

THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE  
ANTIGUA AND BARBUDA

Claim No. ANUHCV2021/0042

IN THE MATTER OF SECTIONS 3,5,7,12,14,15, & 18 OF THE CONSTITUTION OF ANTIGUA AND BARBUDA

AND IN THE MATTER OF SECTIONS 12 & 15 OF THE SEXUAL OFFENCES ACT OF ANTIGUA AND BARBUDA, NO.9 OF 1995

BETWEEN:

ORDEN DAVID

WOMEN AGAINST RAPE INC.

CLAIMANTS

-and-

THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

DEFENDANT

Appearances:

Mr. Andrew O'Kola led by Mr. Douglas Mendes S.C. for the claimant

Dr. David Dorsett appearing with Mrs. Carla Brookes-Harris for the defendant

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2022: June 15<sup>th</sup>

2022 July 5<sup>th</sup>

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**JUDGMENT**

[1] **Robertson, J: Introduction and Findings.** The selection of an intimate partner is a private and a personal choice. This court was asked to consider the legislation which criminalizes certain sexual activities between same sex consenting adults.

[2] This court has determined, for the reasons set out hereunder, that sections 12 and 15 of the Sexual Offences Act 1995 are unconstitutional as they contravene sections 3, 12, and 14 of the Constitution of Antigua and Barbuda. Specifically, this court declares that:

- a. Section 12 of the Sexual Offences Act 1995 offends the right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex, in so far as section 12 of the Sexual Offences Act 1995 is inconsistent with the rights of persons sixteen (16) years and older to engage in consensual sexual intercourse per anum in private, and to the extent of that inconsistency section 12 of the Sexual Offences Act 1995 is void.
- b. Section 15 of the Sexual Offences Act 1995 offends the right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex, in so far as section 15 of the Sexual Offences Act 1995 is inconsistent with the rights of persons sixteen (16) years and older to engage consensually and in private in the sexual acts described in section 15(3), and to the extent of that inconsistency section 15 of the Sexual Offences Act 1995 is void.

[3] In order to give effect to the second declaration, this court orders that subsection 15(2)(b) of the Sexual Offences Act 1995 be read as if the words "a male person and a female person" were deleted and replaced with the word "persons". This court also orders that the defendant is to pay the costs of the claimants in an amount to be assessed if not agreed within 21 days.

### Overview

[4] These proceedings concern a challenge to the constitutionality of **sections 12 and 15** of the **Sexual Offences Act No.9 of 1995** ("the Act"). These sections address the offences of buggery and serious indecency.

[5] The first claimant, Orden David, is a citizen of Antigua and Barbuda. He is an openly homosexual man, who works as a counsellor and tester at the Ministry of Health in Antigua and Barbuda. He works with populations identified by international health organizations as well as the Ministry of Health as the most vulnerable to HIV/AIDS. The second claimant, Women Against Rape Inc., is a duly incorporated company under the laws of Antigua and Barbuda. The organization's mandate includes the provision of information, education, general support and direct services to LGBT community which includes men who have sex with men ("**MSM**") and women who have intimate relations or sexual engagements with other women. In addition, the organization also advocates for

the changing of laws and policies which discriminate against members of the LGBT and other similar communities.

[6] The claimants filed a constitutional motion seeking declarations that **section 12** and **section 15** of the Act offend their constitutional rights as guaranteed by sections 3, 5, 12, and 14 of the Antigua and Barbuda Constitution Order 1981 (the Constitution) and affirmed in the Preamble of the Constitution. In particular, the offending provisions contravene the rights to (i) privacy; (ii) personal liberty; (iii) the right not to be discriminated against based on sex, which the claimants contend properly subsumes sexual orientation; and (iv) freedom of expression.

[7] Section 12 of the Act provides:

(1) A person who commits buggery is guilty of an offence and is liable on conviction to imprisonment -

- a. for life, if committed by an adult on a minor;
- b. for fifteen years, if committed by an adult on another adult;
- c. for five years, if committed by a minor.

(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.

[8] Section 15 provides:

(1) A person who commits an act of serious indecency on or towards another is guilty of an offence and is liable on conviction to imprisonment

- a. for ten years, if committed on or towards a minor under sixteen years of age;
- b. for five years, if committed on or towards a person sixteen years of age or more,

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

- a. a husband and his wife; or
- 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.

(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.

[9] More specifically, the claimants contend that section 12 of the Act contravenes the Constitution in so far as the section applies to consensual and private sexual acts between adults each of whom has attained the age of sixteen (16) years, and is accordingly null, void and of no force and effect. Additionally, that section 15 is null, void and of no effect to the extent that section 15 applies to acts in private between consenting persons each of whom is 16 years of age or more. Further, that section 15 contravenes the Constitution owing to its vagueness and uncertain application.

[10] The claimants seek orders in the alternative that section 12(2) of the Act be read as if the words "except where the sexual intercourse is in private and between consenting persons each of whom is sixteen years of age or more" were added at the end of the provision. Additionally, section 15(2)(b) of the Act be read as if the words "a male person and a female person" were deleted and replaced with the word "persons".

[11] The grounds of the originating motion are:

1. Sections 12 and 15 of the Act criminalize certain sexual acts in private between consenting adults including the first-named claimant as well as other LGBT adult persons whose interests are represented herein by the second named claimant.
2. In the premises, and in light of the Preamble to the Constitution, which recognizes "the dignity and worth of the human person" and "the entitlement of all persons to the fundamental rights and freedoms of the individual", sections 12 and 15 of the Act violate:
  - a. The right, regardless of one's sex, to life, liberty, security of the person, and the protection of the law guaranteed by Article 3(a) and Article 15 of the Constitution, in so far as the impugned articles predispose or imperil the first-named claimant, as well as other adult persons represented by the second named claimant, to the risk of prosecution, conviction and imprisonment, for sexual acts consensually done in private.
  - b. The right, regardless of one's sex to freedom of expression, guaranteed by Article 3(b) and Article 12 of the Constitution, in so far as the impugned

sections constrain by threat of criminal sanction, the free expression of sexuality and/or sexual identity, by the first named claimant and/or by other adult persons represented herein by the second named claimant, which expression is or may be manifested through private consensual sexual acts, such as those prohibited by the impugned sections.

