

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**IN THE HIGH COURT**

**CIVIL DIVISION**

**No. CV 0044 of 2020**

**IN THE MATTER OF THE CONSTITUTION OF  
BARBADOS,**

**AND**

**IN THE MATTER OF AN APPLICATION FOR REDRESS  
IN ACCORDANCE WITH SECTION 24 OF THE  
CONSTITUTION BY RENÉ HOLDER-McCLEAN-  
RAMIREZ, RAVEN DAVINA GILL AND EQUALS INC.  
BEING PERSONS ALLEGING THAT THEIR RIGHTS AS  
GUARANTEED TO THEM BY SECTIONS 11, 13, 15, 20  
AND 23 OF THE CONSTITUTION AND AFFIRMED IN  
THE PREAMBLE TO THE CONSTITUTION HAVE  
BEEN, ARE BEING OR ARE LIKELY TO BE  
CONTRAVENED,**

**AND**

**IN THE MATTER OF SECTIONS 9 AND 12 OF THE  
SEXUAL OFFENCES ACT, CAP. 154, OF THE LAWS OF  
BARBADOS.**

BETWEEN:

**RENÉ HOLDER-McCLEAN-RAMIREZ**

First Claimant

**RAVEN DAVINA GILL**

Second Claimant

**EQUALS INC.**

Third Claimant

-- and --

**THE ATTORNEY GENERAL OF BARBADOS**

Defendant

*Before The Honourable Madam Justice Michelle I. L. Weekes, Judge of the High Court.*

**Dates of Hearing: September 29, 2021**

**October 18, 2022**

**November 08, 2022**

**Date of Orders: December 12, 2023**

**Date of Judgment: May 25, 2023**

**Appearances:**

Mr. Douglas Mendes S.C. in association with Mr. Westmin James and Mr. Kashka Hemans Attorneys-at-Law for the Claimants.

Mr. Jared K. Richards in association with Ms. Kim Ramsay-Moore and Ms. Rochelle Lashley, Attorneys-at-Law for the Defendant.

## **JUDGMENT**

### **INTRODUCTION**

[1] This is an application for relief under **Section 24** of the **Constitution of Barbados** (the “**Constitution**”) and under **Rule 56**

of the Supreme Court (Civil Procedure) Rules, 2008 (the “CPR”). The Claimants allege that sections 9 and 12 of the Sexual Offences Act Cap 154 (the SOA) criminalise certain sexual acts in private between consenting adults, in particular same-sex adults. It is essentially a human rights application.

[2] Barbados transitioned to Republican status in November 2021 after the trial in September 2021. This Decision is made under the law at the time of the trial.

## THE APPLICATION

[3] By Fixed Date Claim Form filed on 15 January 2020, the Claimants sought:

1. *A Declaration that section 9 of the Sexual Offences Act, CAP 154 (“the Sexual Offences Act”) which provides, “[a]ny person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life” contravenes the constitutional rights of the Claimants enshrined in sections 11, 13, 15, 20 and 23 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that it applies to consensual sexual intercourse between persons of sixteen years of age or more in private.*
2. *A Declaration that section 12 of the Sexual Offences Act which provides*
  - (1) *A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.*
  - (2) *A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence*

- and is liable on conviction to imprisonment for a term of 15 years.*
- (3) An act of “serious indecency” is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.*
  - (4) contravenes the constitutional rights of the Claimants enshrined in sections 11, 13, 15, 20 and 23 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that sub-section (1) applies to acts of serious indecency committed in private between consenting persons each of whom is sixteen years of age or more.*
- 3. A Declaration that the offence of serious indecency under section 12 of the Sexual Offences [Act] is unconstitutional, null and void and of no effect on account of its vagueness and uncertain application.*
  - 4. An Order that section 9 be read as if the words “except where it occurs in private and between consenting persons each of whom is sixteen years of age or more” were added at the end of that section.*
  - 5. Such other Declarations and Orders and such directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the Declarations and Orders.*
  - 6. Such further or other relief as the Court thinks just.*
  - 7. Costs.*

## **GROUNDS OF THE APPLICATION**

[4] The grounds as stated in the application are:

- 1. Sections 9 and 12 of the Sexual Offences Act criminalise certain sexual acts between consenting adults in private.*
- 2. In the premises, and in the light of the Preamble to the Constitution, which recognizes inter alia the entitlement of every person in Barbados “to the fundamental rights and freedoms of the individual”, sections 9 and 12 violate:*

- a. *The right to life, liberty and security of the person, guaranteed by section 11(a) of the Constitution,*
  - b. *The right to protection for the privacy of his home and other property, guaranteed by section 11(b) of the Constitution,*
  - c. *The right to protection of the law, guaranteed by section 11(c) of the Constitution,*
  - d. *The right to freedom of expression, guaranteed by section 11(d) of the Constitution,*
  - e. *The right to personal liberty, guaranteed by section 13 of the Constitution,*
  - f. *The right to not be subjected to inhuman or degrading treatment, guaranteed by section 15 of the Constitution,*
  - g. *The right to not be hindered in the enjoyment of freedom of expression, guaranteed by section 20 of the Constitution and*
  - h. *The right not to be discriminated against on the ground of sex, guaranteed under both section 11 and section 23 of the Constitution.*
3. *Further, section 12 of the Sexual Offences Act does not meet the constitutional or common law requirements for legal certainty.*
  4. *Sections 9 and 12 are not prohibited from being held constitutional by virtue of section 26 of the Constitution.*

## **ORDERS**

[5] On 12 December 2022 the Court granted these orders:

1. A Declaration that section 9 of the Sexual Offences Act, CAP 154 which provides, “Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life” contravenes the

constitutional rights of the Claimants enshrined in sections 11, and 20 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that it applies to consensual sexual intercourse between persons of sixteen years of age or more in private.

2. A Declaration that section 12 of the Sexual Offences Act which provides:

*(1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.*

*(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.*

*(3) An act of “serious indecency” is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.*

contravenes the constitutional rights of the Claimants enshrined in sections 11 and 20 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that sub-section (1) applies to acts of serious indecency committed in private between consenting persons each of whom is sixteen years of age or more.

3. A Declaration that the offence of serious indecency under section 12 of the Sexual Offences Act is unconstitutional, null and void and of no effect on account of its vagueness and uncertain application.

4. The Court declines to make an Order that section 9 be read as if the words “except where it occurs in private and between consenting persons each of whom is sixteen years of age or more” were added at the end of that section.

5. Hearing on Costs adjourned until 31st January 2023.

My reasons for doing so are set out below.

## **HISTORY OF THE CHALLENGED PROVISIONS**

- [6] The provisions have their genesis in colonial times when English Criminal Law was also the law of Barbados. The history of buggery dates back to medieval times and until Henry VIII's reign fell under the purview of the ecclesiastical courts. Once the Church of England was established, buggery became a criminal offence. Under the Buggery Act 1533 it was punishable by death and except for a short period of repeal remained a capital crime until the enactment of the Offences Against the Person Act 1861. That Act removed the death penalty and imposed a term of ten years to life imprisonment.
- [7] In 1885 the "Labouchere" Amendment introduced a provision described as "gross indecency" which criminalised all homosexual activity. **Section 9** antecedents in England and Wales were repealed by the Sexual Offences Act 1967 on the recommendation of the Department Committee on Homosexual Offences Act and Prostitution (The Wolfenden Report). In Barbados the precursor of **Section 9** can be traced back to the *Offences Against the Person Act* which was amended in 1978 simplifying the penalty and creating the crime of gross indecency in relation to men.
- [8] The *SOA* commenced on 13 February 1992 and its Long Title describes it is "*An Act to revise and reform the law relating to sexual crimes.*" In *Mayers v The Queen* BB 2009 CA 9, *Williams, J.A.* remarked about the *SOA* that it "*...revised and reformed the law relating to sexual crime by giving an extended definition to the meaning of rape, to include spousal rape, rape of males and penetration with an object.*"

- [9] The *SOA* has been amended once, by the *Sexual Offences (Amendment) Act, 2016-3*. That Act amended **Section 3** of the *SOA* by removing the conditions under which a husband could be found guilty of raping his wife, such as there existing in relation to them a *decree nisi* or separation order. The act of rape, as committed by a husband against his wife, is now a crime once the act of sexual intercourse is engaged through force or fear.

### THE PARTIES' POSITIONS

- [10] The Claimants in their written submissions asserted that **Sections 9 and 12(1)** of the *SOA* are no longer fit for purpose, and must either be declared unconstitutional, null and void and of no effect by the Court, or, be amended by the Court, in the ways set out in their Fixed Date Claim Form.
- [11] After setting out a brief history of **Sections 9 and 12** of the *SOA*, and references to **the Offences against the Person Act 1868** and its amendments, the Claimants observed that courts in other jurisdictions have struck down laws similar in wording or effect to the provisions under challenge here, as being contrary to constitutional law and international treaties.
- [12] The Claimants provided examples of this 'striking down' with cases such as *Dudgeon v United Kingdom* [1981] ECHR 5, *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994), *Lawrence v Texas* 539 US 558 (2003), and *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, among other authorities. Against the backdrop of these and the other cases, Counsel for the Claimants argued that **Sections 9 and 12** of the *SOA* ought to be also struck down by the Court.



- [13] The Defendant recognised that the norms of the culture of a democratic state are subject to change, but then intimated that it is not enough to simply make change—the proposed change or changes must be implemented in a way which honours the values and principles that guard our democracy.
- [14] Counsel reminded the Court that each Branch of Government—the Executive, the Judiciary, and the Legislature—has its own role to play in a democracy, and that the doctrine of separation of powers prevents those Government Branches from functionally overlapping.
- [15] The Defendant recognised that the relief claimed if granted would cause significant change in the way the law is understood and applied within this jurisdiction. He then asserted that the Crown (as it then was) has a responsibility to not only defend the claim, but to assist the Court in disposing of the matter fairly. The Defendant’s position is that the challenged sections do not contravene **the Constitution**.

### **THE EVIDENCE**

- [16] The Claimants filed three Affidavits in Support of the Application. The Defendant filed Affidavits in Response which constitute its Defence. It was agreed among the parties, at the Trial held via Zoom on 29 September 2021, that the affidavits filed would stand as the evidence in the proceedings without cross-examination. Written submissions were filed with some oral amplification at trial. The Court acknowledges with gratitude the extensive Written Submissions and authorities filed by the parties.

