most generous interpretation that the language of the provision permits (Minister of Home Affairs v Fisher (1979) 44 WIR 107). .. This means that in order to establish that a violation can stand, other than cases where it is self-evident that the justification is established, evidence will in all likelihood be needed from those who seek to uphold the violation in order to bring the case within the exception. As the learned Chief Justice indicated, the court will need to know the other alternative measures for implementing the objective that were available to the legislators when they made their decision. This is importing a high standard of accountability, with which we are not familiar, but this is where the law now is." (Bold emphasis mine)

[77] So then that is the law as to who must prove what and the standard of proof necessary to discharge the burden placed on them. In the context of the Grenada Constitution and in particular section 13 (4), the State is required to show that the law which presumptively violates the right afforded to the citizen

[61] [1986] 1 S.C.R. 103.

is reasonably justified in a democratic society and it must do on a balance of probabilities.

[78] Returning for a minute to what must be proven, one recalls the three-rule test recited by Ventose J in **Ras Sankofa Maccabbee** set out at paragraph 69 above. Recent cases have revisited the questions that are to be interrogated on this exercise. In **Huang and others v Secretary of State for the Home Department et al**[62], Lord Bingham of Cornwall after referencing the three-rule test in **DeFreitas**, observed that –

> "This formulation has been widely cited and applied. But counsel for the applicants (with the support of Liberty, in a valuable written intervention) suggested that the formulation was deficient in omitting reference to an overriding requirement which featured in the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, from which this approach to proportionality derives. **This feature is the need to balance the interests of society with those of individuals and groups**. This is indeed an aspect which should never be overlooked or discounted. The House recognised as much in R (Razgar) v Secretary of State for the Home Department [2004] 2 AC 368, paras 17—20, 26, 27, 60, 77, when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said that the judgment on proportionality: "**must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage**.[63]" (bold emphasis mine)

[79] In **Bank Mellat v HM Treasury (No.2)** Lord Sumpton made the same observation about the modern approach to resolving the issue–

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[62] [2007] UKHL 11.
[63] [2007] UKHL 11 at paras 19.

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the rights of the community.[64]

**Proportionality**

[80] At the heart of the question of what is reasonably justifiable (as was said by Lady Hale in **Suratt**) is a consideration of proportionality. The Privy Council in **Suraj and others v Attorney General of Trinidad and Tobago**[65] expounded on the significance of the proportionality test in interpreting Caribbean constitutions such as Grenada's Constitution –

> "The relevance of a proportionality test in Caribbean constitutions was first examined by the Board in its judgment in de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69. That case concerned the constitution of Antigua and Barbuda which set out fundamental rights and contained a provision which allowed for interference with such rights unless it "is shown not to be reasonably justifiable in a democratic society". In a judgment which has proved influential, this was interpreted as imposing a proportionality test. The test has been somewhat refined in the caselaw since then: see T Robinson, A Bulkan and A Saunders, Fundamentals of Caribbean Constitutional Law, 2nd ed (2021), pp 473-475. It is now taken to conform with the modern conventional approach to issues of proportionality, which involves asking in relation to a measure (i) whether its objective is sufficiently important to justify the limitation of a

[64] [2013] 4 ALL ER 533 at 549
[65] [2022] UKPC 26.

fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community: see Huang v Secretary of State for the Home Department [2007] 2 AC 167, para 19 (Lord Bingham of Cornhill) and Bank Mellat v HM Treasury (No 2) [2013] UKSC 39, [2014] AC 700, paras 20 (Lord Sumption) and 73-74 (Lord Reed)[66]"

[81] Lord Sumpton in **Bank Mellat** further explains that:

> "Inherent in the whole convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights … An assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon.[67]"

[82] The conclusion that therefore can be drawn is that what must be proven to meet the requirement of what is reasonably justified in a democratic society are the following –

(1) the legislative objective is sufficiently important to justify limiting a fundamental right;
(2) the measures designed to meet the legislative objective are rationally connected to it;
(3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective; and
(4) Whether a fair balance between the rights of the individual and the interests of the community has been struck having regard to the law and the circumstances in question.

[66] [2022] UKPC 26.
[67] [2013] 4 ALL ER 533 at 567.

**The varying positions of the parties**

[83] It remains to examine and comment on the varying positions of the parties on these matters. The submissions for both sides are quite extensive. I will attempt to summarise. Firstly, what I extract from the claimants is the following –

(1) In a modern democratic society, the governing principle is that persons of all sexes and race must be treated equally. Laws that mete out different treatment merely on grounds of sex are not reasonably justifiable in a democratic society. Any differences in treatment require –

> "…particularly serious and weighty reasons by way of justification and … references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to justification for a difference in treatment any more than similar stereotypes based on race, origin, colour or sexual orientation."[68]

(2) There is no apparent objective in the discriminatory treatment on flogging other than the relief that it brings to a sector of the population based on obvious biological and physiological grounds;

(3) There cannot be said to exist in Grenada such a high prevalence of serious offences committed by men to justify the use of flogging as a crime fighting measure. Example is given of sections 212 and 276 of the Criminal Code which sets out the offences of garrotting and robbery. The claimants argue that these 2 offences cannot be said to be the most prevalent in Grenada so as to justify the retaining of the law on flogging;

(4) While it was a progressive step taken almost 200 years ago to exclude females from the inhuman and degrading punishment of flogging, taking into

[68] See paragraphs 67 – 68 of the claimant's closing submissions filed 15th January, 2024.

consideration the "evolutive" manner in which the Constitution is to be interpreted, retaining the discriminatory treatment where men are concerned has long outlived its utility;

(5) Approaching the matter with this "evolved" thinking in mind, the question for the court is not whether the abolition of flogging for women is a progressive step but whether retaining the same for men is reasonably justifiable in a democratic society that views gender equality as a foundational principle;

(6) Further, on the question of progressive and evolved thinking, at the time that flogging was abolished for women, the punishment was not viewed through the lens of inhuman and degrading treatment. Now flogging and all forms of corporal punishment on all sexes are considered to be "*inhumane and incompatible with international and national guarantees against inhuman and degrading punishment*"[69];

(7) Assumptions that men and women are to be treated differently solely for biological and physiological reasons are discredited. Blanket treatments in law on such distinctions are therefore illegitimate and tend:

> "to prolong the discredited stereotype that men are different from women and must be treated differently to their advantage such as with regard to occupation of positions of power and prestige, pay, promotion and privilege but in the case of flogging, to their disadvantage"[70];

(8) In modern cases where laws making distinctions in sentencing based on sex have been upheld the laws have been found to be closely circumscribed in the manner of being executed. The claimants distinguish the flogging laws in this case:

