REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00720

IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS UNDER S.14 OF THE CONSTITUTION

BETWEEN

JASON JONES

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

AND

THE EQUAL OPPORTUNITY COMMISSION
THE TRINIDAD AND TOBAGO COUNCIL OF EVANGELICAL CHURCHES
THE SANATAN DHARMA MAHA SABHA OF TRINIDAD AND TOBAGO

Interested Parties

Appearances:

Claimant: Richard Drabble QC leading Rishi P. A. Dass instructed by Antonio Emmanuel

Defendant: Fyard Hosein SC leading Keisha Prosper instructed by Lesley Almarales

Interested Parties:

Lorelei Liselle Wong for the Equal Opportunity Commission
Elton Prescott SC leading Alicia G. George for the Trinidad and Tobago Council of Evangelical Churches
Dinesh Rambally for the Sanatan Dharma Maha Sabha

Before The Honourable Mr. Justice Devindra Rampersad

Dated the 12th day of April 2018

JUDGMENT

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Introduction

1. By this action, the court has been asked to determine whether the State has the constitutional authority to criminalise sexual relations between consenting adults. Sexual relations between persons of the same sex constitute a criminal offence by virtue of sections 13 and 16 of the Sexual Offences Act Chapter 11:28 ("the Act").

2. The claimant petitioned the court, pursuant to section 14 of the Constitution, to strike down sections 13 and 16 of the Act and, by so doing, decriminalise consensual sexual relations between persons of the same sex. The defendant took the position that sections 13 and 16 of the Act constitute saved law by virtue of section 6 of the Constitution and, consequently, are saved from challenge. Alternatively, it was argued that even if sections 13 and 16 of the Act were not saved law, section 13 of the Constitution was applicable and that the claimant failed to prove that the sections were not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.

3. This court considered the numerous authorities submitted by the parties[1] hereto outlined in the appendix. The court considered the history of the impugned sections and the applicable principles and tests to be applied to constitutional challenges in this jurisdiction together with persuasive authorities in other jurisdictions.

4. After careful consideration this court came to the following conclusions:

    4.1. Sections 13 and 16 are not saved by section 6 of the Constitution and are open to challenge;

    4.2. The case fell to be determined on an application of section 13 of the Constitution;

    4.3. Sections 13 and 16 of the Act violate the claimant's fundamental rights, especially his right to respect for his private and family life;

    4.4. Sections 13 and 16 of the Act have been proven **not to be reasonably justifiable** in a society that has a proper respect for the rights and freedoms of the individual[2].

[1] And, where applicable, the interested parties

[2] The awkward construction of this sentence seeks to preserve the words used in the test set out in s. 13 (1) of the Constitution

Background

5. It was not disputed that the claimant is an adult male who is openly homosexual. He is a citizen of this country by birth but is currently resident in London and habitually visits this country from time to time. According to the claimant, the impugned sections violate his constitutional rights by forcing him to either express his sexual orientation and risk conviction or forego consensual sexual relationships with another male partner. The claimant has thus asked the court to strike down the impugned sections as it was observed that no heterosexual male in this country is forced into making such a decision.

6. Section 13 of the Act creates the criminal offence of buggery for which a person is liable on conviction to imprisonment for twenty-five years. Buggery is thereafter defined as sexual intercourse per anum by a male person with a male person or by a male person with a female person.

7. Section 16 of the Act stipulates that a person is liable to imprisonment for five years if they commit an act of serious indecency. An act of serious indecency is simply an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire. Section 16 goes on to exempt any such acts, conducted in private, by three classes of persons being either consenting adults of the opposite sex or children. Persons of the same sex who engage in such acts, even in private, are not exempted and as such may be liable to imprisonment if convicted.

8. In these instances, with respect to both of these sections, consent cannot be used as a defence.

9. The claimant seeks a declaration that sections 13 and 16 of the Act are unconstitutional, illegal, null, void, invalid and are of no effect to the extent that these laws criminalise any acts constituting consensual sexual conduct between adults. Alternatively, the claimant also seeks a declaration that:

    9.1. Section 4(a): the right of the individual to liberty and security of the person and the right not to be deprived thereof except by due process of law;

    9.2. Section 4(b): the right of the individual to equality before the law and protection of the law;

    9.3. Section 4(c): the right of the individual to respect for his private and family life; and

    9.4. Section 4(i): the right to freedom of thought and expression;

10. The claimant also sought a declaration that sections 13 and 16 of the Act contravene section 5(2)(b) of the Constitution, which prohibits Parliament from imposing or authorising the imposition of cruel and unusual treatment or punishment. The claimant's position on relief pursuant to sections 4(a) and 5(2)(b) of the Constitution was however reserved to be articulated if the matter was to progress further.

11. The Act was passed by a three-fifths majority and provides, pursuant to section 13(1) of the Constitution, that it is to have effect even though inconsistent with sections 4 and 5 of the Constitution. That does not protect the Act from challenge but successful challenge is dependent on a finding that the Act is not reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. The defendant however asserted that the Act was saved from challenge as it is an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by the Constitution in a manner in which or to an extent to which the existing law did not previously derogate from that right.[3]

12. The issues for the court's determination were thus:

    12.1. Whether the case fell to be determined on an application of section 6 or section 13 of the Constitution. This required an analysis of whether the impugned sections are saved law;

    12.2. If the impugned sections do not amount to saved law and the case fell to be determined pursuant to section 13 of the Constitution, this court then had to consider two issues:

        12.2.1. Whether or not there was a violation of the claimant's fundamental rights; and

        12.2.2. If yes, whether the impugned sections were reasonably justifiable; and

    12.3. What relief, if any, the claimant should be granted.

13. From the onset, because of the nature of the criminalised conduct, numerous parties expressed an interest in being heard by the court. As aptly noted by counsel for the defendant, Trinidad and Tobago is, and was, a secular state and as such this case could not be determined on the basis of religious belief. In this way, the defendant agreed with the claimant that the issues at hand are not moral or religious. The court unhesitatingly agreed with this position.

[3] See section 6(1)(c) of the Act

14. This is not a case about religious and moral beliefs but is one about the inalienable rights of a citizen under the Republican Constitution of Trinidad and Tobago; any citizen; all citizens. As discussed below, this is a case about the dignity of the person and not about the will of the majority or any religious debate. History has proven that the two do not always coincide[4]. To my mind, religious debates are best left to be discussed and resolved in other quarters with persons who subscribe to those particular ideals and for the followers of those ideals to be convinced as to the religiousness, sanctity or morality of those ideals. In this case, the court has had to consider the dignity of the claimant and citizens like him in the Republic of Trinidad and Tobago in the context of whether his, and by extension, their rights under the Constitution are being validly impinged[5].

15. This court thus had sight of the submissions of the interested parties and, where applicable, considered the authorities presented but ultimately saw this as a legal issue with due consideration given to the religious arguments under the question of whether the sections were reasonably justifiable. It must be noted that there was no evidence in this matter from any party but the claimant.

The History of the Law

16. Before proceeding to discuss this case, it is important to place the offences in their historical context.

17. The history of this Act was briefly discussed in the Indian High Court in the case of ***Naz Foundation v Delhi and others*** [2009] 4 LRC 838. In that case, Shah CJ stated the following at paragraph 2 et al:

> "HISTORY OF THE LEGISLATION
>
> [2] At the core of the controversy involved here is the penal provision of s 377 of the IPC, which criminalises sex other than heterosexual penile-vaginal. The legislative history of the subject indicates that the first records of sodomy as a crime at common law in England were chronicled in Fleta (1290)[6] and later in

[4] E.g. the subjugation and virtual extinction of the indigenous and First Nation people upon the "discovery" of the "New World", the Jewish experience in Nazi Germany, the radical religious justification adopted by the Klu Klux Klan to justify its reign of terror and hate (see https://www.splcenter.org/20170925/hate-god%E2%80%99s-name), etc

[5] The court accepts the principle that the rights guaranteed under the Constitution are not absolute and can be validly impinged upon the satisfaction of the conditions set out in the Constitution as discussed and recognized in the case of ***Francis v The State*** (citation and discussion below)

[6] Fleta (fl. 1290–1300), is the name sometimes used to designate the author of a Latin treatise on English common law written between 1290 and 1300, which is entitled Fleta and which updates and abridges an earlier treatise (De legibus et consuetudinibus Angliae... – Source –

Britton (1300)[7]. Both texts prescribed that sodomites should be burnt alive. Acts of sodomy later became penalised by hanging under the Buggery Act 1533 which was re-enacted in 1563 by Queen Elizabeth I, after which it became the charter for the subsequent criminalisation of sodomy in the British colonies. Oral-genital sexual acts were later removed from the definition of buggery in 1817. And in 1861 the death penalty for buggery was formally abolished in England and Wales. However, sodomy or buggery remained as a crime 'not to be mentioned by Christians'."

18. This court is of the respectful view that this summary does not give a complete picture of the attitude and thinking behind the formulation of the provisions as it does not give the full picture of its genesis. That genesis was discussed at length[8] by The Hon. Michael Kirby AC CMG[9] in his article ***"The Sodomy Offence: England's Least Lovely Criminal Law Export?"***[10]

> "It all goes back to the Bible. At least it was in the Old Testament Book of Leviticus, amongst 'divers laws and ordinances', that a proscription on sexual activity involving members of the same sex first relevantly appeared [11]:
>
> > 'If a man ... lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon you.'
>
> …..
>
> The punishment and the offences portray an early, primitive, patriarchal society where the powerful force of sexuality was perceived as a danger and potentially an unclean threat that needed to be held in the closest check.
>
> According to those who have studied these things[12], the early history of England incorporated into its common law, an offence of 'sodomy' in the context of the provision of protection against those who endangered the Christian principles on which the kingdom was founded. In Medieval times, the notion of a separation between the church and the state had not yet

http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-9716

[7] ***Britton*** was a book that set out to explain the common law in England and was an Anglo-French translation, abridgment and updating of an earlier number of treaties known as Bracton's *De legibus.* It was written between 1291 – 1292 and is an important source for the common law at the end of the 13th century – See ***"Law and Kinship in Thirteenth-Century England"***, Sam Worby, pg 42

[8] The quotation set out below incorporates the author's citations in his article

[9] Justice of the High Court of Australia (1996-2009); Commissioner of the UNDP Global Commission on HIV and the Law (2010-12); Member of the Eminent Persons Group of the Commonwealth of Nations (2010 - 11)

[10] Association of Commonwealth Criminal Lawyers Journal of Commonwealth Criminal Law Inaugural Issue 2011 – see https://www.michaelkirby.com.au/images/stories/speeches/2000s/2011/2540-ARTICLE-JOURNAL-COMMONWEALTH-CRIMINAL-LAW.pdf

[11] Leviticus, 20, 13

[12] An excellent review of the legal developments collected in this article appears in Human Rights Watch This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism, New York, December, 2008 ("HRW"), and D. Saunders, "377 – And the Unnatural Afterlife of British Colonialism", unpublished paper for 5th Asian Law Institute Conference, National University of Singapore, May 22, 2008

developed. The Church had its own courts to try and punish ecclesiastical offences, being those that were perceived as endangering social purity, defiling the kingdom and disturbing the racial or religious order of things[13].

…..

A survey of the English laws, produced in Latin in 1290, during the reign of Edward I[14], mentions sodomy, so described because the crime was attributed to the men of Sodom who thereby attracted the wrath of the Lord and the destruction of their city[15]. In another description of the early English criminal laws, written a little later in Norman French, the punishment of burning alive was recorded for 'sorcerers, sorceresses, renegades, sodomists and heretics publicly convicted'.[16]

Sodomy was perceived as an offence against God's will, which thereby attracted society's sternest punishments.

Initially, it seems, the offence was not limited to sexual acts between men. It could include any sexual conduct deemed irregular and extend to sexual intercourse with Turks and "Saracens", as with Jews and Jewesses [17]. Although the ideas were traceable to the Old Testament, and Jewish Rabbinical law, the offences were reinforced by a Christian instruction that associated the sexual act with shame and excused it only as it fulfilled a procreative function[18]. Sodomy was a form of pollution.

The history of the eleventh and twelfth centuries in England and in Europe included many instances of repression targeted at polluters, such as Jews, lepers, heretics, witches, prostitutes and sodomites[19]."