*The First Claimant's Affidavit*

- [17] The First Claimant identifies mainly as a homosexual man, sometimes, as a bisexual man, or forgoes labels altogether. He is also the co-founder of Equals Inc., the Third Claimant. Equals Inc. is a registered non-governmental organization whose stated goal is to build safe spaces for members of the LGBT community.
- [18] The First Claimant deposed to being subjected to harassment and verbal abuse because of his sexuality. He set out his identity and early years, his need to leave Barbados (and eventually doing so), and the hostility which he experienced on his eventual return to this Island. He also particularized his involvement in various LGBT organizations, and how peer outreach had educated him on the issues faced by Barbados' LGBT community.
- [19] He continued by stating that, his sexuality, and the sexuality of other members of this Island's LGBT community exposes them to potential harassment, even from the police, and there is a general sense of fear experienced by them. This fear has caused them to be reluctant to report to the police whenever they are, allegedly, the victims of crime. Although he is grateful that he need not navigate some of the threats which the other members of Barbados' LGBT community encounter, his major challenge was mental, as he had endured years of pressure, isolation and poor self-esteem which contributed to his anxiety and depression. This led to him needing therapy to cope with his issues of loneliness, sexuality, and abuse.
- [20] The First Claimant believes that the removal of **Sections 9 and 12** of the *SOA* would be a significant step in the right direction for Barbados. He considers that their removal would help members of this Island's LGBT community in

dealing with the myriad issues which they often face, including violence, discrimination, and stigmatization, especially while trying to access public and private services.

[21] Ultimately, it is the First Claimant's desire to live in a country without being socially or legally persecuted for merely being himself.

***The Second Claimant's Affidavit***

[22] The Second Claimant identifies as a transgender woman, but understands that, under the Laws of Barbados as they now exist, she is considered a man. She deposed to being sexually attracted to, and romantically interested in, men.

[23] She stated that the Sections of the *SOA* complained of, which criminalize homosexuality, undermine her rights to express her sexuality and nurture relationships with consenting male partners, in private, without the risk of outside interference.

[24] The Second Claimant recounted a personal history similar to the experiences of other members of this Island's LGBT community. She shared her personal history where she was a victim of rape, violence, abuse, and public humiliation, with the last of those supposedly being at the hands of the police.

[25] She also alleged that the media has been offensive and negative towards Barbados' LGBT community. For example, she referred to a weekend article on the front page of a widely circulated newspaper said to have been titled, "*Gays fleeing island home.*" She explained that omitting critical information in this newspaper article was disparaging and distorted her reason for handing her 'letter of complaint' to the then Attorney General of Barbados. According to her, this only added to her humiliation.

[26] The Second Claimant detailed alleged failures by the police to investigate incidents involving members of Barbados' LGBT community, personal incidents of workplace discrimination, and the effect of societal disapproval on identity, self-esteem and relationship to the community.

[27] She stated that, despite being an adult, and despite the expressions of her sexuality being consensual and conducted in private with other adults, in a way which harms no one, her worth and dignity as a human, and her value as a member of Bajan society, are not recognized by others.

[28] The Second Claimant is also a co-director of the Third Claimant, Equals Inc.

***The Third Claimant's Affidavit***

[29] The Third Claimant, a non-governmental organization, is represented by its Chair, Mr. Michael Rapley. He outlined the mandate and work of the Third Claimant on behalf of this Island's LGBT community.

[30] This work includes the promotion of human rights and sexual reproductive health, strengthening community engagement and capacity, and securing stigma-free access to the public and private services Barbados offers, for this Island's LGBT community.

[31] Equals Inc. has contributed to several studies and reports, which include '*National HIV AIDS Commission Key Populations: Creating Networks and Strengthening Communities, April 1<sup>st</sup> – October 31<sup>st</sup>, 2013,*' and '*Human Rights of Lesbian, Bisexual and Transgender Women in Barbados: A Shadow Report for Consideration at the 67<sup>th</sup> Session of the Committee of the Convention on the Elimination of Discrimination against Women.*'

- [32] The Third Claimant has consistently opposed the ‘criminalization’ of consensual, same-sex intimacy under the challenged provisions.
- [33] Equals Inc. in 2016 recalled a time when they, following the decision of *Orozco v The Attorney General et al.* BZ 2016 SC 36, wrote to the then Attorney General requesting that the Barbados Government consider repealing **Section 9** of the *SOA*.
- [34] Mr. Rapley set out the challenges facing members, which include a lack of access to health care because of the stigmatization and discrimination meted out to them, and the threats of violence directed at them.
- [35] The Third Claimant considers that the stigmatization is because of the challenged provisions which they also consider has led or contributed to abuse, threats and physical violence towards their community.
- [36] Mr. Rapley detailed what Equals Inc. considers to be the unfair and discriminatory treatment (based on their sexual orientation and/or gender identity) which their members have supposedly received when interacting with the police.

### *The Defendant’s Affidavits*

- [37] The Defendant filed three Affidavits in Response to those of the Claimants. The Affidavits were all deposed to by the Permanent Secretary, Office of the Attorney General, who neither admitted nor denied the contents of the Claimants’ Affidavits (because those contents rested within the sole knowledge of their affiants) and denied the allegations in the Affidavits and put the Claimants to strict proof of those allegations. She denied that **Sections 9 and 12** of the *SOA* breached any rights as enshrined in the Constitution or that they fostered intolerance towards members of the LGBT community.

[38] In response to the Third Claimant's Affidavit, the Permanent Secretary stated that she believed that the operation of **Section 24 of the Constitution** under which the Third Claimant brings the action, excludes the Third Claimant from bringing the claim as it is not a natural person with any of the rights sought to be ascribed to it by Mr. Rapley or who can suffer any discrimination, violence, abuse or exclusion or in any way can be affected by the alleged contravention of **Sections 9 and 12** of the *SOA*.

## THE ISSUES

[39] The issues as agreed to between the parties and as argued are as follows:

### *1 Preliminary issues and considerations.*

- a. Does the Third Named Claimant have standing to bring this claim?*
- b. Are sections 9 and 12 of the Sexual Offences Act (SOA) ("the challenged provisions") saved from being declared unconstitutional pursuant to section 26 of the Constitution?*
- c. What principles of interpretation are relevant in the disposition of this claim?*
- d. What use, if any, should the Court make of international law in the interpretation of the Constitution?*
- e. Is Section 11 of the Constitution enforceable?*
- f. What is the burden of proof required by each party in proving a breach of fundamental rights and freedoms?*

### *2 The Challenged Rights: Are Sections 9 & 10 of the SOA inconsistent with the provisions of the Constitution?*

- a. Right to privacy*
  - i. Does section 11(b) of the Constitution contain a general right to privacy?*
  - ii. What is the meaning of the right to privacy guaranteed by section 11(b) of the Constitution?*
  - iii. Do the challenged provisions infringe on the right to privacy guaranteed by section 11(b) of the Constitution?*

- b. *Right to liberty*
  - i. *Do the challenged provisions infringe the right to life, liberty and security of the person guaranteed by 11(a) of the Constitution?*
  - ii. *Do the challenged provisions infringe the right not to be deprived of liberty save as may be authorized by law guaranteed by section 13 of the Constitution?*
  
- c. *The protection of the law*
  - i. *Do the challenged provisions infringe the right to protection of the law, guaranteed by section 11(c) of the Constitution?*
  
- d. *Freedom of expression*
  - i. *Can conduct amount to expression as articulated by sections 11 and 20 of the Constitution?*
  - ii. *Do the challenged provisions infringe the right to freedom of expression guaranteed by sections 11(d) and 20 of the Constitution?*
  
- e. *Freedom from discrimination*
  - i. *Does section 11 of the Constitution contain a freestanding right to non-discrimination?*
  - ii. *What is the scope of the right to non-discrimination under sections 11 and 23 of the Constitution?*
  - iii. *Is sex a prohibited ground of discrimination under sections 11 and 23 of the Constitution?*
  - iv. *Are the categories of discrimination under section 23(3) open to analogous grounds?*
  - v. *Do the challenged provisions infringe the right to non-discrimination?*
  
- f. *Limitations on infringed right*
  - i. *Whether the challenged provisions are reasonably required for a legitimate goal?*
  
- g. *Legal uncertainty*
  - i. *Whether the offence of serious indecency contained in section 12 of the SOA is too vague and legally uncertain*

ii. *and therefore not considered law?*

**3 Remedies and costs.**

- a. *What is the effect if the challenged provisions are found inconsistent with the Constitution?*
- b. *Can the challenged provisions be modified?*
- c. *What remedies if any should be awarded?*
- d. *Is it just in the circumstances to award costs to the successful party in this claim?*

**THE LAW**

[40] The relevant sections of **the Constitution**, are set out below:

**Sections 1, 11, 13(1), 15(1), 20(1), 20(2), 23(1), 23(2), 24(1), and 26(1).**

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

*11 Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

- (a) life, liberty and security of the person;*
- (b) protection for the privacy of his home and other property and from deprivation of property without compensation;*
- (c) the protection of the law; and*
- (d) freedom of conscience, of expression and of assembly and association,*

*the following provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment*



*of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.*

*13 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say*

- a. in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Barbados or some other country, in respect of a criminal offence of which he has been convicted;*
- b. in execution of an order of the High Court or the Court of Appeal or such other court as may be prescribed by Parliament punishing him for contempt of any such court or of another court or tribunal;*
- c. in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;*
- d. for the purpose of bringing him before a court in execution of the order of a court;*
- e. upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Barbados;*
- f. in the case of a person who has not attained the age of twenty-one years, under the order of a court or with the consent of his parent or guardian, for the purpose of his education or welfare;*
- g. for the purpose of preventing the spread of an infectious or contagious disease;*
- h. in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;*

- i. *for the purpose of preventing the unlawful entry of that person into Barbados, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Barbados or for the purpose of restricting that person while he is being conveyed through Barbados in the course of his extradition or removal as a convicted prisoner from one country to another; or*
  - j. *to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Barbados or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person with a view to the making of any such order or relating to such an order after it has been made or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Barbados in which, in consequence of any such order, his presence would otherwise be unlawful.*
15. (1) *No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.*
20. (1) *Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence or other means of communication.*
- (2) *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; or*

- (b) *that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the administration or technical operation of telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*
  - (c) *that imposes restrictions upon public officers or members of a disciplined force.*
- 23. (1) *Subject to the provisions of this section*
  - (a) *no law shall make any provision that is discriminatory either of itself or in its effect; and*
  - (c) *no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*
- (2) *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, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description.*
- 24. (1) *Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 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 which is lawfully available, that person (or that other person) may apply to the High Court for redress.*

26. (1) *Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question*
- (a) *is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;*
  - (b) *repeals and re-enacts an existing law without alteration; or*
  - (c) *alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent*

[41] **Section 4 (1) of the Barbados Independence Order 1966 (the “Independence Order”)** provides that

4. (1) *Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order.*

[42] The challenged provisions of the **SOA** are:

9. *Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.*
12. (1) *A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if*

*committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.*

(2) *A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.*

(3) *An act of “serious indecency” is an act whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.*

***DOES THE THIRD NAMED CLAIMANT HAVE STANDING TO BRING THIS CLAIM?***

[43] The Defendant initially contested whether the Third Claimant, as a corporation and not a natural person, had *locus standi* in the action in its Affidavit in Response to the Third Claimant.