c. The right, regardless of one's sex, to protection for family life, personal privacy and the privacy of the home and other property guaranteed by Article 3(c) of the Constitution; in so far as the impugned sections prohibit sexual acts between consenting adults in private, which acts fall within the realm of personal privacy.

d. The right not to be subjected to inhuman or degrading punishment or other such treatment guaranteed by Article 7 of the Constitution, in so far as the impugned sections:

i. support and encourage homophobia in Antigua and Barbuda, predisposing and imperiling the first named claimant, as well as persons represented by the second named claimant, to negative stigmas, discrimination, exclusion, violence, abuse, and other forms of unfavorable treatment, which are degrading and compromising of one's human dignity; and

ii. are degrading, demeaning, and damaging to human dignity by virtue of the impugned sections' unjustifiable diminution of personal autonomy, and in respect of LGBT persons, by virtue of the criminality imposed on or associated with homosexual sexual behaviours, and by extension, homosexual persons.

e. The prohibition pursuant to Article 14 of the Constitution against laws which make any provision that is discriminatory on the basis of sex, including sexual orientation.

3. Redress under section 18 of the Constitution.

[12] Generally, the counsel for the respondent did not challenge the constitutional motion as it related to the unconstitutionality of section 12 of the Act. The respondent initially challenged certain grounds as the grounds related to the constitutionality of section 15. The argument proffered by counsel for the respondent is that section 15 ought not to be stricken on account of vagueness. This matter has been resolved and no longer requires the attention of the court.

### **EVIDENCE OF THE CLAIMANTS**

[13] The evidence in support of the constitutional motion was provided by Orden David and Alexandrina Wong. Alexandrina Wong is the co-founder and current president of the second-named claimant.

#### **First Claimant**

[14] The claimant evinces that he is an openly homosexual man. At the age of 9 years old, he recognised that he was different from other boys, this was evident in his mannerism and his general disposition which were stereotypically recognised as feminine traits. He recounted that during his formative years in school he was subject to bullying and ridicule owing to his sexual preference. The claimant indicated that the circumstances left him feeling isolated from his schoolmates and teachers.

[15] As an adult the claimant recalled being subject to ridicule. The claimant indicated that he has faced ridicule by persons taking pictures of him, posting online with comments stating, "watch this gay". He also referred to being a victim of persecution and subjected to acts of physical violence. In his affidavit, the claimant stated:

*"In or around 2014, before I started working for the Ministry of Health, I worked at a local pharmacy. On one occasion, I was walking to the bus station after finishing a night shift and texting on my phone, when a man pulled up in front of me in a car. After getting out of his car, the man said something about "gay people walking on the street late at night" and then hit me in the head. I pushed my phone into my bag and tried to defend myself. Two other men then came over and also started trying to hit me. I ran away and they did not try to follow me ..."*<sup>1</sup>

[16] The claimant expressed that while living in Antigua and Barbuda, he has also been the subject of discriminatory treatment by police officers and that he was not afforded the full protection and

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<sup>1</sup> See paragraph 13 of Affidavit filed 27<sup>th</sup> January 2021.

service of law enforcement as would normally be afforded to others. The claimant stated that he has reported several incidents to the police and that these reports have not been attended to or were not taken seriously. In his affidavit, the claimant recalled that on one occasion when he reported an incident of robbery, the police officers appeared to be more focused on his sexual orientation as opposed to the crime alleged. This he concluded from the fact that the officers on duty at the time posed questions such as "why are you gay?" and "why did you choose this lifestyle?" and appeared to be less interested in the alleged offence perpetrated against him.

[17] The claimant also referred to an occasion when he was driving late at night with his lesbian friend and her girlfriend when they were pulled over by a police officer. The officer accosted the claimant by dragging him out of his vehicle. The claimant stated that the action of being pulled out of his vehicle caused the claimant's shirt to be torn and the physical interaction between the officer and the claimant caused the claimant to sustain a bruised lip. The claimant's evidence is neither was he nor were his friends told the reason they were stopped by the police. They were later taken to the police station and held for 5 hours before they were release without explanation.

[18] The claimant further gave evidence of being struck on the right side of his face by a hospital patient, who alleged that the 'claimant's long hair had touched him'. The claimant contended that in his view this act was an example of a violent act of homophobia. The claimant also stated that he has been discriminated against in the workplace by my staff members, patients and/or customers. Further, the claimant has given evidence that in his present job, patients have refused to accept treatment from him because of his sexual orientation.

[19] The claimant indicated that fear for his wellbeing and out of a desire to protect himself and his family, the claimant would dissuade himself from engaging in public expressions of his sexual identity. The claimant also indicated that his past experiences and the experiences he has witnessed being meted out to fellow members of the LGBT-plus community have resulted in the claimant feeling depressed and ostracized.

## Second Claimant

[20] Ms. Wong deposed evidence that the second named organization has done extensive work with the LGBT population both in Antigua and Barbuda and the wider Caribbean. Ms. Wong avers that through this work the agency has garnered extensive knowledge of the issues affecting the LGBT population in Antigua and Barbuda. These issues include:

1. Fear of being tested for HIV/AIDS and other STDs by mainstream healthcare providers due to the hostile treatment which often includes being scorned or ridiculed.
2. A lack of confidentiality by the healthcare providers. This is a major concern in the small nation-states like Antigua and Barbuda. The concern of possible breaches in confidentiality has resulted in persons in the LGBT community avoiding HIV/AIDS testing or treatment, follow-up visitations and adherence to treatment regimes. Thus, there is a prevalence of HIV within the community such as within the MSM population.
3. Hostile treatment by health care providers.
4. The under reporting of violent and other crimes to the police by person in the LGBT community out of fear of being ill-treated by police officers.

[21] Ms. Wong stated that in her experience as a former nurse and co-founder of the second named claimant, she has observed that the homophobic atmosphere, violence and discrimination can negatively affected the mental health of LGBT members. Members often approached her wanting to speak about issues which they do not feel comfortable discussing with a mainstream healthcare provider.