19. Kirby went on to say[20]:

> "The great text writers of the English law, exceptionally, denounced sodomy and all its variations in the strongest language. Thus, Edward Coke declared[21]:
>
> > 'Buggery is a detestable, and abominable sin, amongst Christians not to be named. ... [It is] committed by carnal knowledge against the ordinance of the Creator and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast'

[13] HRW, 13

[14] Fleta, Seu Commentarius Juris Angicani was a survey of English law produced in the Court of Edward I in 1290 (Ed. and trans. H.G. Richardson and G.O. Sayles, London, Quaritch, 1955). See HRW, 13

[15] Genesis, 13, 11-12, 19, 5

[16] The work by Britton is described in H. Brunner, The Sources of the Law of England (Trans. Williams Hastie, Edinburgh, T.T. Clark 1888). See also H.L. Carson, "A Plea for the Study of Britton" 23 Yale Law Journal 664 (1914)

[17] D.F. Greenberg, The Construction of Homosexuality, Chicago, Uni of Chicago, 1988, 274ff

[18] Cf. J.A. Brundidge, Sex, Law and Marriage in the Middle Ages: Collected Studies, Aldershot, Variorum, 1993

[19] R.I. Moore, The Formation of a Persecuting Society, London, Blackwell, 1987. See also M. Douglas, Purity and Danger: An Analysis of the Concepts of Pollution and Taboo, London, Routledge, 2002. See generally HRW, 13-14

[20] At pg 4

[21] E. Coke, The Institutes of the Laws of England (3rd part), cap. X Of Buggery, or Sodomy, 1797, 58

> When William Blackstone, between 1765-9, wrote his Commentaries on the Laws of England, he too included the 'abominable crime' amongst the precious legacy that English law bequeathed to its people. By reason of the contemporaneous severance of the American colonies from allegiance to the British Crown in 1776, Blackstone's Commentaries were to have a profound influence on the development and expression of the criminal law in the American settlements and elsewhere. So in this way, by common law, statute law and scholarly taxonomies, the English law criminalising sodomy, and other variations of 'impure' sexual conduct was well-placed to undergo its export to the colonies of England as the British Empire burst forth on the world between the seventeenth and twentieth centuries."

20. He opined further[22]:

> "Same-sex activity was morally unacceptable to the British rulers and their society. According to the several codified provisions on offer, laws to criminalise and punish such activity were a uniform feature of British Imperial rule. The local populations were not consulted in respect of the imposition of such laws."

21. The 1533 Buggery Act was described as:

> *"….a short piece of legislation declaring the detestable and abominable Vice of Buggery committed with mankind or beast to be a felony subject to the penalties of death and loss of property customarily suffered by felons, without the benefits of clergy, which meant that offenders in holy orders could not claim to be tried in ecclesiastical courts"*[23].

Prior to this enactment by the non-Catholic Henry VIII, the offence was regarded as an ecclesiastical offence[24] and it was returned to its ecclesiastical roots by the Catholic Queen Mary, and the jurisdiction of the church's regulatory function, after the 1533 Act was repealed in 1547[25]. It was then re-enacted in 1562 and **remained a capital offence** until the English Offences Against the Person Act, 1861.

22. The Buggery Act was repealed by section 1 of the Offences against the Person Act 1828 (9 Geo.4 c.31) and by section 125 of the Criminal Law (India) Act 1828 (c.74). It was replaced by section 15 of the Offences against the Person Act 1828, and section 63 of the Criminal Law (India) Act 1828, which provided that buggery would continue to be a capital offence.

23. The original 1828 version of the Offences Against the Person Act in England:

> *"….changed the requirements of evidence in sodomy trials from penetration and*

[22] At pg 10
[23] Hyde, The Other Love An Historical and Contemporary Survey of Homosexuality in Britain, p.39
[24] Hyde, The Trials of Oscar Wilde, p. 349
[25] Hyde, The Trials of Oscar Wilde, p. 350

emission in the body to penetration only. The 1861 Offences Against the Person Act formally abolished the death penalty for sodomy and introduced instead life sentences of penal servitude. It also formalized the maximum and minimum sentences for indecent assault by introducing a prison term of between two and ten years as the standard sentence. In 1885, Labouchere's amendment ostensibly introduced the new offence of gross indecency, but did not enlarge the scope of the law any further. Neither did it affect sentencing practice in a noticeable fashion. The law regarding soliciting was changed in 1889, making it possible to prosecute someone for importuning a homosexual offence." [26]

24. The 1861 Act *"removed the capital indictment for sodomy, but retained the archaic Buggery Act of 1533 as the basis for legislation."*[27] The provision under that Act was as follows:

> "Unnatural Offences.
>
> 61. Whosoever shall be convicted of the abominable[28] Crime of Buggery, committed either with Mankind or with any Animal, shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Ten Years."

25. The 1885 Labouchere amendment in relation to gross indecency provided:

> "11. Outrages on decency. Any male person who, in public or private, commits, or is a party to the commission of or procures (a) or attempts (b) to procure the commission by any male person of, any act of gross indecency (c) with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

26. This amendment was intended, according to several commentators, to extend the laws against homosexuality. As described by Cooks[29]:

> "The Criminal Law Amendment Act was passed, as we have seen, on the back of mass protest. Section 11 of the Act which criminalized acts of gross indecency between men was a last minute addition, made by the maverick Member of Parliament Henry Labouchere and introduced and passed in a chamber that was virtually empty. It was not the subject of government comment and was barely mentioned in press coverage of the Act's passing. Neither did it significantly add to the available statues that could be deployed

[26] Cocks, Nameless Offences Homosexual Desire in the Nineteenth Century, p.30-31

[27] Brady, Masculinity and Male Homosexuality in Britain 1861-1913, p. 96

[28] **Abominable** - ***Causing moral revulsion*** [https://en.oxforddictionaries.com/definition/abominable]; ***Extremely unpleasant: horrible, dreadful, disgusting***
[https://www.macmillandictionary.com/dictionary/british/abominable];
adjective 1. ***offensive; loathsome; detestable*** 2. (Informal) ***very bad, unpleasant, or inferior***
[https://www.collinsdictionary.com/dictionary/english/abominable]

[29] (Cook, Law, p. 79 in Palgrave Advances in the Modern History of Sexuality, edited by H. G. Cocks and Matt Houlbrook.)

against men having sex with other men, all of which remained in force. The amendment was symptomatic of confusion rather than intentionality in the making of laws on sex in England, and raises the key question of whose will this law, but also other laws, enshrined."

27. The amendment was further described[30]:

> "The other purpose was met by the ineffably awful clause XI, the Labouchere amendment, which made illegal all types of sexual activity between males (not just sodomy, as hitherto), and irrespective of either age or consent. It is not clear whether this was a genuine attempt to deal with male prostitution, or a Purity measure, opportunistically and irrelevantly tacked on to the Bill, or whether it was Labouchere's way of trying to overturn a Bill he disliked by a ridiculously extravagant amendment. Whatever the intention, the effect of its enactment is clear: Britain ended up with a proscription going far beyond anything else in any other country at the time. Italy and the Netherlands actually abolished punishment for consenting adults in private in the late 1880s, while it took the advent of Hitler to make Germany follow the new British model."

28. By then, the last execution by hanging for sodomy had been carried out in 1835[31].

29. In Trinidad, as in most, if not all, colonial countries under British rule, the provisions were transplanted. The 1925 Offences Against the Person Ordinance, assented to on 3 April 1925, provided at sections 60 and 62:

> "Unnatural Offences.
>
> 60. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for any term not exceeding five years, nor less than two years, with or without hard labour, and, if a male, with or without corporal punishment.
>
> 62. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

30. That Ordinance was eventually repealed and replaced by the Act, which took effect from 11 November 1986. The provisions of sections 13 and 16 of the Act are the subject of this litigation. Those sections provide;

> "13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years. (2) In this section 'buggery' means sexual intercourse per anum by a male person with a male person or by a male person with a female person.

[30] Hyam, Empire and Sexuality The British Experience, p. 65

[31] See "***A History of London's Newgate Prison***" - http://www.capitalpunishmentuk.org/newgate.html

…

16. (1) A person who commits an act of serious indecency on or towards another is liable on conviction to imprisonment for five years.

(2) Subsection (1) does not apply to an act of serious indecency committed in private between—

(a) a husband and his wife;

(b) a male person and a female person each of whom is sixteen years of age or more, both of whom consent to the commission of the act; or

(c) persons to whom section 20(1) and (2) and (3) of the Children Act apply.

(3) An act of 'serious indecency' is an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire.'

31. Since its enactment there were three amendments made to the Act with amendments being made to the impugned sections by Act No. 31 of 2000 and Act No. 12 of 2012.

32. As this history illustrates, the offence was born out of the Christian church's patriarchal moral jurisdiction and yielded, and continues to yield, serious consequences statutorily.

33. In 1967, the land which gave the Trinidad and Tobago the forerunner of the impugned sections 13 and 16 decriminalized homosexual acts between two men over 21 years of age in private in England and Wales by The Sexual Offences Act 1967. That Act did not apply to Scotland, Northern Ireland nor the Channel Island and has since been further amended to decrease the age of consent.

The Current Legislation

34. The Republican Constitution which replaced the 1962 Independence Constitution from 1 August 1976 describes its function in the preamble as follows:

"Whereas the People of Trinidad and Tobago—

(a) have affirmed that the Nation of Trinidad and Tobago is founded upon principles that acknowledge the supremacy of God, faith in fundamental human rights and freedoms, the position of the family in a society of free men and free institutions, the dignity of the human person and the equal and inalienable rights with which all members of the human family are endowed by their Creator;

(d) recognise that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

(e) desire that their Constitution should enshrine the above-mentioned principles and beliefs and make provision for ensuring the protection in Trinidad and Tobago of fundamental human rights and freedoms."

35. In order to achieve that end, the Constitution declares at section 2:

"2. This Constitution is the supreme law of Trinidad and Tobago, and any other law that is inconsistent with this Constitution is void to the extent of the inconsistency."

The Savings Clause

36. However, notwithstanding that declaration, the Constitution instituted a general savings clause at section 6 which provides:

"6. (1) Nothing in sections 4 and 5 shall invalidate—

(a) an existing law;

(b) an enactment that repeals and re-enacts an existing law without alteration; or

(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.

(3) In this section—

'alters' in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;

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

'right' includes freedom.'

37. The juridical basis for the court to review the Act is found in sections 2 and 14 of the Constitution. In ***Collymore and Abraham v The Attorney-General***[32], Wooding CJ said:

> "I am accordingly in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is ultra vires and therefore void and of no effect because it abrogates, abridges or infringes … One or more of the rights and freedoms recognized and declared…."

38. The Bill of Rights of Trinidad and Tobago was broadly modelled on the Canadian declaration of rights, but with the addition of certain rights, such as the right to equal treatment by a public authority and freedom of movement.

39. Coming out of the jurisprudence emanating since Independence, it is clear that a legal fiction in relation to the presumption of constitutionality developed. The presumption is as follows:

39.1. It requires the court, if it is possible, to read the language of the statute as subject to an implied term which avoids conflict with any constitutional limitations[33];

39.2. A statute is presumed constitutional unless it has been shown to be unconstitutional and the burden on the party seeking to prove that a statute is unconstitutional is a heavy one – see ***Faultin v AG***[34] which refers to the following extract of Isaacs J[35]:

> "Nullification of enactments and confusion of public business are not likely to be introduced. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will."

Previously, Hyatali CJ had said in ***AG v Mootoo***[36]:

> "Legislators, as well as judges, are bound to obey and support the Constitution and it is to be understood that they have weighed the constitutional validity of every Act they pass. Hence the presumption is always in favour of the constitutionality of a statute, not against it;

[32] (1967) 12 WIR 5
[33] ***AG v Momodou Jobe*** [1984] AC 689
[34] [1978] 30 WIR 351
[35] ***Federal Commissioner of Taxation v Munro*** [1926] 38 CLR 180
[36] TT 1976 CA 23 [Unreported]

> and the Courts will not adjudge it invalid unless it is a violation of the Constitution is, in their judgment, clear, complete and unmistakable."

40. This theory of the concept of the presumption of constitutionality is famously attributed to the case of ***DPP v Nasralla***[37] in which it was also said:

> "General savings clauses, …, were intended to afford a measure of stability in the transition from colonial rule to independence. Governments in the region needed to be sure that they had some laws in place upon which they could rely as they embarked on independence….The Bills of Rights contained in the Commonwealth Caribbean constitutions were thus intended to guard against the dangers that lay in the future: to prevent the governments of these newly countries from infringing the rights that had been enjoyed by their citizens prior to independence. **It was not countenanced at the time of independence that their citizens' rights might also be infringed by existing laws or existing forms of punishment**. "[38]
>
> [Emphasis added]

41. This resulted in our courts adopting a position which called for courts to presume that the rights guaranteed by the Constitution were the same as those already secured by existing laws which, necessarily, were presumed to be constitutional.

42. There then followed an attempt by the Judicial Committee of the Privy Council to move away from this presumption to a more purposive approach as adopted by Lord Wilberforce in ***Minister of Home Affairs v Fisher***[39].

43. This followed several years of uncertainty as the Privy Council struggled back and forth[40] between the ***Nasralla*** presumption and the purposive approach.

44. In an effort to bring some order to the dichotomy in the minds of the Judges of our highest court, who, with the greatest respect, are not guided in the development of their own jurisprudence by any written Constitution and who have to transpose and convert their parliamentary supremacy thought process to the Constitutional supremacy thought process of the local courts, Lord Hope[41] sought to suggest that the courts ought not to try to employ ingenuous ways of trying to side step the savings clause through this purposive approach and should rather await the respective Parliaments to do so legislatively if they so desired.