[44] The Claimants however argued that the provisions of **Section 24 of the Constitution** were such that the Third Claimant did have *locus standi* to bring the claim. The Claimants also submitted, citing *McEwan and others v The Attorney General of Guyana* [2018] CCJ 30 (AJ), *Dumas v The Attorney General* TT 2014 CA 62, *Attorney General v Dumas* [2017] UKPC 12, and many other cases, that the broadness of **Section 24 of the Constitution** was such that, considering the aims and objectives of the Third Claimant (as an NGO), that the Third Claimant had a legitimate interest in the claim.

[45] In their Written Submissions and at the hearing the Defendant conceded that the Third Claimant had *locus standi* in relation to the claim. The Defendant was satisfied that the Third Claimant, as a “*person*” under **Section 17(1) of the Companies Act, Cap. 308, of the Laws of Barbados, with Section 24(1)**

of **the Constitution**, and as an organization which advocates for the health and human rights of the LGBT community, had *locus standi* to be a litigant in this case. Counsel cited *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617, *R. v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 All ER 611, and *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society et al.* [2012] SCC 45, in support. There was never any objection by the Defendant to the standing of the First and Second Claimants.

[46] The parties ultimately agreed that all the Claimants have *locus standi* and against a background of the authorities presented the court considers that the Claimants all have standing in the matter.

#### ***WHETHER SECTIONS 9 AND 12 OF THE SOA ARE SAVED BY THE CONSTITUTION'S SAVINGS LAW CLAUSE***

[47] The Claimants questioned whether **Sections 9 and 12** of the *SOA* are saved by **Section 26** of the **Constitution**, or by **Section 4 (1)** of the **Independence Order** and are therefore considered existing laws. **Section 26** provides that:

26. (1) *Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question*

*(a) is a law (in this section referred to as "an existing law") that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;*

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

*(c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a*

*manner in which, or to an extent to which, it was not previously so inconsistent.*

[48] This constitutional provision known as the savings law clause purports to prevent existing laws, that is, laws enacted or made before 30 November 1966, from being subject to judicial challenge on the ground that the law or laws is inconsistent with **Sections 12 to 23 of the Constitution**. In addition, **Section 4 of the Independence Order** provides that:

*(1) Subject to the provisions of this section, the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Barbados Independence Act 1966 and this Order.*

[49] **Section 4** is meant to save existing laws to the extent that the existing laws must be construed with such modifications adaptations qualifications and exceptions as may be necessary to bring them into conformity with **the Constitution**.

[50] The parties agree that **Section 12** of the *SOA* is not an existing law. This is because it enacted after 30 November 1966. Serious indecency was not considered an offence before 1992. Before that, **the Offences Against the Person Act 1868** contained an offence of “gross indecency” but that has been altered by the *SOA* in a way that made it different from the original enactment. The Court agrees with the parties that **Section 12** is not saved by **Section 26 of the Constitution**. It is therefore not subject to modification under **Section 4 of the Independence Order** and is therefore liable to be declared void and of no effect to the extent of its inconsistency with any provision of the Constitution.

[51] However the parties differ in their interpretation and analysis of **Section 9** of the *SOA*. While the Defendant considers it an existing law the Claimants disagree with that assessment. The Defendant submits that amendments related to **Section 9** of the *SOA* fall within the ambit of **Section 26(1)(c)** of the **Constitution** as it saves laws which are altered insofar as the alteration does not make the law inconsistent to an extent that it was not previously.

[52] The Pre-Independence section in relation to buggery can be found in **section 62 of the Offences against the Person Act 1868** which provides:

*Whosoever shall be convicted of the abominable crime of buggery committed with either 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 three years or to be imprisoned for any term not exceeding two years with or without harsh labour.*

[53] That section, amended in 1978 became **Section 64** and states:

*Any person convicted of the abominable crime of buggery committed whether with mankind or with any animal shall be liable to imprisonment for life.*

[54] And the current section in the *SOA* now provides:

*Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life.*

[55] The Claimants submit that because of its linkage to **Section 62** of the pre-Independence **Offences Against the Person Act 1868** together with its amendment and repeal and replacement in 1992, the present law in relation to buggery cannot be considered an existing law. The penalty attached to **Section 62** was changed in 1978. The Claimants argued that, while a person may, under **Section 9** of the *SOA*, be “*liable on conviction on indictment to imprisonment for life*” for committing the offence of buggery, a person who was convicted of that offence under **Section 62 of the Offences against the Person Act 1864**



was liable, at the discretion of the court, to “*penal servitude for life, or for a term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.*” With those two categories having been repealed, it is now easier for the Court to impose a sentence of 2 years or more for the offence of buggery.

[56] The Claimants argued that savings law clauses must be construed as narrowly as practicable to provide individuals with the fullness of the constitutional, fundamental rights and freedoms. They cited *Watson v R.* [2004] UKPC 34, *R. v Hughes* [2002] UKPC 12, *A-G of Grenada v Coard* (2005) 68 WIR 289 (but this decision was overturned on an appeal to the Privy Council; see *Coard and others v Attorney General of Grenada* [2007] UKPC 7), and *Nervais and Severin v The Queen* [2018] CCJ 19 (AJ) in support.

[57] The Claimants also cited *McEwan*, where the CCJ held that Guyana’s Pre-Independence cross dressing law was no longer an existing law given its many amendments following Guyana’s Independence from Britain. The Claimants therefore consider that **Section 9** of the *SOA* is no longer an existing law for the same reasons.

[58] The Defendant however considered that the amendments to **Section 9** of the *SOA* fall within the ambit of **Section 26(1)(c)** of the **Constitution** and attempted to distinguish *McEwan* from this matter.

[59] The Defendant reasoned that Guyana’s **Summary Jurisdiction (Offences) Act**, at **Section 153(1)(xlvii)**, was amended after Guyana achieved independence from Great Britain, to create harsher penalties for infringements of that statutory provision.

- [60] The Defendant considered the purpose of the amendments to **Section 9** of the *SOA* was to bring that Section into conformity with **the Constitution**. Counsel invited the Court to consider that, before Independence, the penalty for committing buggery was the sentence of “*penal servitude for life*.” He also expressed that **Section 9** of the *SOA* no longer has a minimum sentence, since a ‘minimum sentence’ was held to be unconstitutional by the Court of Appeal of Barbados in *Alexander v The Queen* BB 2014 CA 15.
- [61] The Defendant emphasised that amendments to the Laws of Barbados which predate Barbados’ Independence, and which impose a sentence that would be made harsher by the proposed amendment, are not within the scope or ambit of **Section 26(1)(c)** of **the Constitution**. Otherwise, the law(s) whose amendment is/are under proposal maintains its/their status as an existing law, or existing laws.
- [62] Further, the Defendant considers that **Section 9** of the *SOA* is like **Section 62** of **the Offences Against the Person Act 1868** and the amendment made to the latter statute in 1978. However, they do not believe that either of those statutory provisions renders **Section 9** of the *SOA* inconsistent with any provision of **Sections 12 to 23** of **the Constitution** in a manner in which, or to an extent to which, it was not previously so inconsistent. Thus, the Defendant considers that **Section 9** of the *SOA* is an existing law protected by the Constitution’s Savings Law Clause.
- [63] The Court is of the view that the Caribbean Court of Justice’s (**the CCJ**) advice in *McEwan* on how to interpret savings law clauses is instructive. This advice can be found at paragraphs 48 and 49.

[48] *Guyana's cross-dressing law did not remain in its pristine form after it was enacted in 1893. It was repeatedly amended after the country's independence in 1966. Acts Nos. 1 of 1989, 8 of 1997 and 10 of 1998 all amended it by imposing harsher penalties on convicted persons. When the courts below had to consider whether this law was an "existing law", it was open to them to regard these amendments as having altered the law so that it was no longer to be regarded as an existing law i.e. a law that was in existence at the time of independence. This approach would have been consistent with a narrow application of the savings clause. The courts below neglected to take that approach. They opted instead for a somewhat liberal application. They held that the repeated amendments to the penalties laid out in the law did not cause the law to lose its status as an existing law because the essence of the law remained un-altered.*

[49] *In our view, in light of all that has been said above, the courts below should have construed the clause strictly. They should have held that section 153(1)(xlvii) in its current form is not what the colonial legislature had enacted; that it was not an "existing" (i.e. pre-Independence) law; that it had lost its character as an existing law by reason of the post-Independence amendments that had been made to it by the legislature. This restrictive approach would have allowed the appellants to challenge the constitutionality of the law so that, if it were found to be unconstitutional, the courts could declare it invalid.*

[64] An analysis of the CCJ's advice from *McEwan* reveals that savings law clauses are to be interpreted narrowly, especially regarding Pre-Independence statutes which are amended post-Independence. Or to be more specific, savings law clauses are to be interpreted with such narrowness as to pave the way for an existing law to be stripped of its status as such whenever it is challenged on a constitutional basis.

[65] This Island became independent on 30 November 1966. Since then, much like Guyana's cross dressing law Barbados' buggery law has not remained in its pristine form from colonial times.