[22] Ms. Wong deposed that the organization acquired some of its knowledge through publications by experts in the field of health, human rights and/or other related areas. Publications, to which references were made included:

- i. Universal Periodic Review Compilation Report for Antigua and Barbuda dated 7<sup>th</sup> March 2016<sup>4</sup>. The report indicates:

“Lesbian, gay, bisexual, and transgender people, particularly from the lower economic bracket, faced discrimination and stigma and might encounter challenges accessing basic health care and social services and face greater



difficulties finding a job. The sub-regional team indicated that civil society organizations had reported that such persons remained vulnerable to persecution and harassment daily. Gay rights activists had reported that lesbian, gay, bisexual, and transgender persons who had been subject to violent crimes were hesitant to report the crime to the police. Attacks against such persons frequently went unreported for multiple reasons, such as fear of revealing their sexual orientation, fear of stigma and discrimination, and fear due to experience with police or hearing the experiences of other lesbian, gay, bisexual, and transgender people.”

- ii. National Strategic Plan (NSP) for HIV/AIDS in Antigua and Barbuda (2021-2016), published in December 2011 by the Antigua and Barbuda Ministry of Health, Social Transformation and Consumer Affairs. The plan, in paragraph 4.2.3, referred to research by Caribbean Vulnerable Communities which suggested that:

“(.) gay, bisexual and other MSM are not accessing healthcare for a range of reasons, including experiences of discrimination, judgmental and moralistic attitudes, outright hostility of healthcare providers, concerns about privacy and confidentiality, shame, lack of healthcare services specific to MSM needs and lack of money to pay for alternative private-sector health care.”

- iii. Antigua and Barbuda: Treatment of sexual minorities by society and authorities; legal recourse and protection available (2010-2013), published by the Immigration and Refugee Board of Canada on 10 January 2014, referred to multiple reports of employment-related discrimination, violence and excessive police force against LGBT people in Antigua and Barbuda; as well as reports of LGBT people in Antigua and Barbuda avoiding reporting violent crimes against them to the police, out of fear that they would be ill-treated by the police.

[23] Ms. Wong stated that through her experience she is of the opinion that the challenged provisions in the Act result in LGBT people in Antigua and Barbuda avoiding sexual and reproductive health services and the members of the group avoid reporting acts of violence and other crimes to the police.

### **ISSUES TO BE DETERMINED**

[24] The issues which fall for determination before this court are whether the provisions of section 12 and 15 of the Act infringe the fundamental rights and freedoms as stated under sections 3, 5, 12 and 14 of the Constitution. The court must also determine the appropriate action to be adopted if it is determined that fundamental rights and freedoms have been infringed.

### **THE HISTORY OF CRIMINALISATION OF BUGGERY IN ANTIGUA AND BARBUDA**

[25] Apart from ancient writings in biblical text on the narrative of Sodom and Gomorrah, the first known records for the criminalization of buggery found in English laws is traced to two medieval legal documents, *Fleta* (1290, Latin written text); and *Britton* (1290 English written text). *Fleta* advised that 'sodomites' (along with 'sorcerers, Jews and renegades') were to be buried alive. A similar sentiment was adopted in the *Britton* document with respect to sodomy save the punishment was burning. Buggery was a matter for the ecclesiastical church which regarded sodomy as a sin against God and punishable by being buried alive in the ground or being burned to death.

[26] It was not until 1533 that the offence of buggery was transposed to criminal law. The Buggery Act of 1533, was enacted during the reign of King Henry VIII. The sexual offence of the "*Acte for the punishment of the vice of Buggerie*" was punishable by death. Save periods of repeal between 1553 to 1563 and minor amendments, buggery remained a capital crime until the enactment of the Offences of the Person Act 1861.

[27] The Buggery Act introduced during King Henry VIII's reign was repealed and replaced with the Offences Against the Person Act 1828. This Act changed the buggery law by altering the offence from one that was gender neutral to male-same-sex encounters. The offence still attracted the death penalty.

[28] It was not until 1861 the capital punishment for buggery was abolished. The Offences Against the Person Act 1861 replaced the death penalty for buggery with life imprisonment or for any term not less than ten years. It provided that:

*“Whosoever shall be convicted of the abominable 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.”*

[29] It is noted that in 1860 there was the Indian Penal Code (section 337) which indicated that *“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal”* shall be punished with imprisonment and shall also be liable to fined<sup>2</sup>.

[30] In 1885, there was a further amendment to the buggery law in the UK, known as the Labouchere Amendment. Henry Labouchere introduced ‘gross indecency’ in section 11 of the Criminal Law Amendment Act. The law criminalized all homosexual activity as “gross indecency” and it attracted the criminal sanction of two (2) years imprisonment. Section 11 of the Criminal Law Amendment Act, 1885 provided that:

*“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 misdemeanour, and, being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year with or without hard labour”*

[31] The provisions of the 1885 Act<sup>3</sup> could be used to prosecute intimate relationships between men in circumstances where the act of sodomy could not be established.

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<sup>2</sup> In 2018 this provision was deemed to be unconstitutional as infringing, among other things, the right against discrimination, right to expression, the right to life and personal liberty. See: *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

<sup>3</sup> The 1885 Act was used to prosecute Oscar Wilde (1895) and Alan Turing (1952).

[32] In a response to the climate in England regarding the treatment of homosexual men, the Wolfenden Committee met in 1954, and 3 years later published the 'Wolfenden Report' in 1957. The report recommended that 'homosexual behaviour between consenting adults in private should no longer be a criminal offence'. Ten (10) years after the report, Parliament implemented the recommendations in the Sexual Offences Act 1967, thereby decriminalizing same-sex acts between consenting men. Thus, the antecedent to section 12 of the Sexual Offences Act was repealed in England.

[33] The criminalization of buggery in Antigua and Barbuda has its history in its colonial past. The offence of buggery in Antigua and Barbuda can be traced to the Offences Against the Persons Act, 1873. Sections 48, 57 and 58 provided that:

*"48. Whosoever shall be convicted of any indecent assault upon any female shall be liable to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement. (...)*

*57. Whosoever is 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 ten years, with or without hard labour, and with or without solitary confinement.*

*58. Whosoever attempts to commit the said abominable crime, or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, is guilty of a misdemeanour, and, being convicted thereof, shall be liable to be imprisoned for any term not exceeding four years, with or without hard labour, and with or without solitary confinement."*

[34] The Offences Against the Person Act 1873 criminalizing the act of buggery in Antigua remained in force post-independence. Sections 48, 57 and 58 were amended in 1961 in the General Revision Ordinance and in 1982. The effects of the amendments were that the words "and with or without solitary confinement" were deleted and the term of imprisonment was increased to five years.