> "In the context of the present case, the punishment of flogging has been condemned as degrading and inhuman. Except for provision limiting the number of strokes to 12 and the instrument to be used, there are no guidelines

[69] Supra n. 68 at paragraph 66.
[70] Supra n. 68 at paragraphs 67 – 68

regulating the manner of application of the flogging. For example, there is no provision controlling the degree of force used or the pain to be inflicted, leaving up to the arbitrary determination of the person inflicting the flogging to determine the amount. There are no guidelines in the Criminal Code for the protection of the person on whom the flogging is to be inflicted such as being checked by a medical doctor before the flogging is inflicted and having a doctor present when the flogging is being inflicted. There are no provisions authorising a doctor to prevent or stop the flogging on medical grounds. All men are, arbitrarily, assumed physically and psychologically suitable. There is no possibility of relief from flogging once it is executed. There are no provisions for post execution care for the physical and psychological injuries suffered by the person on whom the flogging is executed"[71];

(9) The claimants also included submissions on the margins of appreciation that may apply in cases of this nature. But for reasons to follow those submissions do not aid the outcome of this case.

[84] For the defendant's part, it is argued that –

1) Limb one and two of the four rule test on proportionality set out above have been satisfied in this case since "*the objective is sufficiently important to justify the limitation of the protected right and the measure used to limit such right is rationally connected to the objective of the statute*."[72] How this is the case, especially with respect to limb two, was not articulated on the defendant's submissions except an allusion to the fact that "*the legislature, Parliament, is entitled to a wider margin of judgment than the executive*."[73] The defendant explains this posture to mean that "[*U]nlike a person exercising delegated powers, the legislature has a wider range of options open to it, and as result of being elected, it enjoys democratic legitimacy and direct democratic accountability*."[74]

[71] Supra n. 68 at paragraph 74.
[72] See paragraph 5.44 of the Defendant's submissions filed on 16th August, 2018.
[73] Ibid at paragraph 5.43
[74] Ibid.

2) One cannot strenuously dispute the principle being expressed above by the defendant. But with respect, I cannot see how this position aids the defendant in the present proceedings and in any claim for constitutional redress in Grenada for that matter. Grenada is a constitutional democracy where the Constitution is the supreme law. In that regard any margin of judgment or other powers presumed in the legislature as high as the defendant may assume those powers to be, must comport with the letter and spirit of the Cconstitution. The legislature may do what it is empowered to do but it must in so doing comply with the Constitution. It seems to me that the defendant was, in some way, trying to lure the court into the old debates on either parliamentary supremacy or the presumption of constitutionality of legislation. Both notions have been either scotched or put into proper context when interpreting our constitutions. On the latter, I could not put the position more decisively, articulately and succinctly than his Lordship Ventose J in **Ras Sankofa Maccabbee** where his Lordship observed that –

> "the so-called presumption of constitutionality, exemplified by the decision of the Privy Council in Director of Public Prosecutions v Nasralla [1967] 2 A.C. 238, has no place in constitutional and human rights adjudication in the Commonwealth Caribbean. It harks back to an earlier time in the immediate post-colonial period, the dark ages even, when British judges, unfamiliar as they then were with written constitutions, adopted interpretations that did not give our citizens the full benefit of the wide scope of the Chapter on the fundamental rights and freedoms found in our Constitutions.[75]"

3) However, since the defendant did not develop on this point either in submissions or in oral arguments, I will not presume what the defendant meant to say;

4) The defendant goes on to argue that limb three has been satisfied because there is no less intrusive means of achieving the legislative objective other than subjecting women to flogging. I will address this submission below in this judgment;

[75] SKBHCV2017/0234 at para 86.

5) The defendant also reasons that limb four has been satisfied in that the legislature has struck a fair balance between the rights of the individual and the interests of the wider community. Interestingly, again the defendant has not presented any material on this part of the submissions to explain how this asserted balance has been achieved;

6) The defendant also urged this court to depart from the proportionality test and to resort to what they term a "reasonable classification test." The defendant presents the case of **Lim Meng Suang v Attorney General**[76] in support of this proposition**.** With respect, the extensive arguments made by the defendant on this point are unconvincing. At its core, the submissions suggest that the proportionality test tends to put more focus on a proportionality approach rather than a rationality approach. Again, a sound basis for this assertion was not presented. But if I was to venture a thought, I would leave the debate with the view that one cannot conduct any serious interrogation using proportionality as a focal point without venturing into an assessment of rationale to some degree at each turn of the 4-rule test;

7) Additionally, the defendant argues that the reasonable classification test gives much legislative leeway to the legislature. The defendant's preference for an approach that gives more deference to the legislature than the Constitution affords has been addressed above. The proportionality test, in my view, strikes an adequate balance between considerations of the role of the law maker in enacting laws that account for social, economic and other societal imperatives on the one hand and the need to ensure constitutional rights are protected as far as possible on the other. Any other deference to the imperatives and wishes of the legislature would, in my view, tips the assessment away from being one of proportionality and inch it towards an approach that places parliamentary supremacy or a presumption that parliamentary acts are always constitutional, until proven otherwise, at the apex of any discourse on these matters.

8) In this context see the illuminating exposition by Chief Justice Sykes in **Robinson** at paragraphs 132 to 145 where his Lordship scotched the notions of margins of appreciation and deference in assessing the questions of proportionality when

[76] [2013] 4 LRC 473

determining whether a law violates the fundamental freedoms outlined in the Constitution. His Lordship made the important observation that margins of appreciation and deference arguments come "…*very close to endorsing Parliamentary sovereignty as distinct from constitutional supremacy*."[77]

9) In later submissions, the defendant moved away from the "reasonable classification test" and relied on the proportionality test to submit that –

> "…the deterrence of crime is undoubtedly a legitimate purpose for justifying flogging. The aim of reducing crime and recidivism through the punishment of flogging in the impugned provisions was proportionate to the alleged limitation on the protection against inhuman and degrading punishment or treatment."[78]

10) They relied on the case of R v **Pryce (Errol)[79].** Again, with respect, these additional submissions do not demonstrate how the purported proportionality was achieved. They merely conclude that it was proportionate and that where it is not, the courts should not address the matter since parliament rather than the court is tasked with that responsibility. For the reasons that I have set out above, the posture that the courts are precluded from dealing with laws that are patently unconstitutional is evidently untenable. To repeat what Lord Bingham explained in **R v Reyes** –

> "When … 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…."[80]

[85] In closing submissions, the defendant further expanded on the proportionality submissions. The defendant correctly submits that due to physiological and other differences, women are in some instances, treated differently from men.

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[77] [2019] JMFC Full 04 at para 142.
[78] See paragraph 20 of the Defendant's submissions filed on 7th May, 2021.
[79] (1994) 47 WIR 336.
[80] [2002] UKPC 11 at para 26.