[66] Previously, a person who was convicted under **Section 62 of the Offences Against the Person Act 1868** was liable, in the Court's discretion, to "*penal*

*servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.”*

- [67] **Section 62 of the Offences against the Person Act 1868** was amended to remove “*penal servitude*” as an imposable punishment and to reflect the finding of the unconstitutionality of a minimum sentence of three years by the Court of Appeal of Barbados in *Alexander* (paragraph [62] *supra*) and to erase the maximum sentence of two years, “*with or without hard labour.*” Now, under **Section 9** of the *SOA*, the Court has the discretion to impose any term of imprisonment attendant upon a buggery conviction, for many years, including life imprisonment.
- [68] A side by side comparison of **Section 62 of the Offences Against the Person Act 1868** and **Section 9** of the *SOA* reveals that the latter no longer resembles the former. I therefore find that **Section 9** of the *SOA* is not an existing law given its post-Independence amendments, including the abrogation of a minimum term of imprisonment on the ground of unconstitutionality, and the widening of judicial discretion *vis-à-vis* sentencing for buggery.
- [69] The parties made submissions on whether **Sections 9 and 12** of the *SOA* would be saved by **Section 26 of the Constitution** if the Court found them to be existing laws. Having decided that they are not existing laws that issue does not arise. That said, I am constrained to state that the majority judgment in *Nervais* confirmed that **Section 26 of the Constitution** must be interpreted as subordinate to the provisions of the *Independence Order*. While the Defendant adopted the minority judgment of Anderson JCCJ, it is the majority judgment which represents the law in Barbados on this issue.
- [70] Paragraphs [58], [59], [67], and [68] of the *Nervais* are instructive:

[58] *The general saving clause is an unacceptable diminution of the freedom of newly independent peoples who fought for that freedom with unshakeable faith in fundamental human rights. The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the truth of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned. Professor McIntosh in Caribbean Constitutional Reform: Rethinking the West Indian Polity (2002), commenting on section 26 noted that to give literal effect to the provision as written was to deny any special eminence to the Constitution and in particular, its fundamental rights over all other law. He emphasized that the “horror of this is brought home to the intelligent mind when one realizes that the literal consequence is to give prominence to ordinary legislation over the Constitution.”*

[59] *It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution. With these general savings clauses, colonial laws and punishments are caught in a time warp continuing to exist in their primeval form, immune to the evolving understandings and effects of applicable fundamental rights. This cannot be the meaning to be ascribed to that provision as it would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.*

[67] *...Lord Hoffmann concludes that section 4(1) of the Independence Order cannot be used here to modify existing laws where necessary “to bring them into conformity with the Barbados Independence Act 1966 and this Order” because section 26 of the Constitution creates “an irrebuttable presumption that the existing laws were in accordance with the fundamental rights protected by the Constitution.” This view undermines concepts of independence and sovereignty and reflects his unacceptable idea that the colonial law as applied to the colonial subjects contained all the fundamental rights to which they were entitled. Yet in the same speech or judgment he demonstrated that the presumption is artificial as he expressed the opinion that the mandatory death penalty does not accord with the fundamental rights provisions of the Constitution.*

[68] *We are satisfied that the correct approach to interpreting the general savings clause is to give it a restrictive interpretation which would give the individual full measure of the fundamental rights and freedoms enshrined in the Constitution. This interpretation should be guided by the lofty aspirations by which the people have declared themselves to be bound by. A literal interpretation of the savings clause has deprived Caribbean persons of the fundamental rights and freedoms even as appreciation of their scope have expanded over the years. Where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution. In our view, the Court has the duty to construe such provisions, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, by fashioning a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights.*

[71] The CCJ in **McEwan** set out the four approaches a court can take to ameliorate the harsh consequences of the application of the savings law clause. That court confirmed that only narrow interpretations are appropriate regarding Savings Law Clauses of constitutions, to the extent necessary to enable individuals to enjoy the fruits of the Constitution's fundamental rights and freedoms.

#### **PRINCIPLES OF INTERPRETATION RELEVANT TO THE DISPOSITION OF THIS CLAIM**

[72] It is widely accepted that a generous approach should be adopted in the interpretation of constitutions. In **The Attorney General of Guyana v Cedric Richardson** [2018] CCJ 17 AJ Justice Anderson stated at paragraph 146 that

*“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”.*

[73] The Constitution is to be treated as a living instrument capable of having different meanings over time. As Lord Bingham stated in **DPP v Mollison** [2003] UKPC 6; [2003] 2 WLR 1160 at para [16]:

*“..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...”*

## **THE RELEVANCE OF INTERNATIONAL LAW TO THE INTERPRETATION OF THE CONSTITUTION**

[74] The Claimants argued that international human rights treaties play a crucial role in the interpretation of fundamental rights and freedoms. They cited *The Attorney General and others v Joseph and Boyce* [2006] CCJ 3 (AJ), *Reyes v R.* [2002] UKPC 11, *The Queen v Lewis* [2007] CCJ 3 (AJ), and *The Maya Leaders Alliance et al. v The Attorney General of Belize* [2015] CCJ 15 (AJ) to bolster that viewpoint. According to them, there are several international human rights treaties which Barbados has ratified which prohibit discrimination on many grounds, including sexual orientation.

[75] The Defendant agreed that international law may assist the Court in interpreting constitutional and statutory provisions where those provisions are unclear. The Defendant considered that the Court is entitled to employ international law to “measure the advancement in law, the state’s attitude towards issues and the general temperature of the international community on specific issues. The Defendant discussed whether international laws could be used in the interpretation of Barbados’ Laws, particularly **the Constitution**. Counsel cited *Joseph and Boyce*, at paragraph 106, and said that international law is only persuasive in adjudicating matters of this nature and cannot

displace the clear words and meaning of the statute. According to him, *The Maya Leaders Alliance*, at paragraph 8, supported this position.

[76] During his oral submissions, Claimants' Counsel set out the "canons" of international law with these words, "...if a provision of domestic law is susceptible to reasonable interpretations, then the Court is duty-bound to adopt that interpretation which furthers international obligations."

[77] In the *The Maya Leaders Alliance* at paragraph 8 the CCJ stated that:

*"...the international jurisprudence does not and cannot alleviate the duty of this Court to have regard to the actual wording and context of the constitutional provisions in question and to give such interpretations to those provisions as are consistent with the jurisprudence evolving in Belize and other countries with similar constitutional provisions. In short, international jurisprudential prescriptions must be mediated through the peculiar legal traditions and constitutional arrangements which this Court is sworn to uphold."*

[78] And at paragraph [52] of *The Maya Leaders Alliance*:

*"It also bears note that the right to protection of the law encompasses the international obligations of the State to recognize and protect the rights of indigenous people. A recognized sub-set of the rule of law is the obligation of the State to honour its international commitments. This ideal was expressed by the late Lord Bingham, delivering the Sixth Sir David Williams lecture in 2007. Recognising the inherent elusiveness that attends any definition of the rule of law, Lord Bingham proposed a list of eight sub-rules which can be derived from the rule of law, the last of which posits that "the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations."*

[79] The Court considers that the rule of law requires compliance by the state with its obligations in international law if compliance is to be consistent with evolving jurisprudence. International law, for claims like the Claimants, is not a force superseding domestic law, but a body of laws to be given the



consideration and respect due to them. The Court notes that Barbados has ratified several human rights treaties which expressly protect on grounds including sexual orientation. These treaties include **the International Covenant on Civil and Political rights, the Convention on the Rights of the Child, and the Convention on the Elimination of all forms of Discrimination against Women.**

#### WHETHER SECTION 11 OF THE CONSTITUTION IS JUSTICIABLE

- [80] The Claimants contended that sections 9 and 12 contravened **Section 11 of the Constitution** and that **Section 11** is justiciable or enforceable.
- [81] Claimants' Counsel acknowledged that the CCJ in *Nervais*, at paragraphs 35 and 36 decided, that **Section 11 of the Constitution** establishes fundamental rights and freedoms for which an individual can seek redress from the Courts under **the Constitution**. Before that ruling *Section 11* was treated as a preambular.
- [82] In doing so, the CCJ officially departed from the reasoning of the Privy Council on the same subject matter in *Newbold v Commissioner of Police and other cases* [2014] UKPC 12 and *Campbell-Rodriguez v Attorney General* [2007] UKPC 65.
- [83] The Defendant agreed with Counsel for the Claimants that **Section 11 of the Constitution** is separately enforceable.
- [84] *Nervais* (at paragraphs 25, 36, and 37) ushered in a new interpretation of **Section 11 of the Constitution**. In *Nervais*, the CCJ held that **Section 11 of the Constitution** was intended to be, and is, “*an enacting section declaring the fundamental rights and freedoms of the individual.*”

[85] In effect, **Section 11 of the Constitution** is separately enforceable, and contains enforceable constitutional rights regarding which there is available constitutional redress. Paragraphs [25], [35], [36], and [37] of the decision of *Nervais* are instructive in that regard.

[25] *The language of section 11 is not aspirational, nor is it a preliminary statement of reasons which make the passage of the Constitution, or sections of it desirable. The section is in two parts. The first part commences with the word “whereas”, a word which it is contended implies that the section is merely preambular and ends at the end of sub-paragraph (d). This part gives effect to the statement in the preamble which states that the people have had rights and privileges since 1652 and these have been enlarged since then. It declares the fundamental rights and freedoms of the individual to which every person in Barbados is entitled in clear and unambiguous terms. It is the only place in the Constitution that declares the rights to which every person is entitled.*

[35] *Reviewing section 11 of the Constitution of Barbados through the lens of this evolution we can describe it as an enacting section. The reasoning which was applied to the provisions for the protection of the law, 11 (c), and unconstitutional deprivation of property 11(b) is equally applicable to the other subsections. Take for example, the right contained in section 11 (a), which is the right to life, liberty, and security of the person. Section 12, which the side note identifies as dealing with the “protection of the right to life”, deals only with the regulation of the intentional deprivation of life by legislation or a lawful act of war. In the world of today it would be inconceivable that the right to life can have no other meaning than that. Then there is section 13 where the side note of which refers to “protection of the right to personal liberty”. The content of section 13 deals with the ways in which this right can be deprived by legislation; and the ways in which arrest and detention can be carried out without breach of the constitutional right proclaimed in section 11. There is no section with a side note reflecting the “protection of personal security” again declared by section 11, but section 14 deals with “protection from slavery and forced labour” and section 15 deals with “protection from inhuman treatment”. It may be implied that*

*these sections deal with personal security that is declared in section 11.*

[36] *It is true that the extent of the rights declared in section 11(a) have not been tested in litigation in Barbados or in the Caribbean. But it could not be perceived that the rights declared in section 11(a) would be incapable of being defined or protected except in the manner expressed in those following sections. One only has to look at the way in which the Indian Supreme Court has addressed the concept of life and personal liberty. There could be no justification for the courts in Barbados or the Caribbean to be prevented from considering whether the rights conferred in section 11(a) include protections not referenced in those subsequent sections. This principle would equally apply to sub-paragraph (d) which deals with the very important fundamental right relating to freedom of conscience, bearing in mind that there is already decided authority in relation to sections 11 (b) and (c).*

[37] *In summary, section 11 declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados. Sections 12 – 23 afford protection to those rights and freedoms conferred by section 11 subject to such limitations of that protection as are contained in those provisions.*

[86] The CCJ declared at that time that, though the integrity of **Section 11(a)** and **Section 11(d) of the Constitution** has yet to be tested before the Courts, it would be permissible for individuals to initiate claims which test whether “*the rights conferred in section 11(a) include protections not referenced in those subsequent sections.*” Since such a test would represent constitutional redress for breaches of **Section 11 of the Constitution**, the Section is therefore justiciable.