[35] Subsequent to the consolidation of Antigua and Barbuda's legislation in 1992 the provisions of Offences Against the Person Act were updated so that s. 47 became s. 50 and ss57 and 58 became ss. 59 and 60.

[36] Further, in 1995 Parliament passed the Sexual Offences Act. That Act stated that it was an Act to *"repeal and replace the laws related to sexual crimes, to the procurement, abduction and prostitution of persons and to kindred offences"*. Section 32 of the Criminal Law Amendment Act repealed sections 46, 47, 48, 49, 50 and 57 of the Offences Against the Person Act. Section 50 of the Offences Against the Person Act was replaced with the offence of "serious indecency" which was introduced in section 15 of the Sexual Offences Act, 1995.

[37] The law relating to these offences always carried penal sanctions. Since the passage in 1995 of the Act the sanction for buggery between consenting adults carried fifteen years and serious indecency a period of five years.

### **Constitutional Relief**

[38] The supremacy of the Constitution and the requirement for laws to conform to the provisions of the Constitution are well established principles of law.

[39] It is to be noted that certain rights and freedoms to which the Constitution refers are inalienable to human beings. The protection of those rights is important to the protection of human dignity. Chapter II of the Constitution fortifies the basic rights and freedom of individuals. These enshrined rights and freedom include, and are not limited to, the right to life, liberty, personal privacy, legal redress, protection of law, freedom of expression, and protection from discrimination. It is common ground that the constitutional rights are not absolute and are subject to limitations.

[40] The protection of human rights is also safeguarded against derogation under section 19 of the Constitution. This section delimits the ability of the Legislature to enact laws which abrogate, abridge, or infringe upon the fundamental rights and freedom of the individual as provided in the Constitution. The progressive realization of the fundamental rights of the individual is secured and enforced by the judiciary.

[41] Section 18 of the Constitution accords the right of access to the Constitutional Court for persons to obtain redress when there is an allegation of the breach of a fundamental right. In the context of certain allegations there is no requirement to prove that the fundamental rights guaranteed are infringed, it is sufficient for the applicant to show that on a textual analysis of the concerning provisions, is likely to infringe the claimant's right. The referred section provides, in part:

*if any person alleges that any of the provisions of sections 3 to 17 has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.*

### **The Test of Constitutionality**

[42] It has been firmly settled and accepted that the proportionality is the appropriate test when addressing the matter of the constitutionality of impugned provisions of a statute. In the application of the test the court initially presumes the provisions, in this case sections 12 and 15 of the Act, to be constitutional. The rationale being that laws enacted, particularly those enacted after the Constitution came into force, have faced the legislative and other of scrutiny and the law, the laws' purposes and the Constitution are not in conflict. However, this presumption cannot be used in aid of a justification to infringe fundamental rights.

[43] Thereafter, the court then proceeds to ask itself whether the alleged provisions infringe, have infringed or are likely to infringe the claimants' rights as alleged. At this stage, the court is tasked with determining the expanse of the claimants' rights as a matter of objective interpretation of the provisions. Having ascertained the scope of the claimants' rights, the burden of persuasion lies with the claimants to make out a case that the provisions, sections 12 and 15, abrogate their fundamental rights as set out in the Constitution.

[44] The burden of persuasion on the claimants can be discharged on a textual analysis of the language of the provision, affidavit evidence or both. All that needs to be proven is that there is a *prima facie*

infringement. Once the claimants have discharged their burden, the burden shifts to the party arguing that the limitation is reasonably justified in a democratic society, and that the imposition is no more than is necessary.

### **Analysis of The Rights and Freedoms Raised.**

[45] The Constitution is often described as a living instrument which gives significant room for the realization and enjoyment of individuals' human rights. The very rights that the document espouses and protects are capable of evolution since concepts, attitudes and the understanding of human rights and dignity evolve over time. A proper interpretation of the constitutional text is only achieved by giving due recognition to the spirit of the instrument and what the instrument aims to protect. In this regard the aspiration is to be on a continuous path to a better understanding and realization of matters relating to human rights and human dignity. Wit JCCJ indicated that "*the Constitution in our part of the world is generally seen as a principle-based living instrument*".<sup>4</sup>

#### **(i) The Preamble.**

[46] The underlying spirit of the Constitution is derived not only from its substantive provisions but also from the words written in the preamble. The preamble sets out the purport and objectives of the Constitution. The ensuing provisions should be interpreted to be harmoniously connected with the core principles on which the Constitution rests. The preamble to the Constitution indicates that:

"Whereas we the people of Antigua and Barbuda –

- a. *Proclaim that they are a sovereign nation founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person, the entitlement of all persons to the fundamental rights and freedom of the individual, the position of the family in a society of free men and women and free institutions;*
- b. *respect the principles of social justice and, therefore, believe that the operation of their economic system should result in the material resources of their community being so*

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<sup>4</sup> Belize International Services Ltd. v The Attorney General of Belize [2020] CCJ 9 at [14].

*distributed as to serve the common good, that there should be adequate means of livelihood for all, that labour should not be exploited or forced by economic necessity to operate in inhumane conditions but that there should be opportunity for advancement on the basis of recognition of merit, ability and integrity;*

- c. *assert their conviction that their happiness and prosperity can best be pursued in a democratic society in which all persons may, to the extent of their capacity, play some part in the national life;*
- d. *recognize that the law symbolises the public conscience, that every citizen owes to it an undivided allegiance not to be limited by any private views of justice or expediency and that the State is subject to the law;*
- e. *desire to establish a framework of supreme law within which to guarantee their inalienable human rights and freedoms, among them, the rights to liberty, property, security and legal redress of grievances, as well as freedom of speech, of the press and of assembly, subject only to the public interest."*

[47] The preamble affirms that Antigua and Barbuda is founded upon principles of democratic ideals, where the concepts of, among other things, human dignity, inalienable human rights and freedoms, respect, inclusiveness, lawfulness and equality for all are sacrosanct. The reference to the supremacy of God, among other things, harkens to the principles of natural law and therefore, among other things, places the protection of the fundamental rights and freedom of every individual within an important foundational framework.