This can hardly be a controverted fact. The defendant therefore posits that it is hardly surprising that Parliament differentiated between women and children on the one hand and men on the other when it came to the issue of flogging. In even later submissions the defendant posited that Parliament was empowered to accord differentiated treatment to males and females based on their different characteristics. The defendant maintains that the claimants have failed to show the "*basis on which a finding can be made that the nature and physical characteristics of women… is not a reasonably justifiable basis for affording different treatment as allowed by section 13(4) of the constitution*."[81]

[86] With respect, the foregoing submissions miss two points. Firstly, the claimants are not arguing and truly they could not rationally argue, that the law is discriminatory because women are not being flogged. Rather, they are insisting that the law is discriminatory because the law is unjustifiably according treatment to men that is less favourable to that given to women. They are not arguing that the law ought to mete the same flogging punishment or treatment to women that it metes out to men. Rather they are arguing that modern society recognises that all are equal in the sight of the law and must be treated thusly except where differentiated treatment is reasonably and justifiably warranted.

[87] Further, the claimants are contending in this context that modern evolved thinking accepts that flogging can be described as torture and is an abhorrent way to treat any human being. Accordingly modern society rightly protects women and children from the infliction of flogging as a form of punishment or treatment. However, the claimants view the approach of only protecting women and children from this form of torture as being inconsistent with constitutional proscriptions against discrimination since they, the claimants, believe that no reasonably justifiable basis has been presented for maintaining and inflicting such inhuman and degrading punishment or treatment on men.

[88] Secondly, the defendant's posture is wrong because, as I have discussed above, section 13(4) of the Grenada Constitution does not require the claimant

[81] See paragraph 4(iii) of the Defendant's closing submissions filed on 14th January, 2024.

to show that the law is not reasonably justifiable in a democratic society. But rather the section imposes the obligation on the defendant to show that the law is reasonably justified in a democratic society.

**My thoughts on the varying positions**

[89] So what then is one to make of these opposing views on whether retaining the law on flogging is reasonably justifiable in a democratic society? For the purposes of the antidiscrimination clause, a useful starting point is the concept that, as stated in the cases, *"[A]t the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal…"*[82] With respect to issues of equality in matters of race and sex for instance then, it has been said that "*the underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally*."[83]

[90] But as I have noted above the Constitution itself acknowledges that, as has also been expressed in the cases:

> "[T]o differentiate is not necessarily to discriminate…true justice does not give the same to all but to each his due: it consists not only in treating like things as like, but unlike things as unlike. Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently."[84]

[91] It is for this reason then that section 13(4) permits laws that may, on their face amount to rank discrimination, as in this case, on grounds of sex so long as those laws can be shown to be reasonably justifiable in a democratic society. The claimants rightly interpret this to mean that the law must have some reasonable justification or in other words it must pursue a legitimate aim and there must be a proportionate correlation between the means employed and the aim sought to be

[82] McEwan and others v Attorney General of Guyana (2019) 94 WIR 332 at paras 64 – 68.
[83] R (on the application of European Roma Rights Centre) v Immigration Officer of Prague Airport [2004] UKHL 55 at para 73.
[84] Wade v Roches BZ 2005 CA 5 at para 39.

achieved by the law. As I have stated above, it is for the defendant, on cogent evidence, to supply a reasonable basis for retaining the discriminatory law. Lady Hale put the matter forcefully in **Immigration Officer of Prague Airport**–

> "The underlying concept in both race and sex discrimination laws is that individuals of each sex and all races are entitled to be treated equally. Thus it is just as discriminatory to treat men less favourably than women as it is to treat women less favourably than men; and it is just as discriminatory to treat whites less favourably than blacks as it is to treat blacks less favourably than whites.... However, because people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment is less favourable than that of a comparable person…the court will look to the alleged discriminator for an explanation. **The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds**...[85]" (Bold emphasis mine)

[92] I find that the explanation required in this case or cases of this nature must satisfy the criteria set out in the 4-rule test on proportionality articulated in cases such as **Huang**. For it is only then that one can safely conclude that the law is shown to be reasonably justifiable in a democratic society. On the facts of this case, I cannot say that the defendant has met the obligations to show that retaining the flogging laws is reasonably justifiable in a democratic society. At every turn of the 4-rule test, cogent evidence is required to satisfy the court that the legislative objective is sufficiently important to justify limiting a fundamental right, that the measures designed to meet the legislative objective are rationally connected to it, that a less intrusive method cannot be employed and that in fact a fair balance has been struck between the right of the individual and the needs of the wider society.

[85] [2004] UKHL 55 at para 73.

[93] The defendant argues that a sufficiently important legislative objective exists in this case, namely the deterrence of the offences set out in the praedial larceny law and the Criminal Code. It takes no more than simple reasoning to discern that these objectives are not trivial. But as correctly stated by the claimants, it is for the defendant to establish by cogent evidence that the asserted legislative imperative does exist to the extent that a limitation of the constitutional right in question is justified. This they have not done. Chief Justice Sykes in **Julian J Robinson** quoted from McLachlin J's (as she then was) dissent in **RJR MacDonald Inc v Canada [1995] 3 LRC 653** where Her Ladyship opined that –

> "…the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the Charter is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. **In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.** Second, to meet its burden under s. 1 of the Charter, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. **This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.**[86]"

[94] Even if, in the absence of material, one may conclude that deterring the offences of praedial larceny and offences such as robbery with violence set out in the Criminal Code provide a sufficiently serious enough legislative objective to

[86] [2019] JMFC Full 04 at para 141.

warrant limiting the constitutional rights of all or some of the citizens, I would think that the defendant would be hard pressed to show how retaining a law that protects one set of its citizens from the inhuman act of flogging while exposing another set of its citizen to this offensive form of punishment bears a rational connection to deterring the offences in question.

[95] The defendant argues that women are physically and psychologically different to men and that the law recognises these differences. Clearly it does. But is that the object of the statute? If, as the defendant has submitted, the object is to deter crimes set out in the Criminal Code and also the offence of praedial larceny then it has to be shown by cogent evidence how retaining this law that clearly discriminates against men by failing to offer them offering them the same protection given to women against the scourge of a repulsive form of punishment is rationally connected to the stated objective. The answer cannot be that is the case because they are men and that men are different from women. There must be more.

[96] The defendant answers that these offences are largely committed by men. But to this assertion, I join with the claimant and pronounce that to make this statement without cogent proof of the incidence and prevalence of these offences being committed by men in Grenada is to espouse the very offensively discriminatory approach lamented by the claimants. Inherent in that posture, without any evidence (and cogent evidence where limiting a constitutional right is concerned), is to articulate, propagate and rest on the very type of stereotyping decried in such cases as **Immigration Officer of Prague Airport** or to use the language of section 13(2) of the Grenada Constitution relies on rationale wholly or mainly attributable to the sex of men.