### **THE BURDEN OF PROOF REQUIRED BY EACH PARTY IN PROVING A BREACH OF FUNDAMENTAL RIGHT AND FREEDOM**

[87] The Claimants must show on a balance of probabilities first, that the challenged provisions are contrary to the fundamental rights and freedoms

granted to individuals under **the Constitution**, and secondly that the existence of the challenged provisions have infringed, or are likely to infringe, the fundamental rights and freedoms which the Claimants are guaranteed by **the Constitution**.

[88] Should the Claimants overcome those two evidential burdens, the burden would then shift to the Defendant to prove to the Court, that the infringement of the Claimants' constitutional and fundamental rights and freedoms by the disputed provisions is reasonably required "*in the interests of defence, public safety, public order, public morality, or public health or to protect the rights of others.*"

[89] If the Defendant fails to show that the **SOA**'s alleged infringement on the Claimants' constitutional and fundamental rights and freedoms is reasonable for the proper functioning of Barbadian society, the Claimants' claim would succeed.

### **ARE SECTIONS 9 AND 12 OF THE SOA INCONSISTENT WITH THE RIGHT TO PRIVACY?**

[90] **Section 11(b) of the Constitution** provides as follows:

*11 Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

*(b) protection for the privacy of his home and other property and from deprivation of property without compensation.*

[91] By reference to this Island's international human rights obligations, and to various human rights declarations (including **the European Convention on Human Rights**). The Claimant claimed that **Section 11(b) of the Constitution** is not limited to offering protection against unlawful searches.

Counsel further argued that the “*right to privacy*” encompasses “*the concept of dignity of the individual, aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings,*” and that right “*has repeatedly been held to prohibit the state from intruding in the life of the individual by proscribing what sexual activities he or she may engage in and with whom.*” Counsel referred to ***Dudgeon, National Coalition***, and several other cases, to support his submissions on those points.

[92] The Defendant analysed the disputed provisions and relied on the literal rule in statutory interpretation for his analysis using the ***Sussex Peerage case*** as his foundation.

[93] In addressing the right to privacy under **the Constitution**, the Defendant compared an Oxford English Dictionary definition of privacy to that word’s definition as it is understood within a constitutional context. He mentioned that the word privacy, in a constitutional context, means, “*protection for the privacy of his home and other property and from deprivation of property without compensation.*”

[94] The Defendant submitted that the word privacy, as used in a Caribbean Bill of Rights like **the Constitution**, alludes to the prevention of “*arbitrary police searches of the person or home without judicial authority, electronic or other surveillance, not involving physical intrusion, for example telephone tapping or bugging, and the collection and storage of data about the individual without his knowledge.*”

[95] The Defendant considered that **Section 11(b)** aimed to safeguard rights regarding a person’s physical home or property and suggested that the

limitations imposed on **Section 11(b) of the Constitution** are outlined in **Sections 16 and 17 of the Constitution** and are acknowledged explicitly by **Section 11** thereof.

[96] The Defendant urged the Court to find that the words in **Section 11(b) of the Constitution** do not confer upon individuals a general right of privacy, but a specific right of privacy—one which safeguards against arbitrary searches of an individual’s home or property, or the deprivation of one’s property, by the State. He reasoned that because the disputed provisions relate to sexual activity, they are unrelated to, or they are not affected by, **Section 11(b) of the Constitution**.

[97] However, it has been recognised internationally that the right to privacy as set out in **Section 11(b) of the Constitution** is not limited to unlawful searches.

[98] In *Dudgeon v UK* the European court of human rights stated that sexual orientation and activity concern an intimate aspect of private life. It continued:

*...the very existence of this legislation continuously and directly affects his private life... either he respect the law and refrains from engaging - even in private with consenting male partners in- prohibited sexual acts to which he is disposed by reason of his homosexual tendencies or he commits such acts and becomes liable to criminal prosecution...*

[99] The Botswanan case of *Motshidiemang v Attorney General* [2019] 4 LRC 507 which dealt with privacy is also instructive. **Section 3 of the Botswanan Constitution** is similarly worded to **Section 11(b) of the Constitution of Barbados** and **Section 9(1)** of that Constitution is similar to **Section 17(1)** of the Barbados **Constitution**. The High Court of Botswana rejected any notion that their Constitution only protected against unlawful searches and held that

a law which prescribed and criminalised carnal knowledge or any attempt thereof deemed to be against the order of nature infringed the right to privacy.

[100] In *National Coalition of Gay and Lesbian Equality v Minister of Justice* [1998] 3 LRC 648; para. 32 *Ackemann J* explained the connection between sexuality and privacy as follows:

*“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 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.”*

[101] *Ackemann J* continued at para. 117:

*“While recognising the unique worth of each person... the Constitution does not presuppose the holder of rights is an isolated lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies their communities their cultures their places and their times. The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.”*

[102] The Court considers that **Sections 9 and 12** attempt to regulate the sexual activities of consenting adults within the privacy of their own homes. For example, **Section 9** of the *SOA* prohibits anal intercourse between an adult man and an adult woman. **Section 12** of the *SOA* applies to all sexual activity between adults, whether consensual or not of whichever gender. I therefore find that both **Sections 9 and 12** violate the right to privacy guaranteed by **section 11(b) of the Constitution** and intrude upon the private, sexual affairs of adults in this Island.

## ARE SECTIONS 9 AND 12 OF THE SOA INCONSISTENT WITH THE RIGHT TO LIBERTY?

[103] **Section 11(a) of the Constitution** provides:

*11 Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

*(a) life, liberty and security of the person;*

[104] And **Section 13** provides that:

*13 (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say...*

[105] **Section 13** prohibits the deprivation of personal liberty except in the cases listed in its subsections.

[106] The Defendant considered that **Section 11(a) of the Constitution** must be construed in accordance with the rules of statutory interpretation. According to them, **Section 11(a)** may be construed only against the backdrop of **the Constitution** as a whole. In that regard, he referenced the ‘rule’ of *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436, at page 463, per Viscount Simonds, which states that no one should profess to understand any part of a statute before he has read the whole of it.

[107] The Defendant was therefore doubtful whether **Section 11(a) of the Constitution** could be interpreted in a way which would contradict **Section 13 of the Constitution**. **Section 13** states the protected right and then outlines what rights are conferred and in what circumstances. The challenged provisions they submit do not contravene **Section 11(a) of the Constitution**.



[108] The Claimants on the other hand have invoked the right to liberty here because they think this right is multifaceted and includes the right to choose one's own sexual partners, and engage in consensual, sexual intercourse with those partners, as they desire; with the ability to make choices of "*fundamental importance*," per the Canadian authority *B (R.) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315. The Claimants' claim that under the right to liberty, is of sexual autonomy—the freedom to make choices regarding one's sexuality unrestrained by irrational and unfair interference from those who are unaffected by those choices.

[109] **The Constitution** is to be interpreted with generosity by the Courts as articulated in *Minister of Home Affairs and another v Fisher and another* [1980] AC 319, and by the CCJ in *The Attorney General of Guyana v Cedric Richardson* [2018] CCJ 17 (AJ). **The Constitution** is also to be treated as a living instrument.

[110] The CCJ, in *Nervais*, at paragraphs 35-37 stated:

*Reviewing section 11 of the Constitution of Barbados through the lens of this evolution we can describe it as an enacting section. The reasoning which was applied to the provisions for the protection of the law, 11(c), and unconstitutional deprivation of property 11(b) is equally applicable to the other subsections. Take for example the right contained in section 11(a), which is the right to life, liberty, and security of the person. Section 12, which the side note identifies as dealing with the protection of the right to life deals only with the regulation of the intentional deprivation of life by legislation or a lawful act of war. In the world of today it would be inconceivable that the right to life can have no other meaning than that. Then there is section 13 where the side note of which refers to "protection of the right to personal liberty". The content of section 13 deals with the ways in which this right can be deprived by legislation; and the ways in which arrest and detention can be carried out without breach of the*

*constitutional right proclaimed in section 11. There is no section with a side note reflecting the “protection of personal security” again declared by section 11, but section 14 deals with “protection from slavery and forced labor” and section 15 deals with “protection from inhuman treatment”. It may be implied that these sections deal with personal security that is declared in section 11.*

*It is true that the extent of the rights declared in section 11(a) have not been tested in litigation in Barbados or in the Caribbean. But it could not be perceived that the rights declared in section 11(a) would be incapable of being defined are protected except in the manner expressed and those following sections. One only has to look at the way in which the Indian Supreme Court has addressed the concept of life and personal liberty there could be no justification for the courts in Barbados or the Caribbean to be prevented from considering whether the rights conferred in section 11(a) include protections not referenced in those subsequent sections...*

*In summary section 11 declares the entitlement of the fundamental and inalienable rights of the citizens of Barbados. Sections 12 - 23 afford protection to those rights and freedoms conferred by section 11 subject to such limitations of that protection as are contained in those provisions.*

[111] In **Planned Parenthood of South Eastern PA v Casey** 505 U.S. 833 Kennedy J held that matters of personal intimacy and choice are central and key to personal liberty and autonomy and that it is not the business of the law to choose a person's intimate partner.

[112] The Court considers that the right to liberty includes and protects inherently private choices for all whether gay or straight. For the Court to hold that this right only protects against arbitrary detainment and arrest by the State would result in an interpretation which would ignore ever-changing social realities. **Sections 9 and 12** dictate the intimate sexual acts adults may engage in consensually and in private.

[113] The Court therefore finds that both **Sections 9 and 12** violate **Section 11(a)** of the **Constitution**.