**(ii) Substantive Provisions.**

[48] The interpretation of the human rights provisions of the Constitution is required to be generous and purposive. In adopting such an approach, the intention of the court is to give meaning to the Constitution that conforms with prevailing social realities. This principle has long been established by Lord Wilberforce in *Minister of Home Affairs v Fisher*<sup>5</sup>, and later articulated by Lord Bingham

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<sup>5</sup> [1980] AC 319.



in the Privy Council case of *Director of Public Prosecutions of Jamaica v Mollison*<sup>6</sup>. Lord Bingham stated:

“[16] First, it is now well-established that constitutional provisions relating to human rights should be given a generous and purposive interpretation, bearing in mind that a constitution is not trapped in a time-warp but must evolve organically over time to reflect the developing needs of society...”

[49] Similar words were stated by Anderson JCCJ in the Caribbean Court of Justice case of *Attorney General of Guyana v Cedric Richardson*<sup>7</sup>:

“[146] The judiciary has long accepted that in interpreting human rights provisions the language of the Constitution should not be construed in a narrow and legalistic way but broadly and purposively so as to give effect to the spirit of the provisions and to avoid what has been called “the austerity of tabulated legalism.”

[50] Another elucidation on the principle that the constitution is a living instrument is seen in the judgment of Lord Hoffman in *Boyce v R*.<sup>8</sup> where the court considered “inhumane and degrading treatment” and made statements which are helpful for the purpose of this decision. In that case Lord Hoffman stated:

“[27] If their Lordships were called upon to construe section 15(1) of the Constitution, they would be of opinion that it was inconsistent with a mandatory death penalty for murder. The reasoning of the Board in *Reyes v The Queen* [2002] 2 AC 235, which was in turn heavily influenced by developments in international human rights law and the jurisprudence of a number of other countries, including states in the Caribbean, is applicable and compelling. But since this conclusion would almost certainly have come as a surprise to the framers of the Constitution, it is perhaps worth dwelling for a moment upon why it is nevertheless the correct interpretation of the subsection.

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<sup>6</sup> [2003] 2 AC 411.

<sup>7</sup> [2019] CCJ 9.

<sup>8</sup> [2004] UKPC 32.

[28] Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the Enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts—what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment—had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights. The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges, in giving body and substance to fundamental rights, will naturally be guided by what are thought to be the requirements of a just society in their own time. In so doing, they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. ***On the contrary, they are applying the language of these provisions of the Constitution according to their true meaning. The text is a “living instrument” when the terms in which it is expressed, in their constitutional context, invite and require periodic re-examination of its application to contemporary life.*** Section 15(1) is a provision which asks to be construed in this way. The best interpretation of the section is that the framers would not have intended the judges to sanction punishments which were widely regarded as cruel and inhuman in their own time merely because they had not been so regarded in the past.” [Emphasis added].

### Collective Experiences and Wisdom of Courts and Tribunals.

[51] Saunders JA (as he then was) in *R v Peter (Peter)*<sup>9</sup> a case regarding, among other things, inhumane treatment provisions in St. Lucia, St. Vincent and the Grenadines, cautioned of the danger of embarking on an individualistic approach to the interpretation of human rights provisions. Saunders JA stated:

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<sup>9</sup> (2001) 60 WIR. 156.

"[214] In any assessment of a possible violation of s 5, a court must confront the question as to what criteria should be used to evaluate punishment or treatment that is inhuman or degrading. In my view, we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique, as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 imposes upon the State an obligation to conform to certain 'irreducible' standards that can be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered"

[52] It has been accepted that the domestic courts may consider the interpretation of Human Rights bodies to assist in the adjudication of domestic fundamental rights provisions. As counsel for the claimants proffered in their submissions, and this court agrees, there is a strong interdependency between domestic constitutional provisions and international human rights with the greater recognition of "universal standards of human rights, accepted at the domestic and international level".

[53] In the joint judgment of President de La Bastide JCCJ and Saunders JCCJ in the case of **Attorney General and another v Joseph and another**<sup>10</sup> it was indicated that:

"[106] At the domestic level, the jurisprudence of international bodies is fully considered and applied. In determining the content of a municipal right, domestic courts may consider the judgments of international bodies. Likewise, on the international plane, the judgments of domestic courts assist in informing the manner in which international law is interpreted and applied. There is therefore a distinct, irreversible tendency towards confluence of domestic and international jurisprudence."

[54] As it relates specifically to the reference to the incorporation of international instruments this court considers as relevant not only the substantive provisions of the international instrument but also the

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<sup>10</sup> [2006] CCJ 1.

preamble and any declarations made. In this regard this court notes the words of Lord Bingham in **Reyes v R**<sup>11</sup> where Lord Bingham stated:

“[27] In considering what norms have been accepted by Belize as consistent with the fundamental standards of humanity, it is relevant to take into account the international instruments incorporating such norms to which Belize has subscribed, .... By becoming a member of the Organization of American States Belize proclaimed its adherence to rights which, although not listed in the charter of the Organization, are expressed in the Declaration.”

[55] As it relates to the adherence to the protection of rights and the non-discrimination on the basis of, among other things, sexual orientation Antigua and Barbuda has ratified a number of international human rights treaties. These treaties include International Covenant on Civil and Political Rights in 2019<sup>12</sup>; (ii) International Covenant on Economic, Social and Cultural Rights in 2019<sup>13</sup>; (iii) Convention on the Rights of the Child in 1993<sup>14</sup>; (iv) Convention on the Elimination of all forms of Discrimination against Women in 1989<sup>15</sup>; and (v) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1993<sup>16</sup>.

[56] For the purposes of this decision reference is made to some of the provisions in the treaties or international agreements:

(i) Article 12 of the Universal Declaration of Human Rights prohibits “... *arbitrary interference with (a person’s) privacy, family, home or correspondence...*”. Article 12 also indicates that “*Everyone has the right to the protection of the law against such interference or attacks.*”

(ii) Article 17 of the International Covenant on Civil and Political Rights provides that “*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or*

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<sup>11</sup> [2002] UKPC 11. A consolidated appeal.

<sup>12</sup> International Covenant on Civil and Political Rights (adopted by UNGA res 2200A(XXI) of 16 December 1996 entry into force 23 March 1976).

<sup>13</sup> International Covenant on Economic, Social and Cultural Rights (adopted UNGA res 2200A (XXI) of 16 December 1966 entry into force 3 January 1976).

<sup>14</sup> Convention on the Rights of the Child, (adopted by UNGA res 44/25 of 20 November 1990 entry into force 2 September 1990).