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[37] [1967] 2 AC 238; see 24 G

[38] O Brien at pg 230

[39] [1980] AC 319- see paragraphs 328 F – H and 329 E - F

[40] ***Pratt and Morgan v The AG Jamaica*** overruling ***Riley***; ***Lewis v The AG Jamaica*** overruling several other death penalty cases; and ***Boyce and Joseph v The AG Barbados*** and ***Matthew v The State*** overruling ***Roodal v The State*** - a decision of just 6 months vintage

[41] In ***Lambert Watson v R*** [2004] UKPC 32

45. This approach, however, does not seem to be in concordance with the section 13[42] consideration and exercise which must be conducted and, again, seems a return to the concept of parliamentary supremacy. Further, to my mind, the presumption of constitutionality unfairly shifts the burden from the lawmaker to the citizen. Respectfully, this is not logical in a constitutional scenario but, to my mind, is more amenable to the approach to be adopted where Parliament reigns supreme. In other words, in the context of parliamentary sovereignty and the supremacy of Parliament, the decisions of Parliament are seen to override other objections. That ought not to apply to our Republican Constitution but more will be said about this later on in this judgment in the discussion of section 13 of the Constitution.

46. The Privy Council exhibited this approach vis-à-vis parliamentary supremacy in ***Suratt and others v Attorney General of Trinidad and Tobago*** when Baroness Hale declared[43]:

> "[45] It is a strong thing indeed to rule that legislation passed by a democratic Parliament establishing a new type of judicial body to adjudicate upon a new body of law is unconstitutional. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: see Grant v R44 [2006] UKPC 2, [2007] 1 AC 1, para 15, [2006] 2 WLR 835; citing Mootoo v A-G of Trinidad and Tobago [1979] 1 WLR 1334, 1338-1339. On the other hand, the Constitution itself must be given a broad and purposive construction: see Minister of Home Affairs v Fisher [1980] AC 319, 328, [1979] 3 All ER 21, [1979] 2 WLR 889."

47. To my mind, the local discussion ought to prescribe deference to the Constitution instead, starting from the position that constitutionally protected rights and freedoms should stand affirmed before the application of any fiction. To my mind, the word "presumption" should be deleted and totally eradicated from the constitutional legal vocabulary. There is no need to start from any presumption. Each case can be looked at individually in all of the circumstances with due consideration being given to the applicable constitutional provisions. Consequently, it is this court's respectful view that the time has long passed for a review of the function of the savings clause in a jurisdiction in which the Constitution is supreme. The sad reality, however, is that the very noble intention that was intended to be addressed by the Constitution has been rendered powerless in the face of the savings clause in so far as it relates to provisions falling

[42] Of the Constitution

[43] [2007] UKPC 55

[44] Lord Bingham – "*[15] It is, first of all, clear that the constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional, and the burden on a party seeking to prove invalidity is a heavy one: Mootoo v Attorney General of Trinidad and Tobago [1979] 1 WLR 1334, 1338–1339. Thus the appellant has a difficult task."*

under that section. Instead, citizens are left to the machinations of politics and political expediency and political, rather than necessarily constitutional, decisions in the face of the declaration set out at section 2 of the Constitution.

48. Cynthia Barrow-Giles[45] says in her paper[46]:

> "Moreover, 'savings' clauses which make provisions for exceptions to the rights enshrined in the Constitution also serve to weaken and create ambiguity about fundamental rights under Caribbean constitutions."

49. Consequently as Simeon C.R. McIntosh[47] notes,

49.1. The inclusion of both a general and a special savings clause in the constitutional text compounds the true understanding of the fundamental rights provisions of the Constitution.

49.2. A general savings clause is one that refers in general to the entire Bill of Rights, while a special savings clause is addressed to a specific section or provision of the Bill of Rights. In his view a special savings clause might be one of the most disabling devices in the West Indian Independence constitutions and should therefore be removed.

49.3. Some existing laws may be inconsistent with the Constitution[48].

50. Margaret A. Burnham[49] said in her article[50]:

> "Meant initially as a shortcut method of marrying common law rights and constitutional protections, the clauses have presented particularly vexing problems of construction as appellate tribunals have attempted to reconcile international human rights norms with municipal law."

51. In their writings[51], Robinson, Bulkan and Saunders stated:

> "With these savings law 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. These clauses … operate in constant tension with the Bill of Rights and frustrate the aims and purpose of the constitutional guarantees."

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[45] Senior Lecturer, Political Science, Cave Hill Campus, UWI

[46] ***Regional Trends in Constitutional Developments in the Commonwealth Caribbean***, January 2010

[47] Caribbean Constitutional Reform: Rethinking the West Indian Polity; Kingston: The Caribbean Law Publishing Company, 2002

[48] Page 252

[49] Professor of Law at Northeastern University School of Law – see https://www.northeastern.edu/law/faculty/directory/burnham.html

[50] Margaret A. Burham, Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean, 36 U. Miami Inter-Am. L. Rev. 249 (2005)
Available at: http://repository.law.miami.edu/umialr/vol36/iss2/5

[51] Robinson, Bulkan, Saunders, "Fundamentals of Caribbean Constitution Law", pp. 237 – 8

52. Finally, Professor Richard Drayton, in his address to the Judicial Education Institute of Trinidad and Tobago on 2 March 2016 stated:

> "It is true that the parliaments of the Caribbean were always able to repeal old laws or introduce new ones, but the savings clauses wrapped an externally imposed legal order formed by centuries of despotism and structural inequality in a knot which naturally became encrusted with political and public inertia until it became our own. Like victims of a long period of confinement, we thus carry the manners of the prison even after our liberation."

Professor Drayton went on to recognize:

> "The saving clauses' effect is in a toxic combination with the consequences of the Judicial Committee of the House of Lords acting as the final Court of Appeal. In Lord Devlin's notorious ruling in DPP v Nasralla (1967), for example, characteristic of the early postcolonial period, the Council rigorously protected colonial-era legislation and the social norms from examination on human rights grounds…. The impediment which the Privy Council poses to the emergence of a Caribbean jurisprudence is that, quite naturally, it seeks consistency with UK judicial and governance norms…. Indeed, human rights doctrine, particularly in the expansive post-1968 sense, must always take second place for the Privy Council to judicial coherence with common law precedent. Any evolution towards a Constitution suited, In Montesquieu or Bolivar's sense, to our climate and manners, is thus permanently postponed."

53. In this court's respectful view, this approach ought to be reviewed and the only body which can do so is the Privy Council in light of the statements of law quoted above. The approach in ***Suratt*** was criticized by Archie JA and Jamadar JA in ***Francis v The AG***[52] (see the discussion below) and the court must admit that it is more attracted to their argument in this regard than to that of the majority in that decision. It seems to me to be rather disconsonant to the tenor of the Constitution that a law can be deemed to be constitutional under this presumption without the requirement for the State to justify its constitutionality in the event of a challenge. Otherwise, what is the purpose of section 13 of the Constitution? But, as mentioned, more will be said of this in the discussion of section 13.

Construction to be applied to the interpretation of Constitutions:

54. The general principle was stated in ***AG of the Gambia v Jobe***[53] where Lord Diplock said:

> "A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction."

[52] Crim App Nos. 5 & 6 of 2010
[53] [1984] AC 689 at 700

55. Lord Wilberforce, in ***Home Affairs v Fisher*** [54] stated:

> "These antecedents... call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism,' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. ... Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principles of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

56. Lord Bingham in ***Reyes v R***[55] explained:

> "As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society (see Trop v Dulles, above, at 101). In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion, for reasons given by Chaskalson P in State v Makwanyane, 1995 (3) SA 391, in para 88:
>
> > 'Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution.'"

57. This is in line with the approach adopted in ***Matthew v The State***[56] by Lord Hoffman who at paragraph 42 stated:

> "[42] The correct approach to interpretation of a constitution such as that of Trinidad and Tobago is well-established by authority of high standing. In Edwards v Attorney-General for Canada [1930] AC 124, 136, Lord Sankey LC, giving the judgment of the Board, classically described the constitution established by the British North America Act 1867 as 'a living tree capable of growth and expansion within its natural limits'. The provisions of the Act were

[54] [1980] AC 319 at 328
[55] [2002] UKPC 11 at para 26
[56] [2004] UKPC 33

not to be cut down 'by a narrow and technical construction', but called for 'a large and liberal interpretation'. Lord Wilberforce spoke in similar vein in Minister of Home Affairs v Fisher [1980] AC 319, 328-329, [1979] 3 All ER 21, when he pointed to the need for a 'generous interpretation', 'suitable to give to individuals the full measure of the fundamental rights and freedoms referred to' in the constitution and 'guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences'. The same approach was commended by Dickson J, giving the judgment of the Supreme Court of Canada in Hunter v Southam Inc [1984] 2 SCR 145, 155:

> 'The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'."

The Sexual Offences Act:

58. This Act, which took effect from 11 November 1986, is at the heart of the question for consideration and it is therefore necessary to thoroughly analyze it to understand its intention and underlying purpose.

59. The long title of the Act provides that it is an:

> "An Act to **repeal and replace** the laws of Trinidad and Tobago relating to sexual crimes, to the procuration, abduction and prostitution of persons and to kindred offences."
>
> [Emphasis added]

60. The preamble goes on to explain that:

> "WHEREAS it is enacted inter alia by subsection (1) of section 13 of the Constitution that an Act of Parliament to which that section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 of the Constitution and, if any such Act does so declare, it shall have effect accordingly:
>
> And whereas it is provided by subsection (2) of the said section 13 of the Constitution that an Act of Parliament to which that section applies is one the

> Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House:
>
> And whereas it is necessary and expedient that the provisions of this Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution:
>
> 1. (1) This Act may be cited as the Sexual Offences Act.
>
> (2) This Act shall have effect even though inconsistent with sections 4 and 5 of the Constitution."

61. The long title sets out in general terms the purpose of the Act and serves, similar to the preamble, as a useful guide to legislative intention.[57] It has been recognized that the long title may not always help as to particular provisions but was found to be the plainest of all guides to the general objectives of a statute which the court may consider even if there existed no ambiguity in the operative provisions.[58] Sir John Nicholl in ***Brett v Brett***[59] stated:

> "The key to the opening of every law is the reason and spirit of the law — it is the 'animus imponentis', the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connexion with its whole context — meaning by this as well the title and preamble as the purview or enacting part of the statute. It is to the preamble more especially that we are to look for the reason or spirit of every statute; rehearsing this, as it ordinarily does, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute itself."

62. From the very outset, the legislators have sought, not to ***re-enact***, but to repeal and ***replace*** the laws of Trinidad and Tobago relating to sexual crimes. To my mind, there is therefore no need to try to strain the meaning of the words used to bring the provisions of the Act under the auspices of the savings clause referred to above. If Parliament had intended to re-enact the laws, as provided under section 6 of the Constitution, then it would not have sought to use the word "repeal and replace" but would have used the words "repeal and re-enact". The question is, do they mean the same thing?

63. In this court's simple approach to the meaning, the court's firm impression is that they do not. "***Re-enact***", in this context connotes a step to re-establish, and

[57] See Bennion of Statutory Interpretation, 6th Edn at Sections 245 and 246

[58] See ***Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*** [1975] AC 591; ***Cornwall County Council v Baker*** [2003] 2 All ER 178

[59] [1824-34] All ER Rep 776

recognize as continuing to exist, previous provisions relating to sexual crimes which are being re-introduced into force by the new Act[60]. On the other hand, "***replace***" connotes something new being introduced and enacted instead of what existed before.

64. So, has something new been introduced?

65. Firstly, one must look at what existed prior to the enactment of the 1986 provisions. The 1925 Ordinance, as set out above and repeated here for ease of reference, provided:

> "60. Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for any term not exceeding five years, nor less than two years, with or without hard labour, and, if a male, with or without corporal punishment.
>
> 62. Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour."

66. The new provision under section 13 provides:

> "13. (1) A person who commits the offence of buggery is liable on conviction to imprisonment for twenty-five years.
>
> (2) In this section "buggery" means sexual intercourse per anum by a male person with a male person or by a male person with a female person."

67. Attorney-at-law for the claimant has suggested that section 13 is not a modification of what went before but is a new provision because it increased the penalty substantially from a maximum of 5 years to a maximum of 25 years and also introduced an offence of buggery against a woman. With respect to the latter, however, the 1914 authority provided by the defendant established that the offence which existed in 1861 in the UK sufficiently covered the act in its involvement with a woman[61] so that it appears that the offence in that regard already existed. It is interesting to note what that court had to say as to the meaning of the word "Buggery", again denoting the religious and moralistic foundation of the offence:

> "Buggery is an Italian word, and comes from bugeriare **to commit unnatural**

[60] See for example ***The King v. Speyer. The King v. Cassel.*** - [1916] 1 K.B. 595 per Avory J, 626 "*…re-enact, or to recognize as being still in force,…"*. See also the definition - "*Bring (a law) into effect again when the original statute has been repealed or has expired."* Per https://en.oxforddictionaries.com/definition/re-enact

[61] ***The King v Wiseman*** 92 Eng. Rep 774, 775

sin."

[Emphasis added]

68. However, the court is of the respectful view that something more fundamental occurred in respect of the passing of the Act. Clearly, Parliament considered the sections of the Act afresh in light of the Republican Constitution. That fact is obvious from the recitals set out above. Parliament considered that the Act, or at the very least, certain portions of it, was/were inconsistent with sections 4 and 5 of the Constitution. To come to that understanding, this court views it as a deliberate step away from the presumption of constitutionality imposed by the savings clause rationale mentioned above to a declaration by Parliament that the Act was, whether wholly or in part, unconstitutional. In other words, Parliament took sexual crimes and the other matters discussed in the long title out of the purview and control and restriction of section 6 of the Constitution – the savings clause – and placed it under the control of section 13 of the Constitution. That, to my mind, is a radical change in the legislation and a deliberate decision to derogate from the rights of citizens as recognized and sanctioned. In that regard, the court bears in mind that the 1861 English statute, and the resultant local 1925 Ordinance, provisions were formulated against a background of there being no recognition of the right to privacy, for example, in England[62]. Obviously, therefore, the existing law with respect to buggery could not derogate from a right which was not recognized to exist.