**ARE SECTIONS 9 AND 12 INCONSISTENT WITH THE PROTECTION THE LAW?**

[114] **Section 11(c)** of the **Constitution** provides that:

*Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

(c) *the protection of the law;*

[115] And **Section 18** outlines provisions to secure the protection of the law. The Claimants addressed protection of the law within the context of Barbados' compliance with its international obligations. They cited the CCJ in *The Maya Leaders Alliance*, where at paragraphs 47 and 58, the court held that the right to the protection of the law must involve the state's compliance with international obligations; and that the international human rights treaties of which Barbados is a signatory prohibit the criminalization of consensual sexual relations held privately between adults. The Claimants referred to **the United Nations Human Rights Council's Universal Periodic Review of Barbados** in which the United States High Commissioner observed that **Sections 9 and 12** do not conform to the norms of international human rights law and breached the provisions of privacy and non-discrimination under **the International Covenant on Civil and Political Rights**.

[116] The Court must determine whether the disputed provisions infringe on the right to the protection of the law as afforded by **the Constitution**, when that protection is, according to the CCJ in *Nervais*, supposed to be regarded by the Courts in the broadest possible sense. Defendant's Counsel claimed this raises

the extent to which the protection of the law derived from **the Constitution** is essential in society, and if limits should be imposed on those protections for others.

[117] Certainty and clarity are central principles of the law. The Defendant submitted that broad interpretations of the law without clearly defined limits is bound to result in chaos. And so, with there being no defined limits to **Section 11(c) of the Constitution**, the Defendant submitted that it be interpreted conjunctively with **Section 18**. Should the Court do this, it is said that it will become clear that **Sections 9 and 12** do not infringe on the protection of the law which the Constitution enshrines.

[118] In *Nervais* the CCJ relied on one of its earlier decisions in *Joseph and Boyce* in holding that the protection of the law provided under **Section 11(c) of the Constitution** is separate from that offered by **Section 18** (with the latter limiting the former). In *Nervais*, the CCJ held that broad interpretations must be given to **Section 11(c) of the Constitution**.

[119] The CCJ in *Joseph and Boyce* declared in relation to **Section 18 of the Constitution**, at paragraph 60

*“In a fundamental respect, section 18 is different from the other detailed sections. In each of the others, the Constitution deals comprehensively with the relevant right or freedom. Where the extent or content of the right requires elucidation, that is provided (see for example section 19), and in all cases, any limitations on the enjoyment of the right are set out quite fully. There is, therefore, no scope for enforcement of the relevant right outside the four corners of the detailed sections. In the case of the right to the protection of the law, however, it is clear that section 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that section 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well nigh impossible to encapsulate in a section of a constitution all the ways in*

*which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.”*

[120] I consider that Barbados has failed to meet its international obligations regarding the criminalization of consensual relations between adults of the same sex by retaining **Sections 9 and 12** in the *SOA*. **Sections 9 and 12** therefore violate the right to protection of the law guaranteed by **Section 11(c)** of the **Constitution**.

#### **ARE SECTIONS 9 AND 12 INCONSISTENT WITH THE FREEDOM OF EXPRESSION?**

[121] **Section 11 (d)** of the **Constitution** provides that:

*Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

*(d) freedom of conscience, of expression and of assembly and association,*

[122] **Section 20** also provides for freedom of expression. The Defendant submitted that freedom of expression is to be found in **Section 11(d)** of the **Constitution** and used a definition taken from *Black’s Law Dictionary (9<sup>th</sup> Edition, 2009)*, where it is defined as “*the freedom of speech, press, assembly, or religion as guaranteed by the First Amendment [of the constitution of the United States of America]; the prohibition of government interference.*”

[123] *Black's Law Dictionary* defines the word "conduct" as, "personal behaviour, whether by action or inaction; the manner in which a person behaves." Defendant's Counsel argued this definition shows that conduct is not akin to expression, as communicated by **Sections 11(d) and 20 of the Constitution**; and that the disputed provisions are both incompatible with that constitutional right.

[124] Counsel stated that **Section 20 of the Constitution** lists the protections given to individuals in **Section 11(d)**, but that there are exceptions as provisions for what reasonably must secure the interests of other individuals. **Section 20** itself refers to "the freedom to hold opinions without interference, freedom to receive ideals and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence or other means of communication."

[125] The Defendant could discern no words in **Section 20 of the Constitution** which show that the freedom of expression extends to conduct.

[126] Sir Fred Philips, in his textbook *Commonwealth Caribbean Constitutional Law (Routledge-Cavendish, 1<sup>st</sup> Edition, 2013)*, identified that the European Convention on Human Rights extended the constitutional freedom of expression to include substance and form alike, with the latter including things like art, signs and dress. Defendant's Counsel submitted that conduct is not embraced by **Section 20 of the Constitution**; and by extension, the disputed provisions are not capable of breaching **Sections 11(d) or 20 of the Constitution**.

[127] The Claimants addressed the constitutional freedom of expression, as enshrined in **Section 20(1) of the Constitution**, by beginning with the

observation that it is basically a ‘repetition’ of **Section 11(d)** of the **Constitution**.

[128] The Claimants argued that the freedom of expression under the Constitution is critical for individual self-development and fulfilment (see *Benjamin and others v Minister of Information and Broadcasting and another* [2001] UKPC 8; and comprises expressions that could be reasonably considered offensive (see *Handyside v The United Kingdom* [1976] ECHR 5 and *R. v Zundel* [1992] 2 SCR 731).

[129] The Claimants cited *McEwan*, at paragraphs 76 and 77, where the CCJ held that the Constitutional freedom of expression includes conduct and submitted, referring to *Johar, Lawrence*, and *National Coalition* once more, that sexual intimacy is a form of human expression.

[130] Other cases in which that principle had received approval include *Jones v AG of Trinidad and Tobago* [2018] 3 LRC 651, *AG v Caleb Orozco*, Civ App. No. 32 of 2016. In *Orozco* the Court of Appeal upheld the judgment of the High Court that sexual intercourse between LGBT persons was a form of expression breached by similar buggery laws. On the strength of these authorities, the Claimant urged that the disputed provisions violate **Section 20(1) of the Constitution**.

[131] The CCJ’s rulings in *McEwan* on the constitutional freedom of expression render the Defendant’s arguments otiose. They stated that:

*“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.”*

*These conclusions are not novel. The Indian Supreme Court in National Legal Services Authority v. Union of India and Ors 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 conclusions.*

I therefore find that **Sections 9 and 12** violate the right to freedom of expression guaranteed by **Section 20 of the Constitution**.

## **ARE SECTIONS 9 AND 12 INCONSISTENT WITH THE FREEDOM FROM DISCRIMINATION?**

[132] **Section 11 (c) of the Constitution** provides that:

*11 Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely*

*(b) the protection of the law;*

And **Section 23** provides that:

*(1) Subject to the provisions of this section*

*(a) no law shall make any provision that is discriminatory either of itself or in its effect; and*

*(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

*(2) 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, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not afforded to persons of another such description.*

- [133] With regard to the protection of the law and freedom from discrimination, Counsel for the Claimants submitted that **Section 9** of the *SOA* violates the right to equality of treatment, as it disproportionately affects gay men, since it violates their right not to be discriminated against on the basis on their sexual orientation.
- [134] Claimants' Counsel conceded that Section 23 of **the Constitution** does not provide protection from discrimination on grounds of sexual orientation. They instead relied on **Section 11** recognising the Privy Council's decision in *Matadeen and another v Pointu and others* [1999] 1 AC 98 as an obstacle to be overcome. In *Matadeen* the Privy Council held, in relation to **Section 3** of the **Constitution of Mauritius**, that neither the right to protection of the law or any of the rights and freedoms set out in **Section 3** expressed a general principle of equality, with the effect being that only those grounds specified would render laws which offended those grounds unconstitutional.
- [135] The Claimants observed that, generally, decisions of the Privy Council were binding, even when the decision related to a jurisdiction other than Barbados. However, the CCJ is now this Island's final Court of Appeal, and whether decisions of the Privy Council should still be followed was addressed in *Nervais* where it was held that regard should be given to rulings of the CCJ. Counsel submitted that *Matadeen* differs from the CCJ's jurisprudence

relating to the constitutional right to the protection of the law, and the values of equality and equal treatment, and must therefore be disregarded.

[136] The Claimant then dealt with the CCJ's analysis of the constitutional right to the protection of the law, which they did in *Joseph and Boyce*, which discussion was aided by *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 and *Thomas v Baptiste* [2000] 2 AC 1 in the decision of *Joseph and Boyce*, and which discussion was continued by the CCJ in *Lucas v Chief Education Officer* [2015] CCJ 6 (AJ).

[137] The Defendant emphasised that **Section 11 of the Constitution** is clear and unambiguous in its wording, and that it needs no further explanation beyond the usual meaning of the words. Counsel explained that though it was possible for discrimination to unfold under the circumstances specified in **Section 23**, nothing about this Section's wording reveals that it confers a free-standing right to non-discrimination or to equality.

[138] Counsel submitted that, while **Section 11(c)** is now separately enforceable, it would be unwise to interpret that Section in isolation and with no regard for the limiting provisions of **Section 23 of the Constitution**.

[139] Counsel suggested that the literal rule of statutory interpretation is presumed to be the ideal rule, whose meaning is critical when interpreting statutes (and which can be disregarded only in exceptional circumstances), and which judges tend not to deviate from, because per Lord Parker, C.J. in *Capper et al. v Baldwin* [1965] 2 QB 53, at page 61, "...the intention of Parliament must be deduced from the language used..."

[140] The Defendant submitted that though **Section 11 of the Constitution Section 11(c)** is to be interpreted broadly, there would still be the issue of how to

reconcile a separate justiciability for **Section 11** with the architecture of the constitutional provisions. If this reconciliation does not occur, a line would be drawn through **Sections 11 to 23 of the Constitution**, which would according to Anderson J in his dissenting judgment in **Nervais** render “*the entire edifice of the Bill of Rights superfluous*” According to Counsel for the Defendant, this could not have been Parliament’s intention, considering the limitations imposed on **Section 11** by **Sections 12 to 23**.

[141] The Defendant stated that **the Constitution**, with its clear and unambiguous wording, need not be construed in ways which its legislative draftspersons could not have reasonably contemplated. While he does not disagree with the Claimants’ position that all people in this Island must be treated equally despite their protected characteristics, he is still wary of the prospect of the Court subsuming the powers of Parliament into itself to cure alleged defects of the challenged provisions by granting the relief which the Claimants have sought here.