<sup>15</sup> Convention on the Elimination of all forms of Discrimination Against Women (Adopted by UNGA res 34/180 of 18 December 1979 entry into force 3 September 1981)

<sup>16</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by UNGA res 39/46 of 10 December 1984, entry into force 26 June 1987).

*correspondence, nor to unlawful attacks on his honour and reputation (...) Everyone has the right to the protection of the law against such interference or attacks.”*

(iii) Article 2 of the Convention on the Rights of the Child prohibits “*discrimination of any kind irrespective of the child’s or his or her parent’s or legal guardian’s ...sex...other opinion...or other status.*”

### **Jurisprudence of International and Regional Tribunals.**

[57] Counsel for the claimants accurately captured changes in the international and domestic spheres on the issues before this court. Counsel noted similar laws to that of sections 12 and 15 of the Act which criminalized consensual sexual intimacy between adults of the same sex have been struck down or declared unlawful and/or declared to be in contravention of constitutional and international treaty law. These courts include courts in Africa, Asia, Australia, the Americas, the Caribbean, and Europe.

[58] In the case of ***Dudgeon v United Kingdom***<sup>17</sup> the European Court of Human Rights (ECHR) ruled on provisions in Northern Ireland that criminalize certain same sex sexual acts between consenting male adults. The Tribunal in 1981 deemed the provisions to be in contravention of Article 8 of the ECHR. Similarly, the United Nations Human Rights Committee (UNHCR) in ***Toonen v Australia***<sup>18</sup> in 1992 struck down provisions of a similar nature found in the Tasmanian Criminal Code the effect of which the UNHCR determined was in breach of Article 2 of the International Covenant on Civil and Political Rights (right to non-discrimination).

### ***Jurisprudence in Other Domestic Courts.***

[59] Jurisprudence from domestic courts from other jurisdictions have long been a source of persuasive authority to domestic courts. In a 1998 case of ***National Coalition for Gay and Lesbian Equality v Minister of Justice***<sup>19</sup>, the South African Constitutional Court held that the provisions on sodomy

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<sup>17</sup> ***Dudgeon v United Kingdom***, [1981] ECHR 5 [Dudgeon]; (1981) 4 EHRR 149. Similar positions were adopted by The European Court of Human Rights in ***Norris v Ireland*** [1988] ECHR 22; (1991) 13 EHRR 186 and ***Modinos v Cyprus*** [1993] ECHR 19; (1993) 16 EHRR 485.

<sup>18</sup> ***Toonen v Australia***, Comm. No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994).

<sup>19</sup> [1998] ZACC 15.

constituted violations of constitutional rights to privacy, dignity, equality and freedom from discrimination on the basis of sexual orientation.

[60] In 2018 the Supreme Court of India in the case of *Navtej Singh Johar v Union of India*<sup>20</sup>, held that the provisions of the Indian Penal Code criminalizing same-sex sexual conduct between consenting adults constituted a violation of the constitutional rights to equality and non-discrimination, liberty, freedom of expression and privacy.

[61] In 2019 the High Court of Botswana in *Motshidiemang v Attorney General Botswana*<sup>21</sup> held that the provisions in their Penal Code which criminalized same-sex interactions were found to be unconstitutional as the provisions violated the protections of liberty, privacy and non-discrimination.

[62] Closer home, in jurisdictions such as Belize and Trinidad and Tobago their domestic courts have also found that provisions which criminalized buggery and intimate relations between consenting same sex adults in private to be unconstitutional.

[63] In 2010, Benjamin CJ sitting in the Supreme Court of Belize in *Orozco v Attorney General of Belize*<sup>22</sup> held that section 53 of the Belize Criminal Code contravened the sections of the Belizean Constitution which dealt with right to privacy, right to freedom of expression and the right to equality.

[64] In 2018, Rampersad J. in *Jason Jones v Attorney General of Trinidad and Tobago and another*<sup>23</sup> determined that sections 13 and 16 of Sexual Offences Act of Trinidad and Tobago, provisions similar to sections 12 and 15 of the Act, were in violation of the constitutional right to private and family life, to freedom of thought and expression, equality before the law and the protection of the law.

### **The Constitutional Provisions.**

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<sup>20</sup> Navtej Singh Johar and others v Union of India WP (Crl), No. 76 of 2016 AIR 2018 SC 4321.

<sup>21</sup> [2019] 4 LRC 507.

<sup>22</sup> *Orozco v Attorney General* [2016] No. 668 of 2010.

<sup>23</sup> Unreported CV2017-00720.

[65] Section 3 of the Constitution provides, among other things, that every person, “...is entitled to the fundamental rights and freedoms of the individual, that is to say, the right ... to ... (a) life, liberty...protection of the law...(b) freedom of expression... (c) protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation,...” .

[66] The rights indicated in section 3 can give rise to redress under the provisions of section 18 of the Constitution<sup>24</sup>. The High Court of Botswana considered certain constitutional provisions which are in similar terms to sections 3 and 10 of the Constitution of Antigua and Barbuda and noted that:

“[116] At face value, one may be tempted to postulate that the right to privacy.....only relates to protection against the search of his or her person, property, or entry by others on his/her premises. Such a linear and face value interpretation runs foul to our cherished generous, purposive and context orientated mode of constitutional interpretation. Furthermore, such a narrower construction will thus whittle down fundamental rights.

[117] The right to privacy, under Sections 3(c) and 9(1)<sup>25</sup> thereof is thus multifaceted and multipronged. I am fortified thereof by the case of **KETLHAOTSWE AND OTHERS v DEBSWANA DIAMOND COMPANY (PTY) LTD, CVHGB-001160-07** per Lesetedi J (as he then was) (unreported, delivered on 27 September 2012). See also a scholarly article by two professors Balule T.B. and Othogile B: Balancing the Right to Privacy and the Public Interest: Surveillance by the State of Private Communications for Law Enforcement in Botswana. Statute Law Review (Oxford University Press, 2015)<sup>26</sup>.

### Right to Privacy

[67] In **National Coalition**, Ackemann J considered the matter of sexuality and privacy and stated that:

“[32] Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of

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<sup>24</sup> *Societe United Docks v Government of Mauritius* [1985] AC 585.

<sup>25</sup> Similar to sections 3(c) and 10 of the Constitution of Antigua and Barbuda.

<sup>26</sup> Motshidiemang at paras 116-117.

this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.”