[97] Even if I am wrong and it can be concluded that enacting or retaining this law is rationally connected to the legislative objective, I would find that the law on flogging fails the proportionality test when one asks whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective or whether a less intrusive means could be used to achieve the legislative object. It is quite apparent that the law on flogging is abhorrent to all

notions of human decency and dignity. It is also quite apparent that to protect one class, gender or group of its citizens from the scourge of this offensive form of punishment while exposing another to it, without firm reasons, is patently untenable from a constitutional standpoint. If it is to be successfully argued by the defendant that this is a reasonable means of meeting the aims of the statutes, then it must be shown that this method is no more than necessary or as stated in some of the cases[87], that there is no less intrusive means of meeting the legislative intent. It goes without saying again that the defendant is tasked with presenting such material. The defendant has not presented any such material.

[98] But even in the absence of material on which to deliberate as to whether less intrusive means exist, on the statutes themselves the answer that less intrusive means do exist may be apparent. For instance, as I have stated, the object of section 70 of the Criminal Code is to provide a number of sanctions for persons who committed offences outlined in the Criminal Code. There is certainly a range of sanctions available (and serious ones) to the sentencing court to apply in cases where these offences are committed without having to resort to discriminating against the citizen in this offensive manner. By way of example, section 276(2) speaks of a maximum sentence of 15 years imprisonment for the offence of robbery without violence. In any event, Parliament certainly has the power to enact sanctions to meet this legislative objective without enacting or retaining laws that protect one sector of its population while exposing another sector to repugnant punishment without good reason.

[99] As to whether it has been shown that a fair balance has been drawn between restricting the right and the wider needs of the society, for the reasons stated on

[87] Zuniga et al v Attorney General et al BZ 2012 CA 14, Everaldo Puck v Kareem Michael BZ 2024 SC 29, Sanctuary Workers Union v The Minister of Labour and Small Enterprise Development TT 2019 HC 226, Anguilla Building Construction Supplies Ltd v The Minister of Finance of Anguilla et al [2023] ECSCJ 1218.

the other matters, I would find that such a balance has not been shown. This is since the defendant has failed to demonstrate how the societal needs to deter the crimes in question or any infractions of the law for that matter, are met by retaining a law that exposes one sector of the society to torture while protecting others from it. The law on flogging in the Criminal Code and the Paedial Larceny Act are therefore unconstitutional for violating the provisions of section 13 of the Grenada Constitution.

**If the punishment of flogging in the Criminal Code and Praedial Larceny Act are found to be unconstitutional, whether the provisions can be modified to conform to the Constitution or are void to the extent of their inconsistency with it.**

[100] The long and short of all of this is that the law on flogging as set out both in the Criminal Code and the Praedial Larceny Act contravene section 13 of the Constitution in that the laws are discriminatory and have not been shown to be reasonably justifiable in a modern democratic society. Now what is one to do about it? The Constitution itself provides the answer to addressing laws that do not confirm to constitutional provisions. Section 106 states that –

> "This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

**Modification**

[101] In addition to these powers, where the law under review is a pre-existing law, the court may construe that law with such modifications to make it consistent with the terms of the Constitution. Schedule 2 to the Constitution referred to as the transitional provisions reads –

> **Transitional Provisions**
>
> "1.-(1) The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations,

qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Courts Order."

Existing laws are described in the section to mean -

"(5) For the purposes of this paragraph, the expression "existing law" means any Act, Ordinance, law, rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Constitution or the West Indies (Dissolution and Interim Commissioner) Order in Council 1962(a) and having effect as part of the law of Grenada or of any part thereof immediately before the commencement of this Constitution."

**The Criminal Code**

[102] From our foregoing discourse, it can be readily seen that the Criminal Code and its provisions on flogging pre-existed the Constitution having been enacted as far back as 1897. What then is the approach to modification of a pre-existing law? The issue was addressed in this manner in **Nervais –**

> "The method of bringing into conformity is not limited to modification and adaptation, but it includes the wide powers of qualifications and exceptions. No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it. Of course, in exceptional cases a court must be sensitive to the warning in San Jose Farmers' Cooperative Society Ltd v Attorney General that where the nature of the inconsistency with the Constitution is such that it cannot be modified without a usurpation of the legislative power it should leave that task to the legislature. Liverpool JA noted that the "[The modification clause] is explicit in its requirement that existing laws must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution… the permitted modifications transcend those of nomenclature, reaching matters of substance and stopping only where the conflict between the

existing law and the Constitution is too stark to be modified by construction.." [88]

[103] In **DPP v Mollison (No. 2)**, the Privy Council recited this guidance from the Court of Appeal of Trinidad and Tobago in **Roodal v The State** on the modification clauses –

> "The first thing we can say about that section is that though it speaks of existing laws being 'construed', the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by 'construing'. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law." [89]

[104] In **Greene Browne**, Lord Hobhouse offered this insight –

> "…it is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to it in its modified form, not to strike down the proviso altogether…
> …the answer to this part of the case is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights."[90]

[88] (2018) 92 WIR 178 at para 63.
[89] [2003] 2 LRC 756 at para 17.
[90] [2000] 1 A.C. 45 at para 50.

[105] Starting with the proposition that the Constitution is supreme, all laws, whether pre – existing or not must comport with its terms. Once the offending pre-existing law or the provision in a pre-existing law has been identified, it is the court's duty to determine whether and what changes may be made to bring that law into conformity with the Constitution. The court is permitted a wide latitude in this exercise which latitude stops at the door of "usurping the role of the legislature". I do not believe that section 75(2) of the Criminal Code can be modified to remedy the violation of the anti-discrimination clause in the Constitution because of 2 reasons.

[106] The first reason is that to modify the legislation to remove flogging for women would not only be exposing women to a repugnant punishment but it would run afoul of the rule stated above that the court is not permitted to "act as the legislature". In this case, this aspect of the legislative policy is sound; do not expose women to flogging. If the court is to rule in a manner that says otherwise then that, in my view, would be tantamount to dictating a policy that the legislative arm did not advance or certainly would not propose or advance in a modern enlightened democratic state.