[142] The CCJ has pronounced on whether decisions from the Privy Council should still be followed. In *Nervais*:

*“There are cases where the Jurisprudence emanating from the CCJ differs from and is inconsistent with decisions made by the Privy Council while it was the final appellate Court of Barbados. In such cases even in the absence of a specific overruling of that decision of the Privy Council, it must be open to the Courts in Barbados to apply the jurisprudence emanating from the CCJ.”*

[143] The CCJ has over the years explored the right to the protection of the law. In *Joseph and Boyce*, they described the right to the protection of the law as:

*“...so broad and all pervasive that it would be well nigh impossible to encapsulate in a section of the Constitution all the ways in which it may be invoked or can be infringed.”*

[144] Saunders J in ***Juanita Lucas v Chief Education Officer [2015]*** CCJ described the right to protection of the law as:

*“... broad and pervasive. The right is anchored in and complements the state’s commitment to the rule of law. The rule of law demands that the citizens be provided with appropriate avenues to prosecute, and effective remedies to vindicate any interference with their rights.*

[145] Wit J. also in ***Juanita Lucas*** said at para 175:

*“The right to protection of the law forms part of the rule of law. It guarantees every person in the State whose rights have been infringed or who has been wronged otherwise a right to an effective remedy by due process or due course of the law.”*

[146] In the ***Maya Leaders Alliance***, the seven members of the panel held unanimously that:

*“The law is evidently in a state of evolution but we make the following observations. The right to protection of the law is a multi-dimensional broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty and property...”*

[147] The CCJ’s jurisprudence regarding the right to protection of the law has its foundation in the rule of law which includes the right to equality of treatment and equality before the law.

[148] More recently the Privy Council case of ***Jamaicans for Justice v Police Service Commission*** 2019 UKPC 12 referred to the CCJ’s rulings in ***Nervais***,

*Maya Leaders and Joseph and Boyce* stating at para 22, that the right to protection of the law

*“.... affords every person adequate safeguards against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power.”*

[149] Lady Hale concluded that the “right to equality before the law like the right to the equal protection of the law affords every person protection against irrationality on reasonableness fundamental unfairness or the arbitrary exercise of power”.It is significant that the Privy Council has adopted the CCJ’s interpretation of the protection of the law considering its previous position in *Matadeen*.

[150] In *Attorney General v Dow* 1992 BLR 119(CA) the Court of Appeal held that section 3 of the Constitution (in pari materia with section 11 of **the Constitution**) on the individual the right to equal protection or equal treatment under the law:

*“... the appellant generously agreed that the provision in Section 3 should be taken as conferring equal protection of the law on individuals. I see Section 3 in that same light. That the word “discrimination” is not mentioned in Section 3 therefore does not mean that discrimination in the sense of unequal treatment is not proscribed under the section.”*

[151] Professor VCRAC Crabbe in his text *Legislative Drafting* at page 69 had this to say about equality:

*“Equality is perhaps the primary human right. Fundamental human rights are meaningless unless there is a complete absence of discrimination. There can be no equality where there is discrimination based upon political or jurisdictional considerations. In this regard Koowarta v Bjerke-Peterson is very instructive. The High Court of Australia affirmed the validity of the Racial Discrimination Act 1975. It was enacted to implement the obligation of Australia under the International Convention on the Elimination of All Forms of Racial Discrimination.*

*It was also held in another case that:*

*“... equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities ‘in the political, economic, social, cultural or any other fields of public life.’”*

[152] In relation to the constitutional freedom from discrimination, the CCJ had observed, at paragraph [64], [68], and [70] of the decision of *McEwan*, that

*[64] At the heart of the right to equality and non-discrimination lies a recognition that a fundamental goal of any constitutional democracy is to develop a society in which all citizens are respected and regarded as equal...*

*[68] At its core, the principle of equality and non-discrimination is premised on the inherent dignity of all human beings and their entitlement to personal autonomy. There is a marked link between gender equality, self-determination and the limits placed on self-determination by gender stereotypes.*

*[70] A society which promotes respect for human rights is one which supports human development and the realisation of the full potential of every individual. The hostility and discrimination that members of the LGBTI community face in Caribbean societies are well-documented. They are disproportionately at risk for discrimination in many aspects of their daily lives, including employment, public accommodation, and access to State services.*

[153] Following on the CCJ’s pronouncements on the protection of the law, equality and non-discrimination, together with the decision in *Attorney General v Dow* I find that Section 9 of the *SOA* infringes the right to equality before the law and equal treatment under the law enshrined in **Section 11(c) of the Constitution**.

## WHETHER THE WORD “SEX” INCLUDES THE TERM “SEXUAL ORIENTATION”

- [154] The Claimant argued, by references to conventions such as **the Convention on the Rights of the Child** and **the Convention on the Elimination of Discrimination against Women**, that the term sex, as used in **Section 11 of the Constitution**, includes sexual orientation.
- [155] The Claimant noted that international and national courts have determined that adverse treatment based on sexual orientation violated the right to equality of treatment, and the right to non-discrimination on the ground of sex. He had cited authorities such as *Young v Australia*, Comm. 941/2000, *X v Colombia*, Comm. No. 1361/2005, *Baldwin v Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015), *Hively v Ivy Tech Community College of Indiana* 853 F.3d 339 (7<sup>th</sup> Cir. 2017), and *Bostock v Clayton* 590 US (2020), as examples of cases when such a determination had been reached, and asserted that **Section 9** of the *SOA* violated the right to equality of treatment or equality before the law based on sex.
- [156] The Defendant admitted that Barbados is signatory to various international bodies which have confirmed that protection against discrimination includes the right not to be discriminated against on the basis of sexual orientation. Even with that admittance the Defendant maintained that **Section 11 of the Constitution** is destitute of any “*free standing right*” against discrimination, having regard to the literal rule of statutory interpretation. In addition, Defendant’s Counsel urged the Court to consider that **Section 11** must be read with **Section 23**, which only “*addresses race, place of origin, political opinions, colour or creed,*” and urged that the word “sex” is not included in that list.

[157] The Defendant interpreted the exclusion of “sex” from **Section 23 of the Constitution** to mean that the legislative draftspersons of **the Constitution** did not intend for sex (the sex a person is assigned ‘at birth,’ being male or female) to be a protected characteristic. They stated that if sex is to become a protected feature under **the Constitution**, then it is the responsibility of Parliament to make that so, not the Court.

[158] The belief that the word “sex,” as used in **Section 11 of the Constitution**, does not or cannot encompass the term “*sexual orientation*,” is to ascribe an overly narrow interpretation to that constitutional provision—a practice which the CCJ has strenuously cautioned against.

[159] In the circumstances I consider that the word “sex,” on a CCJ endorsed, wide interpretation of **Section 11**, must include sexual orientation.

#### **WHETHER SEXUAL ORIENTATION IS A STANDALONE CATEGORY OF DISCRIMINATION**

[160] Claimants’ Counsel submitted that sexual orientation is a “*standalone category of discrimination*,” such that the constitutional right to equality before the law under **Section 11 of the Constitution** is not limited *vis-à-vis* the grounds of discrimination listed in it but extends to all grounds on which a person may be meted discriminatory treatment. He re-cited *Dow* to support this proposition.

[161] Counsel for the Claimants then cited *Vriend v Alberta* [1998] 1 SCR 493 for his submission that “*a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity and which is therefore analogous to the enumerated grounds of discrimination would also be a prohibited ground of discrimination.*” He referred to *Hoffman v South African Airways (CCT17/00)* [2000] ZACC 17, where it was held that a



person's HIV status was both a protected characteristic and a prohibited ground of discrimination under South Africa's Constitution; and to *Makuto v State* [2000] 5 LRC 183, where a similar decision for HIV status, and sex, was reached. He also referred to *Egan v Canada* [1995] 2 SCR 513, where it was decided that sexual orientation was analogous to the grounds stated in the Canadian Charter of Rights and Freedoms as being innate characteristics.

[162] In responding to his own question of whether **Section 9** of the *SOA* is discriminatory, Claimants' Counsel said the Section—its use of gender-neutral terms notwithstanding—discriminates against homosexual men especially. That a statutory provision imbued with gender neutrality can have a discriminatory effect against a specific group of persons is a 'fact' which is 'proved' by cases such as *Toonen, Leung TC William Roy v Secretary for Justice* [2006] 4 HKLRD 211, and *McCoskar v The State* [2005] FJHC 500. This sentiment, according to the Claimants, was echoed in *McEwan* and *National Coalition*. After more discussion, which encompassed references to *Vriend* and *Johar*, he submitted that **Section 9** of the *SOA* was discriminatory against LGBTQIA members and is contrary to **Section 11** of the Constitution.

[163] It is well worth repeating that **the Constitution** is, as the CCJ termed it in *Belize International Services Inc.*, at paragraph 14 of that decision, a "principle-based living instrument," which fact is one of the guiding principles of constitutional interpretation in the Caribbean.

[164] Thus, that **the Constitution** does not, at **Section 11**, include "sexual orientation" as a ground of discrimination cannot, in the Court's mind, mean it cannot ever be treated as such without a constitutional amendment to that effect.

[165] The CCJ has stated that **the Constitution** must be interpreted to account for social and societal developments. And there can be no reasonable doubt that persons are discriminated against based on their sexual orientation, both in this Island and abroad. This is a basic reality of life which cannot be ignored. The Court finds therefore that “*sexual orientation*” is a “*standalone category of discrimination*”.

### **WHETHER THE CHALLENGED PROVISIONS ARE REASONABLY REQUIRED FOR A LEGITIMATE GOAL**

[166] The Claimants have shown that **Sections 9 and 12** impugn the fundamental rights and freedoms granted to individuals under **the Constitution**. They have also by their affidavit evidence convinced the Court that the challenged provisions have infringed or are likely to infringe their fundamental rights and freedoms. The burden of proof now shifts to the Defendant to show that the provisions are “*reasonably required in the interests of defence, public safety, public order, public morality or public health or for the purposes set out in subsection (a) and (b) of section 20 [of the Constitution]*.” The Defendant’s affidavits provide no evidence that **Sections 9 and 12** are reasonably required in the circumstances and the Defendant has therefore not discharged his burden. Further, an examination of the Defendant’s written submissions does not disclose any reasonable explanation for whether the continued existence of the challenged provisions is reasonably required in the interests of defence, public health, public morality, public order, or public safety. In the circumstances I declared **Sections 9 and 12** unconstitutional null and void and of no effect to the extent that they apply to consensual sexual intercourse between persons of sixteen years or more.