[68] In *Navtej Singh Johar v Union of India*<sup>27</sup>, the Supreme Court of India in dealing with the right to privacy noted that:

“[16.2] The right to privacy has now been recognised to be an intrinsic part of the right to life and personal liberty under Article 21.

Sexual orientation is an innate part of the identity of LGBT persons. Sexual orientation of a person is an essential attribute of privacy. Its core protection lies at the core of Fundamental Rights guaranteed by Articles 14, 15 and 21. The right to privacy is broad based and pervasive under our constitutional scheme, and encompasses decisional autonomy, to cover intimate/personal decisions and preserves the sanctity of the private sphere of an individual. The right to privacy is not simply the “right to be let alone” and has travelled far beyond that initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice. It extends to the right to make fundamental personal choices, including those relating to intimate sexual conduct, without unwarranted State interference.”<sup>28</sup>

[69] The Inter-American Court in the case of *Atala Riffo and daughters v Chile*<sup>29</sup> it was stated that:

“[135] The scope of protection of the right to a private life has been interpreted in broad terms by the international human rights courts, when stating that it goes far beyond the right to privacy. According to the European Court of Human Rights, the right to a private life encompasses physical and social identity, an individual’s personal development and personal autonomy as well as their right to establish and develop relationships with other people and their social environment, including the right to establish and maintain relationships with people of the same sex. Moreover, the right to maintain personal relationships with other individuals, in the context of the right to a private life, extends to the public and professional spheres.

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<sup>27</sup> *Navtej Singh Johar and others v Union of India* WP (Crl), No. 76 of 2016 AIR 2018 SC 4321.

<sup>28</sup> At page 53 para. 16.2.

<sup>29</sup> [www.corteidh.or.cr](http://www.corteidh.or.cr).



[136] In this regard, a person's sexual orientation is also linked to the notion of freedom and a person's right to self-determination and to freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own choices and convictions. Therefore, [t]he emotional life with the spouse or permanent partner, which obviously includes sexual relationships, is one of the main aspects of that realm or circle of intimacy."

[70] This court accepts the submission of Senior Counsel for the Claimants that "the right to privacy extends beyond the right to be left alone and includes the concept of dignity of the individual, aspects of physical and social identity, and the right to develop and establish relationships with other human beings". The right also includes elements such as gender identification, sexual orientation and sexual life.

### **The Right to Liberty**

[71] Section 3(a) of the Constitution also guarantees the right to liberty. Although the section 5 (protection of right to personal liberty) is read with section 3(a) the former section is not intended to limit the application of section 3(a).

[72] In the case *of Navtej Singh Johar v Union of India*, Misra CJ noted that the autonomy of an individual to choose his/her sexual partner is an important pillar and inseparable facet of individual liberty. Misra CJ further stated that:

"[230] ... When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perceptions that the majority population is peeved when such an individual exercises his/her liberty, despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly the fundamental right of liberty of such an individual is abridged.<sup>30</sup>

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<sup>30</sup> Johar at para 230 (Misra CJ).

[73] It is accepted that the right to liberty is multifaceted and that this multifaceted right is protected by the provisions of section 3(a) of the Constitution.

### Freedom from Discrimination

[74] The claimant contends that sections 12 and 15 of the Act infringe on the right of the first claimant and similarly circumstanced persons not to be subjected to discriminatory treatment under section 14 of the Constitution. Specifically, section 14 of the Constitution provides that:

1. "Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
2. Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any law or in the performance of the functions of any public office or any public authority.
3. In this section, the expression "**discriminatory**" means **affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions or affiliations, colour, creed, or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.**"  
*(Emphasis Added).*

[75] In giving a liberal and purposive interpretation to section 14(3) of the Constitution the reference to "sex" ought not to merely reference a physical gender. Such an approach would be too linear and restrictive. The reference to "sex" would necessarily encompass concepts such as gender identity, sexual character, and sexual orientation. It would be self-defeating to the constitutional provision if the notion of sex were to be separated from matters of sexual orientation and sexual identification since the concept of sex as a physical gender carries with it a perception of how people identify and are oriented even in those instances when the identification and orientation are stereotypical or traditional in nature.

[76] It is to be noted that the identification of self, which includes how persons identify, is intrinsic to self-discovery. The journey to self-discovery is very personal and the outcome is the essence of what it means to be human. To deprive a person of the opportunities while on their life's journey of gender discovery is likely to impact negatively at their sense of self and, consequently, their identity. Subject to expressed constitutional restrictions, the spirit of the Constitution protects against persons having to be "less of themselves" or to suffer the indignity of the loss of personal authenticity.

[77] Noteworthy is the fact that Antigua and Barbuda has ratified international treaties which have interpreted and have adjudged "sex" to include "sexual orientation". Conventions such as the Convention on the Rights of the Child, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of Discrimination Against Women, have in committee documents issued general comments indicating that 'sexual orientation' is included within their respective treaty prohibitions on discrimination<sup>31</sup>. In the case of *Toonen v Australia Communication*<sup>32</sup>, the UNHRC found that the word "sex" in Articles 2 and 26 of the International Covenant on Civil and Political Rights is to be interpreted as including sexual orientation.

### Freedom of Expression

[78] Section 3(b) and sections 12 (1) and (2) speak to the right of freedom of expression. Section 3(b) of the Constitution provides for the "freedom of expression (including freedom of the press). Sections 12 (1) and (2) provide that:

"1. Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

2. For the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive information and ideas without interference, freedom to disseminate information and ideas without interference (whether the dissemination be to the public generally or to any person or class of persons) and freedom from interference with his correspondence or other means of communication."

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<sup>31</sup> Committee on the Rights of the Child, General Comment 4, UN Doc. CRC/GC/2003/4, 1 July 2003, para 6; Committee on Economic, Social and Cultural Rights, General Comment 20, UN Doc. E/C.12/GC/20, 10 June 2009, para 32; General Comment No. 14, UN Doc. E/C.12/2000/4, 11 August 2000, para 18.

<sup>32</sup> See above.