[107] The second and more profound proscription against any modification of section 75(2) of the Criminal Code to remove it or adjust it to excise its discriminatory terms would leave a law in place that runs afoul of section 5(1) of the constitution. The reasoning goes like this; section 5(1) prohibits torture or inhuman or degrading punishment or treatment. Flogging is torture. It is inhuman and degrading punishment or treatment. It ought to be prohibited by virtue of section 5(1). However, section 5 (2) preserves all laws that authorize "…*the infliction of any description of punishment that was lawful in Grenada immediately before the coming into operation of this Constitution*." Flogging as a description of punishment was a law that predated the constitution and as such it is preserved by section 5(2). The converse of this is that any description of punishment that did not predate the constitution and is inhuman and degrading is not preserved and can be held as contravening section 5(1). At the time of enacting the constitution, flogging women was not lawful or did not form part of the law as a description of punishment. To modify section 75(2) of the

Criminal Code to remove the discriminatory element would have the effect of exposing women to flogging, an inhuman and degrading description of punishment that did not predate the Constitution and would open the law on flogging to challenge as being in contravention of section 5(1) of the constitution.

[108] What then is the answer? It seems to me that there can be no other adjustment to the law on flogging as it stands in the Criminal Code other than modifying that statute to have references to flogging removed entirely. There is no saving it by any other form of modification. For to say that one must merely remove section 75(2) or adjust it to reflect a less discriminatory provision would in effect leave a law in place that exposes all citizens to flogging equally. Such an outcome would be patently untenable for the reasons that I have stated previously. No one on this case has proposed any other meaningful way in which the law may be modified to comply with the Constitution. Mr. Joseph has suggested that the sections of the Criminal Code which authorize flogging can be modified with the following "Except that no sentence of flogging or whipping shall be imposed after commencement of the Constitution." I am hard pressed to see how this expression serves any more useful outcome than would be served by excising all references to flogging from the Criminal Code.

[109] I am constrained to reiterate this point. Modifying the Criminal Code by removing flogging would not, in my view, hamstring or hinder the State or in my view, materially impinge on the State's policy of enacting laws to deter serious crimes. The legislature has already enacted section 70 of the Criminal Code to include sanctions for breaches of the law ranging from the sanction of death (section 70(1)), imprisonment (section 70(2), fines (section 70(5) to compensation (section 70(6)). These are by no means insubstantial methods to achieve the overall aims and objectives of the State's response to criminality. Equally, it would be hubris to suggest that, in addition to these measures, the legislature cannot enact other means by which crime fighting objectives can be achieved. Section 38 of the Constitution makes it clear that such is the power of the legislature when it declares that "[*S]ubject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Grenada*." What this ruling seeks to outline is that while

Parliament may enact or retain laws to meet its legislative objectives, the court as a co-equal arm of the State in a functional constitutional democracy is duty bound to scrutinize those laws when they are challenged to ensure that the laws are passed in accordance both with the letter and spirit of the Constitution. Having a properly working balance among the various arms of the State ought to be one of the guiding aspirations of our democracy, equal in value, different in function. **Hinds v the Queen**[91] provides some useful commentary on these matters.

[110] The modifications to the Criminal Code to remove the provisions in violation of the antidiscrimination clause in the Constitution are therefore as follows –

(1) Section 70 is modified to remove subsections 70(3) and (4) which refer to flogging and whipping;
(2) Section 75 is deleted entirely as it refers solely to rules on which flogging and whipping are to be inflicted;
(3) Section 78(1) and (2) refer to alternative sentences in cases where flogging and whipping are ordered and as such are removed from that section;
(4) Section 79(1)(b) is modified to remove the words *"…and any flogging…*" and the words "…*flogging or whipping* …" at section 79(2);
(5) The words " *…and whether with or without flogging or whipping in respect of any offences for which flogging and whipping may be lawfully inflicted*" recited at section 95(2) and (3) are excised;
(6) The words " *…and, in the discretion of the Court, to flogging*" are excised from section 212; and
(7) The words "…*and, in the discretion of the Court, to flogging*" are excised from section 276(2).

**Praedial Larceny Act**

[111] It is already noted that flogging for the offence of predial larceny was enacted in the Praedial Larceny Act 1992. As such this Act does not qualify as an existing law since its enactment post-dated the Constitution. This also means that the Act cannot be considered for modification under the modification clause

[91] [1977] AC 195.

in the Constitution. The Constitution's supreme law clause in section 106 is engaged, and the Act must be scrutinized to determine to the extent to which its provisions violate the terms of the Constitution. Those provisions which are found in violation of the Constitution are void to the extent of their inconsistency with it. The case of **Attorney General for Alberta v Attorney General for Canada** suggests the manner in which constitutional provisions of the nature of section 106 are to interpreted and applied –

> "The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or as it has sometimes been put whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all" [92].

[112] I would say that if one removes section 16(2) of the Praedial Larceny Act which enacts the discriminatory law, what would be left cannot independently survive for the very reasons to which I have stated with respect to the provisions of section 75(2) of the Criminal Code. To remove section 16(2) would be tantamount to leaving a law in place that exposes women to flogging. Such a result would, in my view, amount to an impermissible judicial reach further than it is obvious that the legislature would have gone. It would also expose women to a description of punishment, that is to say a form of torture, inhuman and degrading punishment that did not predate the Constitution and would thus render the statute susceptible to challenges on the grounds that it contravenes section 5(1) of the Constitution. It would appear that, as with section 75(2) of the Criminal Code, the impugned provision cannot be cured without excising the punishment of flogging from section 16 of the Praedial Larceny Act. Removing flogging from the section leaves nothing standing that will comport with the Constitution and as such the section is wholly struck down.

**Whether the mandatory sentences provided for under section 16 of the Praedial Larceny Act contravene section 5(1) of the Constitution**

[92] [1947] AC 503 at 518.

[113] Having found that section 16 of the Praedial Larceny Act is inconsistent with the Constitution and is wholly void, this issue seems moot. I will shortly address it in the event that I am wrong on my assessment with regard to section 16 in the previous section of this judgment. In this context, the claimants complain that the mandatory infliction of flogging pursuant to the proviso to section 16 of the Praedial Larceny Act violates their rights under section 5(1) of the Constitution.

[114] Section 16 of the Praedial Larceny Act has been recited above but I will repeat it here for the present discussion –

> **16. Flogging**
>
> (1) Notwithstanding anything contained in the Criminal Code, Chapter 72A, or any other law prohibiting or regulating the passing of a sentence of corporal punishment by flogging or whipping, it shall be lawful for a Magistrate on a second or subsequent conviction for an offence committed under section 3, 4, 5, 6, 7 or 8, in addition to any other punishment imposed under this Act, to sentence the offender where an adult to be flogged or where a young person to be whipped; but save as hereinbefore provided the provisions of the Criminal Code regulating the execution of such a sentence shall govern any such sentence made by the Magistrate under this section: **Provided that in the case of an offence under section 8(2) or (3), a Magistrate shall order flogging in respect of any such offence, even if it be the first such offence of the particular offender once such offender has attained the age of eighteen years.**
>
> **(2) The provisions of this section shall not apply to any female person convicted of any offence under this Act.** (Bold emphasis mine).