69. In the face of Parliament taking the bold and deliberate step to re-examine the constitutionality of the offences set out in the Act including buggery and serious indecency, any return to the fiction of the presumption of constitutionality in a circumstance where, as set out in the history above and the fact that there is no information to suggest any constitutional or other consideration of the rights in question previously, seems illogical and rather irrational and quite arbitrary. It must be said that the rights – serious rights – of persons, citizens, should not be settled on a fiction or presumption but on an analysis of the factual matrix of all of the circumstances as has been done here[63].

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[62] See ***Wainwright and another v. Home Office*** [2003] UKHL 53 and the discussion of the impact of the Human Rights Act 1998 in the UK which adopted Article 8 of the European Convention on Human Rights which came into force on 3 September 1953. In essence, the House of Lords recognized that there was no tort in relation to invasion of privacy and recognized further that until the HRA 1998, English law did not provide any remedy for a breach of privacy

[63] See ***Chaoulli v. Quebec (Attorney General)*** [2005] 1 S.C.R. 791, 2005 SCC 35 per the joint reasons of McLachlin C.J. and Major and Bastarache JJ. at paragraphs 150 and 152 to the effect that that challenges to the Charter should be settled by evidence rather than presumptions

70. Accordingly, the something different and new which took place was that the legislators, Parliament, rationally and responsibly, moved from a position of assuming the constitutionality of, in this case, buggery and the new offence of serious indecency and consciously recognized that they were or potentially were not constitutional. As a result, and bearing in mind their deliberate intention to sanction possible breaches of sections 4 and 5 of the Constitution, they invoked section 13 (2) of the Constitution[64], and a 3/5 majority was sought and obtained to introduce sections 13 and 16 of the Act which were in possible contravention of sections 4 and 5 of the Constitution. The Act says that in the plainest words.

71. The same can be stated in relation to the new provision under section 16, as set out above, which makes provision for serious indecency as opposed to the old offence of gross indecency. Counsel for the defendant adopted the definition for the crime of gross indecency as outlined in the case of ***R v Hunt***[65] there being none previously outlined in the Ordinance. That definition provides that:

> "It is quite clear that physical contact is not necessary to constitute the offence. If two men put themselves in such a position that it can be said that there is a grossly indecent exhibition going on, they can be found Guilty of committing an act of gross indecency."

72. The crime of serious indecency extends the law as it may refer to acts by men or women not covered by the exemption and makes it specific to the use of the sexual organ.

73. Therefore, to my mind, the Act did not repeal and re-enact a presumptively unconstitutional provision thereby continuing its unconstitutional existence unaltered. Instead, it re-initiated the process of consideration, debate and purposeful contemplation of the provision and replaced the presumed constitutional provision with a deliberately unconstitutional provision in keeping with the procedure for doing so set out in section 13 (2) of the Constitution. As a logical result, section 13 (1) of the Constitution therefore arises for consideration.

The Section 13 Discussion

Commentary on Francis and applicable principles

74. ***Francis v The AG*** is the latest decision addressing the applicable test under section

[64] *"(2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House."*

[65] [1950] 2 All ER 291

13(1) of the Constitution, to which this court is bound. An enlarged panel of five members of the Court of Appeal was constituted to consider whether the proportionality test was appropriate in resolving a section 13[66] challenge to the constitutionality of an Act. The Act there being considered was the Dangerous Drugs Act Chap. 11:25. In the final analysis, the majority held that the proportionality test is appropriate to the question of inconsistency with sections 4 and 5 of the Constitution and not to the section 13(1) considerations, although it may be used as a tool in construing the proviso in section 13(1).[67]

75. In the majority decision in ***Francis***, Bereaux JA at one point – at paragraph 7, last sentence, states that:

> "The proviso in section 13 (1) therefore affirms the supremacy of the Constitution and recognizes that Parliament, in the exercise of its powers and functions, is subordinate to it."

76. At paragraph 47, in the penultimate sentences, His Lordship made a statement with which this court agrees:

> "The inclusion of the proviso in section 13 (1) of the Constitution is in recognition of the fact that the majority view may not necessarily be the right view. It reposes in the judiciary the heavy responsibility of declaring legislation undemocratic, despite the views of a majority of those elected to represent the people."

77. However, in the very next paragraph, paragraph 48, he went on to say that:

> "**In coming to any decision under section 13 of the Constitution, therefore, due deference must be paid to the intention of Parliament**. But ultimately, the responsibility is one from which the courts cannot shirk. Legislation which is undemocratic for the purposes of section 13 (1) does not become any less so by the impramatur of a parliamentary majority."

78. This court must confess that it had some concerns with respect to the highlighted first sentence of paragraph 48. Taken in the context of what went before and after that sentence, this court originally thought it to mean that deference which is due to Parliament's intention must obviously be subordinate to the requirements of the Constitution since Parliament may enforce legislation by way of a majority view which does not conform with the Constitution and it is the court's duty to strike it down or declare it undemocratic. However, the learned Judge went on to say:

> "[49] It is also long accepted that, because of the competing interests of a democracy, the rights conferred under sections 4 and 5 of the Constitution are not absolute and, to the extent that they existed prior to the Independence Constitution of 1962, never were. They must, for the most part, yield to the

[66] Of the Constitution

[67] Unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual

public interest. Thus, not every limitation on a fundamental right by the legislature or the executive will necessarily amount to an infringement for the purposes of section 14(1) of the Constitution. (See Wooding C.J. in Collymore v. AG (1967) 12 WIR 5) See also Suratt & Ors. v. The Attorney General of Trinidad and Tobago (2007) 71 WIR 391, Hayden Toney v. PC Joseph Carraspe (unreported) Mag. Appeal No. 68 of 2008, Inshan Ishmael v. The Attorney General of Trinidad and Tobago, Civil Appeal No. 140 of 2008. **Consequently it is not every restriction of a fundamental right which may require a section 13 majority**."

[Emphasis added]

79. This last sentence was the subject of disagreement by Jamadar JA in ***Inshan Ishmael*** and by Archie CJ and Jamadar JA in ***Francis***. They hold the view, shared by this court and reasoned extensively by them in their separate judgment in light of the constitutional history of our Republic, that breaches of the rights set out by sections 4 and 5 of the Constitution must properly be enacted by way of a section 13 majority and not by a simple majority as was discussed and approved in ***Suratt***. To me, this makes eminent sense since the provisions of the Constitution are clear and the rights set out therein are not to be trifled with in any simple manner but after deliberate consideration and debate under a section 13 majority discussion. Nevertheless, thankfully, that issue does not fall to be resolved in this matter since section 13 ***was*** invoked and ***does*** apply. Therefore, that statement has no applicability to the case before this court nor is the court bound by it.

The Section 13 Test

80. The starting point of any review pursuant to section 13(1) of the Constitution, must be whether there has in fact been a breach of sections 4 and 5 of the Constitution before any justification of the Act, pursuant to section 13(1), can arise.[68]

Has there been an infringement of the claimant's constitutional rights?

81. The claimant has relied on domestic law (including as declared by the Privy Council in respect of Trinidad and Tobago and elsewhere), comparative foreign law, and the international law obligations of Trinidad and Tobago in an attempt to establish violations of each of the rights and freedoms pleaded.

82. As relates the right to privacy and family life the claimant suggested that a same-sex couple constitutes a family unit. In that way it was argued that sections 13 and 16 of the Act deny him the right to form a family unit, or, once a family unit is

[68] See Bereaux JA in ***Francis*** at para 61 and Archie CJ/Jamadar JA at para 8 and 17.

formed via an emotional attachment, the law denies him and his partner the right to develop the intimate part of their relationship. It was noted that many international countries have made strides to decriminalise same-sex sexual behaviour thus observing a right to privacy and family life for homosexuals. This right has been protected even if in practice, as is the case in Trinidad and Tobago, the criminal law is not enforced.[69] Infringement then has been held not to be dependent on whether the law is actually enforced.[70]

83. The claimant also noted that this country is a signatory to the International Covenant on Civil and Political Rights. Article 17 of the Covenant protects privacy rights and was interpreted as preventing criminalization of consensual intimacy between adults of the same sex by the United Nations Human Rights Committee in the case of ***Toonen v Australia***.[71] It was thus argued that construing the constitution in a way that protects the impugned sections of the Act would lead directly to a breach of this international obligation.

84. The claimant further submitted that his constitutional right pursuant to section 4(b) encompasses common law rights and protects him against:

    84.1. treatment that is arbitrary or unreasonable;

    84.2. differential treatment on the ground of his sexual orientation; and

    84.3. differential treatment on the ground of his and his partner's sex/gender.

85. The claimant says the law as it stands is "arbitrary" and/or "unreasonable" as it treats homosexuals as a class of criminals for having consensual sex when heterosexuals as a class are not so criminalised. He submitted that the exclusion of homosexuals from stated rights is an unjustified exclusion which goes against this country's international obligations with no justification. It was further stated that the religious views of some ought not to be relevant or imposed on the whole of society.[72]

86. The Trinidad and Tobago Council of Evangelical Churches (TTCEC) contended that the law against buggery, as hinted to by Senior Counsel for the defendant, did not violate the right to respect for privacy and family life as it does not forbid

[69] Secretary of State for Work and Pensions v M [2006] UKHL 11 at paragraph 83

[70] Dudgeon v United Kingdom, (1981) 4 EHRR 149
Norris v Ireland (1989) 13 EHRR 186; Application No. 10581/83

[71] Communication No.488/1992, CCPR/C/50/d/488/1992 (1994)

[72] The South African Constitutional Court in ***National Coalition*** considered and rejected the relevance of the religious beliefs of those who oppose homosexuality, at paragraph 137: "Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the state to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society."

male persons from establishing, nurturing and maintaining a family or residing in the same household.

87. Counsel for the TTCEC also suggested that as relates section 13 of the Act, there was no discrimation based on sexual orientation as sexual intercourse per anum is prohibited in relation to both males and females and further, the fact that a person takes part in the act of buggery is not proof that such person is sexually oriented towards homosexuality as *many male persons who are heterosexual or pansexual indulge in homosexual activities not because of any incurable tendency but for sexual excitement*.[73] As relates section 16 of the Act, it was suggested that the claimant has not, either by his affidavit evidence or in his submissions, brought himself within the ambit of that section as it criminalizes acts of serious indecency, which it defines as acts "other than sexual intercourse (whether natural or unnatural)". According to the TTCEC the claimant has not, by his affidavit evidence, identified himself as partaking in any such acts.

88. There is no doubt in the court's mind that the impugned sections infringe upon the claimant's fundamental rights or that they are likely to be contravened. Relief pursuant to section 14 of the Constitution does not require actual proof of contravention but a strong case that there is likely to be contravention so that the TTCEC's submission in relation to section 16 of the Act is rejected.

89. A felicitous exposition of what the right to privacy entails, to this court's mind, is summarised in the Supreme Court of India decision in ***Puttaswamy v Union of India.***[74] In that matter, a nine judge bench of the Supreme Court of India handed down its decision in a 547 page judgment, containing six opinions, and ruled unanimously that privacy is a constitutionally protected right in India despite there being no explicit right to privacy in their Constitution. The right to privacy was held to exist based on the principle that the Indian Constitution is a living Instrument and the Court sought to give effect to the values of that Constitution by interpreting express fundamental rights protections as containing a wide range of other rights. As such, Article 21 of the Indian Constitution, which provides that "*No person shall be deprived of his life or personal liberty except according to procedure established by law*"**,** was held to incorporate a right to privacy.

90. The dicta coming out of ***Puttaswamy*** emphasized the fact that sexual orientation

[73] Judge Walsh, dissenting in ***Dudgeon v United Kingdom*** (1981) 4 EHRR, 149 (Application 7525/76 at paragraph 13, page 38)
[74] Writ Petition (Civil) No 494 of 2012

is an essential attribute of privacy,[75] which is inextricably linked to human dignity:

> "Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. …. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture.
>
> …….
>
> Privacy lies across the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary state action. It prevents the state from discriminating between individuals. The destruction by the state of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary state action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual.
>
> ……
>
> Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation"

91. The majority panel's joint decision in ***Puttaswamy*** then went on to question the rationale of the appeal decision in ***Naz Foundation*** cited above which reversed the first instance decision to decriminalize the homosexual laws and indicated that a nine member panel was in the process of reviewing that decision.