[79] Freedom of expression is, like other rights, subject to qualifications as stated within the Constitution. The concept of 'expression' is not necessarily limited to expressions of a particular kind or nature. The generous and purposive approach to the interpretation of the fundamental rights provisions of constitutions lead to a broader understanding of the concept. The case of *McEwan and others v Attorney General of Guyana*<sup>33</sup> provides an example of the expansive interpretative approach to the concept of expression and freedom of expression. In that case the Caribbean Court of Justice considered section 153(1) (xlvii) of the Summary Jurisdiction (Offences) Act of the Laws of Guyana which criminalized a man being dressed in female attire and of a woman being dressed in male attire in a public place for an improper purpose. Saunders JCCJ noted that:

[76] It is essential to human progress that contrary ideas and opinions peacefully contend. Tolerance, an appreciation of difference, must be cultivated, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. A person's choice of attire is inextricably bound up with the expression of his or her gender identity, autonomy and individual liberty. How individuals choose to dress and present themselves is integral to their right to freedom of expression. This choice, in our view, is an expressive statement protected under the right to freedom of expression.

[77] These conclusions are not novel. The Indian Supreme Court in *National Legal Services Authority v Union of India*<sup>34</sup> reached a similar determination when it held that expression of one's identity through words, dress, action or behaviour is included in the right to freedom of expression under the comparable Article of the Indian Constitution. Other courts have also arrived at similar conclusion"

[80] Similarly, the choice of a consenting adult with whom that adult person is or can be intimately or romantically connected is integral to self-expression. This choice is, by its very nature, a personal decision and a private and personal form of expression.

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<sup>33</sup> [2018] CCJ 30.

<sup>34</sup> [2014] 4 LRC 629; Writ Petition (Civil) No. 400 of 2012.

Do Sections 12 and 15 infringe the Rights to Liberty, Protection of Law, Freedom of Expression, Protection of Personal Privacy and Protection from Discrimination.

[81] Sir Edward Coke in *The Institutes of the Laws of England*, 1628 is credited to have said "For a man's home is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refugee]". Although the term is often used in the context of unlawful entry this court borrows the concept for use in relation to the matters before this court. The offences to which sections 12 and 15 relate are offences which occur with consenting adults in a private space. The criminalization of same-sex sexual expression between consenting adults is intrusive by its very nature and thereby offends the right to liberty and personal privacy which the Constitution affords.

[82] On the matter of the freedom of expression the infringement relates not only to the inability of the first named claimant and persons similarly circumstanced from free expression of sexual orientation but also conceivably infringes on the right to hold and express opinions on their sexual orientation without interference. Justice Rampersad in the case of ***Jason Jones v AG of Trinidad and Tobago*** articulated the position thus, "*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*".

[83] Considering the matter of protection from discrimination and protection of the law, it is noted that on its face the provisions of sections 12 and 15 do discriminate in the manner alleged by the claimants. Specifically, section 15 excludes from the offence consenting heterosexual adult couples and specifically targets same-sex adults. As it relates to section 12, this court accepts the observation of senior counsel for the claimants that even "*where, as in the case of sections 12 of the Act, a law is expressed in neutral terms as to the gender or sexuality of its targets, such law will still be discriminatory where the acts prohibited are more closely associated with one class of persons. The fact that neutrally expressed provisions can have a discriminatory and disproportionate effect on gay men has repeatedly been recognised by international and domestic courts*".

[84] The effect of provisions like sections 12 and 15 of the Act is to stigmatize same-sex couples and makes a particular group subject to arrest, prosecution and conviction of an offence which is a part of that group's human experience.

**Whether the Infringements are Reasonably Justified.**

[85] As previously indicated the fundamental rights and freedoms in the Constitution are not absolute. Section 3 of the Constitution provides, in part, that the rights are "*subject to respect for the rights and freedoms of others and for the public interest.*" On the matter of freedom of expression, section 12(2) provides that, "*Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – a. that is reasonably required in the interests of defence, public safety, public order, public morality or public health.*"

[86] The claimants in these proceedings have made out a *prima facie* case of infringement of the constitutional rights and freedoms herein considered.

[87] Ordinarily, the burden would have fallen on the respondent to justify the limitation of the constitutional rights. The respondent in these proceedings has conceded that the understanding of fundamental rights has evolved so that the provisions of sections 12 and 15 of the Act do infringe the rights of the claimants and persons similarly circumstanced. The position of counsel resulted in counsel adopting a particular course regarding the impugned sections.

[88] This court, having considered the matters herein makes the following declaration that:

- a. Section 12 of the Sexual Offences Act 1995 contravenes sections 3, 12, and 14 of the Constitution of Antigua and Barbuda, namely, the right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex, in so far as section 12 of the Sexual Offences Act 1995 is inconsistent with the rights of persons sixteen (16) years and older to engage in consensual sexual intercourse per anum in private, and to the extent of that inconsistency section 12 of the Sexual Offences Act 1995 is void.

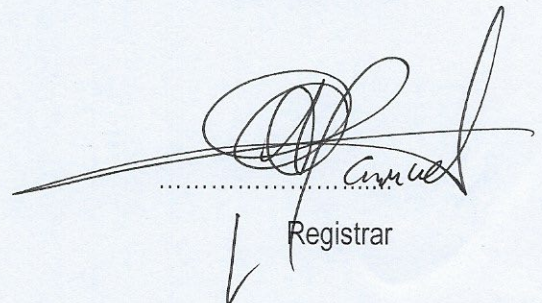
- b. Section 15 of the Sexual Offences Act 1995 contravenes sections 3, 12, and 14 of the Constitution of Antigua and Barbuda, namely, the right to liberty, protection of the law, freedom of expression, protection of personal privacy and protection from discrimination on the basis of sex, in so far as section 15 of the Sexual Offences Act 1995 is inconsistent with the rights of persons sixteen (16) years and older to engage consensually and in private in the sexual acts described in section 15(3), and to the extent of that inconsistency section 15 of the Sexual Offences Act 1995 is void.

[89] This court orders that in order to give effect to the second declaration stated in paragraph [88] b. above, it is ordered that subsection 15(2)(b) of the Act be read as if the words “a male person and a female person” were deleted and replaced with the word “persons”. It is also ordered that the defendant shall pay the costs of the Claimants in an amount to be assessed if not agreed within 21 days.

[90] This court expresses its gratitude to the counsel for the claimants and counsel for the defendant. To the claimants for the very thorough submissions made to the court and to the counsel for the defendant for their approach in the conduct of these proceedings.

Justice Marissa Robertson  
High Court Judge

By The Court

  
.....  
Registrar