[115] The claimants' main argument is that to the extent that the proviso to section 16(1) of the Praedial Larceny Act mandates the manner in which the section of flogging should be applied, it conflicts with section 5(1) of the

Constitution since that section only protects laws that authorize "*the infliction of any description of punishment that was lawful in Grenada immediately before the coming into operation of this Constitution*." As the defendant rightly concedes, the mandatory imposition of flogging enacted at the proviso to section 16(1) of the Praedial Larceny Act does not merely stipulate a description of punishment but mandates the manner or circumstances in which it ought to be deployed.

[116] This was precisely the circumstances in **Reyes**[93] where the Privy Council found that while the death penalty as a description of punishment predated the Belize Constitution, the law requiring (or mandating) that the death penalty be imposed, violated the provisions of the constitution prohibiting inhuman and degrading treatment or punishment. I can do no more than apply the dicta to these circumstances and find that the proviso so violates section 5(1) of the Constitution in so far as the sentencing court is mandated to impose flogging as a sanction in the circumstances therein delineated. The proviso is an unconstitutional reach into judicial discretion in matters of the appropriate sentence to be pronounced by a court and is a breach of the separation of powers implicit in the construct of the Constitution. See **Reyes**[94], **Spence and Hughes**[95] and **Deaton v The Attorney General and the Revenue Commissioners**[96] in this regard.

[117] The Constitution is the supreme law of Grenada and subject to the provisions of the Constitution, if any law is inconsistent with the Constitution, the Constitution shall prevail and the other law, shall, to the extent of the inconsistency be void[97]. I have recited above the guidance from the case of **Attorney General for Alberta v Attorney General for Canada** on applying section 106 of the constitution.

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[93] [2002] UKPC 22.
[94] [2002] UKPC 22.
[95] [2002] 2 LRC 531.
[96] [1963] IR 170.
[97] Section 106 of the Constitution of Grenada.

[118] Applying the principle in **Attorney General for Alberta v Attorney General for Canada** to the proviso, it would appear that the rest of section 16 (1) can stand without the offending proviso. The proviso to section 16(1) which reads –

> **"Provided that in the case of an offence under section 8(2) or (3), a Magistrate shall order flogging in respect of any such offence, even if it be the first such offence of the particular offender once such offender has attained the age of eighteen years"**

is struck down as being null and of no effect since it violates the Constitution for the reasons that I have stated above.

**Whether the imposition of flogging immediately after sentencing (1) infringed the claimants' rights to protection of the law (section 8 of the Constitution); and (2) constituted cruel and inhuman punishment in violation of sections 5(1) of the Constitution**

[119] On this issue, the claimants contend that in Mr. Ferguson's case, flogging him forthwith after sentencing rendered nugatory his right to appeal within 14 days under sections 3 and 4 of the Magistrates Judgments (Appeals Act)[98]. In the case of Mr. Joseph, counsel argues that the arbitrariness of his flogging immediately after sentencing was compounded by the existence of section 40 and 50 of the West Indies Associated States Act[99]. Accordingly, Mr. Ferguson's and Mr. Joseph's rights to protection of the law as guaranteed by section 8 of the Constitution were breached. Counsel for the defendant's response is that in both claims, the issue of the execution of flogging in contravention of the right to the protection of law was not alleged or raised in the present claim as no declarations were sought on the claimants' pleaded cases, and that there is no evidence that an appeal was lodged or is going to be lodged.

[120] Sections 3 and 4 of the Magistrates Judgments (Appeals) Act read –

[98] Chapter 178 of the 2010 Continuous Edition of the Revised laws of Grenada.
[99] Chapter 336 of the 2010 Continuous Edition of the Revised laws of Grenada.

**3**. **Right of appeal**

Unless the contrary is in any case expressly provided by any Act any party may appeal from the judgement of a Magistrate to the Court in the manner and subject to the conditions hereinafter mentioned: Provided that there shall be no appeal— (a) in civil cases where the sum claimed is less than twenty-four dollars, save by leave of the Court granted on an ex parte application; (b) in criminal cases from any judgement dismissing the complaint, save by leave of the Director of Public Prosecutions.

**4. Notice of appeal**

(1) A party who desires to appeal shall— (a) at the time of the pronouncing of the judgement, give verbal notice to the Magistrate and the opposite party of his or her intention to appeal; or (b) within fourteen days after the pronouncing of the judgement, serve notice in writing in the Form A in the First Schedule hereto of his or her appeal upon the Magistrate and upon the opposite party. (2) Where the appellant is in prison, the Commissioner of Prisons shall, on being requested by the appellant to do so, render to the appellant all reasonable assistance in the preparation of the notice of appeal and shall cause it to be lodged and a copy thereof to be served as required above without payment of any fees or expenses.

[121] Section 40 of the West Indies Associated States Act provides for a right of appeal in indictable matters –

**"40. Right of appeal in criminal cases**

A person convicted on indictment may appeal under this Act to the Court of Appeal— (a) against his or her conviction on any ground of appeal which involves a question of law alone; (b) with the leave of the Court of Appeal or upon the certificate of the Judge who tried him or her that it is a fit case for appeal against his or her conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; and

(c) with the leave of the Court of Appeal against the sentence passed on his or her conviction, unless the sentence is one fixed by law."

And section 50 reads:

> "In the case of a conviction involving the sentence of death or corporal punishment –
>
> (a) The sentence shall not in any case be executed until the expiration of the time within which notice of appeal or of an application for leave to appeal may be given under the preceding section; and
>
> (b) If notice is so given, the appeal or application for leave to appeal as the case may be shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is refused, of the application."

**The section 8 complaint**

[122] Section 8 of the Constitution is described in the Constitution as the "provisions to secure the protection of the law". Shortly, the claimants insists that any wrongful denial of the citizen's access to justice is a breach of the right to the protection of the law. I agree. I would also add that any interference whether expressly or implicitly with the citizen's access to justice would be the proper approach to interrogating whether the protection of the law has been affected negatively. It is in this context that I cannot accept the defendant's posture that this issue should be disposed of in the defendant's favour because the claimants did not insist on their right of appeal.

[123] It is quite self-evident that by enacting sections 3 and 4 of the Magistrates Judgments (Appeals) Act and sections 40 and 50 of the West Indies Associated States (Grenada) Act the legislature is making an avenue available to the claimants to review any sentence pronounced whether in the magistrate's court (in Mr. Ferguson's case) or in the High Court (in Mr. Joseph's case). One has bear in mind in this case that, unlike many other forms of punishment, one is not only dealing with a graphic and dehumanising form of punishment but also

the fact that there is no recourse to redressing or meaningfully ameliorating its effect once it is inflicted. More bluntly, once a convicted person is flogged, he cannot be "unflogged".