92. To this court, human dignity is a basic and inalienable right recognized worldwide in all democratic societies. Attached to that right is the concept of autonomy and the right of an individual to make decisions for herself/himself without any unreasonable intervention by the State. In a case such as this, she/he must be able to make decisions as to who she/he loves, incorporates in his/her life, who she/he wishes to live with and with whom to make a family. A citizen should not have to live under the constant threat, the proverbial "Sword of Damocles", that at any moment she/he may be persecuted or prosecuted. That is the threat that exists at present. It is a threat that is sanctioned by the State and that sanction is an

[75] Thus casting doubt on the case of ***Suresh Kumar Koushal v. Naz Foundation*** (2014) which upheld section 377 of the Indian Penal Code, which effectively criminalizes same-sex relationships between consenting adults

important sanction because it justifies in the mind of others in society who are differently minded that the very lifestyle, life and existence of a person who chooses to live in the way that the claimant does is criminal and is deemed of a lesser value than anyone else. It has been so expressed in the recent past by leaders in society. In this way, Parliament has taken the deliberate decision to criminalize the lifestyle of persons like the claimant whose ultimate expression of love and affection is crystallized in an act which is statutorily unlawful, whether or not enforced. This deliberate step has meant, in this circumstance, that the claimant's rights are being infringed.

93. The claimant, and others who express their sexual orientation in a similar way, cannot lawfully live their life, their private life, nor can they choose their life partners or create the families that they wish. To do so would be to incur the possibility of being branded a criminal. The Act therefore impinges on the right to respect for a private and family life.

94. Unlike heterosexual citizens, the claimant is treated differently under the law by reason of his sexual orientation in respect of the manner in which he expresses his love and affection. By engaging in that expression consensually, he is liable to be imprisoned for a term of up to 25 years – that amounts to a term of life imprisonment virtually – and the same does not apply to a heterosexual male unless he engages in intercourse per anum. The Act therefore impinges on the right of the individual to equality before the law and the protection of the law.

95. The claimant has given uncontroverted evidence of the discrimination, threats and abuse that he has suffered by being an openly homosexual male in Trinidad and Tobago. The court is in no doubt that the sanction imposed on him by the State under these provisions affects his ability to freely express himself and his thoughts in public. Those criminal sanctions have the potential to be used oppressively by differently minded citizens as a foundation for hate as condoned by the State. The Act therefore impinges on the individual's right to freedom of thought and expression.

96. There is no doubt, however, that the claimant's fundamental rights are not absolute and may be overriden by the Act, it having been passed pursuant to section 13(2) of the Constitution. It is for the claimant to prove that the impugned sections are not reasonably justifiable as is the burden imposed by authorities to which this court is bound.

The burden of proof

97. As stipulated in authorities such as ***Mootoo***, ***Faultin*** and others, including those decided by the Privy Council, Bereaux JA and Archie CJ/Jamadar JA, in ***Francis***, reaffirmed that the onus lies on the person alleging that it is not reasonably justifiable to provide evidence to that effect unless legal principles and societal norms are sufficient to prove same. They reiterated as well the notion that the burden was a heavy one since the decision of a majority of the country's elected representatives was not to be lightly disregarded[76]

98. This is a very difficult proposition for this court to accept. Prior to the Constitution, Trinidad and Tobago enjoyed the benefit of the legislative provisions of the UK. That jurisdiction has no written constitution and, therefore would have incorporated legislation at the time which had no reference to or restriction by any supreme constitutional document. As a result, it is this court's respectful view that the principle of the supremacy of Parliament arose since Parliament was the sole governing body and principle informing its own legislative agenda – an agenda which realistically involves political expediency and majority views. However, upon the introduction of the Constitutional Bill of Rights after independence, there would necessarily have been a shift in the paradigm from the supremacy of Parliament and parliamentary intention and the rule of the majority to the supremacy of the Constitution. To my mind, therefore, this means that it is Parliament's role to answer to the Constitution and, by extension, the court, in its role as the upholder of the Constitution, in the event that it seeks to derogate from any right guaranteed under the Constitution by way of a 3/5 majority as prescribed under section 13. It must be Parliament which has to justify its decision to do so.

99. Having regard to the provision of section 2 of the Constitution, it is this court's respectful view that it is not for Parliament to sit back under any presumption of constitutionality which, to my mind is an unnecessary fallacy and an unsubstantiated fiction as discussed above. The very provision – section 13 (1) - establishes that. Once an applicant has established that his/her rights under the Constitution have been breached, then it is this court's respectful view that the burden ought to shift unto the Parliament to justify its deliberate decision to derogate from its duty to uphold the Constitution and the constitutional rights of its citizens. There is no doubt that the Bill of Rights in Trinidad and Tobago were born out of the Canadian experience and tweaked for local assimilation.[77] Canada has adopted this method of shifting the burden on to Parliament rather than on to

[76] See paragraph 90

[77] See paras 45 and 49 of the joint opinion of Archie CJ and Jamadar JA in ***Francis***

the applicant in respect of justification[78]. To cling to the presumption of constitutionality is, to my mind, and with the greatest respect, a symbol of a further clinging to the vestiges of the colonial idea of the supremacy of Parliament which has, to my mind, been supplanted by the Constitution.

100. It has to be noted that Archie CJ and Jamadar JA, in their minority opinion, declared/reaffirmed that the notion of Parliamentary supremacy was inapplicable in Trinidad and Tobago[79]

101. It seems rather illogical for the burden to be otherwise. It is Parliament which would know the right which is intended to be breached hence the requirement to invoke a 3/5 majority. It is Parliament which would have debated the need for that breach. Therefore, logically, it ought to be Parliament who should come before the court, through the Honourable Attorney General, to bear the burden of justifying the breach under section 13(1). The reasoning and justification for the breach obviously lies within the bosom of the lawmakers and not within the intimate knowledge of any citizen who is able to prove a breach of his or her rights. Imagine the unsavory hypothetical situation of a breach of a person's right to privacy through the unlawful extraction of a DNA sample. The person may be of simple means without the resources to commission expert reports or evidence, opinions, etc. much of which may already be within the domain or control of the State who may have had to obtain a 3/5 majority by means of full academic persuasion and debate. It therefore seems unreasonable in such a circumstance to expect the person of simple means to fail in his/her challenge where the State would have already traversed the path but may not feel obligated to reveal it because of where the burden of proof lies.

102. The matters which arise for consideration under section 13 requires that an Act be shown "*to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual."* It therefore makes perfect sense for that justification on behalf of society, which is represented by Parliament, to be put forward by Parliament which enacts and enables policies in relation to rights and freedoms of the individual within the parliamentary framework and agenda to justify the particular Act or provision. It is the Parliament which makes decisions to enact legislation to conform to the rights and freedoms of the individuals within its purview and, often, in conformity with the provisions of incorporated international norms as expressed and acceded to in international treaties. Obviously, the definition of what is justifiable in a society which has proper

[78] See for example ***R v Oakes*** discussed below
[79] See para 91

respect for the rights and freedoms of the individual must relate directly to the society in question i.e. the Republic of Trinidad and Tobago with due regard to other democratic societies.

103. To my mind, the burden of justification, therefore, ought to fall on the State and not the individual since it is for the State to stand behind its decision to enact legislation along accepted societal rights and freedoms of the individual applicable to this jurisdiction. If legislation steps outside of the Constitution, it is the State who would be in the best position to explain and justify the decision of Parliament and not the individual. The individual would not be aware of the inner machinations of the parliamentary process and policy in the way that the legislator would.

104. However, statements have been made by legal minds more illustrious than this court's to the opposite as cited at paragraphs 39.2 and 46 above in relation to ***Faultin v AG***, ***AG v Mootoo***, ***Suratt and others v Attorney General of Trinidad and Tobago***, ***Francis***, etc.

105. It is this court's respectful view, therefore, that this rationale ought to be revisited in the light of a constitutional rather than parliamentary supremacy. However, until the line of jurisprudence quoted above are authoritatively addressed otherwise, this court must continue to be bound by the learning of these higher courts.

Reasonably Justifiable?

106. The consolidation of the rights and freedoms of the individuals within the Republic of Trinidad and Tobago is necessarily fashioned generally out of the local experience and culture with due regard being paid to the international norms in relation to individuals. The discussion as to what is *"reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual"* was comprehensively addressed in the case of ***Francis***.

The Bereaux approach:

107. Bereaux JA delivered the majority decision in this case[80] in which he went on to state:

> "[91] The question then is what is the test, if any, to be applied here in assessing reasonable justification. Three cases fall to be considered; ***Morgan v. The Attorney General of Trinidad and Tobago*** [1988] 1 WLR, ***de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries,***

[80] With Weekes JA and Soo Hon JA concurring

Lands and Housing, [1998] 53 WIR 131, ***Attorney General v. Northern Construction*** (supra).

[92] In **Northern Construction**, Archie C.J. propounded the test applicable to section 13(1) of the Constitution as follows:

"in determining whether a statutory provision arbitrarily or excessively invades the enjoyment of a fundamental right, regard must be had to whether:

- The legislative objective is sufficiently important to justify limiting a fundamental right;
- The measures designed to meet the legislative objective are rationally connected to it; and
- The means used to impair the right or freedom are no more than is necessary to accomplish the objective".

108. Bereaux JA expressed the view that these three criteria were adopted by the Privy Council in ***Nyambirai v National Social Security Authority***[81]. He further expressed the view that the terminology used in the interpretation by Gubbay JA in that case to interpret the expression *"reasonably justifiable in a democratic society"* was not particularly helpful as it used the very terminology used in the Constitution. He went on to state that this formula used and adopted in ***de Freitas*** was far too narrow and formulaic. Further, he said that the third limb incorporated the proportionality principles which were more appropriate to the question of inconsistency of an Act of Parliament with sections 4 and 5 of the Constitution rather than to reasonable justification under section 13(1).

109. Instead, he preferred the test enunciated in the ***Morgan*** decision, which was a case about rent restriction. In that case, he said that Lord Templeman considered whether rent restriction was a feature of democratic societies and how democratic societies would ordinarily apply rent restriction legislation which, in his view, was more consistent with the terminology used in section 13(1) of the Constitution. Accordingly, he expressed the view that Lord Templeman's approach was the better approach especially against the background that it was a decision of the Privy Council from Trinidad and Tobago on the very question at hand i.e. section 13(1). In support of his view, he referred to the decision of the Privy Council in ***Worme and Grenada Today Limited v The Commissioner of Police of Grenada***[82] which he said did not seem to follow ***de Freitas*** but, rather, ***Morgan*** instead.

110. Importantly, Bereaux JA went on to state that in deciding whether section 13(1) is

[81] [1996] 1 LRC 64
[82] [2004] UKPC 8

breached[83], in following the Templeman approach which he accepted, the court is entitled to compare the legislation at hand with comparable legislation from other democracies.

111. The theoretical simplicity of this approach is readily apparent but it may, to my mind, result in practical difficulties in establishing what is an acceptable norm across the board. For example, a norm accepted in some but not all democratic societies may become the subject of ambiguity, and ascribing weight to any particular such inconsistency of approach can become decidedly problematic. For example, in the case at hand, buggery laws have been found to be unacceptable in several democratic societies[84] and found to be acceptable in others[85]. The Commonwealth Caribbean situation is complicated by the savings clause regime under the respective Constitutions and has not really been tested judicially except in Belize, which was not hampered by a perpetual savings clause provision[86]. To my mind, such a solely comparative approach, while approved by Bereaux JA in ***Francis*** and by the Privy Council in ***Morgan***, does not seem especially applicable to all circumstances. What may be justifiable in the democratic society of Canada, for example, with its own constitutional regime and jurisprudence, may or may not be necessarily justifiable in the local experience.

112. To be fair, Bereaux JA did say, in the context of the comparative approach:

> "[100] It requires a dispassionate and detached approach by judges. Certainly there will be a local flavour to legislation which will require judges to bear in mind our own national and cultural peculiarities but ultimately, the assessment must be made against norms and accepted standards of civilised nations which subscribe to democratic principles, democratic systems of governance and the rule of law."

113. However, this court prefers an approach which can be adapted to any situation within the context of the local experience and the Republican Constitution of Trinidad and Tobago and that approach requires some sort of formula to be applied. Otherwise, courts may fall into the danger of being inconsistent if a court follows or places too much weight on one internationally recognized democratic norm which is accepted in certain quarters but rejected in others. It can potentially raise the issue of bias if the sole test employed is based on a subjective analysis of

[83] The court is not sure that this is what he wanted to say since the breach applies to the section 4 rights of the Constitution. The question for determination under section 13 is whether such a breach is reasonably justifiable so the court understands the learned judge to be referring to that exercise of considering reasonable justifiability

[84] E.g. South Africa, Australia, Ireland

[85] E.g. Singapore, India although the Indian instance is being reviewed by a newly constituted 9 member panel in the case of ***Naz Foundation v Delhi***

[86] The savings clause provision in Belize expired after 5 years – see ***Reyes v. R***

what an internationally accepted norm is especially where there is disagreement on the point.