## REMEDIES

[167] The parties agreed that should the Court be persuaded that the disputed provisions are not existing laws which are saved by **Section 26 of the Constitution** and **Section 4 of the *Independence Order***, then the Court must declare them null, void and of no effect, insofar as they inconsistent with **Sections 11 and 20 of the Constitution**. They also agreed that any severance by the Court of words in the statute would be inappropriate as that may be considered as “judicial legislating” and usurping the functions of Parliament.

## LEGAL UNCERTAINTY

[168] In the Fixed Date Claim the Claimant raised whether **Section 12 of the SOA** meets the constitutional or common law requirements for legal certainty.

[169] The parties in their Statement of Facts and Issues also agreed as an issue “whether the offence of serious indecency contained in **Section 12 of the SOA** is too vague and legally uncertain and therefore not considered law?”

[170] *Bennion on Statutory Interpretation* seventh edition sets out the rationale for legal clarity and certainty. At Pg 715, they state that:

*“27.1 It is a clear policy that a person should not be penalised except under clear law. The Court when considering in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator’s intention to do so is doubtful or penalises him or her in a way which was not made clear.*

*Comment:*

*A law that inflicts hardship or deprivation of any kind is in essence penal.*

[171] And at page 705 again from **Bennion**.

*“It is a principle of legal policy that law should be certain, and therefore predictable ...*

*Where law is known and certain it is predictable and those affected by it will be able to order their affairs accordingly. The need for certainty goes to the very essence of law. A factor telling against a particular interpretation of an enactment is therefore that it may tend to produce uncertainty in the law.*

[172] Lord Diplock asserted in **Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenberg AG** [1975] AC 591 at pg. 638:

*“The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.”*

[173] In **Fothergill v Monarch Airlines Ltd.** [1981] AC 251 at 279, Lord Diplock expanded on the statement in **Black-Clawson**

*“Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead as to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could*

*be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.*

[174] Judge LJ in *R v Misra, R v Srivastava* 2004 EWCA Crim 2375 at para 32 stated:

“In the seventeenth century Bacon proclaimed the essential link between justice and legal certainty:

*“For if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes ... let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known and certain law.”*

[175] In *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459, para 33:

*“There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it ...”*

[176] And in *Warner v Metropolitan Police Commissioner* 1969 2 AC 256 at 296; 1968 52 Cr App R 373, 414 Lord Morris of Borth-y-Gest stated:

*“... in criminal matters it is important to have clarity and certainty.”*

[177] In considering the issue of legal certainty, I will again set out **Section 12** of the *SOA*. That section provides:

*(1) A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more*

*or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.*

*(2) A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.*

*(3) An act of “serious indecency” is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.*

[178] In their written submissions the Claimants described **Section 12** as a “curious provision”. According to them:

*“It applies to everyone irrespective of sex. It applies as much to what is defined as “serious indecency” between a man and a woman as to the activity between a man and another man or between a woman and another woman. It applies irrespective of the ages of the persons involved, except that the penalty may be different. It also applies whether or not the participants consent and whether or not the activity can be described as unnatural. It applies finally whether or not the activity occurs in private or in public.*

*Most importantly given the broad definition of the offence, it therefore applies to almost all intimate sexual activity which consenting adults might choose freely to engage in the privacy of their houses.”*

[179] They therefore consider that **Sections 9** and **12** contravene the constitutionally protected fundamental rights of LGBT and other persons in Barbados.

[180] The Defendant however argued that **Section 12** is legally certain, that it is plain and unambiguous and sound law, that it does not criminalise actions of consenting adults and that it is in accordance with **the Constitution**.

[181] The Defendant submitted that established rules of statutory interpretation must be used in the determination of the validity of a section in a statute, which is being challenged based on vagueness and uncertainty. They consider that the literal rule is the rule to be used in such an analysis and cited the case of **Duport Steels Ltd and Others et al** and **Sirs and Others Appellants** 1980 1 WLR 142 supporting the principle that according to them where those words of a statute are plain and unambiguous, the role of the Court is to apply them.

[182] The Defendant then separately interpreted **Sections 12 (1)** and **Section 12 (2)**. They stated at paragraph 96 and 97 of their submissions that:

“96. *It is critical to note in the interpretation of section 12 (1) of the Sexual Offences Act, that the act is committed on or towards another. These terms must be understood to mean without the consent of the recipient particularly where ‘committed’ is followed by the preposition ‘on’ Black’s Law Dictionary Ninth Edition defines ‘commit’ as to perpetrate. It further defines ‘perpetrate’ as to commit or carry out. A perpetrator is defined as a person who commits a crime or an offence. To incite is defined as to “encourage or stir up (violent or unlawful behaviour). Where the acts defined by section 12 (3) are committed on or towards a person; or where a person is incited to commit these acts, the literal meaning of the words, conveys that the actions were not permitted by the person upon whom they are being carried out, and as a result they are an offence.*

97. *This differs from section 12 (2) which refers to the act being committed with or towards. Subsection 2 refers to an instance where the question of consent does not arise as consent cannot be given by a person under the age of 16, and the use of the term ‘with’ therefore gives a broader application.*

[183] At paragraph 100 of their submissions they continue:

*“The words ‘committed on’ and ‘incites’ in their ordinary meaning connote a lack of consent.”*

[184] And at paragraph 101:

*“Section 12 (1) establishes an act committed on and therefore without the consent of the other person, or where a person is coerced or incited to commit an act.”*

[185] And they conclude at paragraph 102:

*“It is therefore submitted by the Crown that section 12 of the Sexual Offences Act does not criminalise actions of consenting adults. It is legally certain and in accordance with the Constitution.”*

[186] This court notes the prepositional distinctions which the Defendant has sought to make resulting in nuanced interpretations. I consider that neither the citizen nor his lawyer should have to thread their way through a thicket of prepositions to determine what conduct the law prohibits or allows. **Subsections 12 (1) and 12 (2)** are part of the same section and the language related to both should be clear.

[187] However the issue is further complicated by **Section 12 (3)** which defines an act of “serious indecency” as “an act, whether natural or unnatural”.

[188] The question may be asked what is natural and what is unnatural? The *SOA* provides no guidance on this issue either in its Interpretation section or elsewhere in the Act. The Court must turn to other sources for guidance on a definition. *Black’s Law Dictionary* Ninth Edition defines “natural” in this way:



*“In accord with the regular course of things in the universe and without accidental or purposeful interference ... Normal, proceeding from the regular character of a person or thing .... inherent; not acquired or assumed.”*

[189] While **Black’s** does not define “unnatural” it has a definition of “unnatural offense” which speaks volumes.

*“unnatural offense. See sodomy”*

[190] **Jowitts Dictionary of English Law** Sweet and Maxwell 2010 defines “unnatural offence”:

*“In earlier times a reference to an ‘unnatural offence’ was a reference to the offence of sodomy as it then was.”*

And **Black’s** defines sodomy in these terms:

*“Sodomy – is defined as oral or anal copulation between humans esp. those of the same sex ... Also termed buggery; crime against nature; abominable and detestable crime against nature; unnatural offense; unspeakable crime.”*

[191] The Court is mindful of the Defendant’s submissions in the terms below at paragraph 100:

*“Additionally, when one considers the Act in its entirety and the purpose for its enactment one will easily conclude that the act sought (a) to criminalise acts done against persons without their consent (b) to criminalise acts done with or against persons who cannot give consent by virtue of their age or mental capacity, and c) to criminalise specific actions committed with or without consent”.*

[192] There is no doubt that statutory provision should be made to protect persons who because of their age or mental capacity cannot consent. However, that provision should admit of no uncertainty or vagueness.

[193] Considering my previous findings about the unconstitutionality of **Sections 9 and 12**, to leave the definition of serious indecency under **Section 12(3)** standing would be contradictory. First the Court has ruled that **Sections 9 and 12** are unconstitutional because it contravenes the rights of consenting adults under the constitution. The definition Section is part of **Section 12**. Second, the words – “whether natural or unnatural” taint the definition of “serious indecency” because of the association of the words “natural or unnatural” with the offence of buggery or sodomy from an era when it was considered a crime whether consensual or not. Ironically the very basis of the present application before the court.

[194] After careful review, the Court is therefore constrained to find that the definition subsection of **Section 12** is itself vague and uncertain. The words are unclear and ambiguous, and that lack of clarity and ambiguity is at the root of why the Claimants are before the Court. I am therefore satisfied that no part of **Section 12** can be saved.

## **COSTS**

[195] With respect to costs, the Defendant submitted that they would be assessed under the Prescribed Costs regime under **Rule 65.5** of the **CPR**. However, it was acknowledged that the assessment would turn on several factors not yet resolved.

## DISPOSITION

[196] Given all the foregoing, I granted the following Orders:

1. A Declaration that section 9 of the Sexual Offences Act, CAP 154 which provides, “Any person who commits buggery is guilty of an offence and is liable on conviction on indictment to imprisonment for life” contravenes the constitutional rights of the Claimants enshrined in sections 11, and 20 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to the extent that it applies to consensual sexual intercourse between persons of sixteen years of age or more in private.
2. A Declaration that section 12 of the Sexual Offences Act which provides:
  1. *A person who commits an act of serious indecency on or towards another or incites another to commit that act with the person or with another person is guilty of an offence and, if committed on or towards a person 16 years of age or more or if the person incited is of 16 years of age or more, is liable on conviction to imprisonment for a term of 10 years.*
  2. *A person who commits an act of serious indecency with or towards a child under the age of 16 or incites the child under that age to such an act with him or another, is guilty of an offence and is liable on conviction to imprisonment for a term of 15 years.*
  3. *An act of “serious indecency” is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.*

contravenes the constitutional rights of the Claimants enshrined in sections 11 and 20 of the Constitution, and affirmed in the Preamble to the Constitution, and is accordingly unconstitutional, null and void and of no effect to

the extent that sub-section (1) applies to acts of serious indecency committed in private between consenting persons each of whom is sixteen years of age or more.

3. A Declaration that the offence of serious indecency under section 12 of the Sexual Offences Act is unconstitutional, null and void and of no effect on account of its vagueness and uncertain application.
4. The Court declines to make an Order that section 9 be read as if the words “except where it occurs in private and between consenting persons each of whom is sixteen years of age or more” were added at the end of that section.
5. Hearing on Costs adjourned until 31st January 2023.



**Michelle I. L. Weekes**  
**Judge of the High Court**