[124] I find therefore that in the context of the kind of punishment engaged in cases of this sort, the right to appeal is part and parcel of the access to justice and procedural fairness afforded to the claimants and contemplated by section 8 of the constitution. This is since, to have flogged the claimants before the period to lodge an appeal in both cases had expired, would have shut the door on any possibility of them exploring the right secured to him by the law, a right that presented them with the possibility of reversing the imposition of this cruel form of punishment. The claimants rely heavily on dictum from Lord Hamblen in **Attorney General of Trinidad and Tobago v Charles**, pronouncements which I find wholly apposite to the issue at hand and will adopt –

> "In Maharaj Lord Kerr…giving the judgment of the Board, noted at para 25 that: "In a series of cases where the protection of the law provision in various Caribbean countries was considered, an expansive approach to its potential application has been taken." In this connection, he cited the judgments of the Caribbean Court of Justice in *Attorney General of Barbados v Joseph and Boyce (2006) 69 WIR 104 at para 60,* which describes the right as being "broad and pervasive"... He set out the often-cited passage at para 47 of the *Maya Leaders Alliance* case…It provides as follows: "The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded 'adequate safeguards

against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.' The right to protection of the law may, in appropriate cases, require the relevant organs of the State to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen's rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy."[100]

[125] As I have stated above, I do not see the relevance of the argument raised by counsel for the defendant. While there was no evidence that an appeal was going to be lodged, it is evident for instance in Mr. Ferguson's case, that he was unrepresented at trial. Given the right of appeal secured to him by law, and compounded with the fact that he was self-represented it seems to me even more important that he ought to have been notified of his right to appeal the sentence, and/or that the period during which he could have exercised such a right should have expired before such a dehumanising and degrading punishment was inflicted on him. Equally, Mr Joseph was unrepresented at his sentencing. Given his right to appeal as well compounded with the fact that he was unrepresented at sentencing, he ought to have been allowed the period of appeal to consider his rights of appeal. This is what the full protection of the law envisaged by section 8 contemplates. To do otherwise was in flagrant disregard of the claimants' right to the full protection of the law. As such breach of the section 8 protection of the law has been made out by the claimants.

**The section 5 issue**

[126] Mr. Ferguson sought a declaration that the manner and circumstances of his immediate flogging constituted cruel and inhuman punishment. This

[100] [2023] 1 WLR 177 at 188 – 189.

appears to be a complaint that his section 5(1) rights have been breached. Again, this court reminds itself that section 5(2) of the Constitution only saves flogging as a description of punishment. Section 5(2) does not save or stipulate the manner or circumstances in which the punishment is imposed. The manner and circumstances in which it is inflicted must comply with the law and must in that regard ensure that the rights of the citizen are respected. The case law[101] recited above on this question instruct that the constitutionality of the manner of imposing a saved description of punishment is certainly open for discussion.

[127] In this context the State was obligated to ensure that it executed the sentence of flogging in a manner that, among other things, allowed the claimants the opportunity to explore the full range of appeal rights available to them. More specifically, flogging in a manner that firmly shuts the door on any possibility of a convicted person seeking to have the sentence of flogging reversed before it is executed would not be embargoed by section 5(2) from scrutiny for possible breach of the section 5(1) right not to be exposed to an inhuman and degrading description of punishment. In that regard, flogging Mr. Fergusson and Mr. Joseph without allowing them to explore any appeal (or put more bluntly, before the expiration of the period in which they may have contemplated the right of appeal secured to them by law) was not only a violation of their right to protection of law secured to them by section 8 of the Constitution but was also a violation of section 5(1) of the Constitution in that they were exposed to an inhuman and degrading description of punishment in a manner not contemplated by the law.

**Whether the claimants are entitled to any of the relief sought**

[128] I have found that Mr. Joseph's and Mr. Ferguson's right not to be exposed to discriminatory treatment without reasonable justification has been breached. For Mr. Alexis, his right not to be exposed to discriminatory treatment without reasonable justification is likely to be breached since he is in jeopardy of being flogged if convicted of the offence of praedial larceny. Additionally, flogging Mr. Ferguson and Mr. Joseph immediately after sentencing was a

[101] Hughes and Spence [2002] 2 LRC 531; R v Reyes [2002] UKPC 22.

breach of their section 5(1) and section 8 rights not to be exposed to an inhuman and degrading description of punishment and their right to protection of the law respectively.

[129] Additionally, Mr. Ferguson pleads that he was sentenced to flogging after being convicted pursuant to section 8(1) of the Praedial Larceny Act, and that judicial officers wrongfully exercise their discretion to flog persons convicted of praedial larceny, irrespective of whether the infraction was pursuant to section 8(1), 8(2) or 8(3) of the Praedial Larceny Act. I disagree with Mr. Ferguson's claim on this point. Even though he was charged under section 8(1), the evidence from the defendant shows that he had several previous convictions for praedial larceny[102]. Pursuant to section 16(1) of the Praedial Larceny Act, the magistrate could exercise his or her discretion to order flogging on a second or subsequent conviction for praedial larceny. Accordingly, this claim for relief fails.

**The Appropriate Relief**

[130] Section 16 of the Constitution gives the court power to grant redress where a fundamental right has been, is being or is likely to be breached, and it is on this basis that the claimants make some of their request for relief. In that regard, Mr. Ferguson and Joseph have claimed vindicatory damages for breach of their constitutional rights on the authority of **Attorney General of Trinidad and Tobago v Ramanoop**[103] and exemplary damages for the arbitrary way in which they were flogged in violation of their rights. No authorities on the appropriate quantum was submitted to the court. With respect to relief on the question of the constitutionality of the legislation, the claimants have been granted declarations and orders to reflect the findings on those questions.

[131] The defendant agrees that the court is empowered to award damages if breaches of the claimants' constitutional rights are found as held in **Ramanoop,** but submit that any award of damages ought to be nominal, signifying an acknowledgement of the significance and sanctity of the right

[102] See further affidavit of Corporal George and certificate of exhibits filed on 16th August 2018.
[103] [2005] 2 WLR 1324.

without creating a precedent for abusive or unreasonable exploitation as set out in **Russell & Ors v Attorney General**[104]. Counsel also provides the cases of **Bibi Sheneeza Ali v Commissioner of Police et ors**[105] to make the point that where breaches of constitutional rights are not grave, nominal damages is the appropriate award. The defendant also submits that the circumstances of this case do not justify an award of exemplary damages, but provided no authorities on the appropriate quantum in the circumstances.

**Vindicatory Damages**

[132] On the issue of vindicatory damages Michel JA (as he then was) in **The Attorney General of Saint Christoper and Nevis v Carmel Bernadette Agnes McGill** stated that **–**

> "An award of vindicatory damages is intended to mark the wrong of the affected party rather than to compensate him for the consequences of the wrong. Such an award would usually be made in public law cases where there is a breach of the claimant's constitutional right.[106]"

Further in **Innis v Attorney General of Saint Christopher and Nevis**[107], Lord Hope of Craighead described the object of the award:

> "The purpose of the award, whether it is made to redress the contravention or as relief is to vindicate the right. It is not to punish the Executive…but vindication involves an assertion that the right is a valuable one, as to whose enforcement the complainant…has an interest.[108]"

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[104] [1995] 90 WIR 127
[105] GDAHCV2014/0121
[106] SKBHCVAP2020/0024 at para 43.
[107] [2008] UKPC 42
[108] Ibid at para 27.

Lord Nicholls in **Ramanoop** outlined the principle:

> "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... An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice... An additional award not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award…Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object…[109]"

[133] In **Peters v Marksman and another**[110], Adams J was tasked with assessing damages after Mr. Peters had obtained several declarations in 1997 from Mitchell J that his sentence of whipping by 10 strokes with a cat of nine tails by the Superintendent of Prisons, solitary confinement and shackling in iron clad leggings and handcuffs was unconstitutional for infringing the applicant's right under the Saint Vincent & Grenadines Constitution not to be subjected to inhuman or degrading punishment. Adams J in finding that liability was not based on vicarious liability by virtue of a tort committed by state agents, but rather primarily liability in the area of public law for a wrong committed by the state in its name, also took into account the learning in **AG of St Christopher and Nevis v Reynolds**[111] that the court ought to consider as relevant to computation of damages recompense for the inconvenience and distress suffered by the victim of the breach.

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[109] [2005] 2 WLR 1324 at paras 18 – 19.
[110] [2001] 1 LRC 1
[111] [1973] 3 ALL ER 129

[134] Adams J also considered **Fuller v AG of Jamaica**[112] where Patterson JA reasoned that where an award of monetary compensation is appropriate in constitutional claims, the crucial question on quantum must be what a reasonable amount is in the circumstances, taking into account that the infringement should not be blown out of proportion or trivialised. In arriving at a sum of $50,000 for the flogging, and an additional $100,000 for the shackling and solitary confinement, Adams J considered Mr. Peter's pain and suffering, the assault on his dignity, the distress and inconvenience which followed and the disgrace and humiliation which accompanied the treatment given to Mr. Peters.

[135] Considering the factors outlined in the case, I would award Mr. Joseph and Mr. Ferguson the sum of $ 15,000 each as vindication for the breach of their right under section 5(1) and 8 of the Constitution. In the circumstances of the case, the declarations with respect to section 13 suffice to vindicate the breach of that right.

**Exemplary Damages**

[136] Where the claim for exemplary damages is concerned, I am not satisfied on the evidence that the tests as set out in **Rookes v Bernard**[113] have been satisfied, as I have not found any conduct that is oppressive, calculated to make a profit or that statute provides for such an award. While the claimants have complained that the servants of the government acted arbitrarily and unconstitutionally, the state functionaries were executing lawful sentences of the court at the material time. Misguided as they may have been, there is no evidence that they performed their duties in any oppressive or highhanded manner. I therefore decline to award exemplary damages in this case.

**Costs**

[112] Civil Appeal No 91/1995 JAM CA
[113] (1964) AC 1129.

[137] Neither party made submissions on costs. Given that the claimants have been partially successful, they are entitled to their costs. I award costs to each of the claimants in the sum of $5,000.

**CONCLUSION**

[138] For the reasons set out above, it is declared and ordered as follows:

1) The punishment of flogging authorized by sections 70, 75, 78, 79, 95, 212 and 276 of the Criminal Code and section 16 of the Praedial Larceny Act are unconstitutional as they contravene section 13 of the Constitution's prohibition against discrimination on the basis of sex;

2) Section 16 of the Praedial Larceny Act is struck down in its entirety;

3) The modifications to sections 70, 75, 78, 79, 95, 212 and 276 (2) of the Criminal Code to bring the Criminal Code into conformity with the Constitution of Grenada are as follows –

a. Section 70 is modified to remove the references to flogging and whipping at section 70(3) and (4);
b. Section 75 is deleted entirely as it refers solely to rules on which flogging and whipping are to be inflicted;

c. Sections 78(1) and (2) refer to alternative sentences in cases where flogging and whipping are ordered and as such are removed from that section;

d. Section 79(1)(b) is modified to remove the words *"…and any flogging…*" and the words "…*flogging or whipping* …" at section 79(2)';

e. The words " *…and whether with or without flogging or whipping in respect of any offences for which flogging and whipping may be lawfully inflicted*" recited at section 95(2) and (3) are excised;

f. The words " *…and, in the discretion of the Court, to flogging*" are excised from section 212; and

g. The words "*…and, in the discretion of the Court, to flogging*" are excised from section 276(2).

4) The claimants are granted a declaration that the proviso to section 16(1) of the Praedial Larceny Act which reads –

**"Provided that in the case of an offence under section 8(2) or (3), a Magistrate shall order flogging in respect of any such offence, even if it be the first such offence of the particular offender once such offender has attained the age of eighteen years"** which provides for mandatory flogging is unconstitutional and declared null and void for breach of section 5(1) and violation of the separation of powers doctrine of the Constitution of Grenada;

5) Mr. Ferguson and Mr. Joseph's rights not to be exposed to discriminatory treatment without reasonable justification under section 13 of the Constitution of Grenada have been breached;

6) Mr. Alexis' right not to be exposed to discriminatory treatment without reasonable justification under section 13 of the Constitution of Grenada is likely to be breached;

7) The forthwith execution of the sentence of flogging imposed on Mr. Ferguson on 10th July 2017 breached his rights under sections 5(1) and 8 of the Constitution of Grenada and Mr. Ferguson is awarded vindicatory damages in the sum of $15,000;

8) The forthwith execution of the sentence of flogging imposed on Mr. Joseph on 24th November 2017 breached his rights under sections 5(1) and 8 of the Constitution of Grenada and Mr. Joseph is awarded vindicatory damages in the sum of $15,000;

9) No award is made for exemplary damages and all other declarations sought by the claimants are refused; and

10) Each claimant is awarded costs in the sum of $5,000.

[139] I wish to record my sincere thanks to counsel for the respective parties for their thoughtful and elucidating oral and written submissions filed in support of their respective positions, and for their immense patience in awaiting the ruling in this claim.

**Raulston L.A. Glasgow**
High Court Judge

**By the Court**

**Registrar**

Registrar
Supreme Court
Grenada