The Archie/Jamadar approach:

114. The learned judges, although agreeing with the outcome, wrote a minority decision approaching the test from a different perspective. In their joint opinion, they stated:

> "2. …. In our opinion, our Constitution elects and enacts a clear bias – a permissive preference for the upholding of the fundamental rights provisions (stated by deliberate choice in absolute and unfettered terms) and clear, specific and concrete restraints on the power of the Executive or the Legislature to limit or restrict those rights and freedoms. We are clear, that in Trinidad and Tobago Parliament is not supreme, only the Constitution is supreme. Further, that the Constitution protects the fundamental rights and freedoms by restricting Parliament's power to encroach on then.
>
> 3. This protection of the rights and freedoms from Executive or Legislative encroachment is provided for in the Constitution itself, by creating clear though subtle and finely balanced processes that allow Executive or Legislative encroachment in only specified and limited circumstances. In our opinion, the proportionality test suggested in Suratt constitutes a reading into the Constitution of a 'reasonably required' general limitation of the fundamental rights and freedoms, which is not in the text and was deliberately left out.
>
> 4. In any event, we see proportionality as more akin to reasonability, which is the standard set in section 13 – reasonable justifiability. We do not agree, as Bereaux, J.A. seems to suggest, that inconsistency is the standard under section 13. We are of the firm view that the standard is reasonability. In our opinion, inconsistency with the Constitution simpliciter, is the trigger that invokes section 13 and provided that its requirements are met, otherwise inconsistent legislation is rendered effective. However, even inconsistent legislation that is rendered effective by section 13 must also be reasonably justifiable. Proportionality is therefore a useful tool in determining reasonable justifiability for the purposes of the stage two section 13 analysis. It is consequently inapt for determining inconsistency (the stage one analysis) in the context of section 13 of the Trinidad and Tobago Constitution.
>
> 5. What, therefore, is ultimately at stake in the differences between our opinion and that of the majority, is whether the power of Parliament and the Executive will be enlarged at the expense of the protection of the fundamental rights and freedoms, or whether the protection of the rights will be preserved and the power of Parliament and the Executive limited. In our opinion the Constitution provides for the latter, which we uphold; whereas the opinion of the majority permits (by way of judicial intervention) the former, which we repudiate.

> 6. In our opinion, the non-negotiable constitutional values that the society has through careful deliberation declared as fundamental, are protected from legislative encroachment unless undertaken by specified means constitutionally provided and are therefore to be studiously appreciated and followed."

115. As they embarked upon their analysis of the issue, they placed particular emphasis on the local experience and gave deference to local opinion[87] and the socio-political context and history of the 1962 And 1976 Constitutions[88]. Ultimately, they found that:

> "The Independence and Republican Constitutions of Trinidad and Tobago are clearly the products of the citizens of Trinidad and Tobago and were designed to achieve particular ends, including particular political ends."

116. Archie CJ/Jamadar JA then engaged in an analysis to substantiate their statement at paragraph 5 of their joint opinion cited above and, in particular, to justify them holding that any derogation from the rights under sections 4 and 5 of the Constitution can only be done legislatively by a section 13 majority. In that regard, relying on the applicability and relevance of the decisions in ***Hinds v R***[89] and ***Thornhill v Attorney General***[90] and also referring to the Privy Council decisions in ***Roodal v The State***[91] for the relevant constitutional history of the 1962 and 1976 Constitutions, they said:

> "57. It would appear from the plain language of section 13, that (outside of emergency periods and existing law limitations and restrictions) Parliament is obliged to undertake an evaluation of all legislation it intends to enact, and in so far as any proposed provisions may be inconsistent with sections 4 and 5(2) of the Constitution, the special majorities required by section 13(2) and (3), as well as the express declaration mandated by section 13(1), must be satisfied for those provisions to be effective. This is the override opportunity that the Constitution appears to have provided Parliament with (outside of emergency periods and existing law limitations and restrictions), when it intends to enact legislation that is inconsistent with sections 4 and 5(2) of the Constitution."

117. They expressed their doubt and reservations with respect to the Privy Council decisions in ***Suratt v The Attorney General*** and ***The Public Service Appeal Board v Omar Maraj***[92] which seemed to introduce and propagate the principle of "legitimate aim" which, according to the learned judges, was not consistent with the provisions of the Constitution. This approach was, according to the learned judges, seemingly influenced by the notion of parliamentary supremacy which is

[87] See paragraphs 26 and 27
[88] See paragraphs 28 - 47
[89] [1977] AC 195
[90] [1981] AC 61
[91] [2003] UKHL 78
[92] [2010] UKPC 29

inapplicable in Trinidad and Tobago and resulted in Baroness Hale in ***Suratt*** using a proportionality test to save legislation from being inconsistent with the Constitution – an approach implicitly influenced in like manner by the majority decision in ***Francis***[93]. Ultimately, the learned judges expressed their discomfort with the fact that the Court of Appeal was bound by the decisions in ***Suratt*** and ***Omar Maraj***. In the end, though, the learned judges reached the conclusion that in light of the 2 different approaches taken by the Privy Council on the issue, that of ***Hinds/Thornhill*** and of ***Suratt/Omar Maraj***, they were free to choose between the 2 approaches and they chose the former.

Suratt/Omar Maraj

118. Respectfully, this court is of the humble opinion that the question which our highest court asked itself in ***Suratt*** and ***Omar Maraj*** is not the same question that this court has to ask and resolve.

119. The section 13 test is set out in the following provisions:

> "13. (1) ***An Act to which this section applies*** may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.
>
> (2) ***An Act to which this section applies*** is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House."
>
> [Emphasis added]

120. Therefore, to engage the test at section 13 (1), section 13 (2) must apply.

121. In ***Suratt*** and ***Omar Maraj***, the question that was asked and resolved by the Privy Council was not in relation to a section 13 issue since they were not Acts to which that section applied. Instead, as Baroness Hale said in ***Omar Maraj***, which did not deal with a section 13 majority case but which dealt with the construction to be applied to the applicable provisions under the Constitution relating to the powers of the Public Service Appeal Board:

> "[29] **In any event, what is in question here is not whether a constitutional right has been violated, but whether an enactment should be construed in such a way as to avoid such a violation**. The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional: see Grant v R [2006] UKPC 2, [2006] 3 LRC 621 at [15]. On the other hand, the Constitution must be given a broad and purposive

[93] See the discussion at paragraph 91

> construction: see Minister of Home Affairs v Fisher [1979] 3 All ER 21 at 25. In short, in interpreting these provisions, the Board should presume that Parliament intended to legislate for a purpose which is consistent with the fundamental rights and not in violation of them."
>
> [Emphasis added]

122. As a result, that question differs from the one before this court since no such presumption of constitutionality exists in light of the declaration made in the Act for the reasons set out above. Therefore, there is no need for legal gymnastics to construe the enactment in such a way as to avoid a violation. The court has already found that there has been a violation.

123. Similarly, ***Suratt*** dealt with the construction to be applied to the Equal Opportunity Act 2000 ("the EOA") which was passed by a simple majority. As in the later case of ***Omar Maraj***, Baroness Hale placed great emphasis on the presumption of constitutionality. The majority in the case found that the EOA was not unconstitutional without reference to any section 13 test. Instead, a proportionality approach was adopted in relation to the legitimate aim addressed by the legislation. That approach, respectfully, did not address the section 13 discussion. There was mention of the impinging upon freedom of expression by section 7 of the EOA 2000 and freedom of contract by sections 17 and 18 of that Act. However, it is not clear that any section 13 (1) analysis was done since, by definition and the fact that it was passed by a simple majority, the provisions of section 13 did not apply. Consequently, no analysis was necessary under that section and, therefore, it must be that a different question was being addressed by the Privy Council. That is not the case in the matter before this court.

124. As a result, this court does not feel bound by the test set out in ***Suratt*** and ***Omar Maraj***.

125. At the end of the day, Archie CJ/Jamadar JA concluded that:

> "125. It is clear that the process of analysis contemplated by section 13 involves three discrete but interrelated steps. **First, the determination of inconsistency. Second, the determination of reasonable justifiability. Third, the determination of the core inviolable and relevant standards of a democratic society against which the provisions challenged must ultimately be measured and the undertaking of that measurement**. However, because section 13 requires the justifiability to be reasonable, proportionality 'tests' are an obvious tool that may be used to assist courts in determining section 13 challenges. Indeed, the proportionality analysis applied in Northern Construction, could also be used by Parliament as an initial filter, when it intends to pass legislation, which though inconsistent with the Constitution it seeks to render effective pursuant to section 13 of the Constitution. Having done this, Parliament ought also to go further and test

the proposed legislation against the constitutional values that a society that has a proper respect for fundamental rights and freedoms recognises.

126. ….Therefore, in any section 13 analysis, a court must be guided by the values and principles which are embodied in due regard for the rights and freedoms of the individual. Examples of these overarching constitutional values are also to be found in the Preamble to the Constitution. It is these and the other overarching constitutional values and principles (such as respect for the dignity of the human person, the rule of law and the separation of powers) that are the final standard against which limitations on and restrictions of the rights and freedoms must be shown not to be reasonable and demonstrably justified. This is the effect of the analysis that Bereaux, J.A. has undertaken in relation to section 13, the outcome of which we agree with."

126. For the reasons given above with respect to the inapplicability of the ***Suratt*/*Omar Maraj*** rationale to a case such as this which falls to be decided under section 13, this court adopts the approach postulated by Archie CJ/Jamadar JA which is summarized at paragraph 5 of their joint opinion and set out above. In other words, this court accepts that:

126.1. The protection of the rights set out under the Constitution is preserved and the power of Parliament and the Executive is limited[94];

126.2. Other than as provided for under section 6 (the saving clause), section 7(3) (exceptions for legislation passed during periods of emergency) and section 13, the section 4 and 5 rights under the Constitution are preserved and, to my mind, ought to be guaranteed.

The Oakes Test

127. It is not disputed that the rights set out in our Constitution were modeled on the Canadian Bill of Rights 1960 without it being slavishly followed[95]. Consequently, it would be helpful to consider the Canadian position in relation to a constitutional issue such as this.

128. In ***R v. Oakes***[96], the respondent was charged with unlawful possession of a narcotic for the purpose of trafficking contrary to section 4 (2) of the Narcotic Control Act, but was convicted only of unlawful possession. The respondent brought a motion challenging the constitutional validity of section 8 of that Act which provided that if the court found the accused in possession of a narcotic, he

[94] See paragraph 54 of their joint opinion: *"From the text and apart from section 54 of the Constitution (which deals with alterations to the Constitution), it appears that it is only section 6 (the saving clause), section 7(3) (exceptions for legislation passed during periods of emergency) and section 13 which permit legislation to be effective even though its provisions may be inconsistent with or otherwise limit and/or restrict (abrogate, abridge or infringe) the section 4 fundamental rights and freedoms."*

[95] See paragraph 73 of the Archie CJ/Jamadar JA decision in **Francis**

[96] [1986] 1 SCR 103; [1986] SC J No. 7

is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. On appeal, the Act was found to be unconstitutional because it violated the presumption of innocence entrenched in section 11 (d) of the Canadian Charter of Rights and Freedoms. The issue as to whether or not section 8 of the Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of section 1 of the Charter was addressed by the Supreme Court of Canada.

129. Dickson CJ, at paragraph 62, set out the provisions of section 1 of the Canadian Charter of Rights and freedoms which provides:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**."
>
> [Emphasis added]

130. For ease of reference, section 13 (1) of the 1976 Republican Constitution is once again reproduced for comparison:

> "13. (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be **reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual.**"
>
> [Emphasis added]

131. Bereaux JA in ***Francis*** accepted that the section 13 (1) reference to *"a society that has a proper respect for the rights and freedoms of the individual"* referred to *"a free and democratic society"*.

132. Accordingly, the test seems to be substantially the same between section 1 of the Charter and section 13 of the Constitution with the only apparent difference being a limit which is ***reasonable*** and can be ***demonstrably*** justified, in the case of the former, as opposed to one which is ***reasonably*** justified, in the case of the latter. To my mind, there is no material difference.

133. In relation to the words *"free and democratic society"*, Dixon CJ said:

> "Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect

> for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."

134. This statement is consistent with the approach adopted by Archie CJ/Jamadar JA at paragraph 126 of their joint opinion quoted above.

135. Dixon CJ went on[97] to confirm that the onus of proof lies with the party seeking to uphold the limitation since limits on the rights and freedoms are exceptions to the general guarantee of section 1. He said that the presumption is that the rights and freedoms are guaranteed unless the exceptional criteria justifying the limit of those rights have been met. He also mentioned that the standard of proof is the civil standard.

136. As this court has noted above, this court agrees with this statement as to where the burden of proof ought to lie in relation to the burden with respect to the proof of the justification.

137. Local authorities and the Privy Council have stated this burden in the negative in that it is for the person who is alleging that the limit is not reasonably justifiable to bear the burden of proof as opposed to the Canadian position.

138. Again, for the reasons that this court has set out above, the Canadian position makes eminent sense since section 2 of the Republican Constitution guarantees the supremacy of the Constitution and therefore, to my mind, constitutional rights ought to be guaranteed unless the party seeking to abrogate, derogate or curtail those rights can justify otherwise. As mentioned above, however, this court is bound with respect to this burden of proof until it is addressed by an authority higher than this court.

139. The test, as modified by later authorities, is recognized as follows[98] (the quote below is broken down into separate lines for the sole reason of the analysis which follows in the next paragraph):

> "The Oakes test has two parts.
>
> First, it requires that the objective pursued by the limit be of sufficient importance as to warrant overriding the right.
>
> Second, the limit must be proportionate, which has three aspects: there must be a rational connection between the measures containing the limit and the

[97] At paragraph 66

[98] Halsbury's Laws of Canada - Constitutional Law (Charter of Rights)(2014 Reissue) / III. LIMITATION OF RIGHTS / 3. Reasonable Limits: The Oakes Test '/ HCHR-19 The Oakes test analysis

objective pursued; the degree of infringement must be minimal; and there must be an overall proportionality between the deleterious and salutary effects of the measure."

140. To my mind, this test is not unlike the one settled by Archie CJ in ***Northern Construction*** supra which is reproduced here for ease of reference:

> "In determining whether a statutory provision arbitrarily or excessively invades the enjoyment of a fundamental right, regard must be had to whether:
>
> - The legislative objective is sufficiently important to justify limiting a fundamental right;
> - The measures designed to meet the legislative objective are rationally connected to it; and
> - The means used to impair the right or freedom are no more than is necessary to accomplish the objective".

141. The only missing element in the ***Northern Construction*** analysis is the statement on proportionality in the last limb of the second part of the Oakes test. Therefore, apart from the difference as to where the burden of proof lies, both tests seem substantially the same. In the case of ***Inshan Ishmael v The AG***[99], Bereaux JA asked the question whether that test applied in light of the decision in ***Suratt*** but, for the reasons given above, this court is of the respectful view that the ***Suratt*** test does not apply since it was addressing a different limb of the analysis i.e. whether the provision itself breached the constitutional rights rather than the second limb dealing with reasonable justification.

The Test to be Applied?

142. Having regard to the fact that this court finds that it is bound by the Court of Appeal decisions in respect of ***Northern Construction***, ***Francis*** and the later case of ***Steve Ferguson & Ors v The AG & Or***[100], all of which related to section 13 questions, the court will prefer to follow the ***Northern Construction*** test than the less formulaic but, respectfully, potentially more ambiguous test propounded by Bereaux JA in ***Francis*** as formulated in the Privy Council decision in ***Morgan.*** The court is of the respectful view that despite the difference in approach between the majority and minority views, the majority view accepted that there was more than one test available for the analysis and did not assert mandatory compliance with the majority approach. Therefore, this court has chosen the test mentioned for the reasons given.

143. Again, unfortunately, since the court is bound as mentioned above, the burden of

[99] Civ. App. 140 of 2008
[100] Civ Apps P-085 of 2013; P – 098 of 2013 and P – 106 of 2013

proof in this case at this stage remains with the claimant. It may very well be that if or when this case moves forward through the legal process, as it no doubt will, to the different levels of appeal, the reviewing bodies may wish to reconsider this burden of proof point.

The position in Democratic Societies

144. The position with respect to democratic societies as enunciated in the claimant's submissions at paragraphs 10 to 13 is uncontroverted and amount to matters which can be spoken of and referred to in submissions. Those paragraphs are set out below:

> "10. Laws that criminalise consensual sexual intimacy between adults of the same sex have been struck-down or declared unlawful by courts around the world, in the Americas, Europe, Africa, Asia and Australasia and declared in contravention of international treaty law, including by:
>
> a) The European Court of Human Rights (the "Strasbourg Court") on three occasions on the ground of privacy, as protected by Article 8 of the European Convention on Human Rights ("the ECHR"), in:
>
> i. Dudgeon v United Kingdom (1981) 4 EHRR 149';
>
> ii. Norris v Ireland (1989) 13 EHRR 1862; and
>
> iii. Modinos v Cyprus (1993) 16 EHRR 4853;
>
> b) The United Nations Human Rights Committee in Toonen v Australia Communication No.488/1992, on the ground of privacy, as protected by Article 17 of the International Covenant on Civil and Political Rights ("ICCPR");
>
> c) The South African Constitutional Court in National Coalition v Minister of Justice and Others (CCT11/98)5 on the grounds of dignity, privacy, and sexual orientation discrimination, as protected by Sections 9, 10 and 14 of the Constitution of South Africa 1996;
>
> d) The Supreme Court of the United States of America in Lawrence v Texas 539 US 558 (2003)6, on the ground of privacy, as protected by the Due Process Clause in the Fourteenth Amendment to the US Constitution 1787;
>
> e) The Fijian High Court in McCoskar v the State (2005) Criminal Appeals HAA0085 & 86 of 20057 on the grounds privacy and equality before the law on the grounds of gender and sexual orientation, as protected by Sections 37 and 38 of the Fijian Constitution 1997;
>
> f) The Nepali Supreme Court in Pant v Nepal Government, Office of the Prime Minister and Council of Ministers (2008) NJA Law Journal 2628 on the ground of gender discrimination, as protected by Article 13 of the Interim Constitution 2006; and
>
> g) The Belize Supreme Court in Orozco v Attorney General of Belize Claim No. 688 of 2010, on the grounds of human dignity, privacy, sex discrimination,

and freedom of expression, as protected by Sections 3(c), 6, 12 and 14 of the Constitution of Belize 1981.

11. Additionally, court proceedings to decriminalise consensual sexual intimacy between adults of the same sex are on-going in Jamaica, India and Kenya.

12. The Court will note that each of the above cases concerned laws in ex-British colonies (including the United States, whose founding 13 states inherited their anti—gay laws from Britain, which then spread westwards as the United States expanded).

13. England and Wales decriminalized consensual sexual intimacy between adults of the same sex in 1967 by legislative change, followed by Canada in 1969, and then by other Commonwealth countries, including Malta (1973), New Zealand (1986), the Bahamas (1991), Vanuatu (2007) and most recently the Seychelles (2016)."

145. As hinted to earlier in this judgment and referenced in the submissions of the claimant, other democratic nations have also embarked on decriminalizing homosexual acts between adults which are conducted at the very least in private. Therefore, it is patently obvious that democratic societies are moving away from the criminalization of homosexuality.

146. Further, the availability of several international treaties condemning such law, as discussed in ***Toonen*** (supra) places the international position in context.

Application to the facts

147. As relates to section 13 of the Constitution, the claimant acknowledged that there is an initial burden of proof on him to prove that there is an infringement of his fundamental rights but it was suggested that as a matter of general principle there is generally a burden on the State to justify its actions in circumstances where rights are being infringed or taken away. It was submitted that even if the burden is on him then he can easily discharge same on "legal principles", "societal norms" and the evidence deposed to by his affidavit.[101]

[101] The claimant has appended within Exhibit J.J.2. to his affidavit evidence of the link between democracy and the absence of laws that criminalise homosexuality. The survey identified two types of democracies, "full" and "flawed"; with the UK, Canada Australia and New Zealand in the former group, among others, and the United States, South Africa and Trinidad and Tobago in the latter group, among others. 18 out of 19 (or 95% of) "full democracies" do not criminalise homosexuality; only Mauritius does so. 44 out of 57 (or 77% of) "flawed democracies" do not do so. Further, four countries in this category – which happen to score the highest among criminalising countries in this category - have on-going court proceedings to decriminalise (India, Jamaica, and Trinidad and Tobago) or courts have handed down judgment protecting the rights of homosexual people as a class, paving the way for decriminalisation.

148. There was no evidence submitted by the defendant so that the only evidence before this court is that of the claimant. His evidence in this regard is as follows:

148.1. The claimant's uncontested evidence is that he fled to London with his openly homosexual partner in 1996 to escape harassment and discrimination. According to him, it was necessary because they realised that they could not safely continue their relationship or build a family.

148.2. The claimant deposed that he returned to Trinidad and Tobago in 2010 with the intention of staying permanently. He however returned to England in April 2014 because of the homophobia he experienced and what he described as the negative effects the impugned sections had on his life. In that regard, the claimant gave an example of having attended a party where a number of gay, bisexual and transgender persons were attacked and robbed by a gang of men. He indicated that the police officers who responded were uncooperative and even threatened to arrest some of the victims. He was therefore of the opinion that the citizens of this country are emboldened in their homophobia and discrimination by the impugned sections as there is a stigma attached to such persons.

148.3. The claimant gave evidence generally of living in fear, not just of other citizens, but also of the police.

149. The court asked the question outright of Mr. Hosein of the State's justification for the law during the oral submissions. His response was that the objective can be looked at from long title of the Act. He further said the objective now is to maintain traditional family and values that represent society. It was also to preserve the legislation as it is and clarify the law. He said section 16 seeks to extend buggery to women and reduce it to serious indecency from gross indecency.

150. It was pointed out by counsel for the defendant that, as far as he was aware, this law has never been enforced with respect to consenting males.

151. On the other hand, its purpose and continued inclusion in the laws of Trinidad and Tobago where, theoretically, every creed and race find an equal place and which strives for the ideals enunciated in the preamble to the Constitution, is certainly quite dubious.

152. In his article "***The Secret Ambition of Deterrence***"[102], Professor Dan M. Kahan, a professor of law at Yale Law School, stated:

[102] Kahan, Dan M., "***The Secret Ambition of Deterrence"*** (1999). Faculty Scholarship Series. Paper 109 http://digitalcommons.law.yale.edu/fss_papers/109 at pg 421

> "Sodomy laws, even when unenforced, express contempt for certain classes of citizens. The injustice of this message supplies a much more urgent reason to oppose the persistence of these rarely enforced laws than does their supposed impingement on anyone's liberty to engage in particular sexual practices."

153. His statement above referred to a finding by Terry S Kogan, ***"Legislative Violence against Lesbians and Gay Men"***[103] which concluded that the rare enforcement of sodomy laws demonstrates that:

> "Our society exhibits little interest in implementing direct control over sexual activity in private bedrooms … Rather, the purpose of sodomy statutes is to proclaim the message that society hates homosexuals, whoever that category happens to encompass and what ever those people happen to do in bed."

154. Ryan Goodman expressed his views in an opinion entitled **"Beyond the Enforcement Principal; Sodomy Laws, Social Norms, and Social Panoptics"**[104] when he said at page 688:

> "The public is sensitive to the visibility of lesbians and gays as socially and legally constructed miscreants"

155. He continued to make the point that[105]:

> "This Article has argued that to understand the effects of law in general, and criminal laws against homosexual acts in particular, one must take into account the law's role in a wider social context…. the criminalization of homosexual practices interacts with other forms of institutional authority, such as religion and medicine. I have suggested some ways in which sodomy laws exert influence within these other domains….Sodomy laws have lost some of their constitutive capacities, and instead operate more as a symbolic, if not direct, threat of state-sponsored violence."

156. If these theories are to be believed, and they certainly make eminent sense, then maintaining an unenforced law on the statutes makes no logical sense and, instead, seems more vindictive than protective or curative in any manner. As if to hold a "big stick" over a minority to try to enforce a portion of society's morality over it. This is especially so since the fact that there has been no enforcement suggests some sort of de facto acceptance of the practice between consenting adults without the removal of the stigma or the withdrawal of the "big stick". Obviously, it remains as a statement by the State against homosexuality since there seems to be no other purpose. The fact that the State proscribes against it quite obviously validates society's feelings against anyone who does call himself a

[103] 1994 UTAH L. Rev. 209, 233

[104] Ryan Goodman, ***Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics***, 89 Cal. L. Rev. 643 (2001). Available at: http://scholarship.law.berkeley.edu/californialawreview/vol89/iss3/2

[105] At 733

homosexual to the extent that society may possibly feel justified in denouncing the practice forcefully or physically[106].

157. The very name – sodomy – is derived from the well-known biblical account of the depraved societies of Sodom and Gomorah synonymous with depravity, unnaturalness and substandard moral and spiritual values and existence.

158. There is absolutely no reason why nonconsensual sexual intercourse per anum cannot be caught under the provisions of section 4 (1) of the Act i.e. rape. That section provides:

> "4. (1) Subject to subsection (2), a person ("the accused") commits the offence of rape when he has sexual intercourse with another person ("the complainant")—
>
> (a) without the consent of the complainant where he knows that the complainant does not consent to the intercourse or he is reckless as to whether the complainant consents……."

159. For completeness, section 25 of the Act provides:

> "25. Where in any proceedings for an offence under this Act it is necessary to prove sexual intercourse (whether natural or unnatural) it shall not be necessary to prove the completion of the intercourse by the emission of seed but the intercourse shall be deemed complete upon proof of penetration only."

160. The definition of rape is therefore broad enough to cover nonconsensual sexual intercourse per anum. The conscious effort and deliberate action to extract this nonconsensual activity from that offence of rape is an obvious preservation of the societal abhorrence towards homosexuality.

161. Therefore, when counsel for the defendant stated that this was not a matter about homosexuality, this court respectfully disagrees. The retention of the law seems to have everything to do with homosexuality and the colonial abhorrence to the practice which has been retained by the State in its separate identification and isolation in the very onerous provision under the Act.

162. In the context of a constitutional challenge in relation to the right to open a store on Sundays, Dickson CJ reasoned as follows in the case of ***R. v. Big M Drug Mart Ltd***.[107]:

> "80 …. In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the

[106] Professor Kahan, in his article, cited several instances of US judges decreasing terms of punishment in respect of offenders attacking homosexuals.
[107] [1985] 1 S.C.R. 295 at pg 331 et al

legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.

81 Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

82 This approach to the relevance of purpose and effect is explicit in the American cases. In McGowan v. Maryland, supra, Chief Justice Warren stated at p. 453:

> We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose -- evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect -- is to use the State's coercive power to aid religion.

83 Similarly, in Braunfeld v. Brown, supra, he wrote at p. 607:

> Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

84 I would note that this approach would seem to have been taken by this Court, in its unanimous decision in Attorney General of Quebec v. Quebec Association of Protestant School Boards, [1984] 2 S.C.R. 66. When the Court looked for an obvious example of legislation that constituted a total negation of a right guaranteed by the Charter, and therefore one to which the limitation in s. 1 of the Charter could not apply, it recited the following hypothetical at p. 88:

> An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(a) of the Charter, which guarantees freedom of conscience and

> religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1.
>
> 85 If the acknowledged purpose of the Lord's Day Act, namely, the compulsion of sabbatical observance, offends freedom of religion, it is then unnecessary to consider the actual impact of Sunday closing upon religious freedom. Even if such effects were found inoffensive, as the Attorney General of Alberta urges, this could not save legislation whose purpose has been found to violate the Charter's guarantees. In any event, I would find it difficult to conceive of legislation with an unconstitutional purpose, where the effects would not also be unconstitutional.
>
> ….
>
> 88 In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose."

163. At this point it is important to note that the interested party, The Equal Opportunities Commission, has adopted the claimant's submissions.

164. The interested party, the Sanatan Dharma Maha Sabha adopted the defendant's submissions and made reference to scriptural injunctions against homosexuality arising out of the Shrimad Bhagavad Gita, the Mahabharata and the Manusmriti. As mentioned above, this is not a religious debate and counsel quite reasonably did not seek to do so by reference to particular scriptural provisions. Counsel, however, submitted, that on the application before the court, there was no evidence other than the facts relied upon by the claimant as a male homosexual and therefore he could not speak about the position in relation to the female experience and issues. Counsel also submitted that notwithstanding the worldwide trend in relation to decriminalizing homosexual offences, the court ought not to use judicial notice in the absence of evidence to fill in the gaps.

165. In this regard, the court agrees with the dicta of Bereaux JA in ***Francis,*** that there are instances where the general proposition on the law may be sufficient. In this case, the court is of that respectful view, and is so minded, to consider the both sections in their totality. In any event, the claimant is able to speak about both sections as they apply to him and has been able to satisfy the court that they do not stand up to scrutiny under section 13 (1) of the Constitution.

166. Other than the matters referred to above in relation to the submissions put forward by the TTCEC, a request was made on its behalf to file and serve further submissions to deal with the medical issue of the relationship between homosexuality and HIV-AIDS to suggest that legalizing homosexuality would result in the proliferation of HIV-AIDS. That permission was not granted since the issue was dealt with and debunked in ***Toonen*** where it was stated:

> "8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

167. In any event, consistent with the quote above, there was no evidence to that effect before the court for its consideration.

Conclusion:

168. Having regard to the evidence and submissions before this court on all sides, there is no cogent evidence that the legislative objective is sufficiently important to justify limiting the claimant's rights. Mr. Hosein's stated objectives of:

168.1. Maintaining traditional family and values that represent society;

168.2. Preserving the legislation as it is and clarifying the law; and

168.3. Extending the offence in section 16 to women and reduce it to serious indecency from gross indecency;

do not counterbalance the claimant's limit of his fundamental right of which he has given evidence. Instead, the court accepts the claimant's position that the law as it stands is not sufficiently important to justify limiting his fundamental rights and that he has proven it on a balance of probabilities.

169. There is no doubt that maintaining the traditional family and values that represent society are important concepts but those words have now to be adapted to a different world than medieval and Victorian times. In any event, none of the objectives referred to by Mr. Hosein are mentioned in the Act and there is no evidence of those objectives stated anywhere else. Certainly, it was not in evidence

before this court as part of the rationale of the legislators – whether by way of Hansard reports or otherwise.

170. What is a traditional family? If it is limited to a mother, father and children, then, once again, the rationale for keeping that template is no longer sufficiently important as the rationale for denying the claimant's fundamental rights. For example, single-parent families are becoming a norm which is unsettling to many traditionalists despite its reality. As has been shown, the values that represent society have dramatically changed as democratic societies have now moved to accept that laws such as these under scrutiny are no longer necessary.

171. In the circumstances, and in light of the evidence and other material before this court, the court is satisfied that the claimant has discharged his evidential and legal burden in relation to the first limb of the ***Northern Construction*** test referred to above. Further, under the third limb, as the court has pointed out, there already exists legislation which can address the actual criminal offence intended to be covered by the particular acts. Therefore, without even having to consider the second limb, the infringement is shown to be unjustified.

172. Therefore, the court is of the respectful view that the claimant has proven his case.

173. At this point, the court feels compelled to state in conclusion that it is unfortunate when society in any way values a person or gives a person their identity based on their race, colour, gender, age or sexual orientation. That is not their identity. That is not their soul. That is not the sum total of their value to society or their value to themselves. The experiences of apartheid South Africa and the USA during and after slavery, even into the mid and late 20th century, have shown the depths that human dignity has been plunged as a result of presupposed and predetermined prejudices based on factors that do not accept or recognize humanity. Racial segregation, apartheid, the Holocaust - these are all painful memories of this type of prejudice. To now deny a perceived minority their right to humanity and human dignity would be to continue this type of thinking, this type of perceived superiority based on the genuinely held beliefs of some.

174. This conclusion is not an assessment or denial of the religious beliefs of anyone. This court is not qualified to do so. However, this conclusion is a recognition that the beliefs of some, by definition, is not the belief of ***all*** and, in the Republic of Trinidad and Tobago, **all** are protected, and are entitled to be protected, under the Constitution. As a result, this court must and will uphold the Constitution to recognize the dignity of even one citizen whose rights and freedoms have been invalidly taken away.

175. In closing, this court wishes to commend the counsel on all sides for the mature and respectful way that they conducted their respective cases and delivered their submissions. The submissions, in particular, were of the highest order and were clearly designed to give this court the maximum assistance possible. It did. The court did identify other authorities and opinions which it considered helpful and those were communicated to the parties by email prior to the delivery of this opinion.

The Order

176. Consequently, the court will grant the following relief:

176.1. The court declares that sections 13 and 16 of the Act are unconstitutional, illegal, null, void, invalid and are of no effect to the extent that these laws criminalise any acts constituting consensual sexual conduct between adults;

176.2. The court will hear the parties on whether the offending sections should be struck down in their entirety along with the issue of costs.

/s/ Devindra Rampersad J

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Justice Devindra Rampersad

Assisted by Charlene Williams
Judicial Research Counsel
Attorney at Law

Appendix

1) Dudgeon v United Kingdom, (1981) 4 EHRR 149
2) Norris v Ireland (1989) 13 EHRR 186; Application No. 10581/83
3) Modinos v Cyprus (1993) 16 EHRR 485; Application No. 15070/89
4) Toonen v Australia, Communication No.488/1992, CCPR/C/50/d/488/1992 (1994)
5) UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999
6) National Coalition v Minister of Justice and Others (CCT11/98) [1998] ZACC 15
7) Lawrence v Texas 539 US 558 (2003)
8) McCoskar v the State (2005) Criminal Appeals HAA0085 & 86 of 2005
9) Pant v Nepal Government, Office of the Prime Minister and Council of Ministers (2008) NJA Law Journal 262
10) Orozco v Attorney General of Belize, Claim No. 688 of 2010
11) Criminal Law Amendment Act, 1968–69 S.C. 1968-69, c. 38
12) Homosexual Law Reform Act 1986 1986 No 33
13) Sexual Offences Act of 1991 (Bahamas)
14) Penal Code (Amendment) Act, 2016
15) Charles Matthew v State of Trinidad and Tobago [2004] UKPC 33
16) Offences Against the Person Ordinance No. 10 of 1925
17) Offences Against the Person Act 1861 (UK)
18) Hunter v Southam Inc [1984] 2 SCR 145
19) Pretty v the United Kingdom (2002) 35 EHRR 1
20) Bouyid v Belgium (2016) 62 EHRR 32
21) Rodriguez v Minister of Housing of the Government [2009] UKPC 52
22) Secretary of State for Work and Pensions v M [2006] UKHL 11
23) Report of the Departmental Committee on Homosexual Offence and Prostitution in Great Britain (known as the Wolfenden Report), 1957

24) Private Consensual Homosexual Behavior: The Crime and Its Enforcement." The Yale Law Journal, vol. 70, no. 4, 1961, pp. 623–635. JSTOR, JSTOR, www.jstor.org/stable/794265; 'Timeline: Gay fight for equal rights', BBC News, 6 December 2002.

25) Singh v ECO (New Delhi) [2004] EWCA Civ 1075

26) Schalk and Kopf v Austria (2011) 53 EHHR 20; Application No. 30141/04

27) Ong Ah Chuan v Public Prosecutor [1981] AC 648

28) R (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63

29) Secretary for Justice v Yau Yuk Lung Zigo [2006] 4 HKLRD 196 (CFA)

30) Matadeen v Pointu [1999] 1 AC 98

31) Gurung v Ministry of Defence [2002] EWHC 2463 (Admin)

32) Egan v Canada [1995] 2 SCR 513

33) European Convention on Human Rights

34) Salgueiro da Silva Mouta v Portugal (2001) 31 EHRR 47

35) EB v France (2008) 47 EHRR 21

36) OHCHR, 'Born Free and Equal - Sexual Orientation and Gender Identity in International Human Rights Law', 14 September 2012

37) Loving v Virginia 388 US 1 (1967)

38) Macdonald v Advocate General of Scotland [2003] UKHL 34

39) Surratt v Attorney General [2007] UKPC 55

40) Sutherland v United Kingdom (1997) 24 EHRR CD22; Application No. 25186/94

41) Gitari v NGO Board [2015] eKLR, Petition 440 of 2013

42) de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69; [1998] UKPC 30

43) R v Oakes [1986] 1 SCR 103

44) Libman v Attorney General of Quebec (1997) 3 BHRC 269; [1997] 3 R.C.S.

45) A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68

46) Huang v Secretary of State for the Home Department [2007] UKHL 11

47) R v Shayler [2003] 1 AC 247; [2002] UKHL 11

48) R (on the application of Chester) v Secretary of State for Justice [2013] UKSC 63

49) Thuto Rammoge and others v AG of Botswana (2016) Court of Appeal Civil Appeal No. CACGB-128-14

50) G. O'Sullivan v M.N.R. (No. 2) [1991] 2 CTC 117

51) Trop v Dullies (356 US 86, 101)

52) Reyes v R [2002] 2 AC 235

53) Planned Parenthood of Southeratern PA v Casey 505 US 833 (1992)

54) S v Makwanyane [1995] 1 LRC 269

55) Boyce & Joseph v The Queen (2004) 64 WIR 37

56) Watson v The Queen [2004] UKPC 34

57) Naz Foundation v Delhi [2009] 4 LRC 838

58) UK Criminal Law (Amendment) Act 1885

59) The King v Wiseman 92 Eng Rep 774

60) The King v Barron 1914 KBD 570

61) R v Hunt [1950] 2 All ER 291

62) Hinds v R [1977] AC 195

63) Roodal v The State (2003) 64 WIR 270

64) R v Ireland [1998] AC 147

65) Ferguson v Attorney General of Trinidad and Tobago Civ App No 207 of 2010

66) Interpretation Act Chap. 3:01

67) Minister of Home Affairs v Fisher (1979) 44 WIR 107

68) R v Hughes [2002] UKPC 12

69) Collymore v Attorney General [1967] 12 WIR 5

70) The 1962 Constitution

71) Seepersad v Attorney General [2012] UKPC 4

72) Chuck Attin v The Attorney General of Trinidad and Tobago (unreported) HCA No 2175 of 2003

73) DESALCOTT v Registration and Recognition Certification Board CV2013-00039 unreported

74) The owners of the vessel "Alam Selaras' v The owners of the vessel "Diamond Cay" CV2008-04598

75) Attorney General v Northern Construction Civ App No 100 of 2002 unreported

76) La Salle v Attorney General (1971) 18 WIR 379

77) Pinder v R (2002) 6 WIR 13 at 20

78) Tracey Robinson et al, Fundamentals of Caribbean Constitutional Law, 2015

79) Faultin v Attorney General of Trinidad (1978) 30 WIR 351

80) Attorney General of Trinidad and Tobago v Mootoo TT 1976 CA 23

81) Ramesh Dipraj Kumar Mootoo v Attorney General of Trinidad and Tobago (1979) 30 WIR 411

82) Grant (Steven) v R [2006] UKPC 2

83) Hector v Attorney General of Antigua and Barbuda and Ors (1990) 37 WIR 216

84) Public Service Appeal Board v Maraj (2010) UKPC 29

85) Fox v the Queen [2002] 2 AC 284

86) Zuniga & Ors v The Attorney General of Belize [2014] 5 LRC 1 at 23

87) Nyambirai v National Social security Authority [1996] 1 LRC 64

88) Bank Mellat v HM Treasury [2013] UKSC 39

89) Peter W Hogg, Constitutional Law of Canada 5th ed. (vol.2)

90) R v Big. M Drug mart [1985] 1 SCR 295

91) Beatson, Grosz, Hickman and Ors, Human Rights: Judicial Protection in the United Kingdom, (2008) Sweet & Maxwell

92) Alberta v Hutterian Brethren of Wilson Colony 2009 SCC 37

93) Professor Richard Drayton, Address to the Judicial Education Institute of Trinidad And Tobago on 2 March 